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COUNTIES—CONTRACTS FOR ERECTION OF PUBLIC
BUILDINGS—STATUTORY REQUIREMENTS—JAIL.

1. The cells of a jail are a part of the building, and under the county government act of 1893, § 25, subd. 9, giving boards of supervisors authority to contract for the erection of public buildings, contracts for such cells must be let as therein provided.

2. Under the provisions of the county government act of 1893, § 25, subd. 9, that none of the public buildings therein authorized to be erected by a board of supervisors "shall be erected or constructed until the plans and specifications shall have been made therefor and adopted by the board," and "that all such buildings must be erected by contract let to the lowest responsible bidder after notice by publication in a newspaper of general circulation published in such county for at least 60 days," the letting of a contract for the construction of the cells in a new jail, on bids in which each bidder furnishes his own plans and specifications, is illegal, as it not only prevents the competition which it is the object of the statute to secure, but furnishes no standard by which the board can determine the lowest bid, and gives an opportunity for favoritism in awarding the contract.

Department 1. Appeal from superior court, Placer county; W. H. Grant, Judge.

Action by John Ertle against D. M. Leary and others. Judgment for plaintiff, and defendants appeal. Affirmed.

F. P. Tuttle, for appellants. John M. Fullweiler and Ben P. Tabor, for respondent.

PER CURIAM. The demurrer of defendants to the complaint in this action having been overruled, they declined to answer, and plaintiff obtained judgment enjoining defendants—who are the county of Placer, the persons composing the board of supervisors of said county, and D. M. Leary and J. H. Van Dorn—from proceeding under a certain contract, of date November 28, 1894, whereby said Van Dorn undertook to construct parts of a new jail for the use of the county. The judgment also declared the contract to be void. Leary, it seems, represented Van Dorn in the negotiation and execution of the contract. He and his said principal appeal, and contend that the complaint stated no cause of action. It is to be gathered from that pleading that about February 21, 1894, the board of supervisors adopted plans and spec-

ifications for the erection of a county courthouse and jail, which jail was to contain cells in number and dimension as there designated, and in accordance therewith the first story of the courthouse and the outer walls of the jail were duly constructed by contract with one McCann. In August, following, the board advertised for bids for the construction of 12 jail cells, and required bidders to furnish complete specifications. Six bids were received, each upon plans and specifications submitted by the bidder, and not upon any previously adopted by the board. The bid presented by Leary, with accompanying plans and specifications, was accepted by unanimous vote of the supervisors, and a contract founded thereon was made with Van Dorn, by which the latter agreed to construct and deliver to the county "the jail of the size and dimensions set forth in the plans, specifications, and detail drawings adopted by said board," and made part of the contract, and the county agreed to pay him therefor the sum of \$10,750. The work contracted for included steel cells, with floors, doors, prisoners' corridors, locking devices, and certain plumbing. If said work is done, the moneys of Placer county will be paid therefor, the cost of the county government will be increased, and the property of plaintiff, a resident taxpayer of the county, will, he says, be unjustly taxed.

Boards of supervisors, in their respective counties, have jurisdiction and power to cause to be erected and furnished, by contract let to the lowest responsible bidder, a courthouse, jail, and other public buildings, "provided, that none of the aforesaid buildings shall be erected or constructed until the plans and specifications shall have been made therefor and adopted by the board." County Government Act 1893, § 25, subd. 9. The jail in this case is a new edifice, and we agree with plaintiff that the cells are an integral part of the same, not "furniture," merely, as said by appellants. In the contract the structures to be completed and delivered by Van Dorn are themselves called "the jail," and they probably are the most essential part of the prison. They are therefore within the statute prohibiting the board from causing the same to be constructed until plans, etc.,

have been made and adopted. But the power given by the act to build the jail carries with it, as an incident, the right to determine the plan and mode, restricted only by such limitations as some statute imposes. 1 Dill. Mun. Corp. § 140; *Peterson v. Mayor, etc.*, 17 N. Y. 449. The provision of the statute above quoted requires that plans and specifications shall be adopted before the building is erected or constructed. Giving to this provision a literal construction would cause it to mean that the board should not construct a building until it had determined the mode and plan in which it should be constructed; but the requirement that before its construction the board shall first adopt certain plans and specifications, taken in connection with the provision immediately following in the same section, that "all such buildings must be erected by contract let to the lowest responsible bidder, after notice by publication in a newspaper of general circulation, published in such county, for at least sixty days," shows that the legislature has clearly restricted the board from entering into a contract for the construction of a building until after an opportunity has been given to bidders to bid for its construction according to plans and specifications which the board may have adopted at least 60 days before awarding the contract. In the present case it appears from the complaint that, in its invitation for bids, the board authorized bidders to furnish the specifications in accordance with which they would construct the jail, and that they were not required to bid for its construction according to the plans and specifications that had been adopted by the board in the previous February. Under this call, six bids were received by the board, and, in the language of the complaint, "each of said bids was and were upon plans and specifications drafted and submitted by each individual bidder, and none of said bids were made under or according to the plans and specifications theretofore adopted by said board of supervisors for the construction of said jail, cells, or interior part of said jail." One of these bids was by Van Dorn, and the contract was awarded to him. Thereafter certain changes were made in the plans presented by him, increasing the contract price, and the contract was entered into with him for the construction of the jail. It is only necessary to compare this transaction with the requirements of the statute, to perceive the invalidity of the contract. To permit each bidder to propose the plans and specifications according to which he will construct the building not only prevents competition in bidding for the work, but gives to the board an opportunity for the exercise of favoritism in awarding the contract, instead of being required to let it to the lowest responsible bidder; for, since neither of the bidders can know of the plans and specifications under which others are making their bids, there is no standard by which the board can determine which is the lowest bid-

der. Whether these plans and specifications increased the cost of the building above those previously adopted by the board, or not, is immaterial. There was no opportunity for competition in bidding to do the work according to the plans, and the board, by its own act, prevented itself from complying with the requirements of the statute, to let the contract to the lowest responsible bidder. The judgment is affirmed.

**SANCHEZ v. GRACE METHODIST
EPISCOPAL CHURCH. (L. A. 51.)**

(Supreme Court of California. Sept. 18, 1896.)

SEPARATE PROPERTY OF WIFE—VACATION OF HIGHWAY—CONVEYANCE—RELIGIOUS CORPORATION—POSSESSION OF CHURCH EDIFICE.

1. A conveyance of property to a married woman by deed, reciting that it is conveyed "as the separate estate of the grantee," prima facie makes it her separate property.

2. Land deeded to a married woman in exchange for other land owned by her becomes her separate property.

3. A deed of lots in a certain tract, as per map thereof, does not carry any part of what was at the date of the map a highway, on which the tract and lots abutted, though in the meantime the highway had been vacated, and the land conveyed to the grantor of the lots; he not having owned the fee in any part of the highway before its vacation.

4. Land deeded to trustees of a church society will, on the society becoming incorporated, and a church edifice being erected thereon, and used for religious services, be presumed to be in the possession of the corporation, though control is not assumed by any formal act or resolution.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; W. H. Clark, Judge.

Action by Maria S. Sanchez against the Grace Methodist Episcopal Church. Judgment for plaintiff, and from an order denying a new trial defendant appeals. Affirmed.

W. Pollard, Henry Bleecker, and Cochran & Williams, for appellant. S. M. White, R. H. F. Variel, Henry T. Gage and George D. Blake, for respondent.

BRITT, C. Action of ejectment, begun March 11, 1886, for a parcel of land in the city of Los Angeles. Judgment was for plaintiff. Appellant contends that plaintiff never had title in the disputed premises; that, if she did acquire such title, yet it was lost by her conveyance thereof, or by adverse user; and, lastly, that it (the defendant) never ousted the plaintiff or had possession of the premises.

1. In April, 1872, the city council of Los Angeles passed an ordinance vacating portions of a highway in said city commonly known as "Messer's Lane" (styled in the ordinance "Old First Street"), and establishing instead thereof a new street, called "First Street." Plaintiff then owned a number of lots including those designated as lots 23 and 24 (the latter a fractional lot),

in block 4 of the "Sanchez Tract," which lots and block abutted on the north side of Messer's Lane. The Sanchez tract extended thence northerly, having an area of 14 acres, intersected by other streets, and bounded on the east by Alameda street. The land on the south side of Messer's Lane, opposite plaintiff's tract, was owned by T. D. Mott and Albert Johnson. The new street established by said ordinance was laid out a little to the south of said lane, so that there intervened between the south line of plaintiff's said lots and the north line of First street thus fixed a piece of land which included the whole of the former lane in that part of its course, and also a narrow, wedge-like strip off the Mott & Johnson tract. April 28, 1872, said Mott & Johnson executed a deed to plaintiff, conveying, "as the separate estate of the grantee," their interest in the whole of such intervening parcel; and on May 3, 1872, the city conveyed to plaintiff its "right, title, claim, and demand" in and to the same premises. The deed of the city recited a consideration of one dollar paid with the grantee's "separate funds and for her separate use," though it was really the result of exchange for other land of plaintiff, contained in the new street, conveyed to the city about the same time by her deed, in which her husband, Tomas Sanchez, joined. The premises in controversy on this appeal are included in the calls of said deeds of the city and Mott & Johnson to plaintiff, and are bounded north by said lots 23 and 24, south by First street, and on the other sides, respectively, by the west line of lot 23 and the east line of lot 24 if those lines were produced to First street.

It is argued that the title became vested in plaintiff's husband as community property. *Prima facie*, the deed of Mott & Johnson to Mrs. Sanchez, which conveyed, at least, that part of their tract between the new street and the vacated lane, made the estate granted her separate property (*Swain v. Duane*, 48 Cal. 358); and no attempt was made to rebut the presumption. Whether the deed from the city, reciting a consideration "paid with her own separate funds, and for her separate use," is attended with the like presumption, need not be inquired. It is conceded that the title to all the lands mentioned was originally in the city of Los Angeles, as successor of the Mexican pueblo of that name, and confirmed to it by patent of the United States; and if, as appellant contends and respondent virtually concedes, the title in the soil of Messer's Lane vested in the owners of the abutting lands upon the vacation of that street, or if it then reverted to the city, in either case the title accruing to plaintiff, whether as abutting owner or as grantee of the city, was received in exchange for other land owned by her and conveyed to the city, and unquestionably became her separate estate.

2. On March 29, 1875, plaintiff made a deed

to one Leonis, and appellant claims that by this deed she divested herself of title in the demanded premises. Its descriptive portion was as follows: "All those certain lots of land * * * being parts of that tract of land situate on the east side of Alameda street, in said city, known as the 'Sanchez Tract,' and lots 11, 12, 13, 14, 21, 22, 23, 24, in block 4 of said tract, as per subdivision map of said tract made * * * in April, 1871." The map referred to did not exhibit the land in suit as part of the Sanchez tract. Said lots 11, 12, 13, 14, fronted north on Banning street, and abutted south on the other four lots. Admitting that, after the lane was vacated, the land in it was considered by plaintiff as part of the Sanchez tract, yet it was certainly an unsurveyed and unplatted part, and there is no language in the foregoing description apparently designed or sufficiently definite to carry any land not delineated on the map. A more serious question is whether the land in Messer's Lane, to the middle of it, did not become, when the lane was vacated, by a sort of accretion, parcel of the abutting lots, so as to pass with them by the deed to Leonis without further designation. See *Challias v. Railroad Co.*, 45 Kan. 398, 25 Pac. 894; *Railroad Co. v. Patch*, 28 Kan. 470,—cases turning upon a peculiar statute. We think no such rule can obtain in this case. The conveyance of land bounded by a highway is presumed to carry title to the median line of the way, but there is no reason in a like presumption to include land which has formed, but forms no longer, part of a highway. In 1875, when the deed was made to Leonis, the soil of the former lane, together with the strip off the Mott & Johnson tract, formed a body of land some 70 feet in width, lying between lots 23, 24, and First street, and wholly free from the legal incidents which pertain to the soil of a highway. There is therefore no more reason to say that any part thereof passed under the designation of those lots in the deed than for extending the scope of that description to adjacent land (if such there had been) which never was impressed with the highway use; more especially since neither party claims that plaintiff owned the fee in any part of said lane before its vacation as a highway. *Harris v. Elliott*, 10 Pet. 25, 54.

Defendant pleaded certain provisions of the statute of limitations,—sections 325 and 326, Code Civ. Proc. We have been unable to find in the record any sufficient evidence that the land sued for, whether alone or with other land, was for any period of five years before the commencement of the action protected by a substantial inclosure, or was usually cultivated or improved; so that those sections are not available as a defense.

3. In 1882, J. A. Forthman and W. B. Bergin, successors in interest of said Leonis, made a deed to seven named persons, called in the deed "Trustees of the Grace M. E. Church."

of premises described thus: "Lot numbered 23 and fractional lot 24 in block 4 of the Sanchez tract, * * * with its continuance up to the line of First street added thereto by the city council of Los Angeles by straightening First street," etc. In 1883, the church—that is, as we understand the evidence, the professed Christian society composed of pastor and lay members called the "Grace Methodist Episcopal Church," governed locally by a quarterly conference consisting of official members, and acting as regards fiscal matters through a board of stewards—erected an edifice for public worship on the land described in this deed, including the premises now in dispute. Subsequently, in December, 1885, the corporation (appellant here) was formed under sections 593-603 of the Civil Code. Its constating instruments show that it was created, among other purposes, to take charge of the building, property, and temporalities of the church; that its principal place of business was to be in the church building; that the trustees to have the management of its affairs were seven in number, and were the same persons styled "trustees" in said deed of Forthman and Bergin; and that such trustees were elected for the purpose of forming the corporation at a meeting of the members of the quarterly conference of said church. Such title as passed by the deed of Forthman and Bergin has never been conveyed to the corporation. It is provided in section 595, Civ. Code, that such a corporation may hold all the property of the association owned prior to incorporation or acquired thereafter in any manner, and transact all business relative thereto. Appellant claims that it has never acted under this provision of the statute; that the seven persons named as grantees of Forthman and Bergin hold whatever title passed by that deed, and were in possession of the premises when the action was commenced; that the corporation "had nothing to do with either the purchase or occupation of said land."

We are concerned only to determine who was the actual occupant of the premises when the suit was brought. It must be conceded that no avowed taking of possession, nor assumption of control of the property by formal act or resolution of the corporation, is shown in the record. But we do not think this was necessary. It was the ecclesiastical society constituting the church, not the seven persons who signed the articles of incorporation, that became a legal entity, with power to transact all business relative to the church property. The trustees or directors were but its agents in that behalf. Civ. Code, §§ 593, 595, 603; *Robertson v. Bullions*, 11 N. Y. 243; *People's Bank v. St. Anthony's Church*, 109 N. Y. 512, 17 N. E. 408. It does appear that the church had a pastor to whom it paid a salary; that it collected funds, and furnished the building, and kept it in order. It is fair to infer that it was conducting the ordinary ministrations of the church in the ordinary way,

by its pastor, board of stewards, sexton, etc., and for these purposes used the land in question as a place of worship. The society that was doing these things had become incorporated for the express purpose of having the property in charge, and no longer existed as a noncorporate association. We must therefore attribute such acts of possession to the corporate body which had legal power to permit and authorize them, rather than to a concourse of trespassers, none of whom individually had any right to direct the functions of the church in the utilization of the property. That the church permitted its taxes to be paid and its temporal affairs to be managed by a board of stewards, instead of the board of directors or trustees mentioned in the statute and the articles of incorporation, cannot affect the matter. It was the corporation which was created to control the temporalities of the church, not the board of trustees; and it is not important by what name it called its agents for that purpose. We do not mean to hold that the fact of incorporation of a religious or benevolent body necessarily estops a denial that the property enjoyed and used by it is possessed by the corporation, but only that the presumption of such possession is so strong as not to be rebutted by evidence of mere organic corporate inactivity, such as appears in this instance. It was said by a respectable court that a church edifice occupied for the purpose of religious worship by a society which had become incorporated, and not used in any other way, or by any particular individual, must, "from the very nature and necessity of the case, be adjudged to be in actual occupancy of the corporation." *Lucas v. Johnson*, 8 Barb. 249. It is not necessary in the present case to press the doctrine so far. The order denying a new trial should be affirmed,—a result to occasion, under the circumstances appearing, some degree of regret; but it serves to accentuate the propriety of ascertaining the title to realty before rather than after, undertaking its improvement.

PER CURIAM. For the reasons given in the foregoing opinion, the order denying a new trial is affirmed.

CURRY v. HOLLAND. (No. 15,744.)¹
(Supreme Court of California. Sept. 16, 1896.)
APPEAL—QUESTIONS OF FACT—CONFLICTING EVIDENCE.

Where the only point in dispute on an appeal relates to the value of the services sued for, on which the evidence is conflicting, the verdict of the jury will not be disturbed.

Department 2. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by Edward J. Curry against Patrick Holland. Judgment for plaintiff, and from an order denying a new trial defendant appeals. Affirmed.

¹ Rehearing denied.

M. E. Babb and A. F. Low, for appellant.
Sullivan & Sullivan, for respondent.

PER CURIAM. Action to recover the reasonable value of work and labor performed by plaintiff for the defendant at the request of the latter, between September 14, 1888, and September 14, 1889, in cutting and fitting clothing in the tailoring establishment of the defendant, in the city of San Francisco. The plaintiff alleged in his complaint that his services thus rendered were reasonably worth the sum of \$3,400, that he had been paid on account thereof only the sum of \$2,260, and prayed judgment for the balance of \$1,140. The defendant denied that the reasonable value of plaintiff's services exceeded \$2,260, which had been paid him. The cause was tried by a jury, whose verdict was in favor of plaintiff for \$1,140, the sum demanded. The defendant made a motion for a new trial, which was denied, and his appeal is from the order denying his motion for a new trial.

The only point in dispute relates to the value of plaintiff's services, as to which appellant contends that the verdict is excessive and not justified by the evidence. Upon this issue, however, there was a substantial conflict of evidence, and for this reason the verdict of the jury should not be disturbed. The order denying a new trial is affirmed.

DUNN et al. v. DUNN et al. (S. F. 153.)

(Supreme Court of California. Sept. 15, 1896.)

JUDGMENT—VALIDITY AGAINST INSANE PERSON—
COLLATERAL ATTACK—INNOCENT PURCHASERS.

1. A judgment of foreclosure entered against an insane person having no guardian, without the appointment of a guardian ad litem, is irregular, but not void.

2. Where land sold under a foreclosure has passed into the hands of third persons, who are bona fide purchasers for value, the judgment under which the sale was made, if regular on its face, though voidable in direct proceedings, or as between the parties, cannot be collaterally attacked.

Department 2. Appeal from superior court, city and county of San Francisco; Charles W. Slack, Judge.

Action by Lizzie F. Dunn and others against Catherine Dunn and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

F. W. Lawler and Henry K. Mitchell, for appellants. Smith & Murasky, for respondents.

TEMPLE, J. February 26, 1878, one Mary A. Kingman owned the premises here in question. It was found that she was then, and long prior thereto had been, insane, incompetent to transact business or to understand the nature of her acts, and entirely without understanding, and continued to be in such mental condition up to the time of her death, in 1886. She had not been judicially declared

of unsound mind, and had no guardian. On the date first mentioned, one Garwood loaned to Mary A. Kingman \$400, and took from her a mortgage upon the property mentioned to secure the same. On the 11th day of September, 1878, Garwood commenced an action to foreclose the mortgage against said Mary A. Kingman. Personal service of summons was made upon Mary A. Kingman. She suffered default, and a decree of foreclosure was entered. A sale was had under the decree, Garwood being the purchaser for the sum of \$555. No redemption was made, and Garwood obtained a deed from the sheriff, and in September, 1879, sold and conveyed the premises to the defendant Catherine Dunn for \$3,500, paid by said defendant. It was found that defendant Catherine Dunn had no knowledge of the insanity of Mary A. Kingman before the commencement of this action, and that she purchased the property in good faith, and for a valuable consideration. The plaintiffs are heirs at law of Mary A. Kingman, and bring this suit to annul the mortgage, and the judgment of foreclosure. This cannot now be done. The defendant Catherine Dunn is a purchaser in good faith, and for a valuable consideration. Insane persons may be sued, and jurisdiction over them acquired, as of other persons. True, guardians should be appointed to represent them. It was, no doubt, the duty of the plaintiff to cause it to be done. But the judgment entered without the appointment of a guardian, though irregular, is not void. Undoubtedly it may be vacated in a direct proceeding, if no innocent purchaser has acquired rights under it. But public policy forbids that as to such persons the validity of the judgment shall be questioned. The judgment was regular on its face. The court had jurisdiction of the subject-matter, and of the person of the defendant. The judgment itself was an adjudication that the court had jurisdiction, and, on collateral attack, was conclusive, except as to infirmities shown in the judgment roll. There may be exceptions to this rule, but this is not one. It is a hardship upon plaintiffs, and it is possible that the mortgage and judgment were obtained by unfair means. But of these defendant had no knowledge, and the wrong cannot be righted at her expense. The judgment is affirmed.

We concur: HENSHAW, J.; McFARLAND, J.

DIXON v. RISLEY, Judge. (S. F. 514.)

(Supreme Court of California. Sept. 11, 1896.)

APPEAL—MANDATE AND PROCEEDINGS BELOW—
AMENDMENT OF PLEADING—PETITION
FOR MANDATE.

1. Where the judgment for plaintiff is reversed on appeal, with leave to him to amend his complaint in certain specified respects, the trial court cannot impose payment of costs, as a condition to permission to file the amended complaint.

2. Even in a case where the trial court has a right to impose payment of costs, as a condition to permission to file an amended complaint, it should not order proceedings stayed for an indefinite period, till such costs are paid; but, if plaintiff refused to comply with the condition, it should proceed with the trial as the pleadings are, and then, if plaintiff is defeated, he can, on appeal, present the question whether, in refusing the amendment, the court abused its discretion.

3. A petition for mandate to require the trial court to allow filing of amended complaint, in accordance with the judgment of the appellate court granting leave to plaintiff to amend his complaint in certain specified respects, need not set out in detail the facts constituting the cause of action, or show what were the allegations of the amended complaint.

Department 2. Application by H. S. Dixon, an insane person, by his guardian, J. R. Dixon, for writ of mandate to E. W. Risley, judge of the superior court of Fresno county. Granted.

Minor & Ashley, for petitioner. Horace Hawes, for respondent.

TEMPLE, J. This is an application for a writ of mandate to require the superior court, of the county of Fresno to allow plaintiff in a certain action there pending to amend his complaint, and to proceed with the trial. H. S. Dixon in April, 1891, commenced an action in the superior court of Fresno county to foreclose a mortgage. After the commencement of the action, plaintiff became insane, and J. R. Dixon was appointed guardian for him. An amended complaint was then filed, in which J. R. Dixon, as guardian of H. S. Dixon, was plaintiff. The defendants appeared and answered, and the case was tried, with the result that plaintiff recovered judgment. This judgment, on appeal to this court, was reversed and remanded, with leave to plaintiff to amend his complaint in certain respects specified. 39 Pac. 857. After the remittitur had been filed in the superior court, an order was made, by stipulation of the respective parties in open court, that in all further proceedings plaintiff be represented by his guardian, and have leave to file an amended and supplemental complaint. The amended and supplemental complaint was filed in pursuance of the order. Afterwards, upon defendants' motion, and upon notice, the court modified the order allowing an amended complaint to be filed, by requiring plaintiff, as a condition for permission to file the amended complaint, to pay the costs of the appeal, together with accruing costs, and ordered that all proceedings in the cause be stayed until such costs were paid; and the court further ordered that defendants' time to answer the amended complaint be extended until 10 days after compliance with the order on the part of plaintiff, and after notice of such compliance had been given. Plaintiff has not paid such costs, but, after the making of said last-mentioned order, he asked the court to vacate the same, and to set the cause for trial. This the court refused to do, and still refuses to pro-

ceed with the trial of said cause unless plaintiff first pays said costs.

The respondent demurs to the petition on the ground that it does not state sufficient facts, and as uncertain. The point of the demurrer, in regard to uncertainty, is that it does not set out the facts constituting the cause of action in detail, or show what were the allegations or contents of the amended complaint. This was not necessary. The court was directed to permit plaintiff to amend his complaint in certain respects, which were specified. He had an absolute right to make those amendments. Undoubtedly, it was within the power of the superior court to interpret the judgment rendered here, and to restrict the plaintiff to those amendments. If the court erred in its construction of the judgment rendered by this court, or abused its discretion in refusing other amendments, such error or abuse of discretion could not be corrected by mandate. Plaintiff would be forced simply to take his exceptions, and seek his remedy upon an appeal from the judgment. But when the court refuses to allow the amendments which were ordered by this court, even as understood by the trial court, it refuses to obey the direction of this court, and obedience may be compelled. It is not the province of that court to affix conditions to the exercise of privileges granted by this, unless, as is sometimes done, this court directs that the amendment may be made on terms to be fixed by the trial court. It is conceded that the learned judge of the superior court acted in making the order in no contumacious spirit, but conscientiously, in the discharge of his duty; but there has sometimes been friction, and, if the judge could impose conditions upon the exercise of rights granted by this court, a litigant could in some cases be deprived of the benefit of a judgment in his favor here.

In no event, however, was the court justified in making an order which is equivalent to a refusal, for an indefinite period, to try the case. If the court had the right to impose the conditions, and the plaintiff refused to comply with them, the court should proceed with the trial on the pleadings as they now are. Then, if the plaintiff were defeated, he could, on appeal, present the question whether, in refusing the amendment, the court abused its discretion. Under the order the plaintiff must pay the costs, or leave his case forever untried. Let the writ issue as prayed for.

We concur: McFARLAND, J.; HENSHAW, J.

POWER v. MAY, Treasurer. (Sac. 100.)
(Supreme Court of California. Sept. 14, 1896.)
COUNTIES—OFFICERS—CONTRACTS FOR ATTORNEY'S SERVICES.

1. The board of county supervisors has power to employ an attorney to collect a claim due the

county from the state. *Lassen Co. v. Shinn*, 26 Pac. 365, 88 Cal. 510, followed.

2. Where services have been rendered for the benefit of the county in a manner authorized by law, the board of county supervisors, having had original power in the premises, may cure informalities in procedure by a subsequent ratification and recognition of its liability.

3. A contract by the board of county supervisors with its clerk, under regular salary as such, to pay him a commission for collecting moneys from the state, he and the county attorney having agreed that the former should get the contract and the latter do the work, and the two divide the compensation, is void, as an attempt to increase the compensation of a public official during his term of office.

Department 2. Appeal from superior court, Tulare county.

Action by Maurice E. Power against M. A. May, treasurer of Tulare county. Judgment for plaintiff, and defendant appeals. Reversed.

F. B. Howard and T. E. Clark, for appellant. Lamberson & Middlecott, for respondent.

HENSHAW, J. This is an appeal from a judgment given on the pleadings. Plaintiff applied for a writ of mandate against defendant, treasurer of Tulare county. In his complaint he averred simply that the auditor of the county had issued to him a warrant, payable out of the hospital fund, which warrant recited that it was "for commissions on moneys collected from the state on indigents." The warrant was presented to the treasurer, who refused to pay it, although there was and is sufficient unappropriated money in the fund for that purpose. After the filing of defendant's answer the court rendered the judgment appealed from.

Respondent contends that the only questions presented by the appeal are two questions of law: (1) Has the board of supervisors the power to employ an attorney for the purpose of collecting a claim due the county from the state? This question is completely answered by the case of *Lassen Co. v. Shinn*, 88 Cal. 510, 26 Pac. 365. (2) Can the board of supervisors legally allow a claim for the beneficial use of money, labor, or property, although the formalities necessary to bind the county have not been employed? Without entering into an elaborate consideration of this question, it is sufficient to say that this may at times and under certain circumstances be done, provided the power to do so be not withheld in the grant of powers to the board, and provided, further, that the service has been bestowed or the money expended for the benefit of the county in a manner authorized by law. Under such circumstances, if the board had original power in the premises, it may cure informalities or irregularities in procedure by a subsequent ratification and recognition of its liability. *Watts v. Ormsby Co.*, 1 Nev. 370; *Pimental v. City of San Francisco*, 21 Cal. 352.

But, while both of these questions may thus be resolved in favor of respondent, their an-

swers do not, as respondent claims, remove all difficulties. The pleading of defendant is far from being a model. Indeed, it is an extremely bad pleading. It denies matters not averred in the complaint. It "alleges" that defendant has been informed, and has reason to believe, and does believe" certain facts, but does not aver the existence of these facts. It expressly admits in one paragraph that there is money in the hospital fund sufficient to pay the amount claimed, after payment of all other sums legally chargeable against that fund, and elsewhere seems to aver that the moneys of the fund had all been exhausted before presentation of the demand. Imperfect and inartistic as the answer undoubtedly is, nevertheless it sufficiently sets forth certain matters in defense. If these matters constitute a defense, then it would be good against demurrer, and the court erred in rendering judgment upon the pleadings. The complaint discloses nothing of the nature or origin of the demand of plaintiff for which the warrant was ordered drawn. If the demand was illegal, then, indubitably, the treasurer was authorized to refuse payment of it, and to show this in his answer. It is the illegality of the claim which he seeks to show, and to do this he pleads that the board of supervisors, upon December 8, 1894, by resolution, ordered that John Broder be employed and authorized to collect from the state moneys due for the care of indigents, orphans, and half orphans, said Broder to receive as compensation 15 per cent. of all moneys so collected. At the date of this employment, and thereafter, Broder was clerk of the board of supervisors, under regular salary, paid by the county of Tulare. Maurice E. Power, the plaintiff, at that time and thereafter, was the district attorney of the county, and the agreement between the two was that Broder should secure the employment, Power should perform the service, and the two should divide the compensation. Plaintiff's claim, presented to the board, was "for commissions on \$3,926.25 allowed by the state to Tulare county as per contract with John Broder," etc. Defendant also averred that the contract is nonassignable, and that it is void. There is enough here, if the allegations are true, to have entitled the defendant to a judgment. The averments, then, constitute a defense. Plaintiff's claim is expressly based upon the Broder contract. If by this contract the supervisors attempted to increase the compensation of a public official during his term of office, the contract is void, and cannot be made the basis of a recovery in the hands of any person. If Broder, as clerk of the board, colluded with Power, the then district attorney, to procure for themselves a contract, it was not only void as an attempt to increase their compensation, but void as against public policy, which sternly discountenances any personal interest upon the part of public officers in public contracts. The judgment is reversed, and the cause re-

manded, with directions to the trial court to deny plaintiff's motion for judgment.

We concur: McFARLAND, J.; TEMPLE, J.

KELLY et al. v. LEMBERGER et al. (S. F. 160.)¹

(Supreme Court of California. Sept. 15, 1896.)

MECHANIC'S LIEN—REPUTED OWNER OF PREMISES.

1. A claim of lien sufficient in form is properly admitted, as against objection that it does not correctly state the names of either the owners or reputed owners of the premises, there being at the time no evidence before the court to contradict its terms.

2. Though one states, in his claim of lien, that a certain person is owner and reputed owner of the premises, his lien is not impaired by proof that such person was the reputed owner only.

3. A finding that one was the reputed owner of premises, as alleged in a claim of mechanic's lien, is not impaired by the fact that conveyances to other persons were on record.

Department 1. Appeal from superior court, Alameda county; F. W. Henshaw, Judge.

Action by Kelly and others against Lemberger and others. From a judgment for plaintiffs, and an order denying a new trial, defendants appeal. Affirmed.

Morrison, Stratton & Foerster, for appellants. C. L. Colvin, T. F. Graber, and Charles F. Hanlon, for respondents.

PER OURIAM. Four actions having been brought against the defendants to foreclose mechanics' liens upon certain land in Berkeley, they were consolidated and tried together under the above title. One of these actions was brought by H. W. Taylor, and judgment was rendered in his favor, giving him a personal judgment against Lemberger, and making the same a lien upon the land. Certain of the defendants moved for a new trial as against the claim of Taylor, and the present appeal is taken from the judgment and from the order denying their motion for a new trial.

The question presented by the appellants is the sufficiency of the claim of lien filed by Taylor, and the error relied upon by them in their motion for a new trial was the admission in evidence of this claim of lien and the insufficiency of the evidence to sustain certain findings. For the purpose of stating "the name of the owner or reputed owner, if known," of the land upon which the improvements were made, the claim of lien offered in evidence was as follows: "That Charles A. Bailey and Frank Lemberger are the names of the owners, and they are the reputed owners, of said premises, and caused said buildings and structures to be erected and constructed." The defendants objected to its introduction, upon the ground that it did not correctly state the names of either

the owner or owners, or reputed owner or owners, of the premises, and excepted to the ruling of the court in admitting it in evidence. The claim of lien was, however, sufficient in form to comply with the requirements of the statute, and at the time it was offered it does not appear that there was any evidence before the court to contradict its terms. It was not error, therefore, to admit it in evidence.

From the findings of the court it appears that at the time the claim of lien was filed the appellant Bailey was the actual owner of the northerly 12 feet of the land, and that the wife of Lemberger owned the 24 feet adjoining, and the defendant Claims the southerly 36 feet. In the bill of exceptions the defendants specify, as one of the particulars wherein the evidence is insufficient to justify the decision, "that part of finding 1 which finds that at the time of the filing of the lien the defendant Frank Lemberger was the owner of all the land in said finding described." This exception, however, misconceives the language of the finding. The court did not find that he was the "owner," but that he was the "reputed owner," and the appellants have not excepted to the sufficiency of the evidence to sustain this finding. The statute does not require the claimant to state the name of the actual owner, at the risk of losing his lien, but makes his statement of the name of the reputed owner as effective as that of the true owner. *Corbett v. Chambers*, 109 Cal. 178, 41 Pac. 873. The statement of the same name as owner and as reputed owner does not deprive the claimant of his lien. *Arata v. Mining Co.*, 65 Cal. 340, 4 Pac. 195. And, as he is only required to state the name of the owner or reputed owner, "if known," he may, if he does not know the name, perfect his lien without naming any owner. *Lumber Co. v. Newkirk*, 80 Cal. 275, 22 Pac. 231. In the absence of any exception to this finding, we must assume that there was ample evidence to show that Lemberger was the reputed owner of the premises, and, if so, the statement of ownership in the claim of lien was sufficient. Its sufficiency was not impaired by the further statement that Bailey was also the reputed owner. The court does not find that Bailey was not a reputed owner at the date of Taylor's contract with Lemberger, or thereafter, but is silent in reference thereto, and its finding that he was the reputed owner prior thereto is immaterial. It appears from the findings that Bailey was the actual owner of a portion of the land, and no exception is made to the findings of the court that the buildings were constructed with the knowledge and consent of the actual owners of the entire land. The fact that conveyances to these owners had been placed on record does not impair the finding that Lemberger was the reputed owner, and the dates of such record were an immaterial fact, and not an issue in the case, and it was not

¹ Rehearing denied.

necessary for the court to make any finding thereof. The judgment and order are affirmed.

VENTURA COUNTY v. CLAY et al. (L. A. 159.)

(Supreme Court of California. Sept. 16, 1896.)

ACTION AGAINST COUNTY TREASURER—PLEADING—JURISDICTION OF SUPERIOR COURT.

1. A complaint on a bond by a county against its treasurer and his bondsmen to recover sums alleged to have been illegally paid out by him is not demurrable as being ambiguous because in the prayer a penalty is asked for which is not authorized in such action.

2. A complaint by a county against a county treasurer, to recover money alleged to have been paid out by him on a warrant issued for a claim on which the county was not liable, is not demurrable because it does not set out the contents of the warrant, where from the facts alleged its illegality must have been apparent on its face, if drawn in compliance with the statute (County Government Act, § 114), which provides that "all warrants must distinctly specify the liability for which they are drawn and when it accrued."

3. The superior court is not deprived of jurisdiction of an action because the separate sums sued for are less than \$300 each, where the aggregate for which judgment is asked is greater than that sum.

Commissioners' decision. Department 1. Appeal from superior court, Ventura county; B. T. Williams, Judge.

Action by Ventura county against Henry Clay and others. From a judgment for defendants on a demurrer to the complaint, plaintiff appeals. Reversed.

H. L. Poplin, for appellant. Orestes Orr, Barnes & Selby, and Blackstock & Ewing, for respondents.

VANCLIEF, C. This appeal is from a judgment in favor of defendants on demurrer to the complaint, and whether or not the lower court erred in sustaining the demurrer is the only matter in controversy. The defendant Clay was elected to the office of treasurer of said county for the term commencing on the first Monday in January, 1893, and the other defendants are sureties on his official bond for that term; and this action is upon that official bond, to recover money alleged to have been unlawfully paid out from the treasury of said county by Clay during said term of office. The complaint consists of 88 counts, each charging the payment of a distinct sum of money from the treasury without authority of law, the sums charged to have been so paid out aggregating nearly \$4,000. The only substantial differences in the counts are that the several payments are alleged to have been made at different times, and that all were not made to the same person, but a portion thereof to different persons and for different kinds of service. That part of the first count to which alone the demurrer applies is substantially a sample of that part of each of the other counts to which the demurrer is applicable,

excepting the aforesaid differences, which are not material to the merits of the demurrer, and is as follows: "That on or about the 8th day of March, 1894, F. E. Smith filed a claim against the county for three-fifths of a month's service during the month of February, 1894, for the sum of \$60, which services were performed, as plaintiff is informed and believes, and so alleges the fact to be, in assisting the recorder and auditor of said county in the performance of the duties of his office; and the board of supervisors of said county, on or about the said 8th day of March, 1894, without any authority of law, and when the said claim was not a legal charge against the said county, allowed said claim, and thereupon the auditor of said county drew a warrant in favor of said F. E. Smith for said sum of \$60 on the treasury of said county without any authority of law, and the said F. E. Smith presented the same to the said Henry Clay as treasurer of said county, which warrant the said treasurer then paid out of the general fund of said county, while and when the said warrant and claim was not a legal charge against said county, to the damage of said county, plaintiff, in the sum of \$60, which sum is due and unpaid from said defendants to said plaintiff." The official bond is in form and substance such as is required by law, and is fully set out in the complaint. The prayer of the complaint is: "Wherefore plaintiff demands judgment against said defendants for the sum of three thousand nine hundred and thirty dollars, the money so paid out by said treasurer without authority of law as aforesaid, together with twenty per cent. damages for the use of said sum of money." The grounds of the demurrer are: That each count is uncertain and ambiguous in several specified particulars; that there is a misjoinder of causes of action; that some of the alleged causes of action appear to be barred by the statutes of limitations; that the court had no jurisdiction of the subject-matter of the action; and that the complaint does not state facts sufficient to constitute a cause of action. Two of the sureties on the bond demurred separately, but all the grounds of their demurrer are embraced in the above statement.

1. The so-called specifications of uncertainty are hardly intelligible, and merit no consideration, except to say that, however defective the complaint may be in other respects, it is not subject to the objection that it is uncertain.

2. The demurrer specifies that each count is ambiguous for the same reasons that it is uncertain. In their brief, however, counsel for respondents contend that the complaint is ambiguous for a reason not specified in the demurrer, namely, that it appears doubtful whether the action is for a breach of the official bond, or for the enforcement of a statutory penalty; that, while the body of the complaint indicates that the cause of action is a breach of the bond, the prayer for "twenty per cent. damages for the use of the money" indicates that the action is based upon

section 8 of the county government act, which authorizes the recovery of 20 per cent. damages in actions founded thereon. It is unnecessary to follow and answer in detail the futile arguments of counsel to sustain this point. It is enough to say that there is nothing in the body of the complaint indicating that the action is based upon section 8 of the county government act, nor that it is not wholly based upon the official bond set out in the complaint; and, conceding that the prayer asks for more damages or interest than is warranted by the facts alleged in the complaint, yet the complaint is not subject to demurrer on that ground. *Bailey v. Dale*, 71 Cal. 35, 11 Pac. 804; *Althof v. Conheim*, 38 Cal. 230.

3. It is contended that the complaint is ambiguous and uncertain as to the terms and contents of the auditor's warrants alleged to have been paid by the treasurer; and, for aught that is alleged, those warrants may have appeared to be for the payment of claims legally chargeable to the county. Assuming, as we must, that the treasurer knew the law, and especially the law prescribing his official duties, he must have known, for example, that an auditor's warrant, directing him to pay F. E. Smith \$60 for services "in assisting the recorder and auditor of said county in the performance of the duties of his office," was an order to pay a claim which was not legally chargeable to the county, and that his payment of such order with money belonging to the county was a breach of his official bond; and, since such was the alleged purport and substance of the warrant, it must have appeared upon its face that the claim for which it was drawn was not legally chargeable to the county, and was therefore void. In this respect the case differs materially from the case of *Los Angeles Co. v. Lankershim*, 100 Cal. 525, 35 Pac. 153, 556. In that case it was held that the treasurer was excusable for having paid what purported to be an auditor's warrant on the school fund without notice that it was not based upon a requisition of the superintendent of schools, nor otherwise invalid. The decision rested upon a finding by the trial court that the payment by the treasurer "was made upon what purported to be a county auditor's warrant made payable to one C. H. Delevan," and it was held that, without any showing to the contrary, it must be presumed that the warrant was regular in form and substance. But in the case at bar the substance of the warrant is alleged to have been such that its illegality must have been apparent on its face. It is alleged that the warrant was drawn for the payment of a claim for services in assisting the recorder and auditor (a salaried officer) "in the performance of the duties of his office." This implies that the warrant stated the services for the pay-

ment of which the warrant was drawn. In addition to this, the county government act (section 114) prescribes that "all warrants must distinctly specify the liability for which they are drawn, and when it accrued." This provision, according to the rule in *Los Angeles Co. v. Lankershim*, *supra*, authorizes the presumption, nothing appearing to the contrary, that the auditor's warrants in question distinctly specified the liability for which they are alleged to have been drawn. If the complaint misstated the liability for which any warrant was drawn, to the prejudice of the defendants, such misstatement was matter of defense, and could have been corrected by answer.

4. There is no merit in the point that the cause, or any cause, of action appears to be barred by any statute of limitation. The complaint shows that all the warrants were paid by the treasurer during his said term of office, and within three years next preceding the commencement of the action; and, as above shown, the action is upon a written contract, and not upon a penal statute.

5. Nor is there anything worthy of special consideration in the point that the superior court had no jurisdiction of the subject-matter of the action. *Bailey v. Sloan*, 65 Cal. 387, 4 Pac. 349.

6. It seems difficult to understand why counsel claim there is a misjoinder of causes of action, unless it may be that the prayer for 20 per cent. damages had the effect to characterize all the alleged causes of action as being merely penal. But it is too clear for argument that such prayer did not change the alleged breaches of the official bond into causes of action of a penal nature.

7. The only ground upon which it is claimed that the complaint is deficient in facts necessary to constitute a cause of action is that it does not show that the treasurer had notice that the claims for the payment of which the warrants were drawn were not legally chargeable to the county. This point has been considered, but the following cases relating to the duty and responsibility of the treasurer may be added: *Merriam v. Supervisors*, 72 Cal. 517, 14 Pac. 137; *Linden v. Case*, 46 Cal. 171; *Trinity Co. v. McCammon*, 25 Cal. 121. The complaint fully complies with the rule announced in the case of *Hedges v. Dam*, 72 Cal. 520, 14 Pac. 133, cited by respondent. I think the judgment should be reversed, and the cause remanded, with instruction to the lower court to overrule the demurrers.

We concur: BELCHER, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, and the cause remanded, with instruction to the lower court to overrule the demurrers.

GOODALE v. MIDDAGH.¹

(Court of Appeals of Colorado. June 8, 1896.)

**FRAUDULENT REPRESENTATIONS—WHEN ACTION-
ABLE—AGENCY—ESTOPPEL.**

1. Defendant, who had money of the plaintiff in his hands, induced her to loan it to a third person, who was unknown to her, by stating to her that the borrower was a man of large means, and that he owned certain lots, which were free from incumbrance, and on which defendant agreed to obtain security before paying over the money. Defendant did not take any security from the borrower, who did not in fact own the lots as stated. The borrower shortly after became insolvent, and the loan was not repaid. *Held*, that defendant was liable to plaintiff for the money, regardless of whether he knew of the falsity of his statements to her at the time they were made.

2. The fact that one who by false representations induces another to make a loan to a third person is at the time the custodian of the money to be loaned, and that the note and security therefor are to be taken by him and delivered to the lender, does not constitute him the agent of the lender.

3. Where plaintiff agreed to make a loan of money in the hands of defendant as custodian to a third person, on representations made by defendant as to property owned by the borrower, and on his agreement to take security on such property before paying over the money, the fact that, after the money had been paid by defendant to the borrower on his note, without security, and after plaintiff knew that the borrower did not own the property as represented, plaintiff accepted the note and attempted to collect it, does not constitute a ratification of the unauthorized act of defendant, which will estop plaintiff to recover from him for the false representations made.

Appeal from district court, Arapahoe county.

Action by Mary E. Middaugh against Charles E. Goodale. Judgment for plaintiff, and defendant appeals. Affirmed.

Appellee brought suit in the county court against appellant to recover some 1,600 and odd dollars. The plaintiff was a widow with several children. The estate left by the husband was principally a life insurance policy of \$5,000, the amount payable in the state of New York. The defendant was a resident of Port Jervis, N. Y. Plaintiff formerly lived there, and the parties were acquainted. Defendant, as the agent of the plaintiff, collected the insurance, came to Denver, and engaged in business, and at the time of the transactions hereafter stated had in his possession the money of the plaintiff, collected on the policy of insurance, not having paid it over. For a proper understanding of the claim of plaintiff, the entire amended complaint seems necessary, as follows:

"The plaintiff complains of the defendant, and for cause of action alleges: That the amount in controversy in this cause does not exceed the sum of two thousand dollars. That on, to wit, the 3d day of February, A. D. 1891, the defendant called upon the plaintiff at her residence in Highlands, in the county of Arapahoe and state of Colorado,

and importuned and persuaded her to loan to a friend of his, the defendant, by the name of Frank A. Miller, the sum of two thousand dollars. The plaintiff then and there stated to the defendant that she did not know, and had never seen or heard of, the said Miller, and that she had but little money, and had two children to educate, and that under no circumstances would she be willing to make a loan of that sum unless it should be secured by a deed of trust or a mortgage upon real estate of sufficient value to secure the payment of the same. The defendant then and there stated to the plaintiff that the said Frank A. Miller was a man of large wealth, and owned valuable real estate in Denver, and elsewhere in Colorado, and that he was prompt and reliable in meeting all of his obligations. The plaintiff renewed the statement to the defendant that she would not consider any application for a loan unless the same should be secured by an incumbrance as a first lien on clear property of sufficient value to insure the payment of such loan. The defendant then and there represented to the plaintiff that the said Frank A. Miller owned three lots on Broadway, in the city of Denver, in the county of Arapahoe and state of Colorado, which were free and clear of any incumbrance, and that the least valuable of any of the three of said lots would readily sell for more than two thousand dollars in cash, and that he, the defendant, would be glad of the privilege of purchasing the least valuable of said lots at the price of two thousand dollars. That he, the defendant, then and there stated to the plaintiff that, if she would make a loan of said sum of two thousand dollars to said Miller, he would procure from said Miller a deed of trust upon the said three lots, situate upon Broadway, to secure payment of said sum, and have said deed of trust executed before delivering the said sum of money to said Miller. The defendant had with him then and there the note of said Miller payable to the order of this plaintiff, which said note is in the words and figures following, to wit: '\$2,000.00. Denver, Colo., Feby. 3, 1891. On demand after date I promise to pay, to the order of Mary E. Middaugh, two thousand dollars, at the Commercial National Bank of Denver, with interest at eight per cent. per annum from date until paid. Value received. [Signed] Frank A. Miller.' That the plaintiff, relying upon the said representations, and believing the same to be true, and upon the promises and assurances then and there made to her by the defendant, that he, the said Miller, did own the lots upon Broadway, and that the same were of the value represented by the defendant, and that the said Miller was possessed of large wealth, and that the defendant would procure and deliver to her, the plaintiff, a deed of trust, to be executed by the said Frank A. Miller upon the said three lots to secure the payment of the said sum of two thousand dollars. That the said Frank A. Miller did not at that time,

¹ Rehearing denied September 16, 1896.

nor has he since, owned any lots upon Broadway. That the said Frank A. Miller was not then, nor has he since been, a man of any wealth or commercial standing; but, on the contrary thereof, the said Frank A. Miller was then, and ever since has been, utterly bankrupt, worthless, and insolvent. That the defendant wholly neglected to procure for or in behalf of the plaintiff the deed of trust upon the said lots on Broadway, and wholly neglected to procure for the plaintiff or in her behalf any other security for the payment of said sum of money, and, notwithstanding the plaintiff made frequent demands and requests of both the defendant and the said Frank A. Miller for the said deed of trust or other security, all efforts to obtain the same or any security have been unavailing. That as to what arrangements existed or were made between the defendant and the said Frank A. Miller with reference to the commissions which the defendant was to receive from said Miller for obtaining the said loan, or as to what distribution was made of the said sum so obtained from the plaintiff between the defendant and said Miller, the plaintiff is not informed, and is unable to state. That the plaintiff made demand of payment of said note at the Commercial National Bank of Denver, Colorado, and has made frequent demands upon the said Frank A. Miller and the defendant for the payment of said note, and has made efforts to collect the money due upon said note; but all such demands and efforts have been unavailing, and there still remains due and unpaid upon the said note the sum of thirteen hundred and sixty-five dollars and ninety-three cents. That the said Frank A. Miller is now, and has been for more than two years last past, absent from the state of Colorado, and for more than said period has been residing out of the state of Colorado. That at no time since the execution of the aforesaid note could a judgment against him have been collected in Colorado. And the plaintiff further alleges that the defendant, in obtaining the money aforesaid from the plaintiff upon the representation that the said Miller owned the said lots situate upon Broadway as aforesaid, and of the wealth and commercial standing of the said Frank A. Miller, and upon the further representation that the defendant would procure the deed of trust as security for the payment of the money aforesaid before the delivery of the money to the said Frank A. Miller as aforesaid, and the default of the defendant to perform his aforesaid agreement with the plaintiff, became and was guilty of fraud and willful deceit in so obtaining the said sum of money from this plaintiff, and by reason of the promises the defendant became liable to and is liable in law for the payment of said sum of money to the plaintiff. That the defendant has never been convicted in a criminal proceeding for the tort and money complained of herein by the plaintiff. Wherefore the plaintiff prays judgment against the

defendant for the said sum of thirteen hundred and sixty-five dollars and ninety-three cents, besides interest and costs of suit, and that the plaintiff may have an execution against the body of him, the defendant, in conformity with the statute in such case made and provided."

The amended complaint was filed October 21, 1893. The defendant answered as follows: "That, the said defendant then and there having in his possession, as the agent of the plaintiff, a sum of money exceeding the said sum of \$2,000, of money belonging to the plaintiff, she then and there, in consequence of the representations aforesaid of the defendant, and relying upon the same, and believing them to be true, was thereby induced to and did consent that the defendant might use the sum of \$2,000 thereof in making the loan aforesaid, to be secured as aforesaid; and the defendant did use the said sum, and charge the same to the plaintiff in thereafter accounting with her for the said money of the plaintiff so in his hands as aforesaid, and delivered the said note of Frank A. Miller to her in lieu and place of the said sum in cash. Comes now the said defendant, by Brown & Smith, his attorneys, and, for answer to the complaint of plaintiff in the above-entitled cause, denies each and every allegation therein contained, save and except that the amount in controversy in this cause does not exceed the sum of \$2,000." A trial was had in the county court, resulting in a judgment for the plaintiff. An appeal was taken to the district court, and case tried to a jury in December, 1894. Verdict for the plaintiff, \$1,165.03. Judgment upon the verdict, and an appeal prosecuted to this court.

T. J. O'Donnell, W. S. Decker, and Milton Smith, for appellant. A. S. Blake and Daniel Sayer, for appellee.

REED, P. J. (after stating the facts). A great deal of testimony was heard upon the trial. The facts of the loan, the taking of the note from Miller, that no security was taken, that Miller was not the owner of any lots on Broadway, that he was heavily indebted and verging upon insolvency at the time, that nearly all the real estate owned by him was heavily incumbered, that he shortly after became insolvent, and that the amount for which judgment was obtained was the balance remaining unpaid, were admitted, or established and uncontroverted. The controversy was as to what the transaction was as between plaintiff and defendant,—whether the plaintiff required, as a condition to making the loan, that defendant should secure a deed of trust upon property upon Broadway; whether defendant made the statements in regard to the wealth and solvency of Miller; whether he agreed to obtain the securities upon the Broadway property; and whether the statements alleged to have been made by defendant in regard to the ownership of the Broadway property by

Miller, and the value of the property, were made, and he agreed with the plaintiff to obtain security upon the property as a condition precedent to making the loan. On these questions the evidence was very conflicting; the plaintiff endeavoring to establish them, and the defendant denying each of them. As to the allegation in regard to the statements made by the defendant in regard to the ownership of the Broadway property, its value, the agreement of defendant to obtain the security, and the refusal of plaintiff to make the loan without the security, the preponderance of the evidence was with the plaintiff. Her daughter, a young lady of 20, was present at the interview, and fully corroborated the statements of her mother. On other and minor points the testimony was that of the two parties. Upon the close of the evidence the court required the jury to answer the following special interrogatories, which they did in the manner shown below, and such special findings were returned with the general verdict. "Did plaintiff loan two thousand dollars to Frank A. Miller through defendant Goodale? A. Yes. Did Goodale tell plaintiff that Miller owned three lots on Broadway, either of which was worth the amount of the loan? A. Yes. Did Miller own three lots on Broadway? A. No. Did plaintiff tell Goodale, either before or after he represented that Miller owned three lots on Broadway, that she would not take the loan without security? A. Yes. Did plaintiff rely on Goodale's statement to her that Miller owned three lots on Broadway, either of which was worth the amount of the loan, and that he would procure a trust deed upon the same, in giving her consent to make the loan? A. Yes. Did Goodale promise to get plaintiff a trust deed upon three Broadway lots? A. Yes. Did plaintiff trust to Goodale to procure for her a trust deed on three lots on Broadway? A. Yes." The finding of the jury upon the facts submitted must be conclusive, unless some error of law intervened to vitiate the verdict. There are a large number of supposed errors assigned, but those relied upon by counsel and urged in argument are comparatively few.

1. It is contended that the statements made by the defendant to the plaintiff, alleged in the complaint and established by the evidence, in regard to the wealth and responsibility of Miller, were merely matters of opinion; and several authorities are cited to show that representations of that character could not afford a basis for an action, and the contention is ably urged and at considerable length. Counsel, in argument, should be very guarded in statements of facts disclosed, which will, if believed, mislead the court, and, if found to be untrue, prejudice his case. Although stated to have been mere matters of opinion, for which the defendant could not be held responsible, counsel immediately after attempt to assert the truthfulness of the statements made in the following language: "The so-called representation that Miller owned valuable

property in Denver and elsewhere in Colorado was shown by the testimony to be true, because, at the time of that representation, the undisputed testimony is that Miller owned a large amount of real estate in Denver, and in the vicinity of Denver, and in Trinidad." The evidence of the defendant and of an abstract company was all that was taken to show his wealth, and by both it was shown that, with the exception of some outlying lots, upon which defendant placed a value of \$10,000, all of his property consisted in equities in heavily incumbered property. How much he owed in unsecured debts is not shown. In order to apply the authorities, the statement in regard to the wealth and responsibility of Miller is separated entirely from the other important statements, made at the same time, that Miller was the owner of three unincumbered lots on Broadway, either of which was worth more than the desired \$2,000, and this was not, as argued, a statement of a mere opinion, but the statement of a fact not depending upon rumor or general reputation. The representations and conversation in regard to the supposed Broadway lots were, properly, divisible propositions: (1) To establish the wealth and responsibility of Miller as a safe person to whom the loan could be made; (2) the agreement of defendant, when assured by the plaintiff that she would not make the loan without security, that he would obtain from Miller a deed of trust upon the property. The testimony clearly shows the obtaining of the security was to be a condition precedent, without which no money was to be loaned, and the fraud of the defendant consisted in—First, the falsity of the statements of fact in regard to the responsibility of Miller; secondly, in lending and misappropriating the money in his hands belonging to the plaintiff by loaning to Miller without the agreed security. In our view of the case, either would have rendered the defendant liable, regardless of whether the action was called one for deceit, or in assumpsit for money had and received to her use and converted to his own use.

It is earnestly contended by counsel that "the general rule is that it is necessary for the party relying upon the representations to show not only that they were false, but that the party making the same knew them to be false." We do not regard such statement as the law of this state. The earliest case is *Sellar v. Clelland*, 2 Colo. 532, in which it was said, at page 544: "But, when one has made a representation positively, or professing to speak as of his own knowledge on the subject, the intentional falsehood is disclosed, and the intention to deceive is also inferred, or, at all events, this is so when the matters falsely represented are peculiarly within the knowledge of the party making them, and are not known to the party to whom they are made. In such a case, the proof would seem to be complete when it was shown that the defendant made the representations; that they were

made to induce plaintiffs to enter into the contract; that, relying upon the same, they did enter into the contract; that the representations were false; that the plaintiffs sustained damage; and that such damage was occasioned by reason of the falsity of such representations." In *Lahay v. Bank*, 15 Colo. 339, 25 Pac. 704, *Sellar v. Clelland* is cited with approval, and the court says: "When one, as in this case, positively assures another that a certain statement is true, professing at the time to speak of his own knowledge, and about a matter not known to the party to whom the representations are made, he cannot be allowed to complain because another has placed too much reliance upon the truth of what he himself has stated." The latter case is so nearly parallel with the case under consideration as to be almost conclusive as to the law governing the case. In *Cooley, Torts*, 498, it is said: "It is often said that, in order to render false representations fraudulent in law, it must be made to appear that the party making them knew at the time that they were untrue. But this rule has so many exceptions that it is difficult to affirm with any confidence that it is a general rule at all." See *Cooley, Torts*, 500, 501; *Story, Eq. Jur.* § 183; *Hill, Rem.* 289; *Sharp v. Mayor, etc.*, 40 Barb. 256; *Craig v. Ward*, 36 Barb. 378; *Bennett v. Judson*, 21 N. Y. 238; *Marsh v. Falke*, 40 N. Y. 562; *Meyer v. Amidon*, 45 N. Y. 169; *Hazard v. Irwin*, 18 Pick. 108; *Stone v. Denny*, 4 Metc. (Mass.) 156; *Hammatt v. Emerson*, 27 Me. 326; *Reynell v. Sprye*, 1 De Gex, M. & G. 660; *Kerr, Fraud & M.* 79-81, 336; *Bigelow, Fraud*, 63-84, 453.

2. It is urged in argument that the action against the defendant cannot be maintained for the reason that the evidence established the fact that defendant made the loan as the agent of the plaintiff. Consequently, an action for deceit would not lie. By the Code forms of action are abolished. There is but one form of action. When the facts are alleged and established by the evidence, if they show the defendant liable, a judgment follows. Under our practice a case cannot be litigated at the common law and named, and technical rules applicable to the common-law practice applied. It is assumed that, if the relation of principal and agent existed, the action could not be maintained; but no authorities are cited in support of it. I may be in error, but even at common law I can see no reason nor find any authority that an action of deceit may not be maintained against an agent, if warranted by the facts. But I can find nothing in the evidence establishing the fact of the agency in the loan to Miller. It is true that he acted as her agent in the collection of her money, and that he was also custodian of it, but that was a separate and distinct transaction from the loaning. Defendant applied for the loan for Miller, and, in order to secure it, made the representations above discussed. Plaintiff consented to loan

the money on certain designated conditions, with which he agreed to comply, and, being the custodian and a supposed friend of the plaintiff, she relied upon him. In his zeal to secure the money for Miller he made false representations, deceived the plaintiff, disregarded his instructions, and violated his agreement to secure the loan by deed of trust upon real property. If the evidence establishes any relation of principal and agent, it would seem that defendant was the agent of Miller.

3. It is contended that the plaintiff, with full knowledge that the required security had not been obtained, adopted and ratified the transaction by collecting money from Miller. When a transaction is consummated by fraud and deceit, the law is that the injured party may rescind, or bring a suit for damages. In order to rescind, parties must be placed in statu quo, which in this case could only have been done by delivering the note to Miller and getting the money lent, which could not be done; and the acts relied upon as ratification were attempts to get the money and receiving what she could get. This cannot be regarded as an adoption or ratification of the act of the defendant. It was, apparently, all she could do. She could not compel the giving of the agreed security, as Miller had no such property. Defendant cannot be allowed to complain that the plaintiff did all she could to get the money from Miller, which was clearly for his benefit. Nor did such course towards Miller relieve the defendant of his liability, or ratify his unwarranted acts. The only effect would be to reduce the amount for which he was responsible.

4. The first 11 assignments of error are to the admission and rejection of evidence. We cannot take them up serially, and, after careful examination, are satisfied that none of the rulings were seriously prejudicial to the defendant, and were mostly, if not entirely, incidental, and having no important bearing upon the issues.

5. Counsel for defendant asked 10 instructions, which were refused, and error assigned upon the refusal of each. The action of the court must be sustained. One required the court to charge that the relation of principal and agent existed between plaintiff and defendant, and that by reason of such relation the action could not be maintained. This differs from our view of the facts and the law as stated above. Another is in regard to ratification, as urged in argument, and was, in our view of the case, properly refused. One, in regard to the necessity of a preponderance of the evidence of the plaintiff, the weight, credibility, etc., was substantially embraced in the charge of the court. The remainder are all predicated upon what we regard, as shown above, a mistaken view of the law and the facts, viz. that the representations were general, and matter of opinion, for which the defendant could not be held, and that proof must have been made by the plaintiff, not only of their falsity, but the knowl-

edge of the defendant that they were false,—a contention that, as stated above, we cannot adopt. The charge of the court is severely and ably criticised at considerable length in the argument of counsel, but mostly upon the lines above indicated, as not being in harmony with the views of counsel as to the law of the case upon the questions presented, and not embracing the assertion that a knowledge of the falsity of the representations by the defendant, and proof of it, were necessary; also, in not charging the jury in regard to the relation of principal and agent, supposed by counsel to have existed. Taken as a whole, we think the charge fairly presented the law as to the liability of the defendant, and the submission to the jury of the seven questions for special findings of facts aided the jury in the application of the law as given. The judgment of the district court will be affirmed. Affirmed.

NEWKIRK v. NOBLE.¹

(Court of Appeals of Colorado. June 8, 1896.)

APPEAL—ERROR NOT AFFECTING SUBSTANTIAL RIGHTS.

Under Civ. Code, § 78, requiring appellate courts to disregard any error not affecting the substantial rights of the parties, the mere admission of evidence after a case has been closed, or even on a reargument granted without objection after judgment had been once rendered, will not authorize a reversal on appeal, where it is not shown or claimed that the evidence was not properly admissible, or that the judgment finally rendered was incorrect.

Appeal from Arapahoe county court.

Action by George D. Noble against Emma L. Newkirk. Judgment for plaintiff, and defendant appeals. Affirmed.

Hartzell & Steele and Bryant & Lee, for appellant.

BISSELL, J. This appeal is prosecuted on a most unusual and purely technical basis. We are asked to reverse this judgment because the court below permitted the plaintiff to introduce testimony after the case was closed. The abstract gives us no information about the case, its merits, the basis on which it was contested, nor does it disclose any other matter than that already suggested on which error could be predicated. We dipped into the record to find out what the case was about, though the appellant printed all that was essential to present the proposition on which she relies. It was a suit by Noble against Mrs. Newkirk to recover his commissions for the negotiation of an exchange of some property on Gorsline street, owned by Mrs. Newkirk, for property on Fourteenth avenue, which belonged to Mr. Higgins. The exchange was agreed on. The prices at which the two properties were to

be valued were determined. The amount of the unpaid purchase money was ascertained, and provision made for securing it by a trust deed on what was to be deeded to Mrs. Newkirk. This is enough to illustrate the character of the suit. When the time came to complete the transfer, an objection was made to Mrs. Newkirk's title. Mr. Higgins was not satisfied to take it as it then stood, though he offered to complete the exchange if Mrs. Newkirk would execute a bond for a deed conditioned for performance within a time specified. This objection to the title ultimately broke off the trade. Thereupon Noble demanded his compensation, on the hypothesis that he had earned it by procuring a customer both able and willing to make the exchange on the agreed terms. The case was tried in the county court in March, 1894. When the testimony was all in, the court took the case under advisement, and on the 10th of April found the issues in favor of the defendant, and rendered judgment that she go hence without day and have her costs. A motion was afterwards made to set aside this judgment, and permit an argument upon the issues. Two days afterwards this motion was granted. The appellant does not object to this proceeding; treats it as entirely regular and unobjectionable. After the entry of this order, leave was asked to introduce record testimony bearing on the main issue. The motion seems to have been made in the following June, though the motion proper was not filed until some time in September. It was taken under advisement, but, when the case came on for final argument, it was granted. Acting under the leave thus obtained, the plaintiff produced a witness, Mr. Barnum, and what then transpired is set out in the abstract. Mr. Barnum did not attempt to give testimony which would bear on the disposition of the case. He gave quite an extended legal opinion regarding the matters involved, testified as to what he considered the objections to the title, and commented somewhat at length on the proceedings in the case of *Brown v. Heirs of Dakin*, known as No. 4,443 in the district court. To make the case still a little plainer, it may be well to state that Mrs. Newkirk's title was regularly deraigned from Mrs. Brown, who deeded, after the decree in that suit, to Maurice Arkins. The title was perfect from that point, but Mrs. Brown's title was disputed. She had originally been the owner of the property, and had deeded it to Dakin, in exchange for some mining interests which turned out to be valueless. On the discovery of this fact, and under allegations of fraud and misrepresentation, Mrs. Brown brought suit to cancel her deed because of the fraudulent representations. She commenced her suit by publication. The case went to decree. The conveyance was set aside, and the title adjudged to be in Mrs. Brown, who afterwards deeded to Arkins, whence, by a regular chain, it came to Mrs.

¹ Rehearing denied September 14, 1896.

Newkirk. Mr. Barnum simply gave a legal opinion regarding this suit and its history, and the plaintiff then introduced the record in that suit. The defendant objected to the evidence because the case had been closed. The court overruled the objection, received the evidence, took the case under advisement, and ultimately entered judgment in favor of Noble. The introduction of the files in No. 4,443 was not objected to. The objection was to the introduction of Mr. Barnum as a witness, on the ground that there was no showing why his testimony had not been offered at the trial, and before the entry of the original judgment. This discloses the nature of the matter urged on us for consideration. It will be observed that thus far there has been no statement respecting the merits of the controversy. We have examined the abstract in vain for any evidence bearing on that element of the case. The argument is utterly silent about it. We are unable to find anywhere any suggestion that the appellant was wronged by the judgment, that substantial justice was not done the parties, or that there is any error in the record other than what came from the order permitting the introduction of this record.

Proceedings in trial courts with respect to the introduction of testimony are always regulated by the discretion of the trial judge, which is rarely interfered with, or a judgment overturned because of its erroneous exercise, unless it appears to have been grossly abused. *Felt v. Cleghorn*, 2 Colo. App. 4, 29 Pac. 813; *Mining Co. v. Englebach*, 18 Colo. 106, 31 Pac. 771. This is simply suggested, though it may be somewhat doubtful whether, under different circumstances, like action on the part of a trial court would not amount to error, which would compel us to reverse the case. It has been pretty generally held that, on the conclusion of the main case, the plaintiff may not, in rebuttal, offer evidence which he should have originally given. Yet permission to do this seldom results in disturbing a judgment. It is a matter which rests so largely with the trial court, and the difficulties surrounding the trial of a case are so many and so complex, that, in order to secure substantial justice, the power of the trial judge to permit it is very frequently upheld. It has sometimes happened that a case has been opened for the introduction of testimony after the argument has been begun. As we conceive it, this case does not stand on any such basis, or call for an expression of our opinion of what should be done where there was a trial by jury, and the plaintiff was permitted to introduce testimony at an irregular time, to the manifest prejudice of the complaining party. This case was tried to the court. It made very little difference when the testimony was offered, or what shape it took, so long as the objecting party was not prejudiced. Of course, it is true, in a motion for a new trial

on the ground of newly-discovered evidence, a party must show diligence and a failure to discover; and it must appear that the evidence could not have been obtained by the exercise of reasonable diligence. Possibly, on a motion for a new trial, this would have been that sort of a case. The matter evidenced by the record was a judgment. It was open to the inspection of the parties, and, had the plaintiff deemed it important, he ought to have produced it at the time of the original hearing. The appellant, however, does not complain that he was surprised, or that it presented a matter about which he was unadvised, and which he was not wholly prepared to meet. Nor, on the other hand, does he support his claim of error by any suggestion or argument or demonstration of other error inhering in the judgment. So far as we are able to discover from what is presented, the substantial rights of the parties were not affected by this proceeding. If this be true,—and we must so take it against the appellant, because he does not urge to the contrary,—we are then bound by our Civil Code provision (section 78), which compels us to disregard any error which does not affect the substantial rights of the parties, and forbids us to reverse a judgment by reason of any erroneous action of the trial court where no injustice has been done the complaining party. The error assigned and argued does not permit us to overturn the judgment, which will accordingly be affirmed. Affirmed.

TERRITORY v. LERMO.

(Supreme Court of New Mexico. Sept. 1, 1896.)

JURY—CHALLENGES—CIRCUMSTANTIAL EVIDENCE—INSTRUCTION AS TO WEIGHT AND EFFECT.

1. Under Laws 1889, p. 28, § 24, providing that no defendant shall be required to exercise any peremptory challenge as to any particular juror until the prosecution shall have finally passed upon and accepted such juror, it is reversible error, when less than 12 jurors are in the box, and the regular panel becomes exhausted, to compel defendant to pass peremptorily on such jurors before a special venire is issued.

2. When the evidence of defendant's guilt is wholly circumstantial, failure to instruct as to the weight and effect to be given such evidence is prejudicial error.

3. When circumstantial evidence alone is relied on for a conviction, the circumstances must be such as to apply exclusively to defendant, and such as are reconcilable with no other hypothesis than his guilt, and they must satisfy the jury of such guilt beyond a reasonable doubt.

Appeal from district court, Eddy county; before Justice G. D. Banta.

The defendant, Agustin Lermo, was indicted, tried, and convicted of murder in the first degree, at the November, 1895, term of the district court for the county of Eddy, in

this territory, on the charge of having on the 9th day of May, 1894, shot and killed Assad Toma. After motions for a new trial and in arrest of judgment had been heard by the court and denied, the defendant was sentenced to be executed in the manner prescribed by the law, from which rulings of the court an appeal was prayed and granted, and the case is here for determination on the alleged errors in the court below. Reversed.

A. A. Freeman and A. S. Bateman, for appellant. John P. Victory, Sol. Gen., for the Territory.

LAUGHLIN, J. The record discloses that all the facts in this case, upon which appellant was convicted, were purely circumstantial. It appears that the body of the deceased, Assad Toma, was found, some seven or eight hours after the supposed time of the homicide, in the bed or channel of the Delaware river,—which at the time was dry,—with a coat and some weeds thrown over it, with a gunshot wound in the head, and one in the body and one in the arm, with indications on the ground that deceased had been killed at the wayside, and the body dragged some distance from the place of the killing, and there partially concealed. Some 10 days after the homicide, defendant was arrested in the state of Texas, and a watch identified as the property of the deceased found in his possession; and also some articles of jewelry, concealed on the inside of the vest of the defendant, and a number of other articles such as are usually sold by peddlers, were also found in defendant's possession at the time of the arrest. It also further appears that the deceased was an Assyrian peddler, and was seen in the neighborhood of the place of the homicide, plying his trade, the morning of the day that the body was found,—in the afternoon, about 3 or 4 o'clock. The defendant did not testify, nor did any witness testify in his behalf. The testimony upon which defendant was found guilty of murder in the first degree was purely circumstantial, as there was no eyewitness to the homicide. Nor was the defendant seen in the neighborhood of the place where the killing occurred, at or near the time when it is supposed to have taken place. The possession of deceased's watch by the defendant and his flight, both of which facts were unexplained by the defendant, were the most damaging, and in fact almost all the testimony in the record which authorized a conviction in the case.

On page 8 of what purports to be the bill of exceptions we find this entry: "The regular panel of the petit jury having been exhausted by reason of the challenges exercised by the parties, the plaintiff asks the court to require both parties to pass peremptorily on the jurors in the box, before issuing a special venire, which motion is by the court sustained. Whereupon the defendant then and there duly excepted." And on page 7 of what

seems to be the record, *inter alia*, we find this: "And, both parties announcing themselves ready for trial, the following named members of the petit jury are duly drawn, accepted, and impaneled to serve as jurors for the trial of the issues joined in this cause pending, to wit: A. J. Allen, W. L. Webster, J. S. Crozier, John Ruark, A. J. Froman, J. C. Anderson,"—thus leaving only six jurors in the box when the special venire was ordered. Then follows an order for drawing and serving a special venire. But there is no mention of this error—for such it is—in the motion for a new trial; and it was not called to the attention of the trial court, and he was given no opportunity to correct his rulings on this exception,—the very purpose for which a motion for a new trial is made and intended. *People v. Phipps*, 39 Cal. 328.

The error above referred to is assigned as the second error in appellant's brief, and authorities cited in support thereof. The language of the statute on that subject is as follows: "Sec. 24. * * * Provided, further, that no defendant shall be required to exercise any peremptory challenge as to any particular juror until the territory shall have finally passed upon and accepted such juror." Laws 1889, p. 26. The defendant is entitled to have the full panel in the box all the time, and he is not required to exercise any peremptory challenge, on any one of the jurors until the prosecution has accepted the juror; and, where the regular panel in the box is reduced to 11 men, then the defendant is not required to proceed further, when the regular panel becomes exhausted, until a special venire is drawn, qualified, and the names are in the box, from which the clerk may draw and fill the panel in the jury box. This was so held in this court. *Territory v. Barrett* (N. M.) 42 Pac. 66. But the record, bill of exceptions, and motion for new trial were in that case, if possible, in a worse condition than in this case; and it was shown in that case that defendant's counsel did not, as in this case, object, and took no exception, and the error could not be availed of by the defendant or the court. The error complained of here is clearly reversible, and, if there were no other errors sufficient to sustain a reversal, it might, in a case of this gravity, be available on review.

The facts in the case being purely circumstantial, it was the duty of the court to instruct the jury fully on the law of circumstantial evidence. This the record shows the trial court did not do, and, by reason of such failure, manifest error, prejudicial to the rights of the defendant, has intervened, and the case must be reversed. Counsel for appellant requested the court to give the following instruction, to wit: "The court instructs the jury that, where circumstances alone are relied upon by the prosecution for a conviction, the circumstances must be such as to apply exclusively to the defendant, and such as are reconcilable with no other

hypothesis than the defendant's guilt, and they must satisfy the minds of the jury of the guilt of the defendant beyond a reasonable doubt." This instruction fairly stated the law, and the weight to be given to circumstantial evidence where there is no direct evidence; and to exclude it from the jury was error, especially where there is no other instruction given substantially covering the same subject. The history and experience of criminal jurisprudence establishes that two essential elements in the case must be proved: First, the identity of the corpus delicti; and, second, the identity of the accused, —before a conviction in any grade is warranted. 3 Greenl. Ev. 30. And, while these essential facts may be proved by circumstantial evidence, yet it is a well-established principle that it is necessary to caution the jury, in a proper instruction, as to the weight and effect to be given the circumstances detailed by the witnesses, to establish these first and most important elements tending to establish the crime as charged. *Turner v. State*, 4 Lea, 206; *Dossett v. U. S. (Okla.)* 41 Pac. 609; *Com. v. Webster*, 5 Cush. 317; *Graves v. People (Colo. Sup.)* 32 Pac. 63; *People v. Murray*, 41 Cal. 60. "We are further of the opinion that, inasmuch as the evidence in the case was wholly circumstantial, the jury should have been instructed as to the nature and conclusiveness of that character of testimony to warrant a conviction upon it." *Struckman v. State*, 7 Tex. App. 581; *People v. Phipps*, 39 Cal. 326. For the foregoing reasons the judgment of the lower court is reversed, and a new trial granted. And an order will be made accordingly.

COLLIER, J. I concur in the reversal of this case, especially upon the ground of the court's failure to instruct as to circumstantial evidence. As to the selection of the jury, I concur only for the reason that such procedure should be considered as established by *Territory v. Barrett (N. M.)* 42 Pac. 66. I am not prepared to say that under the act of 1889 the manner of selection pursued in this case was not authorized.

HAMILTON, J. I concur, for the reasons given by Justice COLLIER.

BANTZ, J. I concur in the reversal of this cause because the record does not show that an instruction as to circumstantial evidence was given.

TERRITORY v. LUCERO et al.

(Supreme Court of New Mexico. Sept. 1, 1896.)

HOMICIDE — INSTRUCTIONS — FALSE TESTIMONY — MALICE — PRESUMPTION — BURDEN OF PROOF.

1. Giving an instruction that one who stood by without objecting or protesting when a kill-

ing is done is guilty of murder in the first degree, equally with him who fires the shot, is prejudicial error, though the conviction is of murder in the second degree; the only instruction as to murder in the second degree consisting of a description of that offense, following the terms of the statute.

2. An instruction that, if defendants made false statements as to the killing, it should be construed as tending to establish their guilt, invades the province of the jury.

3. An instruction, on a trial of officers for murder, that false statements by officers in relation to their official acts should be construed as an aggravation of their offenses, and, if knowingly and willfully made, would justify the disregarding of the whole of their testimony, is erroneous, because omitting the essential element that the falsity must relate to a material fact, because intimating that defendants were guilty of an offense which could be aggravated by false statements, and because the law demands no higher standard for the scrutiny and weighing of statements of public officers than of other citizens.

4. It is error, on a trial for murder, to instruct that malice is implied from the fact of killing, especially where the killing is admitted, and the evidence for defendant tends to show that it was done under circumstances of considerable provocation, after deceased had attempted to secure his freedom by slaying his guards.

5. The burden of proof as to malice never shifts onto defendant.

Appeal from district court, Mora county, before Justice N. B. Laughlin.

Sostenes Lucero and Juan B. Romero were convicted of murder, and appeal. Reversed.

B. M. Read, for appellants. John P. Viotory, Sol. Gen., for the Territory.

BANTZ, J. The appellants were indicted at the March term, 1894, of Mora county, for the murder of Juan Antonio Rael. They were tried at the following November term, and found guilty of murder in the second degree, and sentenced to imprisonment for life in the penitentiary. Numerous errors are assigned, but we need notice only those in relation to certain instructions given to the jury at the request of counsel for the prosecution. It is claimed by the territory that the defendants, after arresting the deceased under a warrant for murder, pretended that he tried to escape, and so killed him, when in truth the arrest was a mere pretense, and under color of it the real design of the defendants was to murder the deceased, and that such design was in fact carried out, as the result of a deliberately planned conspiracy. The defendants testified in their own behalf that they in good faith acted as deputy sheriffs, and arrested Rael on a warrant for murder, and that Rael, who was known by them to be a dangerous man, after his arrest suddenly drew a pistol from a coat tied to the saddle, and shot at defendant Romero, when he was shot and killed by the defendant Lucero. Under the instructions of the court, the proof of conspiracy was not made essential to conviction; and the jury were told that they might acquit one defendant, and find the other guilty. The presiding judge fairly and

correctly instructed the jury as to murder in the first degree, and he defined murder in the second degree in the terms of the statute; but counsel for the prosecution presented numerous instructions, which were given to the jury, which did not fairly or correctly state law, and, we think, were seriously harmful to the defendants.

1. The ninth, tenth, eighteenth, nineteenth, twenty-second, and thirty-first of these instructions, given at the request of the prosecution, told the jury, in substance, that if one of the defendants shot and killed Rael, while the other stood by without objecting or protesting, both were guilty of murder in the first degree. Ordinarily an error in an instruction as to murder in the first degree will not be ground for disturbing a verdict of murder in the second degree; but it may very well happen that instructions as to murder in the second degree, though without error, may be extremely meager, and at the same time there may be a mass of instructions as to murder in the first degree, so involving the guilt of one defendant in that of the other as to cause him great prejudice. In this case the only instruction specific as to murder in the second degree consisted of a description of that offense, following the terms of the statute. It seems to us that when the jury are told, as in the case at bar, that the law regards him who stands by without objecting or protesting when a killing is done as guilty of murder in the first degree, equally with him who fires the shot, then, with equal reason, it would seem that, if the guilt of the one who fired the shot was murder in the second degree, so also would his companion be guilty of murder in the second degree, if he stood by without protesting or objecting when the shot was fired. If that result followed in the higher crime, why not also in the lower one? There is nothing in any instruction which would tend to prevent a conclusion so evident on the part of the jury. The natural tendency of the instruction was to induce the jury to conclude that, if Romero stood by without protesting or objecting when Lucero shot Rael, the guilt of Romero became established. The effect of such an instruction is not at all like a misdirection as to the qualities, conditions, or elements essential to murder in the first degree, and which do not tend to influence a verdict of guilty in some other degree. The injury which such instructions would naturally cause a defendant is made more apparent by the fact that the confounding of the guilt of Romero in that of Lucero was not only emphasized by repeated reiteration in the particular we have just mentioned, but also in other particulars hereafter to be mentioned. It can hardly be pretended that the instructions correctly state the law. They did not even require the jury to find that the nonobjecting defendant knew, or even suspected, the co-defendant's design to kill Rael, nor

that he was in a situation to prevent such killing. In certain other instructions (viz. eighth, ninth, and twenty-second) the jury were told that an arrest made by two persons rendered both guilty of murder, if one of them, after the arrest, killed the person arrested. The ninth and twenty-second instructions use, it is true, the words "acting together"; but these words refer to making the arrest, and not to the killing. If the acting together was really intended to extend to the killing as well as the arrest, then, in a case of such gravity, the meaning is too loosely expressed; and, moreover, it was not sufficiently full to express the essentials of a common unlawful design. To render two persons responsible for a killing done by one, it is not sufficient to tell the jury that if the defendants acted together, and one of them killed, both are equally guilty. Such a direction would be too vague and misleading. But, whatever doubt may be entertained as to the meaning of the phrase "acting together," the eighth instruction told the jury that both were guilty, whether acting pursuant to, or without, any previous agreement, if after the arrest one of them killed Rael. "A mere looker-on while a crime is being committed, who does nothing, and who neither then nor before, by any word or act, encourages it, is not punishable, though he mentally approves the crime." 1 Bish. New Cr. Law, § 204. "A mere presence, or presence combined with a refusal to interfere, or with concealing the fact, or a mere knowledge that a crime is about to be committed, or a mental approbation of what is done, while the will contributes nothing to the doing, will not create crime. In matter of evidence, such facts have a greater or less weight according to circumstances, but in law there must be something a little further; as some word or act, or in the language of Cockburn, C. J.,—spoken, indeed, to a case where there was no presence,—one, to be a party to another's crime, must incite or procure or encourage the act." *Id.* §§ 632-634. Counsel has strenuously insisted that, if the evidence for the territory was true, defendants were both guilty; if the evidence of the defendants was true, they were both innocent; and that it was not an issue as to the guilt or innocence of one of them, but of both. This was, no doubt, a fair argument to the jury, but whether that conclusion was right was a matter for the jury; and, while they may have believed a part of the testimony for the prosecution, they were under no obligations to believe all of it, nor were they bound to disbelieve all of the testimony of both defendants.

2. The eleventh instruction told the jury that, if the defendants made false statements as to the killing, it should be construed as tending to establish their guilt. This was going beyond a mere question of law, and it invaded the province of the jury. A false

statement may, under some circumstances, become highly influential with the jury; but whether so or not, or in what degree, depends upon the time, or the circumstances under which it was made, the particulars or importance of the falsity, whether knowingly uttered, and whether made from a consciousness of guilt, or from motives of fear. All of these matters should be weighed by the jury in determining the effect of a false statement, and whether in what degree the conclusion of guilt is to be influenced by such falsity falls entirely within the line of judgment reposed exclusively in the jury, and there is no rule of law requiring the jury to construe a false statement as tending to prove guilt. It is going beyond a direction to consider such falsity, if proved, and if knowingly made in relation to material facts, in connection with all the circumstances in ascertaining some essential element to be found. This instruction directs them to construe the bare fact of falsity a particular way. A presumption of law is a juridical postulate that a particular predicate is universally assignable to a particular subject. Whart. Cr. Ev. § 707. But this is quite different from an inference of fact drawn from argument, more or less sound, according to the particular circumstances surrounding it. *Hickory v. U. S.*, 160 U. S. 409, 16 Sup. Ct. 327.

3. The twelfth instruction told the jury that public officials should be truthful, and that false statements by officers (i. e. defendants) in relation to their official acts should be construed as an aggravation of their offenses, and, if knowingly and willfully made, would justify the jury in disregarding the whole of their sworn testimony in the case. In *Gold Co. v. Skillcorn* (N. M.) 41 Pac. 533, we held that an instruction which told a jury that they might disregard the whole of the testimony of a witness who had testified falsely, and which omitted the element of willful falsity, was error. It is not only essential that the falsity should be willful, but it must also be in relation to a material fact. 2 *Thomp. Trials*, § 2423. The law does not demand a higher standard for the scrutiny and weighing of statements of fact by public officers than other citizens; nor was it right to intimate that the defendants were guilty of any offenses which could be aggravated by their false statements concerning them.

4. A much more serious class of errors was committed in relation to instructions 14, 19, and 24 given at the request of the prosecution, which are as follows: "Fourteenth. In this case there is no presumption in favor of the defendants Juan B. Romero or Sostenes Lucero, or either of them, but they are to be judged in the same manner as if they were not officers of the law, and had done the killing in question, which is admitted, without

being armed with a writ or warrant; and after the killing has been established, which is not denied in this case, it devolves upon the defendants to establish that the killing done by them was either excusable or justifiable, and that there was no malice, express or implied, in so killing." "Nineteenth. If the jury believe that the defendants, or either one of them, without the other objecting or protesting, and standing by, shot and killed the deceased under such circumstances, then they would be guilty of murder in the first degree, unless they established the fact that they were excusable or justifiable by evidence to the satisfaction of the jury." "Twenty-Fourth. The court instructs the jury that, while it is incumbent upon the prosecution to prove every material allegation of the indictment as therein charged, it is not required that the same shall be proved in every case literally as charged, such, for instance, as the date, which may be changed,—which is not required to be proven of the date shown in the indictment; that, if the material allegations of the indictment are substantially proven as charged therein, the same will be sufficient; that nothing is to be presumed or taken by implication against the defendants, or either of them, until the fact of the killing has been established beyond a reasonable doubt; that then the killing is presumed to be malicious, and it devolves upon the defendants to establish to the contrary."

Is it true that the law implies malice from the fact of killing, upon the trial on an indictment for murder? It is true that a jury would be at liberty to rest their verdict of guilt upon the fact of the killing by the defendant. But this conclusion of fact is quite different from a presumption drawn by law. "Murder is the unlawful killing of a human being with malice aforethought, either express or implied." Acts 1891, c. 80, § 1. It must be (1) a killing; and (2) with malice. The killing of a human being does not constitute murder, but, as Blackstone says, "the grand criterion" which distinguishes murder from other killing is that the killing must be with malice aforethought. 4 *Bl. Comm.* 198. Judge Christianity observes: "To give homicide the legal character of murder, all the authorities agree that it must have been perpetrated with malice prepense or aforethought. This malice is just as essential an ingredient of the offense as the act which causes death. Without the concurrence of both, the crime cannot exist; and as every man is presumed to be innocent of the offense of which he is charged, until he is proved to be guilty, this presumption must apply equally to both ingredients of the offense,—to malice as well as the killing. Hence, though the principle seems to have been sometimes overlooked, the burden of proof as to each rests equally upon the prosecution, though the one may admit and require more proof

than the other." *Maher v. People*, 10 Mich. 212. It is true, the rule that the law presumes malice from the proof of the killing is sustained by numerous and respectable authorities. The leading authority is *Com. v. York*, 9 Metc. (Mass.) 93, 1 Benn. & H. Lead. Cr. Cas. 322. But courts and commentators have, especially of late, denied it as a sound legal principle, and condemned it as an encroachment upon the law. The true rule, more accurately stated, and which does not conflict with the presumption of innocence, the burden of proof, nor as to reasonable doubt, we think, is that malice may be implied from the intentional killing, where the jury, from the whole case before them, and beyond a reasonable doubt, find the additional fact that no circumstances of justification or excuse appear, and when there are no circumstances mitigating the killing to that of manslaughter. If there is reasonable doubt as to justification, there is reasonable doubt as to malice. The evidence of the killing may be considered by the jury, together with the whole of the evidence, in ascertaining whether there was malice; but it would be error to tell the jury that the killing alone is presumptive evidence of malice aforethought, as it would allow the jury to find malice, without stopping to inquire whether a considerable provocation appeared, or whether the circumstances were such as to show a wicked and malignant heart, which are essential ingredients of implied malice. In discussing this subject, Mr. Wharton observes, "We must keep in mind that the doctrine that malice and intent are presumptions of law, to be presumed from the mere fact of killing, belongs, even if correct, to purely speculative jurisprudence, and cannot be applied to any case that can possibly arise before the courts." *Whart. Cr. Ev.* § 737. This is so, because in no case does the prosecution limit its proofs to the bare fact of a killing. There is always disclosed some surrounding circumstances tending to show how and why it was done. It is from the killing, and all the circumstances disclosed upon the whole case, that the jury determine whether malice has been made out beyond a reasonable doubt. "It is true that we hear occasional utterances, as in Massachusetts, of the old doctrine that malice is to be presumed from the mere act of killing; but whenever this is done it is followed by the admission that, when the facts of the killing are proved, then the malice is to be inferred from the facts. Now, as the facts of the killing are always proved, the idea of abstract malice, being presumed from the abstract killing, has no application to the cases before the court." *Id.* §§ 722, 738. And Mr. Wharton adds: "Should, however, the judge make the proposition not speculative, but regulative; should he direct the jury that the logical inferences of this class are presumptions of law, and tell them to presume malice from the act of killing,—then this would be

error." *Id.* § 738. That is exactly what was done in this case, and, indeed, the foregoing instructions went even further. They not only told the jury that malice was to be presumed from the killing, but that it devolved upon the defendants to establish the contrary. What is implied malice? "Malice shall be implied when no considerable provocation appears, or when all the circumstances of the killing show a wicked and malignant heart." Section 3, c. 80, Acts 1891. Implied malice does not, therefore, arise merely from an intentional killing, but from a killing under such circumstances as that the jury can say that no considerable provocation appeared, or that all the circumstances show a wicked and malignant heart. In *State v. Vaughan* (Nev.) 39 Pac. 733, 736, the defendant admitted the killing, and claimed self-defense in justification. It was held error to charge that "malice aforethought means an intention to kill." Bigelow, C. J., says: "The fact that the killing was intentional does not necessarily prove that it was done with malice; for an intentional killing may be entirely justifiable, as where it is done in necessary self-defense; or it may be only manslaughter, as where it is done in the heat of passion, caused by no sufficient provocation. What it is must depend on the manner of the killing, and the surrounding circumstances." And the court in that case points out that, inasmuch as the defendant admitted the killing, it was important that the instructions upon this matter should be correct, and that such an instruction was highly prejudicial, under the circumstances. *Dennison v. State*, 13 Ind. 510; *State v. McKinzie*, 102 Mo. 620, 15 S. W. 149; *Trumble v. Territory*, 3 Wyo. 280, 21 Pac. 1081; *State v. Wingo*, 68 Mo. 181; *People v. Willett*, 36 Hun, 500. The element of implied malice was not merely formal. It involved the real and vital questions contested before the jury in this case. The evidence for the prosecution tended to show that the killing was done without provocation, and was a result of a deliberate purpose, under cover of a pretended arrest and pretended resistance. The evidence for the defense tended to show that the killing was done under circumstances of considerable provocation, after deceased had actually attempted to secure his freedom by slaying his guards. It was for the jury to determine which side spoke the truth. The jury were told that malice was to be implied from the killing, and that the killing by the defendants was established; and therefore the jury were told, in effect, that malice was fully proven, while the evidence for the defense went directly to attack the essential element of implied malice, as defined in the statute.

It will be remembered that the actual killing was done by one of the defendants, yet the jury were told in the fourteenth instruction that the killing done by the "defendants" was established. The instruction then

gives us to say that it devolves on the defendants to establish that the "killing done by them" was either excusable or justifiable, and that there was no malice, express or implied in the killing. Even if it be true that the law imputes malice to him who kills another, the vice running through these instructions is that the legal presumption is raised against both of the defendants, and it is not confined to the one who fired the fatal shot; and in all of them the jury were told that the burden rested upon both defendants, and not merely upon the one who fired the shot, to prove want of malice, and excuse or justification. In the nineteenth they were told that justification or excuse must be established by the defendants by evidence to the satisfaction of the jury. Even though it be true that the law implies malice from the simple fact of the killing, and even though both defendants had actually participated in the killing, these instructions treat the presumption arising from the killing as though the burden of proof became thereby shifted from the prosecution onto the defendants. The presumption of innocence until guilt is established to the satisfaction of the jury is thus completely brushed away. The defendants were required to prove their innocence as to one of the material and essential elements of the crime of which they were charged, namely, that the killing was not done with malice express or implied. In *State v. Payne* (Wash.) 39 Pac. 157, 160, the Washington court, while holding to the old doctrine that malice may be presumed from a killing done with a deadly weapon, say, "Of course, it would not be proper to instruct the jury that it was incumbent upon the defendant to overthrow this presumption by testimony in his own behalf." When counsel for the territory drew instruction No. 24, in which the jury were told that not only was malice to be presumed, but that it devolved upon the defendants to show the contrary, he confounded a mere rule of procedure, touching the order of proofs, with the functions of the jury in weighing the testimony, and applied to the latter a rule relating merely to the former. *Whart. Cr. Ev.* §§ 230, 738. The proofs of the prosecution, no doubt, made out a *prima facie* case amply strong enough to convict. When the defense introduced evidence in explanation and denial, they became actors; but upon the submission of the case it was for the jury to say, upon the whole case, whether every element was established beyond a reasonable doubt, and, if not, to acquit. The presumption of innocence did not end at any particular period in the proofs. It continued throughout the trial, and did not terminate until, upon the whole case, the jury returned their verdict. *Whart. Cr. Ev.* §§ 230, 831; *Coffin v. U. S.*, 156 U. S. 432, 15 Sup. Ct. 894; *Davis v. U. S.*, 160 U. S. 469, 16 Sup. Ct. 352. "In a

criminal case the establishment of a *prima facie* case only does not take away the presumption of a defendant's innocence, nor shift the burden of proof." *Oglethorpe v. State*, 23 Ala. 688; 1 Bowv. Law Dict. 227. Suppose the defendants had not introduced any testimony, although they were legally entitled to demand that the jury find every element established beyond a reasonable doubt; yet, if instructions like the fourteenth and twenty-fourth were given, it would be tantamount to directing them to find a verdict of guilty, even though the testimony of the prosecution's witnesses may have been such as to leave a reasonable doubt of guilt. If the proposition announced in these instructions be correct, the proof of the killing would not only raise a presumption of malice, but that presumption would become proof beyond a reasonable doubt, as a matter of law, unless the defendants successfully assumed the burden of showing the contrary. Such a proposition overturns the fundamental principles of the criminal law. In *Chaffee v. U. S.*, 18 Wall. 516, the jury had been charged that the government need only prove that the defendants were presumptively guilty, and the duty then devolved upon them to establish their innocence, and if they did not they were guilty, beyond a reasonable doubt. Justice Field, speaking for the court, says: "We do not think it at all necessary to go into any argument to show the error of this instruction. The error is palpable on its statement. All the authorities condemn it. The instruction sets at naught established principles." In *Coffin v. U. S.*, 156 U. S. 422, 15 Sup. Ct. 463, the jury had been charged that when the prohibited acts were knowingly and intentionally done, and their natural and legitimate tendency was to produce injury, the intent to injure is thereby sufficiently established to cast on the accused the burden of showing that their purpose was lawful, and their acts legitimate. The supreme court, per Justice White, say, "The error contained in the charge, which said, substantially, that the burden of proof had shifted, under the circumstances of the case, and that, therefore, it was incumbent on the accused to show the lawfulness of their acts, was not merely verbal, but was fundamental." While the case of the prosecution, made up in part by legal presumptions, may be such as to render it expedient for the defense to produce some evidence to qualify, explain, or deny the facts from which the presumption is sought to be raised, the burden of proof is not thereby changed; and, even if the law permits the jury to infer malice from certain things, it does not require them to do so. *People v. Willett*, 26 Hun, 500. The presumption of innocence is itself to be considered as evidence in favor of the defendants in every criminal case, under a plea of not guilty. *Coffin v. U. S.*, 156 U. S. 432,

15 Sup. Ct. 394; *Davis v. U. S.*, 160 U. S. 469, 16 Sup. Ct. 339. Upon this principle it is easy to reconcile the rule that in no case can the judge peremptorily direct the jury to find a defendant guilty of a crime. *Sparf v. U. S.*, 156 U. S. 51, 15 Sup. Ct. 272. "Strictly speaking, the burden of proof, as those words are understood in criminal law, is never upon the accused, to establish his innocence, nor to disprove the facts necessary to establish the crime of which he is indicted. It is on the prosecution, from the beginning to the end of the trial, and applied to every element necessary to constitute the crime." *Davis v. U. S.*, 160 U. S. 469, 16 Sup. Ct. 339. In *State v. Wingo*, 66 Mo. 151, the trial court had charged that "if the defendant, Wingo, shot and killed Gamble, the law presumed it to be murder in the second degree, in the absence of proof to the contrary; and it devolved upon the defendant to show, from the evidence in the case, to the reasonable satisfaction of the jury, that he was guilty of a less crime, or acted in self-defense." The supreme court held the charge erroneous, saying: "The defendant is entitled to the benefit of a reasonable doubt of his guilt on the whole case, not only as to whether the case made by the state is open to reasonable doubt, but if the evidence for the state be clear, and in the absence of other evidence conclusive, still, if the evidence adduced by the accused, whether it establishes the facts relied upon by a preponderance of the evidence or not, creates a reasonable doubt of his guilt in the minds of the jury, he is entitled to an acquittal. At no stage of the trial does he stand asserting his innocence." In the *Stakes Case*, 53 N. E. 164, after an elaborate argument upon this subject, it was held that the jury must be satisfied from the whole evidence of the guilt of the accused; and it was clear error to charge them that when the prosecution has made out a prima facie case, and evidence has been introduced tending to show a defense, they must convict, unless they are satisfied of the truth of the defense. "Such a charge," says the court, "throws the burden upon the prisoner, and subjects him to conviction though the evidence on his part may have created a reasonable doubt of his guilt. Instead of leaving it to them to determine upon the whole evidence whether his guilt is established beyond a reasonable doubt, it constrains them to convict unless they are satisfied that he has proved his innocence." In *State v. Gassert*, 65 Mo. 354, Judge Henry alluded to the difficulty of reconciling the doctrine contained in such instructions as these with elementary principles, but yielded to the force of precedents in that state; but in *State v. McKinzie*, 102 Mo. 320, 15 S. W. 149, it was repudiated, and the earlier cases overruled. See, also, *State v. Wingo*, *supra*; *State v. Hill*, 69 Mo.

453. But in *State v. Evans*, 224 Mo. 411, 28 S. W. 8, it seems to have been restored. In Massachusetts the case of *Com. v. York*, *supra*, has been greatly modified, if not overruled, in *Com. v. Pomeroy*, reported Whart. *Hem. Append.* (2d Ed.) 753, and is so considered by the supreme court of the United States in *Davis v. U. S.*, 160 U. S. 431, 16 Sup. Ct. 353. See, also, *Com. v. Hawkins*, 3 Gray, 463; *U. S. v. Armstrong*, 2 Curt. 446, *Fed. Cas. No. 14,467*. The only case which we have found in this territory which seems to hold that the defendant must prove his innocence of the crime charged is *Territory v. Trujillo*, 32 Pac. 154, where it was held that the burden was upon the defendant to prove an alibi. But that ruling is not sustained by sound principle (Whart. *Cr. Ev.* 333), and is at variance with the rule laid down in *Davis v. U. S.*, 160 U. S. 469, 16 Sup. Ct. 353. An alibi, if true, meets and completely overthrows every allegation against the accused in the indictment. 2 *Thomp. Trials*, § 2436. Extrinsic defenses which do not traverse the averments of the indictment, it is perhaps true, must be affirmatively shown by the defense. Of this class have been mentioned such as *autrefois acquit*, license, command of superior officer, etc. Whart. *Cr. Ev.* § 381 et seq. But such matters of provocation, excuse, or justification which tend to traverse the element of intent or malice must be weighed by the jury, not as a defense, but with all the other evidence, in determining whether every essential element of the crime has been established beyond reasonable doubt. *Id.* § 381; *State v. Porter*, 34 Iowa, 131; *State v. Hill*, 69 Mo. 451; *People v. Marshall* (Cal.) 44 Pac. 718; *People v. Coughlin* (Mich.) 32 N. W. 906; *Coffin v. U. S.*, *Davis v. U. S.*, and *Hickory v. U. S.*, *supra*.

The court, in its own prepared charge, fairly and correctly instructed the jury, in general terms, as to the burden of proof, the presumption of innocence, and the necessity of establishing guilt, as to every element, including malice, beyond a reasonable doubt; and it is argued that, these instructions considered, the defendants were sufficiently protected against those given at the instance of the prosecution. But more than 80 instructions were given to the jury in this case, many of them quite lengthy; and it would hardly be fair to assume that mere abstract propositions would be weighed, to the exclusion of those to which we have alluded, which assume to deal with the facts of this particular case, which were specific, which were emphasized by repetition, and which were of a nature so harmful to the defendants. In this case the errors were of such character that the probability of injury seems quite manifest. 2 *Thomp. Trials*, § 2407; *People v. Casey*, 65 Cal. 200, 3 Pac. 874. It will not be necessary to notice the other errors

assigned, as these are sufficient to require the reversal of the cause. The judgment is reversed, and the cause remanded for a new trial.

SMITH, C. J., and COLLIER and HAMILTON, JJ., concur.

MOFFETT et al. v. BOYDSTUN.

(Court of Appeals of Kansas, Southern Department, C. D. Sept. 5, 1898.)

ATTACHMENT—MOTION TO DISCHARGE—SURPLUSAGE—COURTS—ORDERS AT CHAMBERS.

1. A judge of the district court has power at chambers to discharge attached property from the lien of the attachment.

2. Where a motion is filed in an action by one not a party to the record, asking for the discharge of the property attached in the action, upon the grounds that such party is the owner of the property, anything contained in said motion which relates to the merits of the original action must be treated as surplusage; and any evidence introduced at the hearing of such motion, which related to the merits of the original motion, is irrelevant and immaterial, and could not have prejudiced the judge in his final decision as to the ownership of the cattle.

(Syllabus by the Court.)

Error from district court, Harper county; G. W. McKay, Judge.

Action by T. S. Moffett and John Moffett, partners as Moffett Bros., against Frank Boydston, aided by attachment. From an order discharging the attachment on motion of Euphemia Kittie Boydston, plaintiffs bring error. Affirmed.

Geo. E. McMahon, Washbon & Washbon, and Sankey & Campbell, for plaintiffs in error. J. P. Grove and T. A. Noftzger, for defendant in error.

DENNISON, J. The object of this petition in error is to reverse an order of the judge of the district court, made at chambers, discharging the property levied upon under an order of attachment issued in the case of Moffett et al. v. Frank Boydston. This defendant in error filed a motion in said action asking for the discharge of the property levied upon under said attachment, claiming that the said property belonged to her. This motion was heard by the judge of the district court at chambers, and was by him sustained, and the attached property discharged. The petition in error alleges four grounds for a reversal, as follows: "(1) That the said judge erred in assuming jurisdiction at chambers to try the issues raised and presented by defendant in error's motion. (2) That the court erred in admitting incompetent and improper testimony over the objections and exceptions of plaintiffs in error. (3) That the said judge erred in assuming to try the merits of the main action between

these plaintiffs and the defendant, Frank Boydston, upon the hearing of the motion filed by defendant in error to discharge the attached property. (4) Said judge erred in overruling plaintiffs' motion for a new trial in said action."

The judge did not err in assuming jurisdiction at chambers to try the issues raised upon a motion to discharge the attached property from the lien of the attachment, and to order it returned to its owner. "A judge of the district court has power, at chambers, to discharge an attachment." *Shedd v. McConnell*, 18 Kan. 594, and cases there cited.

The second and third specifications of error may be considered together. The motion filed by this defendant in error reads as follows: "Comes now Mrs. Euphemia Kittie Boydston, and respectfully represents to the court and moves the court as hereinafter set forth: That the defendant in the above-entitled action is her husband; that the 23 head of cattle attached as the property of the defendant in the above-entitled action are not, and never were, the property of said defendant, but are, and have been for about two years last past, the property of, and in the possession of, her, the said Euphemia Kittie Boydston, all of which she is ready to make appear. She says further that at the time the same were attached the said plaintiffs, and the sheriff of Harper county, Kansas, well knew that the same were the sole and individual property of her, the said Kittie Boydston. Further, she denies that her husband, Frank Boydston, is, or was at the time of the commencement of this action against him, indebted to the plaintiffs in any sum whatever; and especially denies the material allegations of plaintiffs' petition. She says that her said 23 head of cattle (being the same cattle attached in this suit, as shown by the return of the sheriff of said county, on the attachment order—reference to which is hereby made for a more particular description thereof), are unlawfully detained from her, to her great damage; and she prays the court, on the hearing, to make an order directing and commanding the said sheriff to restore and deliver the said cattle to her, and for her proper costs against the plaintiffs." This motion, to say the least, is very inartistically drawn. It seems to be intended, and has been treated by both sides and by the court, as a motion to discharge the property from the lien of the attachment. It alleges that the defendant in the action is her husband, and that the cattle attached are not his, but belong to her, and that the plaintiffs and the sheriff knew that they were her property. She also says that the cattle are wrongfully detained from her, and asks for an order restoring the same to her, and for costs. Anything which is contained in the motion, other than these allegations, must be treated as surplusage. Certainly

nothing relating to the merits of the issues raised by the original pleadings could be heard by the judge at chambers, nor upon a motion to discharge an attachment filed by one not a party to the original action. The real question to be determined by the judge was the ownership of the cattle attached. This is the only issue which was decided by the judge. The order was to the sheriff to restore and deliver the attached property to the said Euphemia Kittie Boydston. Any evidence introduced which related to the merits of the main action between these plaintiffs in error and Frank Boydston did not relate to the issue decided. It was irrelevant and immaterial, and could not have prejudiced the judge in his final decision as to the ownership of the cattle. The substantial rights of these plaintiffs in error were not prejudiced thereby. "Where irrelevant and immaterial evidence is introduced on the trial, but it appears that the adverse party's rights were not prejudiced thereby, held not material error." *Railroad Co. v. Grimes*, 38 Kan. 241, 16 Pac. 472. The order of the judge of the district court, discharging the attached property, is affirmed. All the judges concurring.

DODGE v. HAMBURG-BREMEN FIRE INS. CO.¹

(Court of Appeals of Kansas, Southern Department, C. D. Sept. 5, 1896.)

INSURANCE—SUBROGATION CLAUSE—CHANGE OF TITLE—EFFECT ON MORTGAGE—NOTICE.

1. When a loss of insured property occurs according to the terms of the policy, and the insurance policy has attached to it a subrogation contract which stipulates that the loss, if any, is payable to a mortgagee, or his assigns, as his interest may appear, the owner of the mortgage is the insured, to the extent of his interest, and a change of title which increases his interest in the insured property, even to absolute ownership, will not release the insurance company from its liability to pay the loss.

2. A change in the title of insured property, which increases the interest of the insured from a lien holder to absolute ownership, is not such a change of ownership as requires notice to be given to the insurance company, under the terms of a subrogation contract which stipulates that the mortgagee shall notify the insurance company of any change of ownership.

(Syllabus by the Court.)

Error from district court, Sedgwick county; C. Reed, Judge.

Action by John L. Dodge against the Hamburg-Bremen Fire Insurance Company on a policy of insurance. From a judgment for defendant, plaintiff brings error. Reversed.

Bently & Hatfield and Holmes & Haymaker, for plaintiff in error. Bently & Ferguson, for defendant in error.

¹ Rehearing pending.

DENNISON, J. Mrs. Flora Cowley was the owner of a lot upon which was situated a house and barn, upon which she procured a loan from the Sedgwick Loan & Investment Company, and she and her husband executed to said company a mortgage thereon. She also procured a policy of insurance upon said house and barn, from the agents of this defendant in error in Wichita, Kan., which had attached to it the following subrogation contract: "Policy No. 963, in name of Flora Cowley. Agency at Wichita, Kansas. Loan, if any, payable to the Sedgwick Loan and Investment Company, mortgagee or trustee, or its assigns, as its interests may appear as herein provided: It being hereby understood and agreed that this insurance, as to the interest of the mortgagee or trustee only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured, nor by the occupation of the premises for purposes more hazardous than are permitted by the terms of this policy: provided that the mortgagee or trustee, or assigns, shall notify this company of any change of ownership or increase of hazard which shall come to his or their knowledge, and shall have permission for such change of ownership or increase of hazard duly indorsed on this policy: and provided, further, that every increase of hazard not permitted by the policy to the mortgagor or owner shall be paid for by the mortgagee or trustee, or assigns, on reasonable demand, and after demand made by this company upon, and refused by, the mortgagor or owner to pay, according to the established schedule of rates. It is, however, understood that this company reserves the right to cancel this policy as stipulated in the printed conditions in said policy, and also to cancel this agreement, on giving ten days' notice of their intentions to the trustee, or assigns, or mortgagee, named therein, and from and after the expiration of the said ten days this agreement shall be null and void. It is further agreed that, in case of any other insurance upon the property hereby insured, then this company shall not be liable under this policy for a greater proportion of any loss sustained than the sum hereby insured bears to the whole amount of insurance on said property, issued to or held by any party or parties having an insurable interest therein. It is also agreed that whenever this company shall pay the mortgagee or trustee, or assigns, any sum for loss under this policy, and shall claim that, as to the mortgagor or owner, no liability therefor exists, it shall at once, and to the extent of such payment, be legally subrogated to all the rights of the party to whom such payments shall be made, under any and all securities held by such party for the payment of said debt. But such subrogation shall be in subordination to the claim of said party for the balance of the

debt so secured, or said company may, at its option, pay the mortgagee or trustee, or assigns, the whole debt so secured, with all the interest which may have accrued thereon to the date of such payment, and shall thereupon receive from the party to whom such payment shall be made an assignment and transfer of said debt, with all securities held by said parties for the payment thereof. The foregoing provisions and agreements shall take precedence over any provision or condition conflicting therewith contained in said policy. This clause is attached to, and is made a part of, the said policy, from the 9th day of January, 1890. In witness whereof the duly-authorized agent of said insurance company has hereunto set his hand on said day. Cridwell & Fellows, Agent. Hamburg-Bremen Insurance Company of Germany."

Dodge commenced this action to recover upon said insurance policy. The answer was a general denial. The case was tried by the judge without a jury, upon the following agreed statement of facts: "Agreed Statement of Facts. It is hereby stipulated and agreed between the parties to this action that the above-entitled cause may be tried in the court without a jury, and that the court may render judgment upon the pleadings filed herein, and the following facts, which are hereby agreed to: That the defendant, the Hamburg-Bremen Fire Insurance Company, is a corporation organized under the laws of Germany, and duly authorized to and is transacting business in the state of Kansas as an insurance company. That on the 9th day of January, 1890, the defendant herein, for a valuable consideration paid to it by Mrs. Flora Cowley, issued to her its certain fire insurance policy. Said original policy is attached to the plaintiff's petition herein. That at the time said policy was issued Mrs. Flora Cowley was the owner of the fee title of the property described in said policy. That on the 1st day of April, 1892, the said Flora Cowley, with her husband, Hale Cowley, executed a mortgage on the premises described in said policy, to the Sedgwick Loan & Investment Company. That on or about the 9th day of January, 1890, the date on which the policy of insurance was delivered to the said Mrs. Flora Cowley, she delivered the same, with the mortgage clause attached to said policy, to the Sedgwick Loan & Investment Company. That, subsequent to the delivery of said policy of insurance by Mrs. Flora Cowley to the Sedgwick Loan & Investment Company, the said the Sedgwick Loan & Investment Company assigned, indorsed, and delivered said mortgage hereinbefore mentioned, together with this policy of insurance, to John L. Dodge, plaintiff herein. That on the 21st day of January, 1892, John L. Dodge, plaintiff herein, as plaintiff, commenced an action in this court against Hale Cowley and Robert E. Lawrence, ad-

ministrators of the estate of Flora Cowley, deceased, and others, to foreclose the said mortgage herein mentioned, on the premises described in the policy sued on in this action. A copy of petition in said action of John L. Dodge against said Hale Cowley and others, together with a copy of the mortgage sued on herein, above mentioned, is hereto attached, and made a part of these facts, and marked Exhibits 'A' and 'B,' respectively. That thereafter, on the 24th day of October, 1892, the said John L. Dodge, as plaintiff, recovered a judgment in said cause, which has never been vacated, reversed, set aside, or modified. A copy of said judgment is hereto attached, marked 'Exhibit C,' and made a part of these facts. That on the 6th day of September, 1893, I. T. Ault, then duly elected, qualified, and acting sheriff of Sedgwick county, Kansas, did, pursuant to said last-mentioned judgment, sell the premises described in said policy to the said John L. Dodge. That on the 12th day of October, 1893, Hon. C. Reed, judge of this court, did confirm the sale of real estate made in said action by the said sheriff. A copy of said confirmation of sale is hereto attached, and made a part of these facts, and marked 'Exhibit D.' That on the 8th day of November, 1893, the dwelling house and private barn insured by the policy hereinbefore mentioned were totally destroyed by fire. That said policy sued on in this action provides, among other things, in said mortgage clause, as follows: 'It being hereby understood and agreed that this insurance is as to the interest of the mortgagee or trustee only therein; shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured, or by the occupation of the premises for purposes more hazardous than are permitted by the terms of this policy; provided, that the mortgagee or trustee, or assignees, shall notify this company of any change of ownership or increase of hazard which shall come to his or their knowledge, and shall have the permission for such change of ownership or increase of hazard duly indorsed on this policy.' That the said policy and mortgage clause, attached to the plaintiff's petition herein, are to be considered a part of these facts, as if fully set out herein. That this defendant company had no knowledge or information of the suit, or any of the proceedings had therein, by said John L. Dodge against Hale Cowley and others, to foreclose said mortgage herein mentioned, or of the sale of said premises by the said sheriff to John L. Dodge on the 6th day of September, 1893. That on or about the 10th day of November, 1893, the plaintiff, John L. Dodge, by his agent, R. E. Lawrence, notified this defendant company, by stating verbally to Caldwell & Fellows, agents of this defendant company, that the house and private barn insured by this policy had been destroyed by fire. That on the 2d day of December, 1893, the plaintiff herein

submitted proof of loss, as provided for by conditions in said policy of insurance, a copy of which is hereto attached and made a part of these facts, and marked 'Exhibit E.' Dated Wichita, Kansas, December 4, 1894." Judgment was rendered for the defendant, and the plaintiff brings the case here for review.

At the outset, we are met with a motion to dismiss this action for the reason that there is no sufficient transcript or case-made attached to the petition in error. The record is certainly far from satisfactory. It cannot be upheld as a case-made. However, the petition, answer, agreed statement of facts, judgment, and all proceedings necessary to show the errors complained of, are attached to the petition in error, accompanied by a certificate of the clerk of the court which reads as follows: "I, S. N. Bridgman, clerk of the district court within and for the county of Sedgwick, state of Kansas, do hereby certify that the above and foregoing is a true copy of all papers and proceedings in the cause wherein John L. Dodge is plaintiff, and the Hamburg-Bremen Fire Insurance Company is defendant, as the same remains of record in my office, except: Returned summons by superintendent of insurance precepts for copies. Execution. Journal entry of correction. Journal entry overruling motion. Witness my hand, as such clerk, and the seal of said court attached, this the 13 day of April, 1895. S. N. Bridgman, Clerk of the District Court of Sedgwick County, Kansas." By a liberal interpretation, we treat the record as a transcript, and review the case. We cannot, however, recommend it as a model to be copied in the future.

The real question in this case is, should the plaintiff recover, upon the agreed statement of facts and the pleadings? In *Insurance Co. v. Coverdale*, 48 Kan. 443, 29 Pac. 632, it was decided that the mortgagor could not maintain an action upon a policy of insurance which contained a similar subrogation contract, unless the mortgage was paid, but that the mortgagee only could maintain the action, unless he authorized the owner so to do. By the subrogation contract, the insurance company entered into a contract with the mortgage company, or its assigns, by the terms of which the amount of the policy, in case of loss, is to be paid to it, so far as its interest shall appear. It therefore follows that, so far as his interest appears, John L. Dodge is the assured. The subrogation contract must be construed the same as though it read, "Loss, if any, under this policy, payable to John L. Dodge, mortgagee, as his interest may appear." The policy is to run five years, and the premium for the full time has been paid. No one can collect the money, in case of loss, but Dodge. The insurance company takes the risk, and collects the full premium, knowing that, while Mrs. Cowley holds the fee title, Dodge holds a lien upon the property, which may in time be transferred into

a title. It must have anticipated that Dodge was likely to take steps to foreclose the lien which was insured. When an insurance company insures a mortgage lien, it must anticipate that upon default the lien holder will begin foreclosure proceedings, obtain judgment, and secure a sale of the mortgaged property. There can be no question but that the mortgagee is protected by the terms of the contract with the insurance company until the sale is confirmed, and the money ordered by the court to be paid to the mortgagee. Is the purchaser also protected by the terms of the contract, and does it make any difference whether the mortgagee or a stranger is the purchaser? If a stranger is the purchaser, there is a change of ownership. If the mortgagee is the purchaser, his interest is changed from a lien holder to an owner in fee. Counsel for defendant in error contends that the interest of John L. Dodge, mortgagee, was insured, and not the interest of John L. Dodge, owner, and that, in order to have held the insurance in force, Dodge should have notified the company of the change of the fee title, and obtained the consent of the company to the change. They argue that the company might have been willing to have insured the property if Mrs. Cowley was the owner, but not if Dodge was the owner. The property was occupied by a tenant as a dwelling when it was insured, and when it burned. It cannot be said that the hazard was increased by the transfer of the interest of Dodge from a lien holder to a judgment creditor, and then to an owner in fee. The insurance company was willing to insure Dodge, as the assignee of the mortgagee. The contention of counsel for the insurance company is that Dodge failed to notify the company of the change of ownership which occurred when he purchased the property at sheriff's sale, and have the permission of the insurance company for the change of ownership indorsed upon the policy. We cannot think that this is such a change of ownership as is contemplated by that clause of the subrogation contract. The change of ownership in this case increased the interest of Dodge, who, under the subrogation contract, is the insured. In no way was the risk increased. The title had not vested in some one other than the insured. It cannot be said that the insurance company might not be willing to insure the property with Dodge as the owner, because Dodge was already the insured. No one else could have maintained an action for the recovery of the insurance money. "A change of title which increases the interest of the insured, whether the same be by sale under judicial decree, or by voluntary conveyance, will not defeat the insurance." *Insurance Co. v. Ward*, 50 Kan. 349, 31 Pac. 1080, and cases there cited. If the property had been sold to some one other than the insured, and the insured had knowledge thereof, there would be a reason why such knowledge should have been imparted to the insurance company, so that

they could have elected whether they would have carried the insurance with such a person as owner. In this case there was at no time a change of the person insured. It was always the loan company and its assignees. The only change of title or ownership was to increase the interest of the insured in the property, and make his interest the absolute ownership thereof. Surely the insurance company cannot complain of this; nor is it entitled to any notice of such a change, under the terms of the subrogation contract. The judgment of the district court is reversed, and the cause remanded, with instructions to render judgment upon the pleadings and agreed statement of facts against the defendant in error, and in favor of the plaintiff in error, in accordance with the views expressed in this opinion. All the judges concurring.

BERRY v. FAIRMOUNT TOWN CO.

(Court of Appeals of Kansas, Southern Department, C. D. Sept. 5, 1896.)

VENDOR AND PURCHASER—ACTION FOR PRICE—TENDER OF DEED—PLEADING.

The court erred in overruling the demurrer of the defendant below to the petition of the plaintiff below. *Iles v. Elledge*, 18 Kan. 296; *Close v. Dunn*, 24 Kan. 372; *Morrison v. Terrell*, 27 Kan. 326; *Sanford v. Bartholomew*, 5 Pac. 429, 33 Kan. 38; *Soper v. Gabe*, 41 Pac. 969, 55 Kan. 646,—followed.

(Syllabus by the Court.)

Error from court of common pleas, Sedgwick county; Jacob M. Baldenston, Judge.

Action by the Fairmount Town Company against T. Alexis Berry to recover an installment on a contract for the purchase of land. From a judgment for plaintiff, defendant brings error. Reversed.

O. A. Keach and F. Nighswonger, for plaintiff in error. J. V. Daugherty, for defendant in error.

DENNISON, J. A motion has been filed by the defendant in error asking us to dismiss this case for the reason that the record fails to show the presence of the defendant in error at the time the case made was settled, or that he had been served with notice, or had waived notice, of the time and place of such settlement. Affidavits have been filed, which are uncontradicted, that the attorney for the defendant in error was present when the case made was settled and signed. This brings the case within the rule laid down in *Bank v. Rowlinson*, 2 Kan. App. 82, 43 Pac. 304, and the motion to dismiss will be overruled.

This was an action to recover the amount of the last installment claimed to be due upon a contract of sale by which the town company sold to Berry four lots in Iuka, Kan. The defendant below demurred to the petition of the plaintiff below, which said demurrer was by the court overruled. Judge

ment was rendered against Berry, and he brings the case here for review.

The errors complained of may all be disposed of by a decision upon one legal proposition, viz.: Must the vendor allege and prove the execution and tender of a deed conveying title, as a prerequisite to his right to maintain an action for the purchase price of the lots? The contract sued upon provides that in consideration of the stipulations and payments provided for therein, the vendor will sell to the vendee, and convey in fee simple, clear of all incumbrances whatsoever, by a good and sufficient warranty deed, the lots described therein. The petition filed in the court below set up the contract and the breach thereof, and alleged that the plaintiff below was and is ready and willing to execute and deliver a good and sufficient warranty deed upon compliance with the terms of the contract by the defendant below, but that said defendant has wholly failed and refused to pay said third installment, etc. No tender of conveyance was alleged in the petition. The answer was a general denial, except the execution of the contract. The plaintiff below moved for judgment upon the pleadings on October 22, 1890. Upon its hearing on the 23d day of December, 1890, the town company filed with the clerk of the court its warranty deed to the lots, making the defendant below the grantee therein. Counsel for the town company contend that in equity this is an action for specific performance, and that the deed tendered on December 23, 1890, is sufficient. We are of the opinion that the legal proposition embodied in this case has been settled by our supreme court. In the cases of *Iles v. Elledge*, 18 Kan. 296; *Close v. Dunn*, 24 Kan. 372; *Morrison v. Terrell*, 27 Kan. 326; *Sanford v. Bartholomew*, 33 Kan. 38, 5 Pac. 429; *Soper v. Gabe*, 55 Kan. 646, 41 Pac. 969,—it is held that the contracts are mutual, and that neither party can maintain an action for the completion of the contract until he tenders performance upon his part. A careful review of these cases satisfies us that the court erred in overruling the demurrer of the defendant below to the petition of the plaintiff below. In *Morrison v. Terrell*, supra, the court says, "Before either party can justly summon the other into court, and impose the expense and annoyance of a suit, he should at least tender performance on his part." In *Soper v. Gabe*, supra (which is an action upon a contract almost identical with the one in this action, and, so far as this question is concerned, exactly similar), the court says: "It is well settled in this state that a vendor cannot enforce a contract like the one in question, and collect the purchase price of the land which he has agreed to convey, without alleging and proving that he has performed his own obligation, by making and tendering a deed of conveyance. As the delivery and tender of a deed is a prerequisite to compel a performance, allegations of a tender or offer

of performance in the petition were essential; and, as the petition of the plaintiffs below wholly failed in this particular, no right of action was shown, and the court committed error in overruling the demurrer." The judgment of the court of common pleas of Sedgwick county, Kan., is reversed, and the case ordered sent to the district court of Sedgwick county, Kan., with instructions to proceed in accordance with the views expressed in this opinion. All the judges concurring.

RUTLAND SAV. BANK v. WHITE et al.
(Court of Appeals of Kansas, Southern Department, C. D. Sept. 5, 1896.)

MORTGAGE—ASSUMPTION BY GRANTEE—EVIDENCE.

Where W. mortgaged certain lands to S., and afterwards W. and wife executed a deed conveying said lands to D., and there is a covenant in the deed that the premises conveyed are free and clear from all incumbrances, except a mortgage of \$1,500, which is assumed by the party of the second part, and in an action to foreclose the mortgage a personal judgment is sought against D. for the mortgage debt, and D. answers that he did not, in any manner, ever promise or agree to assume the mortgage indebtedness, and there is no evidence that he ever accepted the deed, or in any manner assumed the mortgage debt, *held*, that the court did not err in holding that he was not liable for the payment of the mortgage indebtedness.

(Syllabus by the Court.)

Error from district court, Greenwood county; C. A. Leland, Judge.

Action by the Rutland Savings Bank against Richard White and others to foreclose a mortgage. There was a decree of foreclosure, from that part of which denying a personal decree against defendant J. W. Duncan, plaintiff brings error. Affirmed.

Fuller & Whitcomb and Cloyston & Fuller, for plaintiff in error. Jones & Shultz and Hodgson & Hodgson, for defendant in error.

JOHNSON, P. J. This suit was commenced by the Rutland Savings Bank against Richard White, Julia White, and J. W. Duncan to foreclose a mortgage given by Richard White and Julia White to E. M. Sheldon on the S. W. $\frac{1}{4}$ and N. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 2, also N. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ of section 3, all in township 27, range 9, in Greenwood county, Kan., and for a personal judgment against J. W. Duncan, the grantee of Richard White and Julia White, for the reason that in the deed of conveyance to him he assumed, and agreed to pay off, said mortgage indebtedness. The note and mortgage given to E. M. Sheldon were by him duly sold and assigned to the Rutland Savings Bank. The Kansas Loan & Trust Company, James Shultz, and E. C. Shultz were made parties defendant, by order of the court. Duncan answered the petition of the plaintiff below, and denied generally each and every allegation thereof, and specifically denied that he ever in any manner promised

or agreed to assume or pay said mortgage indebtedness as set out in the petition of plaintiff below. Afterwards H. Bancroft was made party defendant, by order of the court, and voluntarily appeared and filed his answer, setting up that he was a tenant of the owners of the lands, and in possession, and had paid the rents to the landlord, and asked to have his rights in the crops growing on the land protected. The case was afterwards tried, on the issues joined between the parties by the court without a jury, and resulted in a decree of the foreclosure of the mortgage, and for an order for the sale of the mortgaged premises to satisfy said indebtedness. The plaintiff below filed a motion to set aside and vacate the findings and decision of the court, and for a new trial, which was overruled, and judgment of the court excepted to; and, for good cause, plaintiff was given 60 days' time to make and serve a case for the supreme court. Case was made and settled and duly filed in the supreme court, and certified to this court for review.

The only error complained of in the brief of plaintiff in error is that, on the trial of the case, J. W. Duncan claimed that he assumed and agreed to pay the mortgage, not the note, and therefore he was not liable. In the answer of Duncan, he denies that he ever in any manner promised or agreed to assume or pay said mortgage indebtedness set out in the petition of the plaintiff. We find no reply in the records to this answer, and do not think that any reply was necessary; for the petition alleged that he assumed the payment of the mortgage, and his answer denies that allegation. None of the evidence on the trial of the case is preserved in the record. We are unable to determine whether he ever assumed the payment of the mortgage or not. It is true that a copy of the deed from Richard White and Julia White, conveying certain lands to J. W. Duncan, contains a covenant that they are lawfully seised of the premises conveyed; that said premises are free and clear from all incumbrances except a certain mortgage, of \$1,500, which is assumed by the party of the second part. This deed was executed by Richard White and Julia White, but there is no evidence that it was ever accepted by J. W. Duncan, or that the mortgage referred to in the petition of the plaintiff below was the same mortgage referred to in the deed. Duncan would not be liable to pay the mortgage indebtedness unless he accepted the deed. By his general denial he put the question of his promise and agreement in issue, and it cast the burden of proof upon the plaintiff to prove the assumption by Duncan of the mortgage debt. Unless he accepted the deed with the conditions written therein, there would be no assumption or promise on his part to pay the mortgage debt. The record not containing any of the evidence, we are unable to determine whether the court erred

in rendering the judgment it did. There being no error apparent in the record, the judgment of the district court is affirmed. All the judges concurring.

McCALLA et al. v. DAUGHERTY et al.
(Court of Appeals of Kansas, Southern Department, C. D. Sept. 5, 1896.)

LIMITATION OF ACTIONS—PLEADING—FRAUD.

1. Where the petition of the plaintiff shows on its face that the action is barred by the statute of limitation, the petition does not state facts sufficient to constitute a cause of action.

2. Where the petition of the plaintiff alleges a cause of action for relief on account of fraud, and states that the fraudulent transaction complained of accrued more than two years before the commencement of the suit, and there is no allegation in the petition showing when the fraud was discovered, so as to take the case out of the statute of limitation, it fails to state a cause of action.

(Syllabus by the Court.)

Error from district court, Sedgwick county; C. Reed, Judge.

Action by J. V. Daugherty against D. W. McCalla and others. On defendant McCalla's death, J. H. McCall, administrator, was substituted. D. M. Tipton intervened, and filed a cross petition. From a judgment for plaintiffs, defendants bring error. Reversed.

Sankey & Campbell, for plaintiffs in error. J. V. Daugherty and Holmes & Haymaker, for defendants in error.

JOHNSON, P. J. This action was commenced on the 14th day of April, 1893, in the district court of Sedgwick county, by J. V. Daugherty against D. W. McCalla, Lou K. McCalla, and Barbara A. McCalla, to set aside certain conveyances of real estate, and subject the land to the payment of a certain judgment recovered before a justice of the peace on the 21st day of January, 1893, in favor of the plaintiff below and against D. W. McCalla and Lou K. McCalla, on the grounds of fraud in the conveyance of said real estate. Afterwards, on the 21st day of April, 1893, D. M. Tipton appeared in court, and moved to be made a party to said action, and was, by order of the court, permitted to be made a party to said suit. And he thereupon filed a cross petition alleging that on the 22d day of November, 1887, he recovered a judgment in the district court of Sedgwick county, Kan., against D. W. McCalla and Lou K. McCalla, for the sum of \$1,807.50, and that it was declared to be a lien on certain real estate in Sedgwick county; that said land had since been sold under the judgment, and the same did not sell for a sufficient sum to satisfy said judgment and costs, and that the balance of the judgment remaining after the application of the proceeds of the sale of said land was in full force and unsatisfied, and was a valid judgment against D. W. McCalla and Lou K. Mc-

Calla, and that on the 31st day of August, 1889, D. W. McCalla and Lou K. McCalla, for the purpose of placing their property beyond the reach of their creditors then existing and to exist thereafter, conveyed certain lands in Sedgwick county to one Barbara A. McCalla, and that said deed of conveyance was without consideration, and for the purpose of defrauding the creditors of D. W. McCalla and Lou K. McCalla; and that said Barbara A. McCalla received said deed with full knowledge of the fraudulent intention of the grantors therein, and for the purpose of assisting them in defrauding their creditors,—and asks that said conveyance be set aside, and the land subjected to the payment of said judgment. After the commencement of this suit, and the filing of the cross petition of D. M. Tipton, and the answer of D. W. McCalla and Lou K. McCalla, D. W. McCalla died, and J. H. McCall was duly appointed and qualified as administrator of D. W. McCalla, deceased, and the action was thereafter revived against the administrator, and he appeared and filed answer to the cross petition, as such administrator, and the cause proceeded to trial before the court without a jury; and on the trial of the case the court found that the plaintiff below recovered a judgment against D. W. McCalla and Lou K. McCalla for \$50, and that the same is unsatisfied. But the court found, from the evidence, against the plaintiff, and in favor of the defendants, on all other issues joined between them. On the issue between D. M. Tipton and the McCallas, the court found that on the 22d day of November, 1889, D. M. Tipton recovered judgment in the district court of Sedgwick county against D. W. McCalla and Lou K. McCalla for \$1,807.50, and that such judgment is in full force and effect, and there remains due and unpaid on such judgment the sum of \$426, with interest, and that on the 29th day of August, 1889, D. W. McCalla was the owner in fee simple of certain lands situated in Wichita, Sedgwick county, Kan., and that on the 31st day of August, 1889, D. W. McCalla and Lou K. McCalla executed and delivered to Barbara A. McCalla a deed of conveyance for such lands, and that such deed was executed and delivered to Barbara A. McCalla without any consideration whatever having been paid, or to be paid, and that it was executed and delivered for the fraudulent purpose of defrauding the creditors of D. W. McCalla; and the court thereupon directed that the judgment of Tipton be a first lien on the land, and that said deed be set aside, and the land be sold to satisfy the judgment and costs. To the finding of facts and conclusions of law the defendants below duly excepted, and bring the case to this court, and ask that the judgment be reversed.

The record in this case is quite voluminous, and numerous errors are assigned; but, from the view we take of this case, it is unneces-

sary for us to consider all of the errors specified. The court having found against the plaintiff below, and no objections or exceptions being taken by him, that part of the case has been finally disposed of, and it will not be necessary to refer to the issues between the plaintiff and defendants McCalla.

On the trial of the case the defendants below objected to the introduction of any evidence under the cross petition of D. M. Tipton, for the reason that said cross petition did not state facts sufficient to constitute a cause of action in his favor and against the defendants below. The contention of the plaintiffs in error is that the cross petition shows that the conveyance complained of as fraudulent was executed on the 31st day of August, 1889, and the cross petition of D. M. Tipton was not filed until the 21st day of April, 1893, and there is no allegation in the cross petition showing that the fraudulent acts complained of were not discovered until some later day; that, more than two years having elapsed after the fraudulent transaction complained of and the commencement of this action, the action was barred by the statute of limitations. Subdivision 3 of section 18 of the Code of Civil Procedure, fixing the time in which an action may be commenced, provides that an action for relief on the ground of fraud shall be commenced within two years, and the cause of action in such cases shall not be deemed to have accrued until the discovery of the fraud. The cause of action was complete on the day the fraudulent deed was executed; but, if D. M. Tipton had no knowledge of the fraudulent transaction, the right of action did not accrue until he discovered the fraud. While the right of action accrued on the day the fraud was consummated, yet the statute of limitations did not begin to run until the discovery of the fraud. The petition must state facts constituting the plaintiff's cause of action, and the petition must show that the cause of action is one that the plaintiff is entitled to recover a judgment upon. The facts stated in the petition are such that the plaintiff could not recover, on account of the limitation of the statute; and, where there are circumstances that will take the case out of the limitation, it is the duty of the plaintiff to plead the exceptions. Such is the rule in the courts of law and the courts of equity. *Young v. Whittenhall*, 15 Kan. 580; *Zane v. Zane*, 5 Kan. 137; *Sublette v. Tinney*, 9 Cal. 423; *Boyd v. Blankman*, 29 Cal. 20; *Carpentier v. City of Oakland*, 30 Cal. 444. The cross petition of D. M. Tipton showing that more than two years had elapsed since the fraudulent transaction complained of, and no allegation that the fraud was discovered at some later period, so as to take the case out of the statute of limitation, the court should have sustained the objections to the evidence under the cross petition, the attention of the court and of D. M. Tipton having been duly called to the insufficiency

of the cross petition to state a cause of action; and, no amendment being offered or proposed to said cross petition, judgment should have been rendered for the plaintiff in error. The judgment of the district court is reversed, and the case remanded, with directions to render a judgment for the defendants below, J. H. McCall, administrator of D. W. McCalla, deceased, Lou K. McCalla, and Barbara A. McCalla. All the judges concurring.

ATCHISON, T. & S. F. R. CO. v. MASON.¹
(Court of Appeals of Kansas, Southern Department, C. D. Sept. 5, 1896.)

PLEADING—CERTAINTY—DEMURRER TO EVIDENCE—
CARRIERS—LIMITING LIABILITY—OPINION
EVIDENCE—COMPETENCY OF WITNESS.

1. Where the petition states facts constituting the plaintiff's cause of action, in ordinary and concise language, and the defendant is thereby informed of the nature of the action against it, and there is nothing indefinite or ambiguous, and there are no redundant or irrelevant allegations therein that could in any manner prejudice the defendant on the trial of the action, a motion to make it more definite and certain was properly overruled.

2. Where the amended petition contains facts sufficient to constitute a cause of action, a general demurrer on the ground that it does not state facts sufficient to constitute a cause of action was properly denied.

3. Where there is evidence tending to prove all facts necessary to constitute plaintiff's cause of action, a demurrer to the evidence should be overruled.

4. A common carrier cannot limit his common-law liability by a special contract in writing with the shipper, unless it is freely and fairly made; and the carrier cannot exact, as a condition precedent for carrying stock or goods, that the shipper must sign a contract in writing limiting or changing a common-law liability. If the carrier has two rates or charges for carrying stock or goods,—one if carried under the old common-law liability, and the other if carried under a special contract,—the shipper must have real freedom of choice in making his election. *Railroad Co. v. Dill*, 29 Pac. 148, 48 Kan. 210.

5. Ordinarily a witness must speak of facts within his own knowledge, and not as to what others told him, or his conclusion from appearances; and, where the facts are to be established or determined from appearances and circumstances, the witness must describe the appearances and circumstances, and leave the conclusion to be drawn therefrom to the determination of the jury.

6. On questions of science, skill, or trade, persons of science, skill, or trade, or others, having derived a knowledge of the facts under investigation by study, or from actual observation or experience, may not only testify to facts, but are permitted to give their opinions in evidence; but, before such a person can give an opinion on the matter under inquiry, it must be shown that he possesses the necessary qualifications to give an opinion on the matter to which his attention has been called.

(Syllabus by the Court.)

Error from district court, Lyon county; C. B. Graves, Judge.

Action by M. M. Mason against the Atchison, Topeka & Santa Fé Railroad Company. From a judgment for plaintiff, defendant brings error. Reversed.

¹ Rehearing pending.

On the 11th day of October, 1889, M. M. Mason filed his petition in the district court of Lyon county, Kan., against the Atchison, Topeka & Santa Fé Railroad Company, in which he claimed that on the 18th day of October, 1887, he delivered four car loads of cattle to the railroad company, at Lang (a station on said railroad), in Lyon county, Kan., to be transported from said station to Chicago, Ill.; that said cattle were received by the railroad company, in its cattle yards at said station, to be shipped to Chicago, Ill.; that said cattle pens were insufficient to hold the cattle, and part of them escaped from the yards, and he was put to great trouble and expense in hunting up and getting said cattle ready for shipment, and was thereby greatly delayed in the shipment of his cattle, and certain of his cattle were injured in consequence of the defective condition of the stock yards. And he claimed damages in the sum of \$397. The plaintiff below afterwards, by leave of court, filed an amended petition, in which he alleged that the railroad company is a corporation duly organized and existing under and by virtue of the laws of the state of Kansas, and as such corporation is now, and for more than four years last past has been, operating a railroad through and into said state of Kansas, and to the west line thereof; that one of the said stations on the said railroad so operated by said defendant as aforesaid is Lang, in the county of Lyon and state of Kansas; that said defendant is now, and for more than three years last past has been, holding itself out to the public as a common carrier of freight, including live stock, and has solicited the patronage of the public and this plaintiff in that capacity; that at said station of Lang it has invited the people to bring live stock for shipment over its railroad, and has held itself out, and represented itself, as fully and amply equipped for the business of properly and safely receiving and loading live stock at said station, and transporting them from thence to other points; that on the 17th day of October, 1887, he orally contracted with said railroad company, through its duly-authorized agent at Lang, for a valuable consideration, to receive for shipment, and haul for him, 75 beef cattle from the said station of Lang to the city of Chicago, in the state of Illinois, and said railroad company represented to him, and to the public generally, that it had stock yards at the said station of Lang in proper condition for receiving and loading cattle for shipment therefrom, and that said railroad company would receive cattle at said station for loading on cars, and for shipment to other points, as aforesaid; that relying on the representations of the railroad company, and the proper performance of its duties as a common carrier, he at the date aforesaid placed in the stock yards at Lang station the 75 head of cattle hereinbefore mentioned, for shipment; that said yards were in bad condition, and were not at the time constructed so as to hold cattle, and were at the time badly

out of repair, which facts were well known to the railroad company, but were entirely unknown to him; that a portion of the fence surrounding said stock yards had been burned down some time before the date upon which he placed his cattle therein, and had been so carelessly and negligently repaired as not to be sufficient to hold cattle, but so that said fence was easily knocked down by cattle getting against it where it had been so negligently and carelessly repaired; that the gate of said yard was also carelessly and negligently permitted to be and remain out of repair, so as to be at that time unsafe and dangerous; that such defects in said gate and fence were not of a character to be noticed by an ordinary observer, whose attention was not called thereto, and were all unknown to him, but were well known to the railroad company, and had been so known for some time prior to the date last mentioned; that, before said cattle were loaded for shipment, 13 head of them escaped from said yards, owing to the careless and negligent construction and repair thereof, and the railroad company and plaintiff below were unable to find said cattle and restore them to said yards until next day; that in hunting for said cattle he expended the sum of \$15 necessarily, and further by reason of the escape of said 13 head of cattle the entire lot were delayed in shipment 24 hours; that on account of the escape of said cattle, and the delay in shipment thereof, said cattle fell off in flesh to the extent of at least 50 pounds to each steer, thereby damaging said cattle in value at least in the sum of \$180; that by reason of the careless and negligent construction of said gate, and the fact that it was carelessly and negligently suffered to be and remain out of repair, said gate fell down, and crippled two steers, damaging said steers in value at least in the sum of \$20. And for a second cause of action the plaintiff below alleges that the railroad company was careless and negligent in handling said cattle after they were loaded upon the cars; that the train was run out about six miles, and was permitted to stand on the track there for a number of hours, and they were not delivered at Kansas City, Mo., within a reasonable time after they were loaded upon the train; that when they arrived at Kansas City, and were unloaded in the stock pens, and fed, they were intermixed with other cattle, and, reloading them to be taken on to Chicago, one steer was lost, by being intermixed with other cattle, and that he never recovered said steer, and that by reason thereof he was greatly delayed in placing his cattle on the market at Chicago, and damaged by the shrinkage of his cattle and the loss of the steer; and that he suffered damages in the sum of \$397.

To this petition the railroad company filed its motion to make it more definite and certain in certain particulars, which motion was overruled, and the railroad company excepted; and thereupon the railroad company filed

a demurrer to the amended petition for the reason that the petition did not state facts sufficient to constitute a cause of action in favor of the plaintiff below and against the defendant below, which demurrer was overruled, and the railroad company duly excepted. The railroad company then filed its answer to the petition of plaintiff below, containing a general denial of the allegations in the plaintiff's petition, and alleged contributory negligence on the part of the plaintiff below, and, as a third defense, alleged that on the 17th day of October, 1887, it and the plaintiff below made and entered into a written contract whereby it agreed, in consideration of the agreements therein contained to be done, executed, and performed on the part of the plaintiff below, to carry and transport for him 75 head of cattle from its station at Lang, Kan., to Chicago, in the state of Illinois, and attaches a copy of the contract and bill of lading to its answer; that the plaintiff below wholly failed and neglected to give any notice in writing of any claim whatever on his part of any injury, damage, or loss to the live stock agreed by the railroad company, in said contract, to be transported from Lang to Chicago, to any officer of the railroad company, or its nearest station agent, before the stock was removed to the place of destination mentioned and described in the contract, or before the same was removed from the place of delivery of the same to said party of the second part, or his consignee, and before said stock was mingled with other stock, and by reason of the contract, and its terms and conditions, and the facts alleged, the railroad company was not liable to him for any of the loss or damage whatsoever. It is recited in said written contract (third paragraph) "that said party of the second part agrees that he will load and unload said stock at his own risk, and feed and water and tend the same at his own expense and risk, while it is in the stock yards of the party of the first part awaiting shipment, and while on the cars, or at feeding or transfer pens, or where it may be unloaded for any purpose. (4) It is further agreed that said party of the second part will see that said stock is securely placed in said cars furnished, and that the cars are securely and properly fastened so as to prevent the escape of stock therefrom. (5) It is further agreed that, in case the said party of the first part shall furnish labor to assist in loading and unloading said stock, they shall be subject to the orders, and admitted employes, of said party of the second part, while so assisting. (6) And for the consideration before mentioned said party of the second part further agrees that, as a condition precedent to his right to recover any damages for loss or injury to said stock, he will give notice in writing of his claim therefor to some officer of said party of the first part, or its nearest station agent, before said stock is removed from the place of destination mentioned, or from the place of delivery of the same to the

said party of the second part, and before such stock is mingled with other stock. (7) Agents of this company are not authorized to agree to forward live stock to be delivered at any special time." This contract was signed by B. A. Ashley, agent for the company; M. M. Mason, shipper. To this answer, plaintiff below filed his reply. First was a general denial of every allegation in the answer, except as in the petition admitted, and a denial of the contributory negligence, and for a third reply says that he was not fully advised of the contents of the written contract, but signed the same as stated in the petition, and never agreed to release defendant from any of its obligations and duties or responsibilities as a common carrier. Upon the foregoing issues the case was tried before the court with a jury, and resulted in a verdict and judgment for the plaintiff below. The railroad company filed motion for new trial, which was overruled, and was duly excepted to, case made, and brings the same here, and asks for a reversal of the judgment below.

A. A. Hurd and Stambaugh & Hurd, for plaintiff in error. Graves & Dickson and L. E. Lambert, for defendant in error.

JOHNSON, P. J. (after stating the facts as above). The brief of plaintiff in error contains seven separate specifications of error, to which it asks the consideration of this court. The first and second specifications of error complained of may be considered together, as they are both leveled at the amended petition of the plaintiff below,—one to make it more definite and certain, and the other a demurrer to the amended petition. The amended petition alleges that the railroad company is a corporation owning and operating a line of railroad through Lyon county, Kan., and is a common carrier of goods, and including that of live stock; that on the 17th day of October, 1887, the plaintiff below entered into a verbal contract with the station agent of the railroad company at its station at Lang, Lyon county, Kan., to transport 75 head of steers from said station of Lang to the city of Chicago, Ill.; that in pursuance of said agreement he delivered the cattle in the stock yards of said railroad company at its station at Lang, and that, by reason of the defective and unsafe condition of the stock yards, 13 head of his cattle escaped from the yards, and they could not be recovered until the next day, and that the shipment of the entire lot of cattle was delayed 24 hours, and it cost him \$15 to recover the cattle; that the railroad company and its agents had knowledge of the defective and unsafe condition of the stock yards, and plaintiff below had no means of knowing that the stock yards were defective and unsafe; that, by reason of the defective condition of the gates in the stock yards, two of his steers were injured; that the delay in the shipment of his cattle was occasioned by rea-

son of the escape of the 13 head of cattle, and on account of the delay the cattle lost flesh and shrunk up, and he was damaged thereby. And further alleges that after the recovery of the cattle that had escaped from the stock yards, and they were all loaded on the cars for transportation over the road to Kansas City and Chicago, the cars were roughly handled, and cattle were damaged thereby, and, by negligence of the servants in charge of the train, it was unnecessarily delayed on the road, and the cattle did not arrive in Kansas City as soon as they should have done, and when they arrived at Kansas City, and were unloaded in the stock yards and fed, the servants of the company intermingled his cattle with other cattle in the stock yards, and one steer was lost thereby, and that he was greatly damaged on account of the injury to the two steers, and by the shrinkage of the cattle, and by loss of one steer at Kansas City. The petition states the facts constituting the cause of action in ordinary and concise language, and without repetition, and the relief to which the plaintiff below supposed himself entitled to; and the defendant below was thereby informed of the nature of the claim against it. And there was nothing indefinite or ambiguous in the amended petition, nor was there any redundant or irrelevant allegations contained therein, that could in any manner prejudice the rights of the defendant below upon the trial. In the construction of a pleading, for the purpose of determining its effect, its allegations are to be liberally construed, with a view to substantial justice between the parties; and, where the petition contains a plain and concise statement of all the facts constituting a cause of action, the court will not, on motion, require it to be made more definite and certain, or order allegations stricken from the petition, unless the allegations are such as not to be readily understood; or such that the adverse party should have some information of the facts that are in some manner within the knowledge of the other party, and are not apparent to his adversary, from the nature of the facts as shown by the pleadings, or where there are unnecessary allegations, that would in some manner tend to prejudice the defendant. The motion to require the plaintiff below to make the amended petition more definite and certain was properly overruled. The facts stated in the amended petition being sufficient to constitute a cause of action in favor of the plaintiff below, and against the defendant below, the demurrer was rightly overruled.

It is urged that the court erred in overruling the demurrer of the defendant below to the evidence. This brings us to a consideration of the evidence in connection with the written contract for the shipment of the cattle from Lang station, in Lyon county, Kan., to Chicago, Ill., and as to the legal effect of the contract. The execution of the contract is admitted by the pleadings, but

the plaintiff below alleges that; after the cattle had been loaded in the cars of the railroad company, he was requested and required to sign a written and printed contract or agreement, the contents of which he was unable to give; that he was given a duplicate of it at the time, but afterwards the conductor on the train took it up and retained it. He says that at the time he signed it he objected and protested against doing so, but was informed that it was a condition precedent to the forwarding of his cattle, and thereupon, under protest, he signed it. Said contract provided, among other things, that the railroad company would ship the cattle of plaintiff below to Chicago, in the state of Illinois. The contract is set out in full in the answer of the railroad company, and the reply admits its execution, but alleges that it was signed as stated in the amended petition. The contention on the part of the railroad company is: That the written contract of October 17, 1887, entered into by the defendant in error, is binding, and therefore controls. The contract provided "that said party of the second part further agrees that, as a condition precedent to his right to recover damages for loss or injury to said stock, he will give notice in writing of his claim therefor to some officer of said party of the first part, or its nearest station agent, before said stock is removed from the place of destination above mentioned; or from the place of delivery of the same to said party of the second part; and before such stock is mingled with other stock." And, as the evidence shows that no such notice was given; the plaintiff could not recover. The plaintiff below alleged that he was compelled to sign the contract, as a condition precedent to the transportation of his cattle; that he had entered into a verbal agreement for the shipment of his cattle from Lang station to Chicago, Ill., and after the cattle were loaded upon the cars he was required to sign the written contract, before the company would ship them out; that he objected and protested against signing the contract; and that, therefore, the contract was not binding, or of any force. The supreme court of this state has decided "that a special contract for a notice in writing of damages or injuries, when reasonably and fairly made, is binding upon the parties." *Goggin v. Railway Co.*, 12 Kan. 410; *Sprague v. Railway Co.*, 34 Kan. 347, 8 Pac. 645; *Railway Co. v. Koch*, 47 Kan. 753, 28 Pac. 1018. In the case of *Railroad Co. v. Dill*, 48 Kan. 210, 29 Pac. 149, it is said: "As a general rule, and in the absence of fraud or imposition, a common carrier is answerable for the loss or injury to stock, if there is no special contract or acceptance; but, in all cases where the statute will permit, it is just and reasonable that a contract requiring written notice of the injury or damages claimed before the stock is removed from the place of destination, or mingled with other stock, when properly entered into,

should be upheld. Such a contract, however, must be freely and fairly made with the railroad company,—not exacted as a condition precedent of shipment. Railroad companies cannot arbitrarily fix a valuation on property of the shipper, or arbitrarily demand or exact the execution of the contract limiting the common-law liability. *Railway Co. v. Nichols*, 9 Kan. 236. If a railroad company has two rates for the transportation of goods or stock,—one if the goods or stock are carried under the common-law liability, and the other if carried under a limited or special contract,—the shipper must have real freedom of choice. He cannot be denied the right to have his goods carried by the carrier under its common-law liability; but if he desires, and if the statute permits and public policy does not forbid, he may enter into a special contract with the carrier, limiting the common-law liability. *Railway Co. v. Reynolds*, 11 Kan. 251; *Railway Co. v. Simpson*, 30 Kan. 645, 2 Pac. 321; *Express Co. v. Foley*, 46 Kan. 457, 26 Pac. 665; *Railroad Co. v. Lockwood*, 17 Wall. 367; *Hart v. Railroad Co.*, 112 U. S. 331, 5 Sup. Ct. 151."

On the trial of the case the plaintiff below testified: That on Sunday evening he drove his cattle from his pasture over to Lang station, on the railroad, and placed them in the stock yards of the company, with the expectation of shipping them out at 11 o'clock that night. That the cars were then on the siding, in which to load them, and when he arrived at the stock yards with his cattle the station agent of the company came out and unlocked the gates, and the cattle were put in the yards, and the gates locked, and he and his hired help went to supper; and when they returned from supper he was informed that two of his steers had been injured by the falling of a gate, and part of his cattle had escaped from the yards. He went immediately with his hired help in search of the cattle that had escaped. They were unable to recover them until some time the next day; and when his cattle were returned to the stock yards, and the cattle loaded on the cars, ready to be taken out, the agent then requested him to sign the agreement for the transportation of the cattle to Chicago. That he objected and protested against signing the same, and the agent told him that unless he signed the agreement the company would not ship his cattle out. That he then signed the agreement under protest. He also detailed the facts in relation to the handling of the cars; the delay in arriving at Kansas City, and unloading, feeding, and reloading the cattle; and the loss of the one steer at Kansas City; and the time of the arrival of his stock at Chicago; the amount of shrinkage to each steer by reason of the delays; and the value of the steer lost in the stock yards at Kansas City; and the reasonable value of the cattle, per pound, if they had been shipped through without delay. We think the evidence was such that the whole matter was proper to sub-

mit to the jury for their consideration. It was a question of fact, for the jury to determine under all the evidence and proper instruction, as to whether the contract in writing was voluntarily and freely signed by the shipper, or whether it was an unfair exaction by the railroad company after the cattle were delivered to it for shipment, and whether it was an exaction as a condition precedent to the transportation of the cattle to Chicago, or whether the shipper was given his choice in the matter.

It is claimed that the court erred in admitting testimony over the objection of the defendant below. The plaintiff below was sworn, and examined as a witness on his own behalf, and, during his examination, was permitted, over the objection of the defendant, to detail statements made to him by persons who claimed to be employees of the railroad company; but he did not know who they were, or what position they held with the company. He was also allowed to state what he thought to be the value of the services of the men employed to assist him in hunting up the cattle that had escaped from the stock yards, but was not shown to have any knowledge as to what was reasonable and ordinary compensation for such services, and was permitted to give his opinion that two steers were injured by the falling of a gate in the stock yards, and also an opinion as to the shrinkage of cattle by delay in the shipment, and his opinion as to the value of the steer lost in the stock yards at Kansas City. Other witnesses for the plaintiff below were also permitted, over the objection of the defendant below, to give their opinions as to the amount cattle would shrink by being held in the stock yards and in pastures, and in shipment. None of these witnesses were shown to have any particular experience or knowledge what the value of services was, or what amount a steer, under the circumstances, would reasonably lose in flesh by the delays claimed. Ordinarily, witnesses must speak of facts within their own knowledge, and not as to what others told them, or what they determine from appearances; and, where the facts to be established are to be determined from appearances and circumstances, the witness must describe the appearances and circumstances, and leave the conclusion to be drawn therefrom to the determination of the jury. Certain matters may be the subject of opinion of witnesses who are competent to give an opinion on the subject under investigation. On the question of science, skill, or trade, persons of science, skill, or trade, or others, having derived a knowledge of the facts under investigation by study, or from actual observation and experience, may not only testify to facts, but are permitted to give their opinions in evidence; but, before such a person can give an opinion on the matter under inquiry, it must be shown that he possesses the necessary qualifications to give an opin-

tion on the matter to which his attention has been called. Neither of the witnesses who testified in relation to the shrinkage of the cattle were shown to be competent to give an opinion. They were not shown to have been engaged in the business of shipping cattle themselves, or by observation and experience from frequently seeing cattle shipped, or from observing the weight of cattle before and after they were shipped. Men who have had experience as shippers, and have observed the shrinkage of cattle in shipment, and have handled cattle under similar circumstances, and observed the effect thereof on the cattle, would be competent to give an opinion as to what they would shrink by handling, and by confinement in stock pens and in strange pastures, or in transportation; but, before they are competent to give an opinion on the subject, their knowledge of the subject must be shown. The witnesses not having been shown to possess such knowledge as made them competent to give an opinion, their testimony should not have been permitted to go to the jury.

It is insisted by plaintiff in error that there was error in the instructions to the jury. We have carefully examined the instructions of the court, and find them quite full and complete, and do not find any error in them. The learned judge stated in his charge to the jury the issues fully and correctly, and then gave them the law that they should apply to the facts as they should be found by them.

There are other errors complained of by plaintiff in error in its brief and argument, but we do not deem them of sufficient importance to be noticed in this opinion, as the case must be reversed for the error in admitting incompetent testimony. The judgment is reversed, and the case remanded to the district court, with directions to set aside the verdict of the jury and grant a new trial. All the judges concurring.

BOARD OF EDUCATION OF CITY OF HUTCHINSON v. NATIONAL BANK OF COMMERCE.

(Court of Appeals of Kansas, Southern Department, C. D. Sept. 5, 1896.)

JUDGMENT—SETTING ASIDE—DEFAULT—DISCRETION OF TRIAL COURT.

Where a judgment has been rendered against a defendant by default, and he makes a motion at the same term of the court to vacate such judgment, and supports his motion by affidavit, and also tenders a verified answer showing a complete defense to the plaintiff's cause of action,—that he has not been guilty of gross negligence in not protecting his rights before judgment was rendered,—it is within the sound discretion of the district court, on such terms as are reasonable, to vacate the judgment, and permit the defendant to file an answer to the petition.

(Syllabus by the Court.)

Error from district court, Reno county; L. Houck, Judge.

Action by the National Bank of Commerce against the board of education of the city of Hutchinson and others, in which there was a judgment by default for plaintiff. From a judgment overruling a motion to set aside the default, the defendant board brings error. Reversed.

D. H. Martin, for plaintiff in error. Wright & Stout, for defendant in error.

JOHNSON, P. J. On the 26th day of August, 1890, the National Bank of Commerce commenced an action in the district court of Reno county, Kan., to recover a judgment against George H. Rice on account of material furnished by Russell & Wilcox Hardware Company to the said Rice for the construction of a certain schoolhouse which said Rice had contracted to build for the board of education of the city of Hutchinson, in the state of Kansas, and for the foreclosure of a mechanic's lien upon said building. The defendants below were duly served with summons on the 26th day of August, 1890, by the sheriff of Reno county. The September term of the district court commenced on the 5th day of September. The answer day fixed by the summons was September 25th. The trial docket for the September term was made up before the suit was commenced, and the case was not put on the docket for trial at that term of the court. The case was placed at the heel of the docket by the clerk about the 1st day of November, and was never set for trial on the docket, either by the clerk, or by order of the court. There were over 900 cases on the docket, and only 725 of this number set for trial for the September term, the balance of the cases not being reached for trial. The service of summons was made on the president of the board of education, who was at the time cashier of a bank in Hutchinson; and, being busy in the bank, he either lost the summons, or forgot to notify the board of the service of summons. The board had no actual knowledge of the commencement of the suit, or that a suit was pending against it. The board made no appearance, and filed no answer to the petition filed in said court against it, and wholly made default; and on the 15th day of November, 1890, at the September term, the plaintiff below, by its attorneys, moved for judgment by default against George H. Rice for the amount due on said account, and for a foreclosure of the mechanic's lien on said building, and judgment was thereupon rendered against Rice for the amount claimed, and a decree foreclosing the mechanic's lien, and an order for the sale of the building. On the 19th day of December, 1890, and during the September term of said court, the board of education filed a motion to vacate and set aside the judgment, and for leave to file a verified answer to the petition of the plaintiff below, setting up in said motion eight causes for setting such judgment aside, and supported

the motion by affidavit. The motion was heard by the court, and overruled, and the court made special findings of fact, and conclusions of law thereon. The board of education duly excepted to the order and judgment of the court in overruling said motion, and now brings the case to this court, and asks a review of the proceedings had before the court below on said motion, and assigns two reasons why the judgment of the district court should be reversed: "First. Has the court any discretion to vacate and set aside a judgment at the same term at which it was rendered, where judgment was rendered by default? Second. May a plaintiff, upon the default of the defendant, have a case entered upon the heel of the docket, and take judgment without the case ever having been set down for trial either by the clerk or the court, and this where the answer was not due until long after the first day of the term of the court at which the judgment was taken?" The court found as matters of fact: "(1) That the first day of September term of this court, the term at which the judgment sought to be vacated was rendered, was the 5th day of September, 1890. (2) That the service in this case matured on the 25th day of September, 1890. (3) That said cause was not placed on the docket by the clerk of the court when he made up the docket for the September term of court; said cause having been commenced August 26, 1890, and after the trial docket had been made up for said September, 1890, term. (4) That said cause was placed on the docket, at the heel of the same, by the clerk, about the 1st of November, 1890. (5) That said cause was never set for trial on said docket either by the clerk or the court. (6) That there were over 800 cases upon said docket, and that only 725 of said cases were set for trial at the said September term, the balance of said cases not being reached. (7) That the defendant, the board of education of Hutchinson, Kansas, was never notified by their president that he had been served with summons, and had no knowledge that said suit was pending until shortly before this application was filed. (8) That the president of the board is cashier of a bank, and was served in business hours, and inadvertently overlooked the summons, and forgot the fact of the service, and lost the summons, and never notified the board of the fact of the service. (9) That the verified answer presented and duly verified discloses that the board has a valid and complete defense to plaintiff's cause of action. (10) That said cause would not have been regularly reached and set for trial until the January, 1891, term of this court, and after this application was filed." Upon these findings the court made the following conclusion of law: "(1) That the court has no discretion in this cause to vacate said judgment."

The matter of vacating or modifying judgments at the same term of court at which

they are rendered is largely within the sound discretion of the trial court; and when it is made manifest that great injustice has been done, or that a party has been in some manner misled as to his rights, or where a judgment has been taken by default, and the party against whom the judgment has been taken has not been guilty of gross negligence in protecting his rights, where he could have legally done so, it is within the sound discretion of the court, on such terms as are reasonable, to vacate the judgment, and permit the party to file an answer setting up any valid defense to the action he may have. *Sanders v. Hall*, 37 Kan. 275, 15 Pac. 197. The board of education having presented its motion at the same term of the court at which the judgment was rendered, and supported it by affidavit, and tendered an answer, duly verified, showing a complete defense to the plaintiff's action, we think that it would be an abuse of that wise discretion vested in the district court, and prevent a failure of justice to deny the board of education a fair opportunity to be heard upon the merits of the issues tendered by its answer. While the president of the board was negligent in not informing the board of the service of summons, yet we do not think, under the circumstances of this case, the board of education has been guilty of such negligence that should prevent it from a fair and full hearing of this cause on its merits: If the allegations set up in its verified answer are true, it ought not to be compelled to pay this claim to the plaintiff below. We think, in the exercise of that wise discretion vested in the district court, it ought to sustain the motion to vacate the judgment, and allow the defendant below to file its answer and grant a new trial. The ruling of the court below, denying the motion, is hereby reversed, and the case remanded to the district court, with instructions to sustain the motion to vacate the judgment, and allow the plaintiff in error to file its answer to the petition. All the judges concurring.

HAYNER et al. v. TROTT et al.

(Court of Appeals of Kansas, Northern Department, C. D. Sept. 12, 1896.)

AGENCY—CONSTRUCTION OF CONTRACT—COMMISSIONS—RECOVERY BACK BY PRINCIPAL—DEATH OF AGENT—EFFECT.

1. In 1884 and 1885 B. entered into contracts in writing with J. E. H. & Co. to sell certain machinery, as their agent at Junction City, Kan., upon certain commission, for said years. The contract expressly stipulated for the manner of selling and paying the commissions, viz.: (1) For cash, and commission in cash; (2) upon credit, and commission payable in notes; (3) upon part credit and part cash, and commission payable in part cash and part notes,—and further stipulating, "The party of the second part agrees to refund any commissions allowed on notes that may afterwards prove to be worthless, or otherwise uncollectible." Held that, un-

der the terms of this contract, J. E. H. & Co. could only recover back such commissions as B. had received in cash, or for which he had collected the notes taken by him for such commissions upon the sales, for which J. E. H. & Co. held uncollectible or worthless notes.

2. And further, *held*, that upon the death of B. the contract terminated, and that, as all the machinery sold in 1885 was sold after the death of B., and before his administrators took charge of his estate, the mere fact that the administrators received a commission upon the sales so made is not sufficient to make the estate liable to refund commissions.

(Syllabus by the Court.)

Error from district court, Geary county; M. B. Nicholson, Judge.

J. E. Hayner & Co. presented a claim against the estate of William S. Blakely, deceased, of which C. H. Trott and Josephine Blakely were administrators, which was disallowed by the probate court. Claimants appealed to the district court, and from a judgment there rendered against them they bring error. Affirmed.

During the years 1884 and 1885 William S. Blakely, deceased, was the local agent at Junction City, Kan., for J. E. Hayner & Co., for the sale of certain harvesting machinery, under a contract in writing made separately for each year. The terms of the contracts for each year are substantially the same, and, by the terms thereof, Blakely was to receive for his services and performance of his part of the contract a commission. The amount of this commission, and how, when, and what it was to be paid in, are stated in the third article of the contract, which is as follows: "Third. The party of the first part will allow the party of the second part, on the machines below specified, the following commissions, to wit, * * * as a consideration for transacting the business of selling, settling for, setting up, and starting machines in the field, and otherwise fulfilling the conditions herein required and specified; said consideration to be paid in the same proportion, as to money and notes, as the same are received. If the sale be made for 'all cash,' the whole amount of the commission shall be retained in cash; if part money and part notes are received, the commission shall be paid in like manner; if made for all notes, then the whole amount of commission shall be paid in notes. The notes for payment of commissions (when payable in notes) to be selected by the party of the first part, or their authorized agent, and to be of average maturity of all the notes taken." It is also provided in article 9 of said contract, among other things, that "the party of the second part further agrees * * * to carry out, and be governed by the 'Conditions and Instructions' hereto annexed, and the same are hereby made a part of this agreement." Under that part of the contract called "Conditions and Instructions" appears the following stipulation: "Refunding Commission. The party of the second part agrees to refund any commission allowed on notes that

may afterwards prove to be worthless, or otherwise uncollectible." In the contract of 1885 the refunding commission clause is as follows: "And if any notes cannot be collected, in whole or in part, within one year after maturity, party of the second part agrees to refund to the party of the first part the amount of commission that shall have been allowed on the amount uncollected." During the year 1884, and under the contract for that year, Blakely sold a number of harvesters and binders for plaintiffs, taking notes therefor, which were turned over to Hayner & Co. as proceeds of sales made by him under said contract. On the 11th of June, 1885, Blakely died; and one G. F. Gordon, assumed temporary charge of the Blakely business, to preserve and protect the property. On the 25th of June, 1885, C. H. Trott and Josephine E. Blakely were appointed administrators of the estate of W. S. Blakely. After the death of Blakely, certain machines were sold, which were on hand during his lifetime, and notes taken therefor, which were turned over to Hayner & Co. as the proceeds of such sale. Some time in 1887 Hayner & Co. presented a claim against the estate of Blakely to the probate court of Davis (now Geary) county, Kan., to recover from said estate certain commissions claimed to have been paid to Blakely during his lifetime, and to his estate since his death, on notes that had proven worthless and uncollectible, under the refunding commission clause in said contract. This claim was disallowed by the probate court, and from the decision of that court Hayner & Co. appealed to the district court. Upon trial had therein before the court without a jury, the court found in favor of the estate, and against the company. Motion for new trial filed; overruled, and excepted to. Hayner & Co. bring the case here for review.

Thos. Dever, for plaintiffs in error. J. B. McClure, for defendants in error.

GILKESON, P. J. The plaintiffs in error contend first that, under the terms of the contract of 1884, the estate of W. S. Blakely should pay them 20 per cent. upon all the uncollected notes taken by Blakely upon sales of machinery during that year, upon the theory that he was allowed that amount of commission upon sales made by him, and these notes were uncollectible and worthless, and that it is immaterial whether he received this commission or not, or how he received it,—whether in cash, notes, or part cash and part notes; in other words, that he became a guarantor of these notes, to that amount. We cannot agree with them upon this contention, for two reasons: First. The contract itself precludes the idea of guaranty, as it provides what notes he should guaranty, and none of these come within that class. Second. The terms of the contract will not admit such a construction. It is provided there-

in that the machinery shall be sold in three ways, and that commissions shall be paid in the same manner as the sales are made, viz.: (1) Upon credit, commission paid in notes; (2) for part credit and part cash, commission paid in part notes and part cash; (3) for cash, commission in cash. Now, as we understand this contract, when the sale is made upon credit, and the notes taken therefor prove worthless, and it is shown that the agent had collected the note he received as his commission for such sale, he must refund the amount of the commission. When made for part cash and part credit, if the notes taken prove worthless, uncollectible, and it is shown that for this sale the agent received his commission, in like manner, if he has collected the note received, he must refund the amount thereof, provided the notes held by the company prove worthless. And there is a reason for these conditions being placed in the contract. The company by this means makes it an object for the agent to collect its notes first, or at least to exercise as much diligence on its behalf as he does in his own, and when made for cash the transaction is complete. But to hold that where the agent takes notes for his commission, either in whole or in part, and the notes so taken by him, like these turned in to the company, prove worthless, uncollectible, he must pay the note he has taken, would be doing violence to every principle of common sense and justice, and would be simply construing this contract to mean that the agent was to pay the principal 20 per cent. commission for the privilege of handling the machinery, and would not fall within the meaning of the term "refund," which always includes the idea of something having been received. As we have said, when the sale is made for cash the transaction is complete. The agent turns over to the company its proportion, and retains his. This idea receives additional force from the very terms of the refunding clause: "The party of the second part agrees to refund any commissions allowed on notes that may afterwards prove worthless, or otherwise uncollectible." Is there anything in this language from which it can be inferred that he is to hold his cash commissions as a fund to make good deficits in commissions on uncollectible notes? We think not. He is merely to refund the commissions allowed (given and received) upon the uncollectible notes. And if this were not so, and the construction given as claimed by the plaintiffs in error should be adopted, we can readily conceive of circumstances arising in which the agent would be compelled to return to the company a much larger amount than he received from his year's business. Suppose he sold 50 machines at \$300 apiece. This would be \$5,000. Upon this amount he would be allowed, at 20 per cent., \$1,000. Now, 15 of these machines were sold for cash, being \$1,500. His commission would be \$300. Thirty-five sold on credit for \$3,500, and notes taken. His

commission on these would be \$700. Now, he received his commission, under the contract, viz.: Cash, \$300; notes, \$700. But the notes for \$3,500 are not paid. Must he then refund \$700 in cash, or \$400 more than he received? We think not. Under no circumstances can he be required to refund money, unless he has received money as his commission on the identical notes uncollected. The company cannot compel him to refund the amount of a note by merely alleging that it was received as a commission. And, in order to recover under any circumstances, it must prove that he received money as his commission, or collected the note received as his commission, upon the notes it claims are uncollectible; for he is only "to refund commissions allowed upon notes that have proven worthless, or otherwise uncollectible." There must be an identification. This it has failed to do. There is not a scintilla of evidence in the record showing that he ever received any money commissions on any of the notes, or that he ever collected any of the notes he received as his commissions on these sales.

The second contention is that the estate is responsible for, and must respond in money to, the company, for the notes taken for machinery sold in 1885, and which the company has been unable to collect. In addition to what we have said with reference to the contract of 1884, we will add that the court found: "Seventh. Wm. S. Blakely died on the 11th day of June, 1885, and G. F. Gordon assumed temporary charge of the Blakely hardware store to preserve and protect the property; and on the 25th day of June, 1885, C. H. Trott and Josephine Blakely were appointed by the probate court administrators of the estate of Wm. S. Blakely, deceased,"—and further found that "after the death of Blakely, and before the administrators took charge of the assets of the estate, all the machinery sold in 1885 was sold by parties who were in the employ of Blakely during his lifetime, notes taken therefor, and turned over to Hayner & Co., and that the administrators were paid in notes taken for other machinery, the commission on the sales of the machinery for which the uncollectible notes were taken. All of this was done without any order or authority from the probate court of Davis county, and the testimony shows that some of these sales, at least, were made under the express direction of a special agent of Hayner & Co." While it is true, and the court so found, that the machinery sold was received by Blakely during his lifetime, and was on hand at the time of his death, did it ever become assets in the hands of the administrators? We think not. The contract is strictly personal. It does not extend to the heirs, executors, or administrators of Blakely. "The death of the agent terminates the agency," and the only exception to this rule is where the power or authority in the thing is actually vested in the agent; and the

reason for this exception is that the agent, having the legal title to the property vested in himself, is capable of transferring it in his own name, notwithstanding the death of his principal. No such title is vested in Blakely. The contract expressly provides that "the title and ownership of this property remain in the principal until disposed of under the provisions of this contract." The only interest Blakely had in it was to receive commission. The notes were all made payable to the company, and the fact that a special agent of the company was there, exercising acts of ownership over it, directing its sale and disposal, within a very few days after Blakely's death, strongly indicates that the company so understood this contract. All that is required of any administrator is to make an inventory of everything belonging to the estate, and to administer the same according to law. They were not authorized to take possession of this property. It is not shown that they ever charged themselves, in their representative capacity, with these notes, or that they brought them into their accounts with the estate, or that they were made subject to the decree of the probate court, or that the estate had any use thereof, or derived any benefit therefrom; and the mere fact that they received commissions on the sales made is not sufficient to render the estate liable. The record presented in this case is very imperfect. It is difficult to tell what it purports to contain, except all the evidence. It fails to show that it is a full record of all the proceedings had in this case. The judgment of the district court will be affirmed. All the judges concurring.

FREEMAN et al. v. McATEE.

(Court of Appeals of Kansas, Northern Department, C. D. Sept. 12, 1896.)

APPEAL BOND—SUFFICIENCY.

In an action before a justice of the peace a judgment was rendered against the defendant C., a minor, for whom S. appeared as guardian ad litem. In an appeal to the district court by the defendant, the appeal bond recited that S., guardian ad litem for C., "intends to appeal from a judgment rendered against them in favor of the plaintiff," and was conditioned that the defendant would prosecute his appeal to effect, and without unnecessary delay, and satisfy such judgment and costs as might be rendered against him. *Held*, that the bond is not so defective as to be void, and the sureties thereon are liable for the payment of the judgment rendered on the appeal against the defendant.

(Syllabus by the Court.)

Error from district court, Marshall county; R. B. Spilman, Judge.

Action by E. M. McAtee against W. H. H. Freeman and another on an appeal bond. From a judgment for plaintiff, defendant Freeman brings error. Affirmed.

W. H. H. Freeman, for plaintiff in error.
Jno. A. Broughton, for defendant in error.

CLARK, J. The petition herein alleges, in substance, that in a certain action pending before H. W. Chapman, a justice of the peace of Blue Rapids township, in Marshall county, on the 14th day of May, 1887, the plaintiff, E. M. McAtee, recovered a personal judgment against one W. T. S. Critchfield for \$66.65 damages and \$53.20 costs; that Critchfield was a minor, and that one H. K. Sharp was duly appointed guardian ad litem, and represented the defendant in said court; that said defendant and his guardian, desiring to appeal from said judgment to the district court of Marshall county, caused to be executed and filed, in due time, with the justice, an undertaking which was signed by Fred. Lynd and W. H. H. Freeman, a copy of which is attached to the petition, and which, omitting the signatures thereto and indorsements thereon, and the title of the action in which the undertaking was given, is in the following words: "Whereas, the defendant H. K. Sharp, guardian ad litem for W. T. S. Critchfield, intends to appeal from a judgment rendered against them in favor of the plaintiff, E. M. McAtee, on the 14th day of May, 1887, by the undersigned, justice of the peace of Blue Rapids City township, in said county: Now we, the undersigned, residents of said county, bind ourselves to said plaintiff in the sum of two hundred and fifty dollars that said defendant shall prosecute his appeal to effect, and without unnecessary delay, and satisfy such judgment and costs as may be rendered against him therein." The petition further alleges that said undertaking was duly approved, and that thereafter said cause was duly tried in said district court upon appeal, and judgment was therein rendered in favor of McAtee, and against Critchfield, for \$87.77 damages and \$98.20 costs; that no part of said judgment had been paid; that execution had been issued thereon, and had been returned wholly unsatisfied,—and concluded with prayer for judgment against the obligors on said bond for the amount of the judgment and costs rendered against Critchfield, and for costs of this action. Personal service was had on the defendants. Freeman interposed a demurrer to the petition on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer being overruled, the defendant answered to the merits. The sufficiency of the allegations of the petition was again challenged by an objection to the introduction of any evidence thereunder. This objection was also overruled. Thereafter a trial was duly had, and a judgment was rendered in favor of the plaintiff for \$181.36, the amount due on the Critchfield judgment, including the costs therein. Freeman brings the case here, and seeks a review of the several rulings of the court, but, owing to the condition of the record, the only question before this court is as to whether or not the pleadings set forth a cause of action against Freeman.

The plaintiff in error contends that the

bond shows upon its face that it was given to effect an appeal from a judgment rendered against Sharp as guardian ad litem for Critchfield, and was an undertaking on the part of the sureties that Sharp, as such guardian, should prosecute such appeal to effect, and should satisfy any judgment which might be rendered against him, and that, as the petition does not disclose a judgment in the district court against the guardian ad litem, no cause of action against Sharp is shown. As before stated, the petition alleges that this bond was given in order to effect an appeal from a judgment against Critchfield in an action wherein Sharp was duly appointed guardian ad litem, and that, in the district court, upon said appeal, the plaintiff recovered a judgment against Critchfield. The statute provides that the party appealing shall enter into an undertaking to the adverse party, conditioned that the appellant will prosecute the appeal to effect, and without unnecessary delay, and that, if judgment be rendered against him on the appeal, he will satisfy such judgment and costs. The undertaking upon which this action is based was in strict compliance with the terms of the statute, except that it referred to the guardian ad litem, instead of the minor, as appellant. From the pleadings it appears that this instrument was prepared by the plaintiff in error, as attorney for Critchfield, and that the object in view when it was executed—the perfecting of an appeal to the district court from a judgment in favor of McAtee and against Critchfield—was attained. While the judgment before the justice of the peace was rendered against the minor, and the undertaking should have shown the fact, yet we do not think that the misdescription of the appellant in the undertaking is for that reason void, as the district court had ample authority, under section 131 of the Justice's Code, to have ordered a change or renewal of the undertaking, and thus have remedied any formal defect therein. The rights of the plaintiff in error were not prejudiced in any manner by reason of its informality. No one was misled by its recitals. We think the question at issue is somewhat analogous to the one involved in the case of *Wilson v. Me-ne-chas*, 40 Kan. 648, 20 Pac. 468. That was an action brought for the recovery of specific personal property. The real plaintiff and alleged owner of the property in controversy was one Shu-ka-see, a minor. The action was brought in the name of "Me-ne-chas, as next friend of Shu-ka-see," and the defendant filed a motion to dismiss on the ground that the action was not brought in the name of the real party in interest; but the supreme court held that the alleged defect in the title of the action was simply an irregularity, without any possible prejudice to the defendant, and sustained the trial court in overruling the motion to dismiss. For similar reasons we think the court properly held that the pleadings herein stated a

cause of action against Freeman. As the record affirmatively shows that some of the evidence which was introduced at the trial is not before this court, we are unable to say that the findings of fact are without support, or that the court erred in overruling the motion for a new trial. The judgment will therefore be affirmed.

CASNER v. CRAWFORD et al.

(Court of Appeals of Kansas, Northern Department, C. D. Sept. 12, 1896.)

TRIAL—GENERAL FINDING—SUFFICIENCY—SUBSEQUENT MORTGAGEE IN GOOD FAITH.

1. Where a case is tried by the court without a jury, the general finding and judgment include every material fact necessary to sustain such judgment. *Morris v. Trumbo*, 1 Kan. App. 150, 41 Pac. 974.

2. A subsequent mortgagee with notice of prior mortgage is not a subsequent mortgagee in good faith, under paragraph 3905, Gen. St. 1889. The words, "subsequent purchasers, or mortgagees in good faith," in said paragraph, mean only purchasers and mortgagees who purchased or took their mortgages after the expiration of the year from the filing of the prior mortgage.

(Syllabus by the Court.)

Error from district court, Lincoln county; W. G. Eastland, Judge.

Action by E. A. Casner against Robert K. Crawford and another. From a judgment for defendants, plaintiff brings error. Modified and affirmed.

Fred W. Casner, for plaintiff in error. Q. B. Daughters, for defendants in error.

GILKESON, P. J. The plaintiff in error (and plaintiff below) claims ownership and right of possession to one brown horse, named "John," one bay mare, named "Baldy," and one horse colt, named "Charley," by virtue of a chattel mortgage executed by one John Marshall on the 12th day of November, 1889, and filed for record November 27, 1889. The mortgage declared upon is dated July 6, 1889, and recorded November 27, 1889, and shows as follows: One bay horse, named "Dexter," one bay mare, named "Daisy," and farm harness. Also, second mortgage, subject to one held by Crawford, on one bay horse, one bay mare, and all the increase of said stock. J. T. Crawford claims title by virtue of three mortgages executed by John Marshall, and possession thereunder, as follows: (1) Mortgage dated October 20, 1888, and filed November 5, 1888, on one dark brown horse, aged 5, named "John," and one bay mare, aged 11, named "Baldy." (2) Mortgage dated October 21, 1889, filed November 2, 1889, on one brown horse, 6 years old, known as "John," one bald-face mare, with two white hind feet, named "Baldy," and one red cow, five years old. (3) Mortgage dated October 21, 1890, filed October 23, 1890, on one brown horse, 7 years old, named "John," one light bay mare, 12 years old, named "Baldy," one

colt, 7 months old, named "Charley," and all increase. The trial court, jury being waived, found for the defendants, that they were the special owners and entitled to the possession of all the property described in plaintiff's affidavit at the time of the commencement of said action, and that the value of the possession and special ownership in said property to said defendants is \$112.70, and rendered judgment for that amount. Under this finding all questions of fact are settled, and we think the findings are fully sustained by the evidence.

The plaintiff contends, and introduces some testimony upon that point, that, notwithstanding the mortgage shows it was made on the 6th day of July, 1889, it was not in fact made until the 12th day of November, 1889, but was dated back so as to correspond with the notes secured thereby. Even admitting this to be true, Crawford's mortgage of October 21, 1889, which was filed November 2, 1889, was in full force and effect when she took her mortgage, and when she filed it for record, and covered the identical property she claims. How can she, then, be a subsequent mortgagee? "A subsequent mortgagee with notice of prior mortgage is not a subsequent mortgagee in good faith, under paragraph 3905, Gen. St. 1889. The words 'subsequent purchasers' and 'subsequent mortgagees in good faith,' in paragraph 3905, mean only purchasers and mortgagees who purchased or took their mortgages after the expiration of the year from the filing of the mortgage." *Howard v. Bank*, 44 Kan. 549, 24 Pac. 983. And that she had notice of a mortgage in favor of Crawford is shown by the recital in her mortgage. But, they say, "this mortgage was released, and this gave us a first mortgage." This is not sustained by the evidence. The testimony shows that J. T. Crawford, the owner of these mortgages, has resided in Colorado for 10 years; that Robert Crawford and his brother, Grant, have had the control and management of these mortgages and the debts secured thereby exclusively; and that neither he nor his brother ever authorized any one to release this mortgage. And, again, there is not a particle of testimony to show that the colt Charley, which was taken as the increase of the mare Baldy, was Baldy's colt, or even to show that the "bay mare" mentioned in the Casner mortgage was the mare Baldy. On the other hand, the contention of the defendants that these mortgages, from 1888 to 1890, constituted but one transaction,—were simply renewals of the first,—is upheld by a great preponderance of the testimony.

With regard to the usurious interest being included in the judgment, we think, if the trial court's attention had been called to it, he would have stricken it out, and should have done so. As to this, we will modify the judgment to \$104.60, and, with this modification, the judgment of the court in all other respects will be affirmed.

TRAVELERS' INS. CO. v. STUCKI

(Court of Appeals of Kansas, Southern Department, C. D. Sept. 5, 1896.)

MORTGAGES—FAILURE TO DISCHARGE—DEMAND—ACTION FOR PENALTY—LIMITATIONS—ATTACHMENT—PLEADING.

1. Chapter 175, § 1, Laws 1889, authorizes an attachment against the property of a foreign corporation for a refusal or neglect to release a mortgage on real estate when the mortgage has been fully paid and demand properly made.

2. An action to recover a penalty for failing to discharge of record a mortgage which had been fully paid and satisfied cannot be maintained until a demand for such discharge has been made, and it can only be brought within one year after the cause of action accrues; but, where no demand is made until more than one year after a demand should have been made, the action to recover the penalty is barred by the statute of limitations. *Way v. Schofield*, 38 Pac. 333, 53 Kan. 248.

(Syllabus by the Court.)

Error from district court, McPherson county; Lucian Earl, Judge.

Action by Benjamin J. Stucki against the Travelers' Insurance Company. From a judgment for plaintiff, defendant brings error. Reversed.

This suit was commenced on the 14th day of February, 1891, by the defendant in error, in the district court of McPherson county, to recover the statutory penalty for refusing to release a mortgage on real estate situated in that county. The plaintiff below alleges the borrowing of the money, the execution of the mortgage on lands to secure the payment thereof, the payment of the mortgage to E. G. Clark as agent for the mortgagee, demand for the release of the mortgage, and the refusal to do so. As a second cause of action the plaintiff below alleges that the mortgage is a cloud on his title, and that the defendant below wrongfully claims a lien on the mortgaged premises by virtue of such mortgage, and asks to have the mortgage canceled and satisfied of record, and the cloud removed from his title. At the commencement of this action the plaintiff below filed an affidavit, an undertaking for an attachment, and set out that the defendant below was a foreign corporation, and procured the issuing of an order of attachment against the property of defendant below, and caused the sheriff of McPherson county to seize the lands and tenements of said defendant under the attachment. The plaintiff below also filed an affidavit to obtain service on the said insurance company by publication, alleging that it was a nonresident of the state of Kansas, and service of summons could not be obtained on it in this state, and publication was duly made on March 31, 1891. The insurance company made a special appearance, and filed a motion to set aside the service by publication, for the reason that it was an insurance company, and, as such insurance company, had complied with the laws of the state of Kansas, and that personal service could be had on it. The motion was over-

ruled, and the insurance company duly excepted. Defendant below also moved to dissolve the attachment, which was overruled, and duly excepted to, and defendant below then filed a general demurrer to the first cause of action in the petition of the plaintiff below, for the reason that the cause of action was barred by the statute of limitation. The demurrer was overruled, and the insurance company duly excepted, and afterwards filed a verified answer denying the agency of Clark and also the payment of the mortgage, together with a cross petition asking judgment on the note and for foreclosure of the mortgage. To this answer the plaintiff below filed his reply. Upon these issues the case was tried before the court and a jury, and resulted in a verdict for the plaintiff below. The jury also returned with their verdict special findings of facts. Defendant below filed a motion for a new trial, which was overruled, and was duly excepted to, and judgment was rendered by the court for the plaintiff below in accordance with the verdict of the jury. The insurance company made case and filed it in the supreme court, and the record was duly certified to this court for review.

Simpson & Johnson, for plaintiff in error.
Grattan & Grattan, for defendant in error.

JOHNSON, P. J. (after stating the facts as above). This action was brought by Benjamin J. Stucki against the Travelers' Insurance Company to recover \$200 as penalty for refusing on demand to release and discharge of record a certain mortgage on real estate, given by Stucki and his wife to the Travelers' Insurance Company, and to remove a cloud upon his title by reason of such mortgage. The mortgage was given November 15, 1887. The petition of the plaintiff below alleges: That on the 18th day of November, 1890, he paid to one E. G. Clark the full amount of said note and mortgage. That Clark was the duly-authorized agent of the insurance company. That on November 3, 1893, he made demand on the insurance company to release the mortgage. The demand was by letter to the insurance company, and was received by it at Hartford, Conn. The plaintiff in error states in its brief five specifications of error for which it asks the consideration of this court. We will consider only such of the assignments of error as we deem material to a full determination of this case.

The first assignment of error complained of is that the court erred in overruling the motion of defendant below to dissolve the attachment. This action was brought under chapter 175, § 1, Laws 1889, which provides: "When any mortgage of real property shall have been paid, it shall be the duty of the mortgagee or his assignee within thirty days after demand, in case demand can be made by the mortgagor, or his heirs or assigns, or by anyone acting for such mortgagor, his

heirs or assigns, to enter satisfaction or cause satisfaction of such mortgage to be entered of record without charge; and any mortgagee or assignee of such mortgage who shall refuse or neglect to enter satisfaction of such mortgage as is provided by this act shall be liable in damages to such mortgagor or his grantee or heirs, in the sum of one hundred dollars, together with a reasonable attorney's fee for preparing and prosecuting such suit; and the plaintiff in such action may recover any additional damages that the evidence in the case will warrant. Civil actions may be brought under this act before any court of competent jurisdiction and attachments may be had as in other cases." Paragraph 4273, Gen. St. 18-9, provides: "The plaintiff in a civil action for the recovery of money may, at or after the commencement thereof, have an attachment against the property of the defendant, and upon the grounds herein stated: First. When the defendant or one of several defendants is a foreign corporation or a non-resident of this state; but no order of attachment shall be issued on the ground or grounds in this clause stated for any claim other than a debt or demand arising upon contract, judgment or decree, unless the cause of action arose wholly within the limits of this state, which fact must be established on the trial." The statute authorizes the granting of an attachment for refusal to enter satisfaction of a mortgage, on demand, after payment in full, as in other cases. The ground laid for the attachment in the affidavit is that the defendant below is a foreign corporation; and, if all other conditions exist authorizing the attachment of the property of a foreign corporation, an attachment may be maintained for refusal or neglect to release a mortgage on real estate that has been fully paid, when demand is properly made.

It is claimed that the petition and affidavit for attachment of the plaintiff below shows that his cause of action did not wholly arise within the state of Kansas, and for this reason an attachment could not be maintained. The petition alleges the borrowing of a certain sum of money, the giving of a note therefor, and the execution of a mortgage on land in McPherson county, Kan., to secure the payment of the same, the recording of the mortgage in the office of the register of deeds in said county, and the payment of the note and mortgage in full. All of these acts were alleged to have been done in Kansas. The Travelers' Insurance Company being a foreign corporation, and having its general office and place of business in Hartford, Conn., the demand for the release of the mortgage was made on it by letter, and received by it at its office in Hartford, Conn. The mortgage is alleged to have been paid November 18, 1890, and demand made November 3, 1893, on the insurance company, to release the mortgage. Section 190 of the Code of Civil Procedure, which specifies the grounds for which an attachment may issue, provides:

"An attachment may issue where the defendant or any one of the defendants is a foreign corporation, or a nonresident of the state, but no order of attachment shall be issued on the grounds of foreign incorporation or nonresidency for any claim other than a debt or demand arising upon contract, judgment or decree, unless the cause of action arose wholly within the limits of this state." The cause of action in this case is not a debt or demand arising upon contract, judgment, or decree. Then the question arises, did the cause of action arise wholly within the limits of this state? The statute makes it the duty of a mortgagee or his assign, whenever the mortgage has been paid in full, to enter satisfaction within 30 days after payment and demand to release the mortgage; and if the mortgagee or his assign refuse or neglect to enter satisfaction of the mortgage within 30 days after payment and demand to release, he becomes liable in damages to the mortgagor, or his grantee or heirs, in the sum of \$100, together with a reasonable attorney's fee for preparing and prosecuting a suit to recover such damages. No cause of action arises against a mortgagee or his assign until 30 days after demand has been made upon him to release the mortgage. No cause of action arose against the Travelers' Insurance Company until 30 days after it received the letter making demand, and it then had its general office and place of business outside of the state, and the demand was made outside of the state, and its refusal or neglect to release the mortgage occurred outside of the state; and upon these facts it cannot be said that the cause of action arose wholly within the limits of this state, and the motion to dissolve the attachment should have been sustained. *Stone v. Boone*, 24 Kan. 337.

We pass now to the third assignment of error. The defendant below demurred to the first cause of action set up in the petition of the plaintiff below for the reason that the petition showed on its face that the plaintiff's cause of action was barred by the statute of limitation. The petition alleges that he paid the mortgage in full on November 13, 1890, and the only demand that he made for its release was made November 3, 1893, by letter delivered to the Travelers' Insurance Company at the city of Hartford, Conn., three years after the payment of the mortgage. The petition states no reason or gives no excuse why the demand was not made sooner. This was an action to recover a penalty for refusal to release a mortgage. The act prescribing the penalty provides no limitation in which the action must be brought. He is, then, remitted to his rights and remedies under the Code of Civil Procedure, which limits his right to bring his action within one year after the right of action arose. In the case of *Wey v. Schofield*, 53 Kan. 248, 36 Pac. 333, Johnston, J., delivering the opinion of the court, says: "While there is some contention that the whole of the debt secured by

the mortgages had not been paid, the principal contention is that the action to recover the penalty has been barred by the statute of limitations. There being no limitation upon the bringing of the action in the statute imposing the penalty, it can only be brought within one year after the cause of action shall have accrued. Civ. Code, § 18, subd. 4. Before an action can be maintained to recover this penalty, a demand must be made by the mortgagor for the release of the mortgages; but he cannot extend the statutory period of limitation by an unreasonable delay in making such demand. Much more than a year elapsed between the time of payment, and when a demand for a discharge of record might have been made, before the demand was actually made. The preliminary step essential to the maintenance of an action was to be taken by the mortgagor, and it is generally held that a party who must take affirmative action to obtain a right or remedy cannot safely sit still when he might act, nor long delay the taking of such initiatory steps as would enable him to maintain an action, and avert the ordinary penalty of delay. The statute of limitations 'will begin to run within a reasonable time after he could, by his own act, have perfected his right of action; and such reasonable time will not, in any event, extend beyond the statutory period fixed for the bringing of such action.' *Atchison, T. & S. F. R. Co. v. Burlingame Tp.*, 36 Kan. 623, 14 Pac. 271; *Rork v. Commissioners of Douglas Co.*, 46 Kan. 175, 28 Pac. 391; *Bauserman v. Charlott*, 46 Kan. 490, 28 Pac. 1051; *Kulp v. Kulp*, 51 Kan. 348, 32 Pac. 1118; *Bauserman v. Blunt*, 13 Sup. Ct. 466. As the demand was not made until after the statutory period of limitation had elapsed, and no good excuse is given for the delay, it must be held that the mortgagor was too late in bringing the action."

The judgment of the district court must be reversed. All the judges concurring.

STATE v. HOOK.

(Court of Appeals of Kansas, Southern Department, C. D. Sept. 5, 1896.)

LASCIVIOUS COHABITATION—INFORMATION—SUFFICIENCY—OBJECTIONS TO VERIFICATION—WAIVER.

1. Where an information is subscribed by the county attorney, but verified by another person on information and belief, the verification is insufficient to authorize the issuing of a warrant for the arrest of the accused; but where the accused has been arrested under a warrant, and without objecting to the warrant or the information, or verification of the information, enters into a recognizance for his appearance in the district court to answer the charge in the information, and he has appeared in the court in accordance with his recognizance, and voluntarily consents to a continuance of the case until the next term of the court, and enters into a new recognizance for his appearance at the next term of court, he has by his own acts waived any right to thereafter object to the sufficiency of the verification of the information.

2. The offense of lewd and lascivious cohabitation between an unmarried man and a married woman, under the statute, is a joint offense, of which both parties must be guilty, or neither.

3. In an information charging the offense of lewd and lascivious abiding and cohabiting between an unmarried man and a married woman, both must be joined as defendants in the same information, unless one of the parties be unknown or since dead.

4. An information which charges that H., an unmarried man, did lewdly and lasciviously cohabit and have sexual intercourse with one L., a married woman, and that the said H. and L. were not married to each other, does not charge the parties with a joint offense, but charges it against the man alone, and therefore the information is bad.

(Syllabus by the Court.)

Appeal from district court, Reno county; F. L. Martin, Judge.

W. E. Hook was convicted of lascivious cohabitation with a married woman, and appeals. Reversed.

L. M. Fall, Co. Atty., F. B. Dawes, Atty. Gen., and Z. L. Wise, for the State. C. M. Williams, for defendant in error.

JOHNSON, P. J. This is a criminal prosecution commenced on the 3d day of September, 1895, in the district court of Reno county, Kan., against W. E. Hook, in which it is charged, in the information filed against him, that at the county of Reno, in the state of Kansas, he unlawfully, willfully, lewdly, and lasciviously, and continuously from the 28th day of May, 1895, to the filing of the information, did abide and cohabit with one Maggie Lockwood, a married woman, and they did so unlawfully cohabit with each other, and then and there have sexual intercourse with each other, he, the said W. E. Hook, being an unmarried man, and she, the said Maggie Lockwood, being then and there a married woman, and having a husband living, and they not being married to each other. The information was subscribed by the county attorney, but was verified in the following words: "State of Kansas, Reno County—ss.: I, Earnest Lockwood, do solemnly swear that the facts set forth in the within information are true, as I am informed and verily believe. So help me God. Earnest Lockwood. Subscribed and sworn to before me this 3rd day of Sept., 1895. Z. L. Whinery, Clerk District Court." On the filing of the information the clerk of the said court issued a warrant for the arrest of the defendant, and he was arrested under said warrant, and, without any objections thereto, gave a recognizance for his appearance at the September term, 1895, of the district court. The case was continued to the December term on the 3d day of December, 1895. The defendant filed a motion to quash the information for the reasons that the information did not state facts sufficient to constitute an offense; that the court had no jurisdiction to hear and determine the same; and because the information is not such as is required by law; that the information is not verified as required by

law. The motion was overruled, and the defendant excepted. On the 4th day of December the defendant filed a motion to set aside the recognizance for his appearance, because the court has no jurisdiction of said action, and because the information filed in the cause does not state facts sufficient to constitute an offense under the laws of Kansas, and the information is not verified as by law provided. This motion was overruled, and defendant duly excepted. And on the said 4th day of December the defendant waived arraignment, and pleaded not guilty to information, and the case was thereupon tried before the court with a jury, and the jury returned a verdict of guilty of lewdly and lasciviously abiding and cohabiting with Maggie Lockwood in manner and form as charged in the information. Motions for a new trial and in arrest of judgment were filed, and each overruled, and defendant duly excepted to the ruling of the court thereon, and the court then pronounced a judgment in accordance with the verdict. Defendant filed a bill of exceptions, and appealed the case to this court, and asks that the judgment may be reversed.

The defendant was charged with the crime of adultery, under section 232, c. 31, Gen. St. 1889. The district court has jurisdiction of the crime charged, and had acquired jurisdiction over the defendant by his giving a recognizance to appear in the court and answer the charge against him, without objecting to the information, or the verification, or the warrant for his arrest.

The first reason urged why the judgment should be reversed is that the court erred in overruling the motion to quash the information, because it is not properly verified. Section 67 of the Code of Criminal Procedure requires all information to be verified by the oath of the prosecuting attorney or complainant, or some other person. The provision of this section was doubtless intended to secure the oath of some person to the information that had personal knowledge of the facts charged therein, to swear to the truth of the same, so as to authorize the issuing of a warrant for the arrest of the accused party. Section 15 of the bill of rights in the constitution reads: "The right of the people to be secure in their person and property against unreasonable searches and seizures, shall be inviolate; and no warrant shall issue but on probable cause supported by oath or affirmation, particularly describing the place to be searched and the person or property to be seized." Until some person having a knowledge of the facts constituting a crime can swear to it positively, no warrant can be lawfully issued for the arrest of the person charged. The verification of this information was not such as to authorize the clerk to issue a warrant for the arrest of the defendant, and would have been a fatal defect in the information, had the objection been taken at the proper time. There are certain

defects in criminal pleadings, as well as in civil pleadings, that are waived by failure to object to the pleadings at the proper time. When the defendant was arrested under the warrant issued by the clerk, and gave his recognizance for his appearance in the district court, there to answer the charge contained in the information, by thereafter voluntarily consenting to a continuance of the case to the December term of court, and giving a recognizance for his appearance at the December term, he waived any right thereafter to object to the mere verification of the information. *State v. Bjorkland*, 34 Kan. 377, 8 Pac. 391; *State v. Longton*, 35 Kan. 375, 11 Pac. 164. In the last case cited the supreme court says: "We think, when the defendant entered into a recognizance for his appearance at court, without making any objections to the sufficiency of the warrant, or the sufficiency of the information, or the sufficiency of the verification thereof, he waived the supposed defects in the verification of the information, and the irregularity in issuing the warrant without a sufficient verification." In the case of *State v. Blackman*, 32 Kan. 615, 5 Pac. 175, the learned judge delivering the opinion says: "An information or complaint under the prohibitory law, verified in accordance with section 12 of such law (now paragraph 2543, Gen. St. 1889), is, so far as the verification is concerned, sufficient for any purpose except merely for the purpose of issuing a warrant for the arrest of the defendant. Such an information, thus verified, may properly be filed by the county attorney; a trial may be properly had thereon; a conviction may properly follow the trial; and the defendant may properly be sentenced upon such conviction. Of course, before a warrant is issued for the arrest of the defendant, an oath or affirmation, within the meaning of section 15 of the bill of rights, should be made, showing probable cause to believe the defendant guilty; but nevertheless when the defendant, without objection, pleads to the merits of the action, and goes to trial, he waives all irregularities in the verification of the information, and cannot afterwards be heard to question the regularity or validity of any proceedings in the case, if he urges no other objection than that such verification is insufficient." The information being subscribed by the county attorney, and verified by another party, although the verification was defective, did not render the information void. The defect having been waived by the defendant, the motion to quash on that account was properly overruled.

This brings us to the more serious objections to the information,—whether it charges a public offense of which the defendant could be convicted; whether an information under section 232 of the crimes and punishment act, in which the participation of both Hook and Lockwood were necessary to constitute the offense charged against Hook alone be sufficient to authorize a conviction under

the statute. It is well settled at common law that, where an offense can only be committed by the participation of a certain number of persons, the number required to constitute it must be jointly indicted. An indictment against one of the number required to constitute the offense could not be sustained, and if a less number than are required to constitute it be indicted, the indictment is bad, and a conviction could not be sustained, as the specific offense would not have been properly charged, and as Hook could not have committed the offense without Lockwood being guilty of the same crime. Where a statute creates an offense which, from its nature, requires the participation of more than one person to constitute it, a single individual cannot be charged with its commission, unless in connection with a person unknown. In the case of *State v. Bailey*, 3 Blackf. 208, McKinney, J., delivering the opinion of the court, says: "The principle is well settled that, where an offense can only be committed by a certain number of persons, the number required to constitute it must be indicted; to justify a conviction. * * * If a less number than is required to constitute it be not indicted, or if, on trial, less than that number be found guilty, and the others charged be acquitted, the conviction could not be sustained, as the specific offense would not appear to have been committed." Mr. Wharton in his treatise on Criminal Law of the United States, in section 367, says: "Where a statute creates an offense which, from its nature, requires the participation of more than one person to constitute it, a single individual cannot be charged with its commission, unless in connection with persons unknown." In section 431 the same author says: "In riot and conspiracy, where one cannot be indicted for an offense committed by himself alone, the acquittal of those charged in the same indictment with him as co-defendant must, of course, extend to him." In the case of *Delany v. People*, 10 Mich. 241, an information charging that, at the city of Detroit, Delany did lewdly and lasciviously associate and cohabit with one Mary Stewart, of said city,—he, the said Thomas Delany, being then and there a married man, and she, the said Mary Stewart, being then and there a woman, and the said Thomas Delany and Mary Stewart not then and there married to each other,—and Delany being charged individually with the offense, Christianity, J., delivering the opinion of the court, says, "The information cannot be supported unless it be found to be a sufficient charge against both, and upon which both might be tried and convicted." In the case of *State v. Byron*, 20 Mo. 210, Byron, an unmarried man, was alone indicted and convicted for lewd and lascivious cohabitation with an unmarried woman. The supreme court held the indictment bad, and the conviction wrong.

The motion to quash the information should have been sustained, for the reason that the

information charged Hook with the crime alone, which could have only been committed by the participation of Lockwood. The judgment of the district court is reversed, and the case remanded, with directions to set the judgment of conviction aside, and to sustain the motion to quash the information. All the judges concurring.

**LONG ISLAND INS. CO. OF BROOKLYN
v. HALL et al.**

(Court of Appeals of Kansas, Northern Department, C. D. Sept. 12, 1896.)

INSURANCE—CONDITION FOR APPRAISAL—PLEADING—INSTRUCTIONS.

1. In an action to recover on a policy of fire insurance, for a loss by fire, where the policy contains the condition that, in the event of disagreement as to the amount of loss, appraisers shall be selected to ascertain the same, etc., it is not necessary, in order that the insured may maintain an action on such policy, that he negative this condition. The petition in this case held to be sufficient.

2. The decision in the case of *Insurance Co. v. Hall*, 41 Pac. 65, 1 Kan. App. 18, followed.

3. It is not sufficient that instructions contain a correct statement of the law in the abstract. They should also be applicable to the issues in the case, and the facts disclosed upon the trial. (Syllabus by the Court.)

Error from district court, Republic county; F. W. Sturges, Judge.

Action by M. E. Hall and another against the Long Island Insurance Company of Brooklyn. From a judgment for plaintiffs, defendant brings error. Affirmed.

H. M. Jackson, for plaintiff in error. Noble & Hugin, for defendants in error.

GILKESON, P. J.: On March 5, 1891, the defendants in error, as plaintiffs, commenced their action in the district court of Republic county to recover of plaintiff in error, as defendant, the sum of \$1,000, on a policy of insurance issued January 16, 1890, upon a loss by fire alleged to have occurred on March 6, 1890. Trial had before court and jury, general verdict returned by jury, and judgment rendered thereon in favor of the plaintiffs below in the sum of \$850 and costs. Motion for new trial filed and overruled, judgment rendered upon verdict, and defendant below brings case here for review.

The petition in this case contains the general allegations, viz.: The incorporation of the defendant. The issuance of the policy for the term of one year, and the payment of the premium thereon to insure against the loss by fire, not to exceed the sum of \$1,000, on a stock of general merchandise. Permission to carry other and additional insurance not to exceed the amount of \$3,000. That at the date of the loss the policy was in full force and effect. That the loss occurred on the 6th of March, 1890. That the stock of merchandise insured was entirely destroyed by fire, except such things as are specifically men-

tioned. That the stock of merchandise destroyed was worth at the time of the fire the sum of \$4,447.50. That the actual loss to the plaintiffs by reason of the fire is \$4,447.50. And it further alleges, that immediately after said loss they duly notified the defendant as required by the terms of said policy, and subsequently to the making out of the said notice of loss the said plaintiffs made out and transmitted to the defendant a verified statement and proof of loss as required by the terms of said policy; that afterwards they notified the defendant that they were ready to name one of the arbitrators, and submit to arbitration, although there had been no dispute or disagreement as to the amount the plaintiffs ought to recover, the defendant denying all liability whatever; that they have performed, all and singular, the conditions and obligations of said policy, and still the defendant has not paid the said loss, or any part thereof; that they have been at an actual loss of \$4,447.50, and that the said defendant is, by the terms and conditions of the said policy of insurance, indebted to the plaintiffs in the sum of \$1,000, and that the same is long past due, and entirely unpaid, and that defendant entirely refuses to pay the same; that they have done and performed each and every condition of the said policy necessary to be done to entitle them to recover the above sum of money, and still the said defendant refuses to pay the said loss; that the defendant, well knowing the said sum of money is still due and unpaid, and that the plaintiffs are entitled to same, still refuses to pay the said sum of money. The original policy of insurance is attached to the petition as an exhibit, and made a part thereof. Against this petition the defendant filed its motion to make more definite and certain, which was by the court overruled, and thereupon filed their answer, containing: First. A general denial of each and every statement, averment, and allegation in said petition contained, except such as are herein expressly admitted. Second. Admits it is incorporated; the issuance of the policy sued upon; a permission to carry additional insurance as stated in the petition; that the policy was in full force on March 6, 1890; that the loss by fire occurred to said stock of goods so insured, but that the value, extent, nature, and amount of which loss is to the defendant unknown, and extent thereof, as to value and kind, is therefore denied; that the loss occurred on March 4, 1890, and admits that notice and proof of loss was served upon said defendant within the time required by the terms of the policy; that the property was insured in the sum of \$1,000; that by the terms of the policy they were not to be liable to exceed three-fourths of its proportion of all the insurance of the true value of the property insured; that all of the insurance upon such property at the time of the loss was \$1,000. Third. That the amount of loss and damage claimed by the plaintiffs at the time of the attempted adjustment of the loss, in and by their said proof

of loss, was largely in excess of the true, actual, cash value of the property, and of the actual loss and damage by them sustained; that at the time of making the said claim and value of said property, and the proof of loss, this defendant demanded the appointment of appraisers and umpire to determine the amount of said loss and damage, as provided by the terms of said policy, because the same was excessive as aforesaid, and which demand was refused and denied by the plaintiffs, and no arbitration was had of such loss, but the said plaintiffs wholly refused and denied to this defendant the right to have an arbitration and award, and to have the damages sustained by said plaintiffs by reason of said fire, and for which the defendant was liable, ascertained and determined by said arbitration and award; that on or about the 23d of June, 1890, without any arbitration, award, or demand, and without the performance of the conditions of said policy on the part of the plaintiffs, they commenced suit in the district court of Republic county, Kan., against this defendant, to recover the amount of the insurance specified in and by said policy, upon which summons was issued, defendant appeared and answered, plaintiffs replied, and cause remained pending in said court until the 19th of February, 1891, when the same was dismissed by the plaintiffs; and that during all of said time the plaintiffs denied the right of this defendant to have and demand or require an arbitration and appraisal of damages so sustained, and denied during all of said time the right of the defendant to have, name, or designate an arbitrator, or demand or require the plaintiffs to submit to an arbitration of the said differences between the plaintiffs and defendant, but long after said February 19, 1891, and immediately before the commencement of this action, said plaintiffs notified defendant of their readiness to agree upon arbitrators to adjust and arbitrate said claim. Fourth. "The defendant says that by the terms of said policy it is provided as follows: 'No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with the foregoing requirements, nor unless commenced within twelve months next after the fire.' And this defendant alleges and charges the fact to be that said action was not commenced within twelve months next after the fire, and that, by the said terms of said policy, plaintiffs are barred from prosecuting said action any further, and from any recovery therein." Fifth. This defendant alleges and charges the fact to be that said petition does not state facts sufficient to constitute a cause of action in favor of the plaintiffs and against this defendant." To which plaintiffs filed a reply consisting of general denial. Second. And specially denying that the action was not commenced within one year from and after the alleged fire and loss. Third. Denying that defendant ever made a demand for arbitration.

Fourth. Denying that there was ever any disagreement as to the amount of plaintiffs' recovery, but say that the defendant denied all liability whatever under the policy. Fifth. That the plaintiffs duly notified the defendant that they were ready to name one of the arbitrators; that defendant refused to name one, or submit to arbitration; and specially deny that the defendant was ever entitled to arbitration; and that no dispute arose as to the amount of recovery.

Upon the trial of the cause it was admitted that the proofs of loss and certificate were sworn to April 10, 1890, and that about April 10, 1890, they were forwarded to the defendant, and received in due course of mail; that the plaintiffs on June 23, 1890, commenced an action against the defendant as set forth in defendant's answer; that it remained pending in the court until February 19, 1891, when the same was dismissed without prejudice to a future action. It is also admitted that, at the time of the fire by which the stock of goods was injured, there were three policies of insurance upon the said stock, in favor of the plaintiffs herein, in the aggregate amount of \$4,000; that the policy sued on in this action was one of the three; and that there was a three-fourths clause in each of said policies. The defendant insurance company filed its motion to make the petition more definite and certain, in this, to wit: (1) To state when the plaintiffs notified the defendant that they were ready to name one of the arbitrators and submit to arbitration; (2) to state what facts are relied upon as amounting to a denial of liability on the part of the defendant, or what the defendant or its agents said which is claimed to have amounted to a denial of liability.

We think these objections are extremely technical and untenable, and are at a loss to know how the charge could be more precise, or the defendant be more fully informed as to its nature if the date requested in the first ground had been inserted. If the date ever became material, it could only be so as a matter of defense, and the same may be said of the second ground of the motion; and in addition, we think the denial of liability is sufficiently stated. The allegations of the petition are that the amount "is long past due, and entirely unpaid, and defendant refuses to pay the same"; and, again, "that they have done and performed each and every condition of the said policy necessary to be done to entitle them to recover the above sum of money, and still the defendant refuses to pay the said loss; that the defendant, well knowing the said sum of money is still due and unpaid, and that the plaintiffs are entitled to same, still refuses to pay the said sum of money." If, as the plaintiff in error argues in its behalf, "under this contract it was important to know when the notice and when the proof of loss, and when the consent to name arbitrators, were given, as requested by paragraph 1 of motion to

make more definite and certain, and until the time of the performance of such acts was stated in the petition the defendant could not know, nor could the court be advised as to, whether a cause of action had accrued," we can only say: As to when the notice and proof of loss were made, is not raised by the motion; and, if the "date of consent to name arbitrators and submit to arbitration was such an important fact that by the omission thereof the petition failed to state facts sufficient to constitute a cause of action, it should have been raised by demurrer, not by motion to make more definite and certain. And it will be observed in this case that the defendant, in its answer (by way of demurrer), alleges that the petition does not state facts sufficient to constitute a cause of action, but evidently abandoned it, as it was never passed upon by the court, nor mentioned by the defendant in its assignment of error; and, as we have said, if it ever become material it could only be as a matter of defense to be alleged and proved. And this is exactly what the defendant did do, as to the time of serving the notice of consenting to arbitration, and further admitted, by its answer and otherwise, "that the notice of loss and proof of loss were made within the time required by the terms of the policy."

This brings us to the second error complained of: "Admitting evidence under the petition over the objection of the defendant." This is but the presentation of the grounds of the demurrer in a different form, and at a subsequent time, and the rule of construction is not as strict under the latter as under the former. When the latter is interposed the pleadings are all filed and the issues made up, and, to support the judgment of the trial court, all the pleadings are taken and construed together, so that defects originally existing in the petition may be cured by the answer, if it supplies them. The defendant contends (and this is its only contention) "that it did not appear from the petition that any cause of action had accrued." The petition alleges that the fire occurred on the 6th day of March, 1890. The answer alleges that it occurred on the 4th day of March, 1890. The 60 days, then, in which proof of loss and notice should be served, would expire on May 5, 1890, and 60 days from that date would be July 5, 1890, when, under the terms of the policy, the insurance would be payable. The answer further alleges "that a former suit upon this policy had been commenced and remained pending in the district court of Republic county until February 19, 1891, when it was dismissed," and "that long after said 19th day of February, A. D. 1891, and immediately before the commencement of this action," etc. So that by the pleadings it is shown that this action was not commenced until after February 19, 1891, more than seven months after the notice and proof were received, even if

they were not received until the very last day allowed by the terms of the policy.

The third assignment of error is that the court erred in overruling defendant's demurrer to the evidence. The policy provides, "In the event of disagreement as to the amount of loss," the same shall be ascertained by three appraisers, to be selected as provided for in the policy, and the award in writing of any two shall determine the amount of loss. The right of arbitration then depends upon, and can only be demanded after, a disagreement between the parties as to the amount of loss. The weight of authority seems to be in favor of the validity of such a condition, and to hold that arbitration of the amount of loss is a right which either party may demand of the other, and that when such demand is made, in accordance with the terms of the policy, by the insurer, no action can be maintained by the insured to recover for the loss until such demand had been complied with, and an appraisal made. It is not necessary, however, in order that the insured may maintain an action on the policy, that he negative this condition, or prove a compliance with the same on his part. That is a matter of defense. *Insurance Co. v. Hall*, 1 Kan. App. 18, 41 Pac. 65. We think the evidence introduced by the plaintiffs below tended to establish all the material allegations of the petition.

The fourth specification of error is the refusal of the court to give certain instructions, to wit: "The jury are instructed that, upon the pleadings and evidence in the above-entitled cause, the plaintiffs cannot recover, and will return a general verdict in favor of the defendant." This instruction raises the same question that was raised by the demurrer to the evidence (third specification of error), in a more extended form, as it now goes to the extent of attacking the sufficiency of all the evidence introduced at the trial, and is argued in the brief in connection and as a part thereof. We agree with plaintiff in error in its contention that the evidence shows that the notice or offer to submit to arbitration was not received by the adjuster until the 5th of March, 1891, the day the suit was commenced; but the paper itself shows that the offer was made February 25, 1891, and it is admitted that it might have been in the adjuster's home or place of business some days before it actually came into his possession, owing to his absence. The notice also requires immediate notice of its acceptance, or intention of naming an arbitrator, and that a reasonable time to act under it would be given; but it is nowhere shown that it ever accepted the proposition, or attempted to appoint an arbitrator, or that the plaintiffs below have ever withdrawn the offer to arbitrate. It is not claimed that it was prevented by any act of the plaintiffs from having an arbitration, nor has it asked the suit to abate until arbi-

tration could be had; but, on the other hand, it is shown that the plaintiffs waited from February 25th to March 5th for an answer, before commencing their action, and that, under the terms of the policy, was the last day given them in which to commence suit. And to claim, under these circumstances, that the plaintiffs must wait, or could not commence their action, until the company expressly refused to arbitrate, or a sufficient length of time had elapsed from which a refusal would in law have been implied, has no foundation in law, equity, or reason. The defendant could have very easily placed itself in a position to have had the benefit of an arbitration, if desired. No steps were taken on the part of the defendant with reference to this action until the 13th of April, when it filed a motion, and from that time until the 16th day of May it took no other steps; when it filed its answer; and we think that common justice requires us to hold that the mere fact that the adjuster did not receive this notice until the day the suit was commenced does not operate as a bar to the action, and, if it did, the filing of the answer, and going to trial without demanding the right to arbitrate under this notice, amounts to a waiver.

In refusing the following instructions: "(2) It is not the agreement of the defendant, as stated in said policy, to pay the cash value of the property described in said policy of insurance as having been insured, or what may be proven in this court to have been the value thereof, but it is expressly agreed that the defendant shall not be liable beyond the actual cash value of the property at the time the loss or damage occurred. And also, if the plaintiffs and defendant differ as to the amount thereof, that the loss or damage shall be ascertained by appraisers, one to be appointed by the plaintiffs, and one by the defendant company, and the two so chosen shall select a competent, disinterested umpire, and that such two appraisers shall estimate and appraise the loss, and, failing to agree, shall submit their difference to the umpire, and the award in writing of any two shall determine the amount of loss. And if the jury believe from the evidence that there was a difference between the plaintiffs and defendant, jointly with two other companies having policies upon said stock of goods, as to the amount of the loss sustained by the plaintiffs by such fire, under the terms of said policy, the plaintiffs cannot recover until an award in writing shall have been made by two of said appraisers, or one of the appraisers and the umpire selected. (3) The parties, having agreed to such method of determining the cash value of the property, or the amount of loss or damage insured against by said policy, cannot now substitute other form of evidence; and if the jury believe a difference existed, and defendant, by its agent and adjuster, demanded an appraisal of said property, and no such appraisal was made, then the jury must re-

turn a verdict for the defendant. The plaintiffs cannot recover in this action, when a difference arose between them and the defendant as to the amount of the plaintiffs' loss, and an appraisement was demanded, except such appraisement shall have been first made; and then only upon the award of the appraisers and umpire so selected, and for an amount which they may have found to be the cash value of the goods insured in said policy, and destroyed by fire." "(5) If the jury believe from the evidence in this case that on or about April 21, 1890, the defendant demanded an appraisement of the loss and damage claimed in the petition, and that without any appraisement, arbitration, or award, the plaintiffs, on or about June 12, 1890, commenced suit against the defendant to recover the same, and the same remained pending in said court until on or about February 19, 1891, when the same was dismissed, and thereafter plaintiffs demanded an appraisement and award, which was received by defendant's agent between February 19 and March 5, 1891, then the plaintiffs cannot recover in this action; and your verdict should be for the defendant." In *Insurance Co. v. Hall*, supra, it was held by the court, "It should also appear that there was an admitted liability for something, and that there was an actual disagreement as to the loss. All liability under the policy cannot be denied, and at the same time a demand made to submit the amount of the loss to arbitration"; and the remarks of Garver, J., in applying the rule in that case, are particularly applicable in this. The answer contained no allegation of dispute, or disagreement as to the amount of loss. Neither does the evidence in the case, fairly tried, show admission of liability, or actual disagreement as to amount of loss. So far as the evidence indicates, little or no effort was made to agree upon the amount of loss, and no opportunity was afforded for an actual disagreement. While it might be conceded that instructions 2 and 3 are correct statements of the law, in the abstract, yet this is not sufficient to require the trial court to give them, nor would the refusal be error. "Instructions given by a trial court should be applicable to the issues in the case, and the facts disclosed upon the trial." *Lorie v. Adams*, 51 Kan. 692, 33 Pac. 599. And where an instruction is not based upon or applicable to the facts in the case, even though it correctly states the rule of law, it is not error to refuse it. *City of Kinsley v. Morse*, 40 Kan. 578, 20 Pac. 217, and such an instruction ought not to be given. *State v. Lindgrove*, 1 Kan. App. 51, 41 Pac. 688. We cannot agree with counsel as to instruction No. 5 correctly stating the law. It totally ignores the existence of any disagreement or difference existing as to the amount of loss between the parties, without which no right to demand appraisement or arbitration could exist, but asks the court to instruct the jury that an arbitrary demand by the defendant com-

pany is all that is necessary, and if the plaintiffs, without complying therewith, should bring an action, and afterwards dismiss it, the first action would be a complete bar to any future action. In passing, we might say, as to the instructions given, that they are not as full and comprehensive as they should have been; but, from a careful examination of the record in this case, we think the verdict of the jury is clearly warranted by the evidence, and we do not feel justified in interfering with the judgment on the grounds of the instructions alone. The judgment of the court below will be affirmed. All the judges concurring.

STATE v. MEYERS. (No. 1,474.)

(Supreme Court of Nevada. Sept. 24, 1896.)

TAXATION—BOARD OF EQUALIZATION—JURISDICTION—ASSESSMENT—UNIFORMITY.

1. Under St. 1893, p. 47, amending the revenue law, and authorizing the board of equalization to equalize the assessed valuation of personal property, it is not necessary that a complaint should be made, to give the board jurisdiction of the subject.

2. Under section 23 of the revenue law, as amended, which provides that the board of equalization "shall have power to determine the valuation of any property assessed," the board has jurisdiction to equalize property not properly listed on the assessment roll.

3. An agreed statement that the assessor made a uniform and equal valuation of the kind, character, and species of merchandise to which defendant's belonged does not show that the valuation of defendant's property as made by the assessor was uniform with other personal property on the assessment roll, so as to require an inference that a raised valuation made by the board of equalization was unjust to defendant.

Appeal from district court, Ormsby county; Charles E. Mack, Judge.

Action by the state against George H. Meyers for the tax upon the difference between the assessor's valuation and the valuation fixed by the board of equalization on defendant's stock of merchandise. From a judgment in favor of plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

Torreyson & Summerfield, for appellant. A. J. McGowan, Dist. Atty., and Robt. M. Beatty, Atty. Gen., for the State.

BELKNAP, J. Upon August 29, 1895, appellant, owning no real estate in Ormsby county, paid the taxes assessed against him for personal property, amounting to the sum of \$234.75. Afterwards the board of equalization raised the assessed valuation of his stock of merchandise from \$8,000 (upon which figure he had paid the tax) to \$12,000. Judgment was entered against him in the district court for the tax upon the difference between the assessor's valuation and the valuation fixed by the board of equalization and for costs, etc. From the judgment, and an order refusing a new trial, defendant appeals.

The first objection interposed is that no complaint was made to the board touching

the assessment. The statute in this regard was amended at the session of 1893 (St. 1893, p. 47), and, as amended, it is not necessary that a complaint should be made to give the board of equalization jurisdiction of the subject.

2. It is objected that the board had no jurisdiction to equalize defendant's taxes, for the reason that his property was not properly listed upon the assessment roll. This conclusion, it is claimed, results from the construction of the provisions of section 68 of the revenue law, by which the auditor is required to enter upon the assessment roll, upon its receipt by him after the final adjournment of the board of equalization, all the original schedules of personal property made by the assessor. Under the provisions of sections 17 and 19 of the amended revenue law it is made the duty of the assessor, on or before the first Monday in September of each year, to complete the assessment roll, which must contain a list of all the property in the county subject to taxation, which list shall be verified by his affidavit. This requirement of the statute is a sufficient answer of itself to the contention, and we must assume, in the absence of a showing to the contrary, that the assessor obeyed the law, and that the property was properly listed upon the assessment roll. But, aside from these provisions, other portions of the revenue law sustain the action of the board. The official title of the board is the "Board of Equalization." The received construction of its duty is to equalize the taxes. It would seem unreasonable that a board thus constituted would not have jurisdiction to equalize all property, but such only as appears upon the assessment roll. Section 23 of the law provides, among other things, "that the board shall have power to determine the valuation of any property assessed." These words, in the connection in which they are used, include all property, and no qualification or condition whatever is imposed. This was evidently the intention of the members of the legislature that passed the bill. In the sixtieth section, touching personal property, it provides that the taxpayer shall not be deprived of his right to have his assessment equalized, and if, upon equalization, the value be reduced, the excess shall be refunded. In the present case the valuation was raised, and not reduced, but the word "equalize," according to Webster, means "to make equal," "to be like in amount or degree, as to equalize accounts, burdens, or taxes." By raising the assessor's valuation, the board, in the exercise of its judgment, equalized the taxes of defendant with those of the other taxpayers of the county.

3. In the agreed statement of facts it is stated that the assessor made a uniform and equal valuation of this kind, character, and species of merchandise. No mention is made of other kinds, character, or species of personal property. The statement is therefore insufficient to show that the raised valuation

made by the board was unjust. It does not show that the valuation of defendant's property as made by the assessor was uniform with other personal property upon the assessment roll, and, further, that it was not equalized by the board at its true cash value. Judgment affirmed.

BIGELOW, C. J., and BONNIFIELD, J., concur.

WATT v. NEVADA CENT. R. CO. (No. 1,457.)¹

(Supreme Court of Nevada. Sept. 23, 1896.)

RAILROAD COMPANIES—ACTION FOR FIRE — MEASURE OF DAMAGES.

In an action against a railway company for destruction of hay by fire, the measure of damages, it appearing that there was no market for the hay at the place where it was destroyed, is the value of the hay at the nearest market, less the cost of transportation there, and not such value plus the cost of transportation from such market to the place where the hay was destroyed.

On rehearing. Original decision modified on condition.

For former opinion, see 44 Pac. 423.

BONNIFIELD, J. The plaintiff has petitioned for rehearing "on the ground that it is probable that the court, in its decision, has arrived at an erroneous conclusion, and overlooked important questions which were necessary to be considered in order to arrive at a full and proper understanding of the case; and on the ground that petitioner verily believes that the court, upon such rehearing, will come to different conclusions from those announced in its former decision." Counsel argues at great length that the court erred in its conclusions on all points wherein the decision was adverse to plaintiff's contention. The matter of the quantity of hay destroyed we will not further consider, but briefly notice counsel's contention as to measure of the value of the hay. The case is reported in 44 Pac. 423, 22 Nev. —, in which, after thorough and deliberate consideration, we held that: "In the absence of a showing that it had any greater market value where it was situated, its value in the Austin market, less the cost of transportation, must control." The plaintiff tried the case in the court below upon the theory, and his counsel contended there and on appeal and now contends in his petition, that, as the plaintiff had harvested and stored the hay for use in the event of the occurrence of a hard winter like that of 1889-90, in which he lost \$100,000 worth of stock, and could have saved \$50,000 worth with the amount of hay defendant destroyed, the true measure of the value of the hay is such a sum of money as it would require to place on plaintiff's ranch the same quantity and quality of hay as that destroyed. He claimed on appeal from the evidence

that no hay of the same quality as that destroyed could be procured at any place nearer than Carson Valley. There is no evidence in the record of what the cost would have been to have bought and shipped hay from that place to replace the hay destroyed. He argued that, taking Austin as the supply point, there must be added to the Austin market price the cost of transportation from Austin to plaintiff's ranch, and the difference between the value of the plaintiff's red-top hay and the common river hay sold at Austin, and thus he figures the value of the hay destroyed at \$32.50 per ton. While we may admit that the sum of \$32.50 per ton is a correct result of his theory, there is no ingenuity of argument, however learnedly and lengthily it may be presented, that can cover up from the ordinary mind the fallacy of the theory as applied to the facts and circumstances of this case. The fact that the plaintiff only claimed \$15 per ton in his complaint, or was allowed only \$10, or now claims only the latter sum, does not relieve his theory of its fallaciousness as a guide in arriving at the value of \$10, or any other sum per ton. If the value of the destroyed hay is to be based on what the value of like quantity and quality would be for use in the contingency of such a winter as plaintiff claims, then \$50,000 would not be an unreasonable valuation for it. He testified, and his counsel argues, that he could have saved \$50,000 worth of stock in the hard winter named, with the amount of hay the defendant destroyed. If that be so, it is as probable that such amount and quality of hay would be worth that sum in the event of such another winter as that such winter will again occur. But, as neither history nor tradition furnishes any evidence of the occurrence in the past of such another winter as that of 1889-90 within the borders of this state outside of the Sierra Nevada Mountains, we are of opinion that such contingent value is not the criterion by which it is to be determined what the plaintiff's hay was worth in 1893. Counsel informs us "that for the purpose of providing against future deep snows the stock farmers commenced in 1889-90, and continued every year since, to store up all the hay they could for such purpose." But we are not so informed by the record, or otherwise, except as to the plaintiff. If the theory or contention be true that redtop hay is worth \$32.50 per ton for the purpose of storing for use in the event of the coming of a winter like that of 1889-90, and the farmers find it out, there ought to be great revival in the hay business. That the value of the hay destroyed was not \$50,000 in the aggregate or even \$32.50 per ton, we think counsel will not deny; if not, he must admit that any theory of which either sum is the logical result as to the value must be erroneous, and should be discarded in this case. Petitioner asks the court, in the event of its adhering

¹ For further opinion on rehearing, see 46 Pac. 726.

to its conclusions heretofore arrived at, to terminate this litigation by ordering such judgment as it deems proper with the usual alternative that the plaintiff accept it or suffer a new trial. In view of the necessary costs and expenses to which the parties would be subjected by a new trial we are inclined to grant the request. Mr. Van Patton, defendant's witness, and engaged in the livery business at Austin, testified that the market value of hay in bale in Austin was \$12 per ton in the fall of 1893. Other witnesses gave the value at \$10 to \$12. Exhibit 6, in evidence, being a schedule of railroad freight rates, gives the rate of \$3 per ton for hay from "Canyon and Vaughn's and points between to Austin." Walter's or plaintiff's ranch is between Canyon and Vaughn's. There is no siding at Walter's, hence hay at plaintiff's ranch would have to be hauled by wagon to Canyon or Vaughn's where there are sidings for shipment by rail to Austin. Canyon is the nearer station, and distant three or four miles from plaintiff's ranch or Walter's station. We find no evidence as to the cost of hauling hay from Walter's to either siding, but plaintiff's counsel, in his brief, puts it at \$1 per ton from the siding to the ranch. So we will consider \$1 per ton reasonable cost for hauling from the ranch to the siding, where it could have been loaded on the cars. It is in evidence that the rate for hauling general merchandise from the Austin depot into town is \$2.50 per ton, and that the cost of baling hay was about \$2 per ton. Taking the above items of cost as approximately correct for putting hay into the Austin market from plaintiff's ranch, the total cost would be \$8.50 per ton. As there is evidence tending to show that the plaintiff's hay was worth more than the common river hay sold in Austin, we are of opinion that it is reasonable to conclude that his hay was worth the highest market price, \$12 per ton. We are of opinion that the evidence would sustain a finding of a net market value of \$3.50 per ton, and no more. The evidence is that the hay press cost \$80 in Caleco, Lake Valley, and the value of the labor in hauling it to his ranch the plaintiff puts at \$25 or \$30. We are of opinion that the evidence would support a finding of \$110 as the value of the press, and no more. The \$100 damages assessed for injury to the meadow land we think the evidence justifies. We are of opinion that the plaintiff is entitled, under the evidence and the law applicable to the case, to a judgment for the value of 697.8 tons of hay at \$3.50 per ton, for the value of the hay press, \$110, and for damages to the meadow land, \$100, amounting to \$2,651.60, with legal interest from date of original judgment, besides the costs of suit taxed at \$1,289.70 in court below. The judgment of this court herein is modified so as to read as follows: "It is therefore ordered that the plaintiff have twenty days from the fil-

ing hereof to file in this court a release of all damages claimed in this action, except the sum of \$2,651.60, with legal interest thereon from April 10, 1895, till paid, and that upon filing such release in due form within said twenty days, the judgment of the trial court be affirmed in said sum of \$2,651.60, with interest as aforesaid, and costs of the court below in the sum of \$1,289.70; but, in default of filing such release that the judgment of the district court, and the order denying a new trial be reversed, and a new trial granted. And it is further ordered that appellant recover its costs on appeal. Ordered that the remittitur be stayed fifteen days to give appellant time to petition for rehearing if it desires to do so."

BIGELOW, C. J., and BELKNAP, J., concur.

VAN DE MARK v. JONES et al.

(Court of Appeals of Kansas, Northern Department, C. D. Sept. 12, 1896.)

APPEAL—JURISDICTIONAL AMOUNT—RECORD—DISMISSAL.

1. Under section 542a, Code Civ. Proc., the record brought to this court must affirmatively show that this court has jurisdiction, or the case will be dismissed, although no question of jurisdiction is raised in this court by either party.

2. Such jurisdiction can be shown by making the record show that the amount or value of the controversy exceeds \$100, or by incorporating therein a certificate of the district judge showing that the case is within the exception of such statute.

(Syllabus by the Court.)

Error from district court, Cloud county; F. W. Sturges, Judge.

Ejectment by O. W. Van De Mark against C. Jones and others. From a judgment for defendants, plaintiff brings error. On motion to dismiss. Granted.

O. W. Van De Mark, for plaintiff in error. L. J. Craus and W. S. Cannon, for defendants in error.

GILKESON, P. J. This was an action in ejectment for lots 1, 2, and 3, block 15, in Huntington's addition to the city of Clyde, Cloud county, Kan. Case tried by the court, which found the issues in favor of the defendants. Motion for new trial overruled, and judgment rendered on this finding for the defendants for their costs. Plaintiff brings case here for review.

The condition of this case in this court is precisely the same as that of Skoin v. Limerick in the supreme court. We cannot, then, do better than to quote the language of Valentine, J., in delivering the opinion in that case: "Before we can reverse the decision of the court below, it will be necessary for us to know that we have jurisdiction of the case, and this although, in fact, no question of jurisdiction has been raised by either party. Indeed, the defendants in error, de-

defendants below, and who would naturally be the persons to raise such a question, have not made any appearance in this court, nor has any appearance in this court been made for them. We think, however, it is the duty of this court, on its own motion, where the question is not otherwise raised, to raise the question itself, and to consider the same." *Skoin v. Limerick*, 50 Kan. 406, 31 Pac. 1052. The record is silent as to value in any amount, and, as there is no certificate of the trial judge in the record showing the cause to be one of the excepted cases under the statute, this court has no jurisdiction. The statute limiting the jurisdiction of this court (Code Civ. Proc. § 542a; Gen. St. 1888, par. 4642) provides: "No appeal or proceeding in error shall be had or taken to the supreme court in any civil action unless the amount or value in controversy, exclusive of costs, shall exceed \$100, except in cases involving * * *, and when the judge of the district or superior court trying the case involving less than \$100 shall certify to the supreme court that the case is one belonging to the excepted classes." A fair construction of this language of our statute requires the party appealing to show that his case is within the statute, either by making the record show the amount or value in the controversy, or by including in the record a certificate of the trial judge showing the case to be within the exception of the statute. *Loomis v. Bass*, 48 Kan. 26, 28 Pac. 1012.

As to the record, we will say that, upon the examination thereof, we could not say that there was any error committed by the trial judge, owing to the manner in which it is made up. Six papers are found therein, but without any identification as to what they are or refer to. None of them are marked as exhibits, and, while the agreed statement of facts refers to certain papers attached, but not as exhibits, it is impossible to tell from the papers themselves whether or not they are the ones referred to. The case will be dismissed. All the judges concurring.

MORRIS v. CASE.

(Court of Appeals of Kansas, Northern Department, C. D. Sept. 12, 1896.)

NEGOTIABLE INSTRUMENTS—TRANSFER—PLEADING—ANSWER—BURDEN OF PROOF.

1. In an action on a promissory note by a person who is not the payee thereof, where the petition says nothing about any indorsement of the note, but contains the allegation that said note was "for value sold and delivered to this plaintiff," such allegation may be put in issue by a pleading not verified by affidavit.

2. And where the defendant files an unverified answer, denying the transfer of said note and that the plaintiff was the owner and holder thereof, held, that it devolved upon the plaintiff to prove that the note had been transferred to him.

(Syllabus by the Court.)

Error from district court, Cloud county; F. W. Sturges, Judge.

Action by Theodore A. Case against A. E. Morris. From a judgment for plaintiff, defendant brings error. Reversed.

Pulsifer & Alexander, for plaintiff in error. Webb McNall, for defendant in error.

GILKESON, P. J. Case sues Morris upon a negotiable promissory note. The petition alleges: "That on the 11th day of November, 1890, A. E. Morris executed and delivered to the Union Investment Company his promissory note in writing. That afterwards, and before due, the said Union Investment Company, for value, sold and delivered said note to plaintiff. A copy of said note is hereto attached, marked 'A,' and made a part of this petition. That no part of said note has been paid, and that the entire amount is long past due." The note is as follows: "\$800.00. Kansas City, Mo., Nov. 11th, 1890. Five months after date, for value received, we promise to pay to Union Investment Company, or order, eight hundred dollars, at the American National Bank of Kansas City, Mo., with interest after maturity at 10 per cent. per annum until paid. A. E. Morris. No. 3,065. Due April 11th, 1891." Defendant filed an unverified answer, alleging: General denial; "and, further answering, this defendant says that he denies that the plaintiff, Theodore A. Case, is the owner and holder of the note set up and mentioned in said petition; and, further, he denies that he became the owner and holder of said note before the maturity thereof; and, further, this defendant says that the said note is fully paid, both principal and interest." To which plaintiff filed reply of general denial. It is admitted that upon the back of the note is the following indorsement: "Pay to the order of The A. Case. Demand and protest waived. Union Investment Company, by T. F. Page, Treasurer." The case was tried to a jury, and upon the trial, and upon application of plaintiff's attorney, the court held that the burden of proof was upon defendant. The plaintiff introduced no evidence, nor did the defendant. And thereupon the court, at request of plaintiff, instructed the jury to return a verdict for plaintiff, which instruction is as follows: "In this case you are instructed to find a verdict for plaintiff for the amount claimed. This is \$800, with interest at 10 per cent. from April 11, 1891." And refused the following instruction, asked for by defendant: "The jury are instructed to return a verdict for the defendant." Jury returned verdict for plaintiff, and judgment rendered thereon by court. Motion for new trial overruled, excepted to, and defendant brings case here for review.

The only question presented in this case is, upon whom was the burden of proof? "In all actions, allegations of the execution of written instruments and indorsements thereon, * * * shall be taken as true unless

the denial of the same be verified." Civ. Code, § 108. The first question, then, to be answered, is, does the petition contain any allegation of indorsement upon the instrument declared upon? This we must answer in the negative. It could with as much propriety be said that, because the note shows on its face that it was made November 11, 1890, and to be paid in five months, and has written thereon, "Due April 11-14, 1891," this would constitute an allegation of nonpayment, because the court could see that the time for which it was to run had expired. Section 87, Civ. Code, provides: "The petition must contain: (1) * * *. (2) A statement of the facts constituting the cause of action in ordinary and concise language and without repetition." What are the facts constituting the cause of action, as stated in this petition? "That Morris made his note for a certain amount, payable to the Union Investment Company, in five months from its date, with given rate of interest, and that the payee sold and delivered it to the plaintiff; that it is due and unpaid." Here is a distinct allegation of title, and how it is derived, and we think the plaintiff is bound by it. Sale and delivery of a note does not include indorsement. It is one of the methods of transferring the title, it is true, but not the only one, and the cause of action would have been as complete if the indorsement on this note had never been written. Nor does indorsement necessarily imply a sale of the instrument indorsed.

But it is contended that a copy of the note is attached, and the indorsement appears thereon. True; but is there any allegation in the petition that intimates that the plaintiff relied upon this indorsement as his source of title? Not the slightest hint is given of any such intention. He does not allege the execution of any indorsement, nor even allege that it is a copy of the note with all indorsements thereon, or that the copy shows any indorsement. Can it be said that an indorsement is a part of the note? We think not. It is a separate and independent contract. "The indorsement of a note is not merely a transfer thereof, but it is a fresh and substantive contract." Daniels, Neg. Inst. § 689; Hess v. State, 5 Ohio, 9. We think that, as Case did not refer to any indorsement, the unverified denial of Morris put in issue the title of Case to the note, and the burden of proof was upon him. We think this is well settled in this state. In Washington v. Hobart, 17 Kan. 275, the court says: "Originally, where a note payable to order is transferred, it is so transferred by a written indorsement, placed on its back; and, ordinarily, where such note is sued on, the plaintiff inserts in his petition an allegation of the execution of such indorsement, and such allegation can be put in issue only by a denial thereof, verified by affidavit. But a negotiable promissory note payable to order, as well as every other kind

of promissory note, may be transferred in this state without any indorsement, or without any written instrument, and by delivery merely, and so as to authorize the transferee to sue in his own name. Therefore, in an action on any kind of promissory note, by a person who is not the payee thereof, where the petition says nothing about any indorsement thereof, but there is an allegation in the petition stating that the note was duly transferred to the plaintiff, and that he is now the owner and holder thereof, such allegation may be put in issue by a pleading not verified by affidavit." A parol assignment of this note would have sustained the allegation of the petition, yet a failure to verify a denial would not admit a parol assignment. Pattie v. Wilson, 25 Kan. 328. If the note was in fact indorsed, the plaintiff should have alleged it in his petition as one of the facts constituting his cause of action. A failure to file an affidavit of denial, mentioned in section 108 of the Civil Code, admits nothing except the execution of a written instrument and the making of an indorsement thereon when they are set forth and alleged in the petition. The judgment of the district court will be reversed, and case remanded for new trial. All the judges concurring.

PHILLIPS et al. v. LOVE et al.

(Court of Appeals of Kansas, Southern Department, C. D. Sept. 5, 1896.)

APPEAL—CASE-MADE—SETTLEMENT AND ALLOWANCE.

Where a case-made was duly served on the adverse party within the time fixed by the order of the court extending the time in which to make and serve a case for review in a higher court, and the parties agree that the case so made may be presented to the judge who tried the case for settlement and allowance, and the same is allowed and signed by the judge, but it does not show that he considered any amendments, or that there were no amendments suggested, and it does not show that he considered and settled the case-made, and it does not show that the parties were present at the time of the allowance and signing of the same, and waived amendments, it does not sufficiently show that the necessary prerequisites have been complied with to make it a valid case-made.

(Syllabus by the Court.)

Error from district court, Cowley county; M. G. Troup, Judge.

Action by J. Mack Love and others, executors of James Hill, deceased, against La Quincy Phillips and another, administratrix and administrator, respectively, of James Phillips, deceased, to set aside a sale in foreclosure proceedings. From a judgment for plaintiffs, defendants brought error. On the death of defendant Phillips, Benson C. Lent, executor, was substituted. On motion to dismiss. Granted.

Charles L. Brown and Madden & Buckman, for plaintiffs in error. Pollock & Love, for defendants in error.

JOHNSON, P. J. On March 1, 1889, James Phillips commenced an action in the district court of Cowley county, Kan., upon two promissory notes for \$650 each, against Aaron H. Harnley, Martha J. Harnley, and James Hill. Each of these notes had been made by Aaron H. Harnley and Martha J. Harnley, in favor of James Hill, and had been sold by him to the plaintiff, James Phillips, and indorsed in blank. The Harnleys, being husband and wife, had given a mortgage to secure these notes to James Hill, and, at the time the notes were indorsed by Hill to the plaintiff in that case, he also delivered to the said Phillips the mortgage securing said notes, and Phillips, also, in the same action, asked to have his mortgage foreclosed, and the mortgaged property sold without appraisal, as provided in the mortgage, to satisfy the debt, and also asked for personal judgment against the defendants, Aaron H. Harnley, Martha J. Harnley, and James Hill. The two notes sued upon were made payable at different times, and at the maturity of one of the notes it was duly protested for nonpayment, but the other note was not protested, and therefore the action afterwards proceeded, so far as the indorser, James Hill, was concerned, upon the note which was protested only. After the commencement of the action upon the notes and to foreclose the mortgage, and before judgment, the defendant James Hill died testate, and the defendants in error in this case, J. Mack Love, William Upton, and Eliza Hill, were duly appointed as the executors of his estate, and the foreclosure action was revived in the district court of Cowley county, Kan., in the name of said executors. At about the same time the plaintiff, James Phillips, died, and La Quincy Phillips and Edward D. Keys, plaintiffs in error in this case, were duly appointed administrators of his estate, and the foreclosure action was revived in the district court of Cowley county, Kan., in the names of such administrators. After this petition in error was filed in the supreme court, the plaintiff in error, La Quincy Phillips, married one Benson C. Lent, and after such marriage the said La Quincy Phillips died testate and without children, leaving the said Benson C. Lent as her sole and only heir at law, and he was also appointed as the executor of said will, and, as there was no other administrator appointed for the estate of James Phillips, deceased, upon the death of said La Quincy Phillips Lent, the said Edward D. Keys became the sole surviving administrator of said estate, and on the 5th day of December, 1893, this action was revived in the supreme court of this state in the name of Benson C. Lent as sole heir at law and executor of the last will and testament of La Quincy Phillips Lent, deceased, and Edward D. Keys, sole surviving administrator of the estate of James Phillips, deceased, and now stands in this court revived in manner and form above stated.

After the revivor of the original action, as stated, in the district court of Cowley county, Kan., the necessary amended pleadings were filed, and the issues made up, and the case was finally reached for trial in said court on the 1st day of February, 1890, and on that day judgment was rendered in favor of the plaintiffs against the defendants Aaron H. Harnley and Martha J. Harnley for the full amount due upon both promissory notes sued on in this action, and also judgment foreclosing the mortgage and ordering the property described therein to be sold without appraisal, after six months from the date of said judgment, and barring the defendants Harnley from any interest in the mortgaged property; and by consent and agreement between the plaintiffs and the defendants the executors of James Hill, deceased, the case was continued until the next regular term, as to the liability of the executors of the Hill estate; and at the next term, and on the 26th day of April, 1890, the case was reached for trial as between the plaintiffs and the executors of the Hill estate, and on that day judgment was rendered in favor of the plaintiffs against the executors of the Hill estate, for the full amount of the note which had been protested, together with interest, amounting at that date to the sum of \$810.67; and in the same judgment it was ordered concerning the real estate described in plaintiff's petition, and theretofore ordered sold by said court, as provided in the decree of said court theretofore entered in said action, that after the payment of costs and taxes, the balance of the purchase price be applied to the payment of the judgment against the executors of the Hill estate. All of the parties to that action were present in open court by their respective attorneys at the time both judgments were rendered, and no exceptions were taken by either party to any part of either of said judgments.

Afterwards, and on the 11th day of August, 1890, being more than six months after the rendition of the first judgment above referred to, and in which decree of foreclosure was entered, the plaintiff caused an order of sale to issue in said case, commanding the sale of the real estate described, without appraisal, as provided in said decree. Said order of sale was delivered to the sheriff on the 11th day of August, 1890, and he proceeded to advertise said real estate for sale in the manner provided by law, without appraisal, and gave public notice that he would sell the property on the 15th day of September, 1890. This notice was published in the Arkansas City Dispatch the regular length of time, that being a weekly newspaper, printed and published in Arkansas City, Cowley county, Kan., being the same city in which the executors of the Hill estate resided. On two different occasions, about one week or ten days before said sale, Charles L. Brown, one of the attorneys for the plaintiffs in that case, called the attention of J. Mack Love,

who was one of the executors of the Hill estate, and also a member of the law firm of Eaton, Pellock & Love, who were the attorneys for said executors, to the fact that the sale was being advertised. On the day of sale the sheriff offered said property for sale to the highest bidder, pursuant to said advertisement. The executors of the Hill estate were not present at said sale, nor was any one there to represent them. Charles L. Brown, one of the attorneys for the plaintiff, attended said sale, and purchased the real estate in the name of La Quincy Phillips for \$150, that being the highest and best bid for said property, and the money bid was paid to the sheriff, and the proper credit given. Afterwards, and on the 17th day of September, 1890, the plaintiffs filed in said court their motion to confirm said sale, the return of the sheriff having been made at that time. On the same day that said motion was filed, J. Mack Love, one of the executors of the Hill estate, and one of the attorneys for the executors, saw the motion on file, and examined it. Afterwards, and on the 19th day of September, 1890, there having been no objections made to the confirmation of said sale, the motion to confirm was considered by the court, and the decree rendered and entered to confirm said sale, and ordering the sheriff to make a deed to the purchaser. After the confirmation of said sale, and on the 1st day of October, 1890, the executors of the Hill estate filed a motion in said court to set aside said sale, which motion was considered by the court, and on the 2d day of October, 1890, upon objection being raised, the court held that it had no jurisdiction to consider said motion, and thereupon the court dismissed said motion without prejudice. Afterwards, and on the 16th day of October, 1890, the sheriff made to the purchaser at said sale a sheriff's deed for the property sold, which deed was recorded on the 17th day of October, 1890. Afterwards, and on the 25th day of October, 1890, the defendants in error in this case, as plaintiffs, commenced this action against La Quincy Phillips alone, to set aside said sale, and set aside said deed. To that petition the defendant in that case, La Quincy Phillips, filed her demurrer upon the grounds (1) that there was a defect of parties defendant, as shown by said petition, and (2) that said petition did not state facts sufficient to constitute a cause of action in favor of plaintiffs and against the defendant. That demurrer was heard on the 21st day of April, 1891, and was by the court sustained as to the first ground therein, to wit, that there was a defect of parties defendant, but was overruled by the court as to the second ground therein, to which ruling the defendant at the time duly excepted. Afterwards, and on the 1st day of May, 1891, the plaintiffs filed their amended petition in said case, making La Quincy Phillips and Edward D. Keys, administrators of the estate of James Phillips, deceased, additional parties defendant. Service was made upon said ad-

ditional defendants, and on the 31st day of July, 1891, all of the defendants joined in an answer to said amended petition. Afterwards, and on the 22d day of September, 1891, the case was regularly reached for trial. The defendants at the time of trial objected to the introduction of any evidence by the plaintiffs under said amended petition, upon the ground that the amended petition, together with the exhibits, did not state facts sufficient to constitute a cause of action, which objection was by the court overruled, and excepted to; and, the jury having been waived, the case was then tried to the court. At the close of plaintiffs' testimony the defendants filed a demurrer to said testimony, which was by the court overruled, and excepted to; and the court, upon full hearing, rendered judgment in favor of plaintiffs, the executors of the Hill estate, and against the defendants in that case, these plaintiffs in error, setting aside said sale and setting aside the deed to said real estate. The defendants below then filed their motion for a new trial, which was by the court, on consideration, overruled. The defendants below, having saved exceptions to all the rulings of the court, took time, made a case, and bring the matter here for review.

We are met at the first step in the review of this case with a motion to dismiss the petition in error for the reason that the case-made was not settled, allowed, and signed by the judge who tried the case, as required by law. Case does show that the attorneys for defendants consented in writing that the case might be presented to the judge who tried the case for allowance and settlement on the 24th day of December, 1891; that the case-made nowhere shows that the attorneys for plaintiffs waived their right to suggest amendments to such case-made, nor does it show the amendments were not suggested by counsel for plaintiffs; does not show that counsel for plaintiffs was present when such case-made was settled, nor does it show that amendments suggested by counsel for plaintiffs were considered or passed upon by the judge settling the case-made, or that the rights of plaintiffs to suggest amendments to such case-made was ever in any way considered by counsel for defendants or by the trial judge. The record shows that the case was made and served on the attorneys for the plaintiffs below within the time allowed by the court, and they consented that the case-made might be presented to the Honorable M. G. Troup, judge of the court, for allowance and settlement the 24th day of December, 1891, and they waived notice of the time and place of settlement. The case was signed by the judge December 24, 1891. Section 548 of the Code of Civil Procedure provides: "The case so made, or a copy thereof, shall, within three days after the judgment or order is entered, be served upon the opposite party or attorney who may within three days thereafter suggest amendments thereto in writing, and present the same to the party making the case,

or his attorney. The case, and amendments shall be submitted to the judge, who shall settle and sign the same and cause it to be attested by the clerk and the seal of the court to be thereto attached." The record fails to show that the attorneys for the plaintiffs were present at the signing of the case. They had waived the service of notice of time and place, and consented that the case-made might be presented to the judge for settlement, but they did not agree or consent that the judge should sign the case as thus prepared, which was to be presented for allowance and settlement. The record does not show that the plaintiffs had waived their right to suggest amendments to the case as thus made, or that they had not suggested amendments in writing, nor does it show that the judge settled the case. It shows that he signed and allowed it as a case-made. It nowhere appears that the judge considered any amendments, or that none were suggested, or the counsel had none to suggest, or that they had waived in any manner their right to suggest them. *Safford v. Turner*, 53 Kan. 729, 37 Pac. 985; *Weeks v. Medler*, 18 Kan. 427; *Railway Co. v. Greenwood*, 1 Kan. App. 330, 41 Pac. 225; *Shoe Co. v. Martin*, 45 Kan. 767, 26 Pac. 424; *Railway Co. v. Roach*, 18 Kan. 592. The case-made not showing that the same was settled by the trial judge, as required by section 548 of the Code of Civil Procedure, the case will be dismissed at the cost of the plaintiffs in error. All the judges concurring.

MORRIS et al. v. MIX.

(Court of Appeals of Kansas, Northern Department, C. D. Sept. 12, 1896.)

MORTGAGES—ASSUMPTION BY GRANTEE.

The liability of a grantee who assumes the payment of a mortgage on land conveyed to him depends upon the personal liability of his immediate grantor. If the grantor is not so liable, the mortgagee cannot claim any deficiency from such grantee.

(Syllabus by the Court.)

Error from district court, Osborne county.

Action by Eureka Mix against Marion L. Swisher, Margaret A. Swisher, Jenkin W. Morris, and John Norton. The action was dismissed as to defendants Swisher, and from a decree for plaintiff against the remaining defendants, the latter bring error. Reversed.

W. P. Douthitt, Eugene Wolfe, E. E. Chesney, and Wheat & Wheat, for plaintiffs in error. W. H. Clark, for defendant in error.

GILKESON, P. J. Eureka Mix brought suit against Marion L. Swisher and Margaret A. Swisher and the plaintiffs in error upon a certain note and mortgage, made, executed, and delivered by the said Swishers to R. J. Waddell & Co. The mortgage sued upon covered the following real estate, viz.: S. W. $\frac{1}{4}$ section 2, township 10, range 13, and E. $\frac{1}{2}$ N. W. $\frac{1}{4}$ section 11, township 10, range 13. The

allegations of the petition are those usually found in a petition for foreclosure of a mortgage, and in addition thereto the following: "That the defendants Jenkin W. Morris and Emily J. Morris became the legal owners of said lands in the mortgage described by warranty deed on the 15th day of October, 1888, from one E. F. Robinson and wife; that, as a part of the consideration for said lands, Jenkin W. Morris and Emily J. Morris assumed and agreed to pay the mortgage sued on in this action; that the said defendant John Norton became the legal owner of the said lands described in the said mortgage on the 20th day of December, 1888, by virtue of a deed a copy of which is hereto attached," etc.; "that, as a part of the consideration for said lands, the said defendant John Norton assumed and agreed to pay the mortgage sued on in this action; that the said defendant John Norton and his wife now have or claim to have some interest in or to said lands by virtue of said deed, herein set up and marked 'Exhibit E,' but whatever interest, lien, or right they may have, if any, to said lands, is junior, inferior, and subject to the lien of this plaintiff"; and prayer for judgment against all the defendants, for foreclosure of the mortgage, sale of lands, and that all defendants be barred, etc. The deeds referred to and attached to the petition are: (1) E. F. Robinson and Adah J. Robinson to Jenkin W. Morris, dated October 15, 1888, conveying the S. W. $\frac{1}{4}$ of section 2, and the E. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of section 11, all in township 10, range 13, Osborne county, Kan., and other tracts, and containing the following clause: "To have and to hold the same together with all and singular the tenements, hereditaments, and appurtenances thereto belonging or in anywise appertaining, forever. And said parties of the first part, for themselves, their heirs, executors, or administrators, do hereby covenant, promise, and agree to and with the said party of the second part that at the delivery of these presents they are lawfully seised in their own right of an absolute and infeasible estate of inheritance in fee simple of and in all and singular the above granted and described premises, with the appurtenances; that the same are free, clear, discharged, and unincumbered of and from all and other grants, titles, charges, estate, judgments, taxes, assessments, and incumbrances of what nature or kind soever, except mortgages of record on said lands and interest thereon from this date, which the grantee herein assumes as part payment (crop of 1888 retained by grantor, and possession till January 1st, 1890); and that they will warrant and forever defend the same unto said party of the second part, his heirs and assigns, against all and every person or persons whomsoever lawfully claiming or to claim the same." (2) Jenkin W. Morris and Emily J. Morris to John Norton, as follows: "This indenture, made this 26th day of December, A. D. 1888, between Jenkin W. Morris and Emily J. Morris, his wife, of Leavenworth county,

in the state of Kansas, of the first part, and John Norton, of Shawnee county, in the state of Kansas, of the second part, witnesseth: That said parties of the first part, in consideration of the sum of one and no/100 dollars, the receipt whereof is hereby acknowledged, do by these presents remise, release, and quitclaim unto said party of the second part, his heirs and assigns, all the following described real estate, situated in the county of Osborne and state of Kansas, to wit: The southwest quarter (S. W. $\frac{1}{4}$) of section two (2), township ten (10), range thirteen (13) west; also, the east half of the northwest quarter (E. $\frac{1}{2}$ N. W. $\frac{1}{4}$) section eleven (11), township ten (10), range thirteen (13) west; also, the southwest quarter (S. W. $\frac{1}{4}$) of section twenty (20), township eight (8), range thirteen (13) west; also, the west half (W. $\frac{1}{2}$) of section twenty-nine (29), township eight (8), range thirteen (13) west,—all in Osborne county, Kansas, according to the United States government survey thereof. The grantee hereby assumes all liability of the grantor on account of any mortgages against said property. To have and to hold the same, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, forever. In witness whereof the said parties of the first part have hereunto set their hands the day and year first above written. Jenkin W. Morris. [Seal.] Emily J. Morris. [Seal.]” Summonses issued thereon as follows: To the sheriff of Chautauqua county for Marion L. and Margaret A. Swisher; to the sheriff of Shawnee county for John Norton and Mrs. John Norton; to the sheriff of Leavenworth county for Jenkin W. Morris and Emily J. Morris,—which were duly served and returned. None of the defendants so served appeared in the action. Upon the trial of this cause the plaintiff dismissed her action “without prejudice as to Marion L. Swisher and Margaret A. Swisher, his wife, it being shown to the court that said defendants Margaret A. Swisher and Marion L. Swisher had no interest in the lands described in the petition of said plaintiff at the time of the beginning of the action.” And thereupon the court found as follows: “After hearing the evidence, finds that all the allegations and averments contained in the petition of said plaintiff filed herein are true, and that there is due from said defendants Jenkin W. Morris and John Norton to the said plaintiff, on the notes and mortgage sued on in this action, the sum of eleven hundred thirty-eight and $\frac{15}{100}$ dollars,”—and rendered judgment accordingly. There is no indorsement upon either of the summonses issued herein of the amount for which judgment will be taken if defendants fail to appear. Defendants Morris and Norton bring the case here for review upon the transcript.

The principal question in this case is as to the liability of Jenkin W. Morris upon the

assumption clause in this deed. In other words, can a mortgagee avail himself of an assumption to pay his mortgage, contained in a deed to an intermediate purchaser, unless the purchaser's grantor was personally liable to pay the debt? Robinson is the immediate grantor of Morris. From whom or upon what conditions he obtained title is not shown. It is not alleged that Robinson assumed this mortgage, or was under any obligation to pay the same, or had any interest, legal or otherwise, in having Swisher's covenant performed. We think the liability of the grantee results from an application—or, more correctly, an extension—of the equitable doctrine of subrogation, and the authorities with great uniformity hold “that the assuming grantee becomes the principal debtor, and the mortgagor becomes the surety, and the mortgagee is entitled, if at all, under the principle of equity that ‘A creditor is entitled to the benefit of all collateral obligations for the payment of the debt which a person standing in the situation of a surety for others has received for his indemnity.’” Does not, then, the liability of the grantee to the mortgagee depend upon the fact that his immediate grantor is also personally liable? We think so, since there will be no place for the operation of subrogation in the absence of such personal liability of the grantor. And from a careful and very extended examination of the adjudicated cases we are irresistibly led to the conclusion that the liability of a grantee who assumes the payment of a mortgage on land conveyed to him depends upon the personal liability of his immediate grantor. Therefore, if a grantor is not so liable, the mortgagee cannot claim any deficiency from such grantee. “A mortgagee cannot avail himself of an assumption to pay his mortgage, contained in a deed to a subsequent purchaser, unless the grantor was himself personally liable to pay the debt. It therefore not appearing that there has ever existed any obligation on the part of De Hart to indemnify Pfaum against the mortgage debt, each grantee who assumed the payment of the mortgage was bound thereby only to indemnify; and, if no liability to pay the mortgage debt existed on the part of the immediate grantor, there was no ground for claim of indemnity on the part of the grantor, and, consequently, no personal liability on the part of the grantee to pay the mortgage debt.” *Norwood v. De Hart*, 30 N. J. Eq. 412. “An action brought by the holder of certain premises, liable under a provision, contained in a deed thereto to him, that he purchased the same subject to two certain mortgages, and his agreement therein contained to assume and pay the same as part of the consideration and purchase price of said premises, cannot be maintained, unless it is alleged and proved that the grantors of said owner were in some way liable to pay the plaintiff therein, or his assignors, the debt secured by the mortgages, or, at least, they had a legal interest in having the covenant

in such deed performed." *Carrier v. Paper Co.*, 73 Hun, 287, 26 N. Y. Supp. 414. This question has also been discussed by Mr. Desty in his notes to *King v. Whitely*, 10 Paige, 465 (4 Lawy. Ed. N. Y. Ch. p. 1052), and he states the doctrine to be: "Where the grantor of an equity of redemption in mortgaged premises is not personally holden for the debt, and the covenants from him contained covenants of seisin and warranty, and a statement that the premises are subject to the mortgage the payment of which is assumed by the grantee, the latter is not liable personally for the mortgage debt, or any part thereof. The assumption of the mortgage debt by the subsequent purchaser will not in any case be available to the mortgagee, unless the grantor was himself personally liable for the payment of the mortgage debt. Unless the grantor is personally liable for the debt, the promise of the grantee, the purchaser, is held to be a mere nudum pactum, and, of course, without efficacy in favor of either the grantor or mortgagee. The mortgagee cannot look to the grantee personally at all, because the assumption is but an indemnity, and, the grantor not being liable, the indemnity is practically a nullity. To make the promise of a grantee to pay the mortgage available to the mortgagee of the land conveyed to him, it must be made to a person personally liable for the mortgage debt. Where a grantor of an equity of redemption in mortgaged premises is not personally liable to pay the mortgage debt, and has no legal or equitable interest in such payment, except so far as the mortgage may be a charge on the land mortgaged, his grantee thereof incurs no liability to the holder of the mortgage by reason of the covenant on his part contained in the deed to assume and pay the mortgage,"—citing *Trotter v. Hughes*, 12 N. Y. 80; *Vrooman v. Turner*, 69 N. Y. 280; *Cashman v. Henry*, 5 Abb. N. C. 232; *Biddel v. Brizzolara*, 64 Cal. 361, 30 Pac. 609; *Crowell v. St. Barnabas Hospital*, 27 N. J. Eq. 656; *Crowell v. Currier*, 27 N. J. Eq. 155; *Norwood v. De Hart*, 30 N. J. Eq. 414; *Mount v. Van Ness*, 33 N. J. Eq. 265; *Wise v. Fuller*, 29 N. J. Eq. 266; *Birke v. Abbott*, 103 Ind. 1, 1 N. E. 485; *Huyler v. Atwood*, 28 N. J. Eq. 505.

In the state of New York this question has arisen in almost every conceivable form, and the more it has been discussed the clearer have the courts become in their statements of it. In *Carter v. Holahan*, 92 N. Y. 504, the court said: "The only ground upon which a liability has been sustained between others than the immediate parties to such contract is that growing out of the relation of principal and surety, whereby one becomes entitled to the benefit of any security received by the other from a party primarily liable for the payment of the debt. Drake never having been personally liable for the payment of any part of the mortgage debt, the covenant taken by him from Kerr did not inure to the benefit of his grantor, or to that of the holder of

the mortgage. Should a grantee who assumes the payment of a mortgage convey to a third person, taking a similar covenant for his indemnity against the obligation assumed by him, his grantor would be entitled to the benefit of that contract. If a break, however, occurs in the chain of successive covenants, its foundation is destroyed." And this doctrine has been asserted in *Thayer v. Marsh*, 75 N. Y. 340; *Dunning v. Leavitt*, 85 N. Y. 30; *Wilbur v. Warren*, 104 N. Y. 192, 10 N. E. 263; *Lorillard v. Clyde*, 122 N. Y. 504, 25 N. E. 917; *Wager v. Link*, 134 N. Y. 125, 31 N. E. 213; *Durnherr v. Rau*, 135 N. Y. 219, 32 N. E. 49. Also, in *Minnesota*, *Nelson v. Rodgers* (Minn.) 49 N. W. 526; *Brown v. Stillman*, 43 Minn. 126, 45 N. W. 2; also, in *Keller v. Ashford*, 133 U. S. 610, 10 Sup. Ct. 494. In New Jersey this question has frequently been before the courts, and thoroughly considered, as shown by cases before cited. In *Mount v. Van Ness*, 33 N. J. Eq. 265, the court used the following language: "If the grantor is not personally liable for the mortgage debt, the mortgagee cannot look to the grantee personally at all, because the assumption is but an indemnity, and, the grantor not being liable, the indemnity is practically a mere nullity. Nor does the fact that the grantee obtained the benefit of the mortgages, by having the amount allowed to him as part of the purchase money, make any difference. The purchase money was payable to his grantor, and the assumption is to him, and in his favor." This doctrine obtains in Virginia. "In such cases the mortgagee does not acquire a right of action against the assuming purchaser, but the benefit flowing to him from the contract is limited to a right to be subrogated to the rights of the debtor. His right is simply a right of substitution, subject, however, to the equities between the purchaser and his immediate grantor." *Osborne v. Cabell*, 77 Va. 462; *Willard v. Worsham*, 76 Va. 392. An assuming vendee of mortgaged premises is yet not liable to the holder of the mortgage, if his immediate grantor is not personally liable, also, upon the ground that an assumption is a mere indemnity, not made for the benefit, primarily, of the holder of the mortgage, before the indemnity of the immediate vendor, and the benefit flowing to the holder of the mortgage from the contract is only a right to be subrogated or substituted to the right of the immediate grantor, and that there is no consideration for anything further than a mere indemnity. *Mellen v. Whipple*, 1 Gray, 317.

But it is contended that "a person for whose benefit a promise to another upon sufficient consideration is made may maintain an action in his own name against his promisor." This is undoubtedly the doctrine in Kansas, and it is also the law in most of the states. And it might not be out of place at this point to state that in Pennsylvania, one of the few states which holds that a person assuming the payment of a

mortgage is liable, even though his vendor is not personally liable to pay the same, a third party for whose benefit one has made a promise to another on adequate consideration cannot sue thereon in his own name, while in New York he can. In *Dunning v. Leavitt*, 85 N. Y. 30, this proposition was specially pressed upon the court: that the party was liable to such vendee for the reason that a third party can maintain an action for and upon a promise made to still another party for the benefit of the third party. The court says: "It is said that the action can be sustained upon the doctrine of *Lawrence v. Fox*, 20 N. Y. 263, and kindred cases; but I know of no authority to separate the proposition that a person not a party to the promise, but for whose benefit the promise is made, can maintain an action to enforce the promise, where the promise is void as between the promisor and the promisee for fraud, or want of consideration, or failure of consideration. It would be strange, I think, if such an adjudication could be found. The party suing upon the promise, in cases like *Lawrence v. Fox*, is in truth asserting a derivative right." In *Vrooman v. Turner*, 69 N. Y. 280, it was held that "an assumption clause in a deed did not give a right of action to the mortgagee where the grantor was not himself liable to pay the mortgage debt, although in that case there was ample consideration for the promise of the defendant. There are limitations upon this rule, or, rather, the rule is not so far extended as to give a third person who has only an indirect and incidental benefit by the contract the right to sue upon it." In the case of *Simson v. Brown*, 68 N. Y. 355 et seq., the following language is used: "It is not every promise made by one to another, from the performance of which a benefit may inure to a third, which gives a right of action to such third person. He being neither privy to the contract nor to the consideration, the contract must be made for his benefit as its object, and he must be the party intended to be benefited. We think this is a correct statement of law,"—citing, among other authorities, *Vrooman v. Turner*, 69 N. Y. 280; *Dunning v. Leavitt*, 85 N. Y. 30; *Burton v. Larkin*, 36 Kan. 249, 13 Pac. 399. "It is not sufficient that the promise be made by one to another, from the performance of which a benefit may inure to a third. The contract must be made for his benefit as its object, and he must be the party intended to be benefited. *Burton v. Larkin*, supra. The benefit of the third party must have been the object of the contract, within the contemplation of the parties. The parties must have had this in their mind. It must have been more than merely incidental. It must appear as considered, and therefore made, and the grantor must have a legal interest that the covenant be performed in favor of the party claiming performance."

All this must be proved by more than the mere production of an assumption clause in the deed from a vendor to a vendee, for, as the Minnesota cases say, "the presumption is that the vendor and vendee of mortgaged property have in mind, consider, contemplate, and regard, only their own interests, and not the interests of the mortgagee." They are not seeking to increase the security of the mortgagee. The vendor is seeking only his own interests,—indemnity and security that he will never have to pay the mortgage after he has parted with the mortgaged property,—and the vendee is seeking to assume to promise the least possible in order to get the property; and any other presumption would do violence to the well-known course of business in such transactions, and would contradict the universal experience of mankind. The vendor of mortgaged property is entirely careless and indifferent as to the interests of the mortgagee. He is anxious to sell, and cares nothing about the mortgagee. Would he imperil his sale by asking or insisting that his grantee shall assume a mortgage for which he is not himself personally liable? He is perfectly willing that the property, in which he is no longer interested, may be taken. Does he regard the interests of the mortgagee as of more importance than his own, so that he will take the chances of spoiling his sale to have done a thing that he has no interest in? We think not. And what has been said with reference to the liability of Morris applies to that of Norton, and with much greater force, for Norton's contract is, strictly speaking, one of indemnity, viz.: "The grantee hereby assumes all liability of the grantor on account of any mortgages against said property." And unless Morris was liable, and it was so alleged and proven, certainly no liability could attach to Norton. The judgment of the district court will be reversed, and case remanded for further proceedings in accordance with the views herein expressed. All the judges concurring.

MORGAN v. SALINE VALLEY BANK.

(Court of Appeals of Kansas, Northern Department, C. D. Sept. 12, 1896.)

CLAIMS AGAINST DECEDENTS' ESTATES — APPEALS TO DISTRICT COURT — PRACTICE — GARNISHMENT — RIGHTS OF PLAINTIFF IN PROPERTY ATTACHED.

1. In an action for the recovery of money the plaintiff, in order to recover, must prove by satisfactory and competent evidence what, if any, sum is due him from the defendant.

2. Upon an appeal from the probate to the district court, the latter proceeds to try the case anew; and where the indebtedness is not admitted it devolves upon the claimant, before he is entitled to judgment, to establish his claim by competent testimony, as originally required in the probate court.

3. The provisions of the Code for the disposition of attached property, under the terms of section 185 of the justices' act (paragraph 5041,

Gen. St.) are applicable to proceedings in attachment before justices of the peace.

(Syllabus by the Court.)

Error from district court, Lincoln county; W. G. Eastland, Judge.

Action by the Saline Valley Bank against Eula Morgan, administratrix of W. F. Morgan, deceased, in the probate court. There was a judgment for defendant, and plaintiff appealed to the district court, and from a judgment there rendered in its favor defendant brings error. Reversed.

David Ritchie and Geo. D. Abel, for plaintiff in error. C. B. Daughters, for defendant in error.

GILKESON, P. J. This action was originally brought in the probate court of Lincoln county, Kan., by the Saline Valley Bank, as plaintiff, against the estate of W. F. Morgan, deceased, to establish as a claim against said estate the balance due upon a certain judgment claimed to have been rendered by one James H. Smith, a justice of the peace of said county, against said W. F. Morgan, during his lifetime, and in favor of said bank, for the sum of \$184.35 and interest at 10 per cent. It is alleged that, in the original action before the justice of the peace, a promissory note of the face value of \$200 was garnished in the hands of one David Ritchie, and by him turned over to the court, which was on the 28th day of March, 1890, sold by order of the court, for the sum of \$25, at constable's sale. The probate court found that the judgment and demand of the Saline Valley Bank had been fully paid, and rendered judgment against said bank for costs. From this judgment the bank appealed to the district court of Lincoln county, Kan., and upon trial had therein to the court, jury being waived, judgment was rendered against the estate, and in favor of said bank. Motion for new trial filed and overruled, and the administratrix brings case here for review.

There are several errors assigned, but we shall only consider two:

"That the court erred in rendering judgment in said cause without requiring the plaintiff to prove its said claim, said decision and judgment having been rendered by said court without any proof of said demand having been offered by said plaintiff." The record shows that on April 1st notice was served on the administratrix that a claim would be presented against the estate in the probate court of Lincoln county on the 15th day of April, at the hour of 10 o'clock, and that the claim was founded upon a judgment had in the lifetime of the said W. F. Morgan, deceased, before a justice of the peace in and for Elkhorn township, in and for said county, stating the amount of the demand, and attached thereto a copy of the proceedings had before the justice of the peace, and an affidavit thereto attached in words and figures as follows, to wit:

"State of Kansas, Lincoln County—ss.: Before me, the subscriber, a probate judge in and for said county, personally came A. Marshall, and, being by me first duly sworn, upon his oath says that the account there-to annexed is just and true and correct, and that, to the best of his knowledge and belief, he has given credit to the estate for all payments and offsets to which it is entitled, and that the balance claimed, \$189.00, is justly due. [Signed] A. Marshall.

"Sworn to and subscribed before me this 3rd day of April, 1891. H. M. Gilpin, Probate Judge."

After several continuances this cause was heard by the probate court, who rendered the following decision: "Tuesday, April 28th, 1891, 10 o'clock a. m. After hearing the evidence and argument of counsel, and being fully advised in the premises, the court finds that the said judgment demand of the Saline Valley Bank against said estate has been fully paid, and the costs of this hearing, amounting to \$6.85, taxed to plaintiff." The testimony offered in the probate court has not been preserved in the record. The bank gave notice by its attorney in open court of an appeal, and filed the affidavit required by statute, gave bond, and took its appeal to the district court of Lincoln county, by filing a transcript of the proceedings had in the probate court with the clerk of the district court. In the district court the administratrix filed an answer, consisting of two defenses: (1) Admitting the pendency of a certain action on the 10th of February, 1890, before James H. Smith, a justice of the peace in and for Elkhorn township, Lincoln county, Kan., in which the Saline Valley Bank was plaintiff and W. F. Morgan was defendant, and that a summons of garnishment was duly issued and served on David Ritchie, and that he answered admitting that he had in his possession a certain promissory note belonging to said W. F. Morgan, and that by order of the court he turned the same over to the court; that afterwards an order of sale was issued by said court to E. E. Abbott, the constable thereof, and that said Abbott, by virtue of the said order of sale, pretended to sell the said note at public auction, and that the plaintiff, the Saline Valley Bank, pretended to purchase said note at said sale for the sum of \$25; that said pretended sale was absolutely void; that afterwards there was paid to the plaintiff, the Saline Valley Bank, the sum of \$208.70 upon said note, which they ask to be offset against this claim and demand. (2) Alleging that no notice of sale was posted for 10 days previous and prior to the time of said pretended sale, as required by law,—and prayer for judgment that the sale be declared void, and the sum of money so as aforesaid paid be offset against the demand. The plaintiff filed a demurrer to the first cause of action set forth in the defendant's answer, that it did not

state facts sufficient to constitute a defense, which was sustained by the court, and replied to the second cause of defense by a general denial. The only testimony offered at the trial in the district court shown by the record is that of E. E. Abbott, the constable, in reference to the time when he received the order of sale, and when he posted his notice and made the sale. Paragraph 2848, Gen. St. 1889, provides: "Any person may exhibit his demand against such estate by serving upon the executor, or administrator, a notice in writing, stating the nature and amount of his claim, with a copy of the instrument of writing, the account upon which the claim is founded and such claim shall be legally exhibited from the time of serving such notice." Paragraph 2870 provides: "Any person having a demand against any estate may establish the same by the judgment, or decree of some court of record in the ordinary course of proceeding, and exhibit a copy of such judgment or decree to the probate court, but the estate shall not be liable for costs in any such proceeding commenced within one year from the date of the letters of administration." Paragraph 2872 provides: "No probate court shall allow any demand against any estate unless the claimant first make oath in open court, or file an affidavit with such claim, stating, to the best of his knowledge and belief he has given credit to the estate for all payments and offsets to which it is entitled, and that the balance claimed is justly due. The affidavit in this section shall not be received as evidence of the demand, but the same shall be established by competent testimony before it is allowed or adjusted." Paragraph 2980, Gen. St. 1889, provides: "Upon the filing of such transcript and papers in the office of the clerk of the district court, the court shall be possessed of the cause, and shall proceed to hear, try and determine the same anew, without regard to any error, defect or other imperfection in the proceeding in the probate court." We think, under the section last cited, that the jurisdiction of the district court is strictly appellate, the same as it would be in the case of an appeal from the justice of the peace court, and that it would have no larger jurisdiction than had the probate court in the first instance. This being true, it was incumbent upon the bank to establish its claim by competent testimony, the same as is required to be done in the probate court under paragraph 2872, *supra*. This claim, being founded upon a judgment rendered before a justice of the peace, did not establish itself under paragraph 2870; it not being a judgment of a court of record, and the statute expressly provides "that after the transcript is filed, the district court shall try the case anew." And certainly to try it anew, and find that a certain amount was due, would require proof of the amount; and in this respect there is a total failure to show

any amount due upon the judgment of the justice of the peace.

Another point contended for by the plaintiff in error is "that the court erred in sustaining the demurrer to the second ground of defense in the answer." The garnishment process simply gives to the creditor the same right to enforce the payment of the money from the garnishee that the debtor previously had. It is, in effect, only an assignment of the claim from the debtor to the creditor. The creditor gains no more or greater rights than the debtor had, and the garnishee loses no rights, and the payment of the money can be enforced from the garnishee to the creditor only by ordinary action. *Board v. Scoville*, 13 Kan. 32; *Phelps v. Railroad Co.*, 28 Kan. 169; *Mull v. Jones*, 83 Kan. 115, 5 Pac. 383. The attaching creditor does not acquire a more summary remedy for the collection of his debt by the garnishment order than the defendant had. *Rice v. Whitney*, 12 Ohio St. 358; *Secor v. Witter*, 39 Ohio St. 232; *Railroad Co. v. Hopkins*, 94 U. S. 11. It is a mistake to say that the liability of the garnishee is fixed by the order of the justice of the peace. Its office is to give the plaintiff the right of action where the answer discloses an indebtedness to the defendant. That liability is not fixed until a judgment is rendered against him in such action. The garnishment binds him for any debt that on such final adjudication may be found due from him to defendant at the time of the service of the order of attachment and notice (garnishment summons) upon him, and not from the date of the order of the justice of the peace. In cases of all debts not yet due, no action can be commenced until the maturity. If the instrument is not due and negotiable, it is liable to become the property of a bona fide holder before maturity. *Secor v. Witter*, 39 Ohio St. 232. A mere paper evidencing debt, such as a promissory note in the hands of a third person for the purpose of enabling him to collect money due the owner of such paper, is not susceptible of being proceeded against as the res in an attachment suit; for though it belongs to the attachment defendant, it is not the debt of which it gives evidence, nor is it property beyond the value of the mere fabric. The third person having the note in his hands for collection is not the debtor of the defendant. The fact that he will be the possessor of money when he shall have collected the note does not alter the case, for to be garnishable he must owe money or hold liable property at the time of the service upon him. This is the rule in New York, New Hampshire, Maine, Massachusetts, Connecticut, Vermont, Alabama, Texas, Pennsylvania, Illinois, and Mississippi, and the principle is so held in every state, except where such evidences are made attachable by statute. And it is nowhere held that the mere evidence of a debt is the debt itself, any more than that a title deed is the land itself; and, where evidences of debt are made attachable by statute, they are

usually attached as representing the debt, or facilitating the collection of it. When the notes are impounded, they are merely held to prevent their circulation, transfer by mere delivery, etc., in order to conserve the debt due the defendant, that it may remain available to the plaintiff upon his obtaining judgment. The attachment defendant owns the paper. A third person may possess it, but the obligor of the note is the defendant debtor, and the person who ought to be garnished, not the attorney who holds the written paper for the purpose of collecting the amount acknowledged by the note to be due the defendant; for notes, duebills, books of account, and all other evidences of debt that have been taken by the sheriff or other officer as the property of the defendant in attachment, are not choses in possession, nor property, within the meaning of section 47 (paragraph 4303, Gen. St.), Justices' Code, nor within the meaning of the law of attachment. And the statutes are not to be construed as extending the meaning unless where such interpretation is obviously the right one by the terms of the statute.

Paragraphs 4306-4311 provide for the disposition of attached property (and, we think, are certainly applicable to the justice of the peace court, under paragraph 5041), and specially mention the property so to be disposed of, either by receiver or by the sheriff or other officer attaching the property. We think these provisions of the Code extend to and are applicable to the justice of the peace court. *Points v. Jacobia*, 12 Kan. 54; *Stevens v. Able*, 15 Kan. 584; *Clark v. Wiss*, 34 Kan. 553, 9 Pac. 281; *Israel v. Nichols*, 37 Kan. 68, 14 Pac. 438. The levy upon the written evidence of a credit due the defendant, in the form of a note of hand, found in the possession of the defendant, or of some bank or other agent of his, instead of garnishing the creditor who owes him the debt evidenced by the note, is not different in principle from the attachment of books of account instead of garnishing those who owe what the accounts show to be due the defendant. In the latter case it is held "that levy on the account books is not a levy on the debts charged therein, due by others to the defendant." *Wap. Attachm.* 167-170; *Leshner v. Getman*, 30 Minn. 321, 15 N. W. 309; *Ide v. Harwood*, 30 Minn. 101, 14 N. W. 854. If one creditor should attach the promissory note found in the possession of the debtor, and another should attach the debt itself in the hands of the party owing the debt (the obligor in the notes) by the process of garnishment, it would plainly appear that the first would have seized only the evidence of the indebtedness, while the second would have attached the debt. Which would have created a lien? Which would have something susceptible of being proceeded against as the res in the ancillary proceeding? Certainly the creditor who had garnished the obligor would be the only attachée of the

credit due to the defendant. *Prout v. Grout*, 72 Ill. 456. The other, having merely the evidence of the fact that the maker of the note owes the defendant, would have nothing attached which could be proceeded against. In a conflict between the rival creditors, there can be no doubt that the one who should garnish the maker of the note and attach the defendant's credit in the garnishee's hands would be preferred, unless the second attachment was made after the official attaching the note had given notice, as required by section 209 of the Code (paragraph 4308, Gen. St. 1889), which provides that the receiver shall give notice of the appointment to the persons indebted to the defendant, and from the date of such notice the debtors shall stand liable to the plaintiff in attachment for the amount of money or credits in their hands, or due from them to the defendant in attachment, and shall account therefor to the receiver. And section 211 (paragraph 4310), provides that, "when a receiver is not appointed, the sheriff or other officer attaching the property shall have the same powers and perform all the duties of a receiver," etc.

I do not hold that a note cannot be sold, but hold that, if it is sold, it must be under the provision of the Code for the disposal of attached property, and an attempt must be first made to collect it; then, if not collectible, or if it has a great while to run, or from other circumstances that might arise, which, in the judgment of the court, would make it for the best interests of all concerned to have it sold. Nor are the views herein expressed in conflict with the decisions of our supreme court in *Blain v. Irby*, 25 Kan. 499; *Id.*, 31 Kan. 716, 3 Pac. 499; *Beamer v. Winter*, 41 Kan. 596, 21 Pac. 1078,—to which our attention has been called. In the first-cited case, the court decided that under the tax law a note was a chattel, and that under a tax warrant the sheriff had the right to sell the same; but, under the law governing the collection of taxes, there is no special provision as to the disposition of property taken under the warrant, and, besides, the note might be the identical property, or a portion thereof, that was originally taxed, liable for the payment of the tax assessed; and when this case came again before the court, it merely decided that the sale so made was valid, notwithstanding the maker of the note purchased it, and that mere suspicion of fraud would not be enough to set aside the sale. And in *Beamer v. Winter*, 41 Kan. 596, 21 Pac. 1078, the court held that, when a note taken in garnishment was sold, it must be sold in the same township where seized. But I have been unable, after a careful search, to find where the supreme court had ever decided that a note taken by garnishment process before due could be sold as other personal property, and, on the contrary, the weight of authority is against it. But, aside from all this, I think it is the duty of a court to pro-

fect all parties to the action, and not allow the property of the defendant to be eaten up in costs, which are shown in this case to be unnecessary. No attempt was made to collect this note, or to ascertain if it was collectible, but it was at once sold and purchased by the plaintiff in this action at a small price, viz. \$25; the note being for \$200, with interest at 7 per cent., while the debt sued upon was less than the face of the note, being only for \$189. They do not deny, but, on the contrary, admit, by their demurrer, that they received \$207.70 on this note in a very short time after they purchased it, on the very day it became due, and now ask this court to say that, in addition to what they have already collected, which is more than the amount of their original indebtedness, they may recover from the debtor's estate \$207 in addition; in other words, to allow this plaintiff to recover \$414 upon a judgment which, at the utmost, could only be \$184.35, with interest at 10 per cent. from February 10, 1890, to September 3, 1893, amounting in the aggregate to \$213.53 and costs. We cannot consent to this proposition. As we have said, the garnishment process vested no absolute property in the thing garnished. It merely gives the creditor the right to collect the indebtedness the same as the defendant had, and, when so collected, to apply the proceeds to the liquidation of his debt. And we think the defendant had a right, and should have been allowed, to show that this debt had been paid,—that the plaintiff had recovered all he was entitled to receive. The judgment in this case will be reversed, and new trial ordered.

BEEDY v. STATE.

(Court of Appeals of Kansas, Northern Department, W. D. Sept. 9, 1896.)

SCHOOL LANDS—APPLICATION FOR PURCHASE—NOTICE.

1. An applicant for the purchase of school lands, under paragraph 5769, Gen. St. 1889, is not required to publish his notice 10 days prior to the filing of his petition. It is sufficient if such notice has been published 10 days prior to the day set for the hearing of such application.

2. A notice in the following form: "The undersigned hereby gives notice that he will, on the 2d day of April, 1894, make an application to the probate court of Rawlins county, Kansas, to purchase the following described school land, situated in the organized county of Rawlins, Kansas, viz.: The S. E. quarter, S. W. quarter, N. W. quarter, N. E. quarter of the S. E. quarter of section 18, township 5, range 36. He names the following persons to prove his settlement, continuous residence, and improvements, viz.: C. M. Hunter, residence, Pentheka; Joe Conner, residence, Pentheka, Kan. Done at Atwood, county of Rawlins, Kansas, this 16th day of March, 1894. Daniel Beedy, Petitioner."—is not fatally defective, indefinite, or uncertain as to the land desired to be purchased. (Syllabus by the Court.)

Error from district court, Rawlins county.

Application of Daniel Beedy for the purchase of school lands. Demurrer to the ap-

plication sustained, and plaintiff brings error. Reversed.

M. A. Wilson, for plaintiff in error. W. McE. Whealen, for the State.

GILKESON, P. J. On the 16th day of March, 1894, Daniel Beedy filed his petition in the probate court of Rawlins county, Kan., to purchase certain school land in said Rawlins county, Kan. The petition alleges:

"That your petitioner would respectfully represent to this honorable court that he is over the age of 21 years, the head of a family, and that he did on the 20th of August, 1893, make actual settlement upon and has improved the southeast quarter of section 18, township 5 south, range 36, in the organized county of Rawlins, Kansas, and that he has resided thereon continuously, and made it his only home, since the 20th day of August, 1893, being a period of six months immediately prior to the appraisement of said land. That said land was appraised on the 16th day of March, 1894, at the sum of \$480, and that the improvements on said land made by your petitioner consist of a permanent dwelling house and the following other improvements: One horse and cow stable, hen house, hog pen, feed yards, well, pump, and piping, with barrels set in the ground, one frame granary, connected to the house, 16x24,—and were appraised at the sum of two hundred and forty two dollars (\$242). That he has given ten days' notice, through a newspaper of general circulation, of the hearing of this petition. That the names and residences of the witnesses by whom he expects to prove said settlement and improvements are as follows, viz.: J. M. Hunter, residence, Pentheka, Kan.; J. Conner, residence, Pentheka, Kan. That a copy of said notice is hereto appended. That he has not heretofore purchased school land under the provisions of the act providing for the purchase of school land, approved February 18, 1896, or under the provisions of the act of which said act is amendatory. Now, therefore, your petitioner would respectfully ask that he be permitted to purchase said land at the appraised value thereof, as provided by law. And your petitioner will ever pray. Daniel Beedy.

"State of Kansas, County of Rawlins—ss.: I, Daniel Beedy, being duly sworn, depose and say that I have read the foregoing petition, and know the contents thereof, and that each and all of the statements contained therein are correct and true. So help me God. Daniel Beedy.

"Subscribed and sworn to in my presence and before me this 16th day of March, 1894. G. Leeper, Probate Judge. [Seal.]"

And on the 23d day of March he published his notice, as follows:

"The undersigned hereby gives notice that he will, on the 2d day of April, 1894, make an application to the probate court of Rawlins county, Kansas, to purchase the follow-

ing described school land, situated in the organized county of Rawlins, Kansas, viz.: The S. E. quarter, S. W. quarter, N. W. quarter, N. E. quarter of the S. E. quarter of section 16, township 5, range 36. He names the following persons to prove his settlement, continuous residence, and improvements, viz.: C. M. Hunter, residence, Pentheka; Joe Conner, residence, Pentheka, Kan. Done at Atwood, county of Rawlins, Kansas, this 16th day of March, 1894. Daniel Beedy, Petitioner."

And due and legal proof thereof was made and returned to the court.

Proof of publication:

"State of Kansas, Rawlins County—ss.: J. F. Price, of lawful age, being first duly sworn, deposeth and saith that he is the publisher of the Times, a weekly newspaper published in the city of Atwood, county of Rawlins, Kansas, and of general circulation in said county, and which said newspaper has been continuously and uninterruptedly published in said county during the period of fifty-two consecutive weeks, immediately prior to the first publication of the notice hereinafter mentioned; and that a notice, of which a true copy is hereto attached, was published in the regular and entire issue of said newspaper for two consecutive weeks, the first publication being made as aforesaid on the 23d day of March, A. D. 1894. And affiant further says that he has personal knowledge of the statements set forth, and that they are true. J. F. Price.

"Subscribed and sworn to before me this 2d day of April, A. D. 1894. A. K. Bone, County Clerk. [Seal.]"

Upon April 2d the cause came on to be heard by the court, and was by the court refused. Beedy appealed to the district court, and in that court the county superintendent on the 19th day of April filed his demurrer as follows:

"In the District Court of Rawlins County, State of Kansas—ss.: In the Matter of the Application of Daniel Beedy to Make Proof on S. I. S. E. Sec. 16, T. 5, R. 36. Demurrer. And now comes the defendant in the above action, by the county superintendent of public instruction, W. McE. Whealen, and demurs to plaintiff's petition for the following reasons: Defendant for grounds of demurrer says that the court has no jurisdiction of the subject of the action. Defendant, for further grounds of demurrer, says that the petition does not state facts sufficient to constitute a cause of action. W. McE. Whealen. Co. Supt."

Indorsements: "No. 1419. Demurrer. Filed April 19th, 1894. S. W. Gaunt, Clerk."

—Which was heard by the court on the 29th day of May, 1894, and the following order was made: "Thereupon said cause came on for trial upon the petition of Daniel Beedy to be allowed to purchase the southeast quarter of section sixteen (16), in township five (5) south, range thirty six (36), in Rawlins county, Kansas, and upon the demurrer to said petition by

the superintendent, W. McE. Whealen. Thereupon said demurrer was duly argued and submitted to the court. The court, being fully advised in the premises, finds that said demurrer is well taken; that said petition does not state a cause of action; that said applicant, Daniel Beedy, is not entitled to purchase said school land; that said applicant, Daniel Beedy, did not purchase said land in his pretended notice of the presentation of his petition to be allowed to purchase school land. It is therefore ordered, considered, and adjudged by the court that said demurrer be sustained, and said petition dismissed, at the costs of Daniel Beedy herein taxed at \$58.85, for which let execution issue. To all of which the said Daniel Beedy objected and excepted." Motion for new trial filed and overruled. Beedy brings the case here for review.

The defendant in error contends that the judgment of the district court should be affirmed for three reasons:

First. Want of jurisdiction, for the reason that on the 16th of March, 1894, when the petition was verified before the probate judge, the record does not show that the probate court was in session. That this is not well taken needs no argument, scarcely comment. We know of no law requiring the probate court to be in session to enable the judge thereof to administer oaths, or for the purpose of using papers therein.

The second reason is not as clear as it might be, and we will quote the statement: "The publisher's affidavit shows that the first publication notice was made on the 23d of March, 1894. The applicant, Daniel Beedy, claims the preferred right to purchase said school lands under paragraph 5760, Gen. St. 1889, which lays down the conditions precedent to the acquiring of said preferred rights. Among others is the following, viz.: 'Any person may * * * file in the probate court of his county a verified petition stating therein * * * that he has given ten days' public notice through a newspaper of general circulation in the county wherein said land is situated, setting forth in said notice a description of the land, the names and residence of the witnesses by whom he expects to prove said settlement, the time when—the time to be fixed by the probate judge—said petition will be heard by the probate court, and asking that he be allowed to purchase said lands.' This is a condition precedent, and must be done prior to the filing of said petition in said probate court, or the petitioner acquires no preferred right to purchase said school lands." From the statements above quoted we assume that the point intended to be raised is that, as the notice had not been published 10 days prior to the filing of the petition, it and all subsequent proceedings were invalid. We cannot agree with them in this, nor do we think the paragraph will bear any such construction. It does not say so in plain words, nor can it be inferred; and if, on the day of hearing, such notice has been given, we think it is sufficient. It is one

of the things to be proven on the trial, the same as the service of any other notice. Its object is to notify the public that on a certain day he will ask to purchase. It is to protect the rights of others who may have claims thereto, and to give them time to prepare for any resistance they may have to offer to prevent the school lands from being surreptitiously obtained. It in no way establishes his rights as a preferred purchaser. These are established by compliance with the other provisions of the statute, viz.: Settlement, and actual continuous residence for six months, making it his only home for that period; improving the same, and having a permanent dwelling thereon, prior to the appraisement; filing his petition within 60 days after its appraisement. Then, as we have said, if, on the day of trial, it is shown to the court by legal proof that the public have been notified, their rights have been protected, no one can complain. No advantage has been taken. The notice has fulfilled its mission, and if the proof sustains the allegations of the petition,—the requirements of the statute,—the law has been complied with, and the right to purchase should be granted to the applicant.

Third. That the description of the said land in said pretended notice of publication is defective and indefinite and uncertain, and capable of several meanings. What is defective, indefinite, and uncertain in this description? "To purchase the following described school lands, situated in the organized county of Rawlins, Kansas, viz.: The S. E. quarter, S. W. quarter, N. W. quarter, N. E. quarter of the S. E. quarter of section 16, township 5, range 36." True, it is not as full as it might be. These abbreviations might all have been written out. We will concede that, if certain words had been written between certain words, the meaning might be changed; but they are not so written, and our duty is to take it as it is, not as it might have been written, and say what it means. We think the description sufficient, and that it describes four legal subdivisions of the southeast quarter of section 16, township 5, range 36, and is located in Rawlins county, Kan. What other meaning it is capable of has not been pointed out, and we have failed to discover it. Well-known abbreviations may be used in conveyances, and are sufficient, but such as do not permit that degree of certainty which admits of no reasonable doubt as to their meaning, upon which persons of ordinary intelligence, or courts can differ, are not allowable. We do not think this description falls within the exception above stated. There can be no reasonable doubt as to the meaning. The record shows that in every instance where this transaction has been referred to, either by court or counsel for state, it was thus understood,—that Beedy was attempting to purchase a quarter section of school land. This being true, now could the abbreviations have reference to or mean anything except certain quarters of a certain quarter section. It is the duty of the courts to

give effect to instruments of writing, so as to carry out the intentions of the parties, when it can be done consistently with the rules of law, not to defeat them. We think that the court had jurisdiction of the subject-matter and the parties to the action, and that the petition states facts sufficient to constitute a cause of action. The judgment of the court below will be reversed, and cause remanded for further proceedings in accordance with the views herein expressed.

IN RE WALKER'S ESTATE.

(Supreme Court of Arizona. Sept. 8, 1896.)

DESCENT — CHILDREN OF MARRIAGE BETWEEN WHITE PERSON AND INDIAN—APPEAL FROM PROBATE COURT.

1. Comp. Laws 1877, c. 30, § 3, declaring marriages between white persons and Indians illegal and void, renders void a marriage between a white man and an Indian woman, contracted on an Indian reservation within the territory, in accordance with the law of the tribe of which the woman was a member, though followed by cohabitation on the reservation; hence a child of the union has no right of heirship from the father.

2. Rev. St. par. 1470, providing that "the issue also of marriages deemed null in law shall nevertheless be legitimate," does not render legitimate the children of a pretended marriage between a white man and an Indian woman, celebrated on a reservation within the territory, in accordance with the laws of the tribe of which the woman was a member, but not in accordance with the requirements of the laws of the territory; there being in such case no marriage in fact.

3. An appeal to the district court by one party in interest, from a decision of the probate court in a probate matter, takes the whole matter into the district court.

Baker, C. J., dissenting.

Appeal from district court, Pinal county; before Justice O. T. Rouse.

Application by Juana Walker, a minor, by Rosetta Jones, her guardian, for distribution to her of the estate of John D. Walker, deceased. A. J. Doran, administrator, and William Walker and others, resist the application. Judgment against the applicant, and she appeals. Affirmed.

John D. Walker died intestate in Napa county, Cal., about the 2d day of September, 1891, and at the time of his death was a resident of Pinal county, Ariz. On September 18, 1891, A. J. Doran was duly appointed administrator of Walker's estate by the probate court of Pinal county, and duly qualified as such. Juana Walker, a minor, by her guardian, Rosetta Jones, filed a petition in the probate court of Pinal county on the 12th day of May, 1893, asking that an order be made distributing the estate to her, the said Juana, as the sole heir of John D. Walker, deceased. Said petition was resisted by said A. J. Doran, the administrator of said estate, and by William Walker and other brothers and sisters of John D. Walker. By order of said probate court, that petitioner file a bill of particulars, the following bill of particu-

lars was filed, viz.: "(1) That the said Juana Walker was born at or near Blackwater, on the Sacaton Indian reservation, in the county of Pinal, A. T. (2) That the mother of the said Juana Walker was a Pima Indian squaw, named Chur-ga. (3) That Juana Walker is the child of Chur-ga and John D. Walker, and was born on said reservation in lawful wedlock, contracted on said reservation, and while said Chur-ga and John D. Walker were living and cohabiting together as man and wife; and said child, ever since and until the death of said John D. Walker, was recognized and acknowledged by him, the said Walker, to be his child, begotten of the said Chur-ga, on divers and numerous occasions, to divers persons. (4) That the said Chur-ga is dead." The petition of said Juana Walker was resisted by the said administrator and the brothers and sisters of the deceased upon the ground, in effect, that by the petition Juana Walker was not entitled to the estate of John D. Walker; and, further, that John D. Walker left no father or mother or children or their descendants, that he had never married, and that his only heirs were his said brothers and sisters. The case was tried in said probate court, and on July 28, 1893, a judgment was entered in said court in favor of said Juana Walker. Thereafter the said administrator and the said brothers and sisters appealed the case to the district court of Pinal county. The case was tried anew in said district court, commencing on the 23d day of March, 1894, one Isaac D. Smith, a witness for petitioner, being on the stand. Counsel for the respective parties agreed to the following, to wit: "It is consented by the parties hereto that the plaintiff may make the following offer of proof, and the same to stand and to be considered as though raised by apt and proper questions to the witness on the stand: Plaintiff, appellee and petitioner, now offers to prove by the witness on the stand, and will so prove if permitted by the court so to do, that the petitioner is the child of John D. Walker, deceased, and was begotten by him; that her mother was an Indian woman, named Chur-ga, a member of the Pima tribe of Indians, and that John D. Walker, deceased, a white man, was, prior to the conception of the said Juana Walker, on the reservation of the Pima and Maricopa Indians in Arizona, and intermarried with the said Indian woman, Chur-ga, according to the law of the Pima tribe of Indians, and that the said John D. Walker, deceased, recognized petitioner as his child, and supported her; to which proof counsel for appellants (Walker brothers and sisters and the administrator) objected, on the ground that at the time thereof such marriage between a white man and an Indian woman was by the laws of Arizona illegal and void, and the court sustained the objection, and refused to permit such proof of marriage, but would admit the proof of recognition that it was his child and that he had given it support." To the ruling

of the court the petitioner, Juana Walker, excepted, but offered no evidence of recognition and support, and appeals.

Fitch & Campbell, J. B. Woodward, Abram S. Humphries, T. B. McCabe, Barclay Henley, C. W. Wright, and Street & Frazier, for appellant. S. M. Franklin, W. H. Barnea, W. R. Stone, and J. H. Kibbey, for appellees.

HAWKINS, J. Juana, a Pima Indian girl, by her guardian, claims the estate of John D. Walker, deceased, upon the theory that her mother, Chur-ga, a Pima Indian woman, was married to said Walker, who was a white man, according to the customs of such Indians governing marriage, and that she is the child of such union. The statute in force in Arizona at the date of such pretended marriage, viz. 1871, is the following (sections 1-4, c. 30, p. 317, "Marriages," Comp. Laws Ariz. 1877):

"Section 1. Marriage is considered in law as a civil contract, to which the consent of the parties is essential.

"Sec. 2. All marriages between parents and children, including grandparents and grandchildren of every degree, between brothers and sisters, of the one-half as well as the whole blood, and between uncles and nieces, aunts and nephews, are declared to be incestuous, and absolutely void. This section shall extend to illegitimate as well as legitimate children and relations.

"Sec. 3. All marriages of white persons with negroes, mulattoes, Indians or Mongolians, are declared illegal and void.

"Sec. 4. Whoever shall contract marriage in fact, contrary to the prohibitions in the two preceding sections, and whoever shall solemnize any such marriage, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be punished by fine or imprisonment, or both, at the discretion of the jury which shall try the cause, or, if the conviction be by confession, at the discretion of the court, the fine to be not less than one hundred, nor more than ten thousand dollars, and the imprisonment to be not less than three months, nor more than ten years."

It is readily seen that this pretended marriage, if it had been a marriage in fact, was illegal and void, and imposed no obligation on either party thereto. It was provided by the law then in force that marriages had to be solemnized by certain persons designated. A marriage ceremony had to be performed, and the person officiating was compelled to keep a record thereof. Sections 8, 9, c. 30, supra. There must be a marriage in fact (section 4, Id.), and the person officiating, in addition to keeping a record himself, was compelled to report the marriage to the county recorder, and such recorder had to record the same (section 9, c. 30, supra). We do not mean to say that, if two persons capable of contracting

should have done so, and consummated such contract by cohabiting together, and acknowledging that they were husband and wife, and lived all their lives as such, it would not have been a marriage without the aid of a ceremony sufficient for the acknowledged children of such union to inherit. We do hold, however, that marriage in fact could not be consummated at the time this was alleged to have taken place, in Arizona, between a Pima Indian squaw and a white man, either by ceremony as provided in said statute for persons capable of contracting the marital relation, by the customs of said Indian tribe, cohabitation, or any other method. Such marriages were null and void. The two essentials of a valid marriage are capacity and consent. The stipulation of counsel set out in the statement of facts admits that there was no marriage of the parties by a person authorized to marry them; the union or relation, if any, which existed between Walker and the Indian woman, Chur-ga, was therefore not a marriage in fact. It is also admitted therein that Walker was a white man, and Chur-ga an Indian woman. Those being the admitted facts, the union, as a marriage, would be null and void, and no decree would be necessary to annul it. The learned judge who tried the case therefore committed no error in sustaining the objections to the questions contained in such stipulation with reference to the marriage, as that fact could not establish the rights of appellant as an heir. Such heirship, if any existed, must be established on some other basis,—adoption or acknowledgment. As the court below ruled that appellant could offer any evidence as to her adoption or acknowledgment by John D. Walker, and as she failed to offer any such testimony, she cannot now be heard to complain. If she had offered testimony showing that she was the offspring of an illicit union between John D. Walker and a Pima Indian squaw named Chur-ga, and that she had changed her status from a Pima Indian to the child of John D. Walker, who, when he left the Pima Indian reservation, instead of leaving her there, had taken her with him, and educated her, introduced her to his relatives, and held her out to the world as his daughter, and any and all other probative facts showing that John D. Walker acknowledged her to be his child, and intended her to be his heir, and wanted her to inherit his estate, there might be some basis for her claim.

Appellant contends that the alleged relation between John D. Walker and Chur-ga was a valid marriage, because it was established and existed between them on the Pima and Maricopa Indian reservation according to the customs of such Indians, and notwithstanding the laws of Arizona forbade such marriages. Such laws were not in force upon the Indian reservation, and such marriage, being valid according to the

custom of the Indians upon such reservation, was valid everywhere; i. e. the Indian reservation is the same as a foreign country, and marriages under the Arizona statute then in force, valid in the country where solemnized, were valid in Arizona. This doctrine is not tenable in a territory. There are not two sovereignties here, one for the power owning the reservation and one for the territory. There is only one sovereignty here,—that of the United States,—which delegates its power to the territory to legislate on all rightful subjects of legislation; and the legislative acts of the territory are operative in all parts of the territory, including Indian and all other executive or legislative reservations, unless expressly forbidden by the congress of the United States. If both of these parties had been Indians, the courts would recognize such relations as a marriage. Such marriages between a white man and an Indian woman have been upheld by the decisions of some of the states. *Johnson v. Johnson*, 30 Mo. 72; *Wall v. Williams*, 11 Ala. 839. In Missouri the doctrine of common-law marriages has always been upheld. *Dyer v. Brannock*, 66 Mo. 391. But such marriages have never been recognized in Arizona, and the marriages held valid in Missouri between a white man and an Indian woman were where the marriage occurred outside of the state in "an Indian country," in another sovereignty; and it does not appear that any law of the state was violated. The alleged marriage being void, it could not be proved for any purpose. The law reached white men in every part of Arizona, and forbade such marriages. *Wilbur v. Bingham* (Wash.) 35 Pac. 407.

There being no marriage between Walker and Chur-ga, and Chur-ga being a Pima Indian, the child being her offspring is a Pima Indian. This is the status of Juana. She is a ward of the government, and her status so remains until some law of congress, or the legislation of Arizona under authority of congress, changes same. As to whether an Indian is subject to adoption under paragraph 1392, Rev. St., we do not deem it necessary to decide. The court below offered to admit any proof regarding same, but none was offered. It is true that counsel for Juana, in the agreed statement, say that they offer to prove by a witness on the stand, in addition to other things, "that the said John D. Walker, deceased, recognized petitioner as his child, and supported her"; and the court offered to receive any testimony thereon. Yet the court might have sustained any objection to such conclusions. If there were any proof on these questions, the facts should have been offered, so the court could determine whether or not "he recognized her as his child, and supported her." The testimony of the witness Smith does not warrant such conclusions. It does not prove that John D. Walker publicly acknowledged claimant to be his child with the intent of

making her his lawful heir, or that he reared and educated her in his own station of life, and introduced her to his brothers and sisters as his child, and that he wanted her to inherit his estate. In order for her to recover this estate, such testimony should have been offered, and the proof must have been clear and conclusive. Estates are not to be diverted from the ordinary channels of the law of inheritance, except upon proof which is conclusive.

Counsel for appellant contend that as appellant, Juana, is the child of John D. Walker, and though the marriage between Walker and Chur-ga, the Indian woman, was void, nevertheless she is the heir by virtue of the provisions of paragraph 1470, Rev. St. Ariz. That paragraph is in the chapter on "Descent and Distribution," and is as follows: "Where a man having by a woman a child or children, and afterward intermarrying with such woman, such child or children, if recognized by him, shall thereby be legitimized and made capable of inheriting his estate. The issue also of marriages deemed null in law shall nevertheless be legitimate." In no way can that paragraph be made applicable to the case at bar. It applies where a man has a child by a woman, and then marries her, and then recognizing the child, it thereby becomes legitimized, and can inherit from him. It requires marriage and recognition as a condition. The next part declares, "The issue also of marriages deemed null in law shall nevertheless be legitimate." In both parts of said paragraph there must be a marriage. In the case at bar there was no marriage. If said section is applicable without marriage, it follows that it would make legitimate every bastard; and the paragraph on that subject would be useless. By paragraph 1471, *Id.*, it is provided: "Bastards shall be capable of inheriting from and through their mother." Thus it will be seen that, notwithstanding paragraph 1470, there are certain children who are bastards. Bastards are those not born in lawful wedlock. Appellant, not having been born of parents who had been married, was certainly a bastard. Counsel for appellant cites the case *Dyer v. Braunock*, 66 Mo. 331, as an authority to support his contention that, though the marriage of Walker to Chur-ga was null, yet appellant is legitimate. The facts of that case show: "Zachariah Wilson was a river pilot in 1819, and one Mrs. Collins, a widow, at that time kept a boarding house in St. Louis. There was evidence to show that Wilson and Jane Collins, the daughter of Mrs. Collins, and then about 19 years old, on the 24th of August, 1818, about 10 o'clock at night, declared their intention, in the presence of the mother and brothers of Jane and several boarders, who were present, to live together as husband and wife. There was no magistrate or other person authorized by the statutes of the territory to celebrate marriage rites present on the occasion, but they stood up on the floor

of the sitting room, or most public room in the house, side by side, with joined hands, and it was announced to those present by the mother or brother of Jane that she and Wilson had agreed to marry, to which they both assented by an inclination of the head. They then retired to a bedroom, and cohabited together as man and wife for three weeks. When Maj. Long reached St. Louis on his expedition to the Rocky Mountains, Wilson joined the expedition. The result of this cohabitation was a daughter named Cynthia Elizabeth, from whom plaintiff's title is derived. It was understood on the departure of Wilson that Mrs. Collins should take care of Jane, and that he would, when opportunity presented, remit some money to support her during his absence, which he occasionally did. Meanwhile, Mrs. Collins and her family removed to St. Charles, and were living there when Wilson returned to St. Louis, in 1824. He was then married, in accordance with the forms provided for by the statute then in force, to Sarah Ann Adams, the owner of the property now in controversy. By this marriage a female child was born in 1826, who survived the mother, and died in 1827. In 1830, after the death of Sarah Ann and her child, Wilson sent for Jane Collins, who was then in St. Charles, and he and Jane Collins afterwards lived together as man and wife until his death, in 1836, recognizing her as his wife, and treating the daughter, Cynthia Elizabeth, as his child. After the death of Wilson, Cynthia Elizabeth married Abner W. Dyer, and the plaintiffs are the descendants of that marriage. Mrs. Dyer died July 13, 1869, and her husband died June 25th, 1870. This ejectment was brought August 11, 1872." This case shows clearly that Missouri recognized common-law marriages.

Very much is said in the briefs regarding the appeal from the probate court to the district court. William Walker was a party in interest, and had a right to appeal, and, the matter in the probate court being appealed by one of the parties in interest, the whole matter was taken out of that court, and the district court had jurisdiction. The district court did not err in sustaining the appeal from the probate court. The judgment of the lower court is affirmed.

ROUSE, J., concurs. BETHUNE, J., having been of counsel for the petitioner in the probate court, took no part in this case in this court. BAKER, C. J., dissents.

STEVENS et al. v. WADLEIGH.¹
(Supreme Court of Arizona. Sept. 23, 1896.)

LANDLORD AND TENANT—LEASE—COVENANT.

In a lease of lands irrigated by a ditch maintained and owned in common by those having lands to be irrigated, each landowner being entitled to a certain part of the water in the proportion that the number of acres owned bore to the number irrigated, a covenant to defend

¹ Rehearing pending.

the lessee in the peaceful and quiet possession of the premises, and every part thereof, does not require the lessor to maintain the ditch; and therefore he is not liable to the lessee for damages caused by the temporary destruction of the ditch by floods.

Appeal from district court, Pima county; before Justice J. D. Bethune.

Action on bond by Able M. Wadleigh against C. A. Stevens and others for rent due. There was a judgment for plaintiff, and defendants appeal. Affirmed.

Charles Weston Wright, for appellants.
Frank H. Hereford, for appellee.

ROUSE, J. G. H. Wadleigh, on April 18, 1890, leased to C. A. Stevens certain lands in Pima county, for the full term of five years, for the sum of \$3,000, to be paid in installments of \$50 per month on the first day of each month, in advance; and for the faithful performance of the conditions of said lease on his part said Stevens executed a bond, in the sum of \$1,500, with A. V. Grossette and W. S. Read as sureties. Said lease and bond were assigned to Able M. Wadleigh, the appellee. The lands leased are arid, and water to irrigate the same was received through a certain ditch and its laterals, called the "Farmers' Ditch." Said ditch was what is commonly called a "community ditch." It was owned by those having lands to be irrigated by the water flowing through it, and was kept up and maintained by the labor of the landowners; each owner of the lands being entitled to a certain part of the water, in the proportion that the number of acres he owned bore to the number of acres watered from the said ditch. The lands leased were, at the date of the lease, entitled to that proportion of the water. The lease contained the following: "And the said lessor hereby agrees and binds himself, his executors and assigns and administrators, to warrant and defend the said lessee, his heirs, administrators, and assigns, in the peaceable and quiet possession of the said premises, and every part thereof, during the term of this lease; and in default thereof the said lessor * * * and assigns will and shall pay unto the said lessee * * * all damages that the said lessee shall sustain by the said failure to defend and warrant the said lease, not exceeding the sum [of] fifteen hundred (\$1,500) dollars. * * * Stevens failing to pay the rent from and after the 1st day of March, 1893, in May, 1894, Mrs. Able M. Wadleigh filed her complaint, as plaintiff, against Stevens and his sureties, A. V. Grossette and W. S. Read, on the said bond, for \$650, the amount of rent due the 1st day of May, 1894. To the complaint defendants answered, and among other things said Stevens alleged, in effect, that plaintiff had failed to deliver the water to irrigate the lands. In consequence of such failure, he had lost one crop in 1892, and had been greatly damaged,

and had to abandon said property, for the reason that he could get no water to irrigate said lands, and did abandon said premises in March, 1893, and asked judgment for said damages in the sum of \$1,500, for breach of the warranty of possession, as the amount fixed by the said part of the lease herein quoted. The case came on for trial before the court without a jury, and on the trial the evidence tended to show that the head of said ditch was washed out about July or August, in the summer of 1892, by floods in the Santa Cruz river, the stream from which the said Farmers' ditch was supplied with water, and that no water flowed in said ditch from said river for about two months; that at the end of said period the head of said ditch was repaired, and about the same quantity of water that had previously flowed through said ditch was again obtained. There was no evidence that plaintiff or her assignor had performed any act or neglected any duty which caused the injury to the said ditch or diminished the quantity of water to which the lands leased by the defendant Stevens was entitled.

Under the allegations in the pleadings, the terms of the lease, and the facts adduced on the trial, we hold that the lease carried with it, for the term of the lease, all the water which could be obtained through the Farmers' ditch, and that the lessee, by the terms of the lease, had for that period the same rights which the lessor would have had, and was under the same obligations to pay for the use and distribution of the water, and to maintain said ditch for that period, as the lessor would have been had he remained in possession,—i. e. that the lessee for that period succeeded to all the rights and obligations that would have belonged to and rested upon the lessor, had he remained in possession; that, for the term of the lease, said interest in the water of said ditch attached to the lands, whether it be under the name of an "appurtenance," or under some other name or appellation. The part of the lease quoted was only a covenant of quiet enjoyment of the lands leased, since there was no eviction. The said covenant was to the extent only that the lessor had a good title, and could give a free, unincumbered lease for the time specified. 1 Washb. Real Prop. (3d Ed.) p. 428, § 2a; Gazzolo v. Chambers, 73 Ill. 75. Aside from an express covenant to that effect, a landlord is not bound to keep the leased premises in repair, nor is he responsible in damages to his tenant for injuries resulting to the latter from the nonrepairs of the leased premises. Ward v. Fagin, 101 Mo. 669, 14 S. W. 738; Peterson v. Smart, 70 Mo. 38; Brewster v. De Fremery, 33 Cal. 341. And a loss by accident of any portion of the leased premises does not rescind the lease, nor relieve the tenant of his obligation to pay the rent. Ely v. Ely, 80 Ill. 532; Sheets v.

Selden, 7 Wall. 416. The evidence disclosed the further fact that Stevens wrote a number of letters to Wadleigh, after March 1, 1893, of different dates, the last one as late as September or October, 1893. In all of said letters, while there was a declaration that Stevens had moved off the leased lands, yet he stated that he had a family residing thereon, and made mention in glowing terms of the bountiful crops of grain and hay he had growing on said lands. Aside from the matters above mentioned, said letters contained promises to pay the amount of rent due, the dates of payment being fixed at some date not long subsequent to the dates of the respective letters, and also contained excuses for failing to pay the amounts due at the dates fixed in preceding letters. From these letters, and other facts in evidence, the court was justified in finding that the premises were not abandoned at the time Stevens claimed he abandoned the property. We further hold that Stevens could not, under the terms of said lease, abandon said lands, and escape the liability for the rent. The judgment should be affirmed, and it is so ordered.

BAKER, C. J., and HAWKINS, J., concur.

LAWLER et al. v. BASHFORD-BURMISTER CO.

(Supreme Court of Arizona. Sept. 23, 1896.)

JUDGMENT BY DEFAULT — WHEN AUTHORIZED — SETTING ASIDE.

1. Under Rev. St. tit. 61, c. 2, providing that, where property levied on by a sheriff is claimed by a third person, claimant shall make an affidavit and execute a bond, which shall be filed, and that thereafter the court shall direct an issue to be made up between the parties, where such issue is directed, and the execution plaintiff files a complaint or statement, which, with the affidavit of claimant, is treated by the court and by both parties as sufficient to form the issue, and both parties appear and have the cause set for trial, it is error to render judgment against claimant by default, for want of further pleading, without giving him, on motion therefor, a reasonable time within which to prepare and file such pleading as the court requires; no form of pleading being prescribed by the statute.

2. Where, after a judgment by default against a defendant, he at once files a petition to set the same aside, in which he sets out a good reason for the default, and tenders therewith an answer showing a meritorious defense, his petition should be granted.

Appeal from district court, Yavapai county; before J. D. Bethune, Acting Judge.

Action by the Bashford-Burmister Company against John Lawler and Ed. W. Wells. Judgment by default against defendants, from which, and from an order denying their motion to set the same aside, they appeal. Reversed.

The appellee, the Bashford-Burmister Company, commenced an action in September, 1896, in the district court of Yavapai county, against the Seven Stars Gold-Mining Com-

pany, to recover something over \$5,000. An attachment in aid of said suit was duly issued, and the writ of attachment delivered to the sheriff of said county, who levied it on certain property, as the personal property of said gold-mining company. Thereafter, in November, 1893, a judgment was rendered in said case in favor of said Bashford-Burmister Company for the said amount claimed. Thereafter, on the 26th day of December, 1893, the appellants, Lawler & Wells, made and presented an affidavit to said sheriff, claiming the said property which had been levied upon under said writ of attachment as their property, and said sheriff appraised the said property, and said Lawler & Wells executed a bond as required by law; and said property was then turned over to them by said sheriff, and thereafter he filed said affidavit and bond of Lawler & Wells in said district court on December 29, 1893, as required by law. At the June term of said court, and on the 5th of said month, on motion of Lawler & Wells' attorney, said case (the controversy between Lawler & Wells and the Bashford-Burmister Company over said property), on said affidavit, was ordered placed on the calendar, and said Bashford-Burmister Company ordered to tender issues as required by law. Thereafter, on June 22, 1893, said Bashford-Burmister Company complied with said order, and filed a complaint or statement, as plaintiff, against Lawler & Wells, as defendants, therein setting up the fact of its suit against the said Seven Stars Gold-Mining Company; its judgment for the said amount thereon; its attachment in aid thereof; the levy of said writ of attachment on certain property, claimed to be the property of said Seven Stars Gold-Mining Company; the fact that defendants, Lawler & Wells, filed their affidavit claiming said property, and executed their bond therefor; that said property, after said affidavit was made and bond was executed, was delivered to them; with the declaration, in effect, that said defendant the Seven Stars Gold-Mining Company at the time said attachment was levied was the owner of said personal property,—which complaint or statement was filed as its tender of issues. Thereafter the case was set for trial, and reset for trial, on the motion of the respective parties, from time to time, and passed until July 11, 1895, on which date Judge Hawkins made an order that said case be referred to Hon. J. D. Bethune for trial. Thereafter, on July 17, 1895, on motion of said defendants Lawler & Wells, the case was set for trial on July 22, 1895; and on said last date both parties were present in court, in person and with their counsel, and announced ready for trial on the issues presented, whereupon said plaintiff moved for a judgment against defendants by default. Defendants resisted said motion, contending that the affidavit and bond filed on their claim of said property made an is-

sue to be tried; informed the court that they had filed a contract in writing, which had been given them by the Seven Stars Gold-Mining Company, which was a conditional sale of said property to said company, and had given written notice of said filing to plaintiff; that at a previous date Judge Hawkins had decided from the bench that the issues were joined,—and requested that defendants be granted a few minutes to prepare and file issues on their part. The court refused defendants' request, and sustained plaintiff's motion, and gave judgment against defendants for the value of said property, on said bond, with damages and costs. Defendants duly excepted to the rulings of the court, and moved to set aside said judgment by default, and for a new trial, and tendered with said motion a meritorious defense,—among other things, to the effect that defendants had made a conditional sale in writing of the said property to said Seven Stars Gold-Mining Company, that the conditions had failed, and that said property, in consequence of said failure, was the property of defendants. Said motions to set aside said judgment, and for leave to file said answer, were overruled and denied, and defendants excepted and appeal.

J. F. Wilson, for appellants. Johnston & Sloan and Herndon & Norris, for appellee.

ROUSE, J. (after stating the facts). The first thing for us to determine in this case is, was there a default on the part of defendants Lawler & Wells at the time the motion for judgment was made? The term "default," when used in practice, is defined by Bouvier to be "the nonappearance of a plaintiff or defendant at court within the time prescribed by law to prosecute his claim or make his defense." 1 Bouv. Law Dict. 445. The record shows that defendants were in court, and active in trying to bring the case to trial; that they had filed in court the written evidence of their title to said property, and had given plaintiff notice thereof. Hence, under said definition, they were not in default. The term, when applied to a defendant, is frequently (and indeed commonly) used in a much wider sense; and a failure to enter a plea, answer, affidavit of defense, etc., as well as for want of an appearance, is included in the definition thereof. 1 Black, Judgm. § 80. If there was an appearance on the part of defendants, as above defined, there was no default in this case, and the motion for judgment should have been overruled.

Chapter 2 of title 61 of the Revised Statutes provides that when a party claims property levied upon by a sheriff, by making a certain affidavit and executing a certain bond, the sheriff shall deliver the property to the claimant, and the sheriff shall return said affidavit and bond to the proper court, and the clerk thereof shall docket the case in the name of

the plaintiff in the writ as plaintiff, and the claimant of the property as defendant; that at the first term thereafter the court shall direct an issue to be made up in writing between the parties, if they both appear, which shall be tried as in other cases. As both parties appeared in this case, it became the duty of the court to direct that an issue be formed. The judge then on the bench did order such issue to be made, and plaintiffs did file a complaint or statement for that purpose on its part. Paragraph 3178 of the chapter of the statutes above referred to is as follows: "Said issue shall consist of a brief statement of the authority and right by which the plaintiff seeks to subject the property levied on to his execution, and the nature of the claim of the defendant thereto." The complaint or statement filed by plaintiff substantially complied with said paragraph. Defendants filed no defense on their part, but acted as though the affidavit they had made and the bond which they had executed, and which had been filed by the sheriff in said court, was sufficient to present the issues on their part. Indeed, the judge then on the bench seemed to consider those papers as sufficient to present all the issues necessary for a trial; and both parties, by having the case set for trial from time to time thereafter, appeared to join in that conclusion. We do not feel compelled, in this case, to determine what steps should be taken by the respective parties in cases such as this, in order to form an issue, or to determine the nature of the pleadings which should be filed by them. What would be necessary in one case might not be necessary or sufficient in another. But we think the affidavit and bond made and executed by the defendants were such an appearance on their part, and the conduct of the parties in trying to bring the case to trial, and the remarks of the trial judge with reference to the issue, were sufficient to prevent a judgment by default until defendants had been ordered to present some other issue, and had failed to comply, after having had sufficient time to comply with such order. 1 Black, Judgm. § 36; Norman v. Hooker, 35 Mo. 366; Ruch v. Jones, 33 Mo. 393; Mullen v. Wine, 9 Colo. 167, 11 Pac. 54.

Before the judgment was rendered, defendants asked the court to grant them a few minutes only in which to draft and file an answer, at the same time advising the court of the views expressed by the former judge with reference to the pleadings. Said request was refused, and we think the court erred in that respect.

Immediately after the judgment was pronounced, defendants filed their petition, supported by affidavit, praying for an order setting aside the judgment, and for leave to file an answer; tendering therewith an answer containing allegations showing a meritorious defense, which they offered with said petition, and asked to file. In said petition they set out the rulings or declarations of the for-

mer judge with reference to the pleadings, and gave a full history of the case, and of the motions made in court by the respective parties, and steps taken by them to bring the case to trial. Before an appellate court will disturb a judgment by default, it should be made to appear that the trial court had failed to act with proper discretion. Two things, in such cases, must appear, viz. that the defendant has a meritorious defense, and a good reason for not answering in time, or making his defense on the trial. *Robyn v. Publishing Co.*, 127 Mo. 385, 30 S. W. 130; *Pry v. Railroad Co.*, 73 Mo. 123; *Judah v. Hogan*, 67 Mo. 252; 1 Black, Judgm. §§ 347, 348; *Harding v. Cowing*, 28 Cal. 212; *Wallace v. Eldredge*, 27 Cal. 495. The defendants, by their petition to set aside the judgment in this case, having shown that they had a meritorious defense, and a good reason for not filing an answer in time, the judgment by default should have been set aside, and defendants allowed to plead. The judgment of the district court is reversed, and the case remanded for a new trial.

BAKER, O. J., concurs. HAWKINS, J., took no part in this case.

CONSOLIDATED CANAL CO. v. PETERS. (Supreme Court of Arizona. Sept. 21, 1896.)

PLEADINGS—AMENDMENT—PARTIES.

1. It is within the jurisdiction of a trial court to allow plaintiff to amend his complaint after his evidence is in, and defendant has moved to dismiss for material variance between allegations and proof.

2. A contract between a canal company and the shareholders in an unincorporated joint-stock association, whereby the former, party of the first part, agrees to furnish water to the "respective" parties of the second part, and the latter agree to rent their "respective" shares in the association to said first party, is a several contract; and either of the second parties may maintain suit for damages occurring to him thereunder, without joining the others.

3. The stockholders of the U. Canal Co. rented their shares to defendant, a corporation; the latter agreeing to deliver water to said parties "at and on the basis rate of not less than 3 shares for the necessities of a quarter section, said water being in the river." . . . It being understood that, in case of low water," defendant "is to deliver that amount of water that the U. Canal could or would deliver if they were in full control." A complaint by one of the shareholders who entered into said contract alleged that defendant refused to deliver water in sufficient quantities to irrigate the crops when there was flowing in the river sufficient water for such purpose, and, at periods of low water, had refused to deliver to plaintiff the amount of water that the U. Canal would or could deliver if it were in control. The complaint did not allege that plaintiff ever requested defendant to deliver water to him, and did not state how much was necessary, nor the quantity actually delivered, and there was no averment as to the amount that could or would have been furnished by the U. Canal Co. Held, that the complaint did not state a cause of action.

4. The failure of a complaint to state a cause of action may be availed of by demurrer, by

objection to evidence, by motion for judgment on the pleadings, by motion in arrest of judgment, or on motion for a new trial.

Appeal from district court, Maricopa county, before Chief Justice A. C. Baker.

Action by A. J. Peters against the Consolidated Canal Company to recover damages for breach of contract. From a judgment for plaintiff, defendant appeals. Reversed.

This is an action brought by the appellee, A. J. Peters, to recover of the appellant, the Consolidated Canal Company, the sum of \$5,000 damages for the loss and destruction of appellee's crop of grain on section 17, township 1 S., range 5 E., in Maricopa, for the crop-raising season of 1893. The destruction of said crop is, in the original complaint filed herein, alleged to have been caused by the failure of the appellant to furnish the appellee the necessary amount of water at proper times during the crop-raising season of 1892-93 to produce a mature crop on the lands aforesaid. It is alleged in substance in the original complaint that, for the agreed price of 50 cents per acre for the land above described, to be paid by the appellee to the appellant, the appellant agreed to carry and convey from the Salt river, and deliver to the said appellee, upon the land described, the amount of water which the said appellee was and should be entitled to receive and use upon said lands by virtue of his appropriation, for and during the space of one year from the 1st day of September, 1892, and while there was flowing in said Salt river, at a point where the said appellant, by its said canal, diverts water from said Salt river, ample and abundant water to supply the needs and requirements of said appellee in respect to said premises, and to which said water the appellee was entitled by virtue of his appropriation, and which said water was necessary and essential to the production of a crop upon said premises; that appellant failed, neglected, and refused to carry and convey said water from said Salt river to said premises, and failed, neglected, and refused to deliver the said water to the appellee's premises; and that by reason thereof, it is alleged in said original complaint, the crops of the appellee, planted and sowed upon said land, failed to mature, develop, and ripen, and were wholly dried up, lost, and destroyed. To this original complaint the appellant demurred, and alleges, as a ground of demurrer, that said original complaint does not state facts sufficient to constitute a cause of action. Said demurrer was by said court overruled, and the appellant excepted. The appellant further answered said original complaint, denying each and every allegation therein contained. Upon the trial of said action, after appellee had introduced in evidence the written contract, the basis of said action as alleged in said original complaint, the appellant moved to dismiss said action on the ground of a material variance between the proof and the allegations in the complaint. Thereupon the court announced that he would sustain the motion. The appel-

lee at once requested the court not to make the ruling absolute, and to allow him time to amend his original complaint. The court then adjourned the case until the following Monday, and gave appellee leave to amend his original complaint herein, to which ruling the appellant then and there duly excepted. The appellee then filed his amended complaint, alleging that he was the owner of certain shares of stock in the Utah Enlargement & Extension Company and the Eureka Canal Company, joint-stock associations owning and operating certain canals or irrigating ditches running from the said Salt river to a point near said section seventeen (17), by means of which said canals or irrigating ditches, and by virtue of the ownership of said shares of stock, said appellee had received the waters from the said Salt river so diverted and applied, and appropriated by him for the irrigation of said premises; that on the 30th day of September, 1892, the appellant entered into a contract in writing by its president, A. J. Chandler, with the appellee and others, which contract was in words and figures as follows, to wit:

"This agreement, made and entered into this 30th day of September, A. D. 1892, by and between the Consolidated Canal Company, by its president, A. J. Chandler, party of the first part, and A. J. Peters, E. Olsen, L. Harmon, George Drew, A. Marshall, W. W. Dobson, J. S. Watrous, F. T. Powers, M. Wals, J. Newman, J. L. Wesson, P. Eissenbise, N. Peterson (trustee), C. T. Springer, W. W. Dobson (trustee), C. Siegel (trustee), J. R. Andrews, A. J. Huston, parties of the second part, owners, shareholders, or renters of the Utah Canal Enlargement & Extension Company and the Eureka Canal Company, is as follows: We, the parties of the second part, rent our respective shares, or the shares we have rented to said party of the first part, for the ensuing year; and I, A. J. Chandler, president, party of the first part, agree to keep up all assessments levied against all of the shares hereto assigned, during the term hereof, and to deliver water to the respective parties hereto at and on the basis rate of not less than three (3) shares for the necessities of a quarter section, said water being in the river. And we, the parties of the second part, hereby give the first party our respective proxies to vote our respective shares during the term hereof, on matters pertaining to assessments only. The above shall not be construed as to interfere with the board of directors and secretary from carrying out the contract made between the Utah Irrigating Ditch Company and the Alma Irrigating Ditch Company, and as modified by subsequent agreements, or from making agreements and fixing the time for the necessary cleaning of the Utah Canal Extension and Eureka Canal. It being understood that in case of low water said first party is to deliver that amount of water that the Utah Canal would or could deliver

if they were in full control. And in case said first party fails to deliver water, same being in the river, then these presents shall be null and void. In witness whereof, we have hereunto set our hands and seals the day and year first above written. Consolidated Canal Company. A. J. Chandler, President.

Name.	Number of Shares.
Alfred J. Peters.....	18
Alfred J. Peters.....	2
Ellingsen, per A. J. Peters.....	2
George A. Brew, B. Heyman.....	5
George A. Brew, H. N. McLoagan.....	6
George A. Brew, J. S. Armstom.....	2
J. Newman, per F. T. Powers.....	3
M. Walsh, per F. T. Powers.....	3
F. T. Powers.....	3
N. Peterson, Trustee Ruffs.....	8
N. Peterson, B. Heyman.....	3
N. Peterson.....	6
C. T. Springer, 4 Old Utah & Extension; 2 Utah Extension (6).....	6
P. J. Eissenbise.....	3
B. W. Westover.....	3
A. J. Huston.....	4
George Bauer (Dorris).....	2

In said amended complaint it was alleged that said shares of stock in the Utah Canal Enlargement & Extension Company and the Eureka Canal, mentioned in said contract and agreement, were and are the majority of the shares of stock in said company and canals. It is further alleged that the appellant entered into the possession and control of the canal of the Utah Canal Enlargement & Extension, and the Eureka Canal, with their connections, and that said appellant remained in possession and control thereof until July 1, 1893. It is also alleged in said amended complaint that section 17 aforesaid was a part of the premises upon which the said water was to be delivered by the appellant, according to the terms of said contract, during the crop-raising season of 1893; that the said appellant, contrary to his agreement, undertakings, and promises, failed, neglected, and refused to deliver water to the appellee, upon the premises described in said amended complaint, upon the basis rate of not less than three of the shares mentioned in said contract for the necessity of a quarter section of said premises during the crop-raising season of 1892-93, and that the appellant failed, neglected, and refused to deliver to the appellee, upon said premises, sufficient water to irrigate the crops growing upon said premises during the crop-raising season of 1892-93, when there was flowing in said Salt river, where the same could be diverted to said premises, water sufficient for said purpose, and for which purpose the appellee had, by said contract, rented to said appellant three of said shares of stock for each quarter section of land, and that the appellant failed, neglected, and refused to perform each and every obligation of said contract, and that in the period of low water in said Salt river during the crop-raising season of 1892-93 the said appellant failed,

neglected, and refused to deliver to said appellee, upon said premises, the amount of water that the Utah Canal would or could deliver if they were in full control, and by reason of which appellee's crops sowed upon said premises failed to develop, mature, and ripen, and were wholly dried up, lost, and destroyed.

To this amended complaint the appellant demurred: First, from defective parties, in that said contract was jointly executed by the plaintiff and others; that said complaint should join all of the named parties to said contract. Further, that said amended complaint did not state facts sufficient to constitute a cause of action. This demurrer was by the court overruled, to which ruling the appellant duly excepted. Appellant then answered the amended complaint herein: First, that there were defective parties, in that all the parties were not joined, and asked that upon that ground the action be dismissed, which was denied, and to which the appellant duly excepted; and the appellant further answered the amended complaint herein, denying each and every allegation in said amended complaint contained. Upon the trial of said cause a verdict was rendered for the appellee, and against the appellant, for the sum of \$500, appellee's costs being taxed at \$630.60. Judgment was rendered for the amount of said verdict and costs. A motion for a new trial was duly filed, and overruled by the court, to which ruling the appellant duly excepted, and thereupon this appellant appealed to this court.

C. F. Ainsworth, W. H. Barnes, and J. D. Pope, for appellant. W. J. Kingsbury, Millay & Bennett, and Cox & Street, for appellee.

HAWKINS, J. (after stating the facts). I do not deem it necessary to review the action of the court below in sustaining the motion of plaintiff, after the evidence was closed on the trial of the original complaint, to be allowed to amend his complaint. This action was in the discretion of the court below. The contract set out in the amended complaint was executed on the 30th of September, A. D. 1892, and declared to be for the ensuing year. In the closing part of the third subdivision of said complaint it is alleged that the said contract was made for "the crop-raising season of 1892." This is probably a clerical error. If I so treat it, then the pleadings should be considered on their merits. It is shown on the face of the complaint that the plaintiff and others therein named were shareholders in an unincorporated joint-stock company; and it sets out a contract made by the several individual stockholders with the defendant to do certain things. As the shareholders in such a company are partners (*Lindl. Partn.* p. 5; *Smith v. Warden*, 86 Mo. 382; *Richardson v. Pitts*, 71 Mo. 128; *Martin v.*

Fewell, 79 Mo. 401; *Hurt v. Salisbury*, 55 Mo. 310; *Pettis v. Atkins*, 60 Ill. 454; *Flagg v. Stowe*, 85 Ill. 184; *Hodgson v. Baldwin*, 65 Ill. 532), and, as a general rule, the members, however numerous, must join in the suit on such contract (*Dacey, Parties*, 151), yet, as the contract in the case at bar shows that the parties of the second part rented their respective shares to the party of the first part, and "party of the first part agrees * * * to deliver water to the respective parties," it must necessarily be construed as a contract wherein, if any damage occurred thereunder to any of the parties thereto, such party could maintain his suit for such damages without joining the other parties. Whether a contract is several or joint is a question of construction. Generally, where there are joint obligees the contract is joint. Where, however, the language of the contract requires the obligor to account to each of the obligees, respectively, or, by the use of any words, imports a separate right of action, the contract is several, and each obligee may sue thereon. *Lawless v. Lawless*, 39 Mo. App. 539; 17 Am. & Eng. Enc. Law, 566. Joint-stock companies and unincorporated companies, as will be seen from the authorities supra, are generally treated as, and have all the attributes of, a common partnership, yet a mere joint ownership or community of interest in property does not necessarily constitute a partnership, though the income from it is divided. 17 Am. & Eng. Enc. Law, p. 859. And, even if the association of persons described as the party of the "second part" in the contract with the appellant do constitute a partnership, an obligor may render himself liable to each individual member of the partnership separately, as was done in the contract set out in the amended complaint. The objection that there was a nonjoinder of parties plaintiff is not, for the reasons above given, well taken, and the court below did not commit error in overruling it.

If the contract be construed as one for the delivery of so much water to each individual of the second part, and that each one could maintain an action thereon, without joining the others with him, for the damages he might have sustained, the complaint in this case fails to state a cause of action, for nowhere therein is it alleged that plaintiff ever requested defendant to deliver water to him at any place. It is not alleged that plaintiff did not get all the water he contracted for. It is alleged that defendant failed to deliver water on section 17 sufficient to raise a crop, but it does not appear from the contract that the water was to be delivered on that section. Defendant may have delivered it to plaintiff at some other point. It is further alleged that defendant did not deliver sufficient water. The quantity necessary to irrigate plaintiff's land is not stated in the complaint, nor is the quantity which the defendant did deliver stated, nor is the difference capable of being computed. It is nowhere

stated in the contract on what land, or where, the water should be delivered by defendant. The complaint states that the premises described therein, and on which it was claimed defendant failed to deliver the water, was a part of the premises upon which the water was to be delivered; and, though the complaint states that he failed to deliver sufficient water upon that part to raise a crop for the cropping season of 1892-93 (which the contract nowhere binds the defendant to do), it does not state that all the water plaintiff was entitled to receive from defendant was not delivered on the other part or parts of the premises. But if we construe the following allegation in the complaint: "And failed, neglected, and refused to deliver to said plaintiff, upon said premises (section 17), sufficient water to irrigate the crops growing upon said premises, when, during the crop-raising season of 1892-93, there was flowing in said Salt river, at a point where the same could be diverted therefrom to said premises, water sufficient for said purpose," etc.,—into an allegation that there was such quantity of water in the river as contemplated there should be by the terms of the contract, yet the complaint further states that at periods of low water the defendant refused to deliver that amount of water which the Utah Canal would or could deliver to plaintiff if it (the Utah Canal) was in full control; but nowhere is there any allegation as to how much, or whether any quantity, could or would have been received by the plaintiff from said Utah Canal. A complaint that totally fails to state a breach of the contract sued on states no cause of action, and a failure to state a cause of action may be availed of by demurrer, by objection to evidence, by motion for judgment on the pleadings, by motion in arrest of judgment, or on motion for a new trial. This suit seems to have been prosecuted upon the theory that the defendant was bound, under the contract, to deliver sufficient water to plaintiff to raise a crop for the season named upon the land described in the complaint. While the contract was made, evidently, for the purpose of conferring the power of voting the shares on the question of assessment and distributing the water to the respective parties (share owners) which flowed through the canal as a conduit, the quantity of water which was to be distributed was the quantity which would flow through said conduit. This is nowhere alleged in said complaint, nor is it susceptible of being ascertained from the allegation thereof. In times of low water in the river the defendant was only to secure the amount that would flow through said canal, and distribute that. If the defendant failed to distribute the water, he would be liable. And the shareholders could declare the contract forfeited, and take possession of their canal, if the same was in the possession of the defendant; and any party to such contract could recover his damages from the defend-

ant for any breach while the contract was in force, if any occurred.

The general demurrer should have been sustained. Reversed, and new trial ordered, with directions to the court below to sustain the demurrer to the amended complaint.

BETHUNE and ROUSE, JJ., concur.

GOODRICH v. LOUPE et al. (S. F. 417.)
(Supreme Court of California. Sept. 16, 1896.)

APPEAL—VACATION OF DEFAULT—DISCRETION.

An order setting aside a judgment by default is largely discretionary, and, where moved for at once and granted upon terms, will not be disturbed on appeal, though the showing made is not strong.

Department 1. Appeal from superior court, Santa Clara county; John Reynolds, Judge.

Action by one Goodrich against one Loupe and others. Plaintiff appeals from an order setting aside a default judgment in his favor. Affirmed.

Will A. Coulter and C. D. Wright, for appellant. John J. Roche, for respondents.

PER CURIAM. This is an appeal from an order setting aside a default judgment. The motion to set aside was based upon the grounds of inadvertence and excusable neglect. The showing made by affidavit is very weak, and, if the lower court had denied the motion to vacate, its action upon appeal probably would not have been disturbed. But in matters of this kind the superior court is vested with large discretion; and in view of the fact that the motion to set aside was made promptly, and also in view of the further fact that the motion was granted upon terms, when taken into consideration with the showing made by affidavit, we have concluded to affirm the action of the trial court. The order appealed from is affirmed.

JENNINGS v. BROWN. (S. F. 181.)
(Supreme Court of California. Sept. 18, 1896.)

AUSTRALIAN BALLOT LAW—BALLOTS.

The writing by a voter, on his ballot, of the party designation of a candidate, after the name, which he has also written in, does not constitute a distinguishing mark which invalidates the ballot.

Department 2. Appeal from superior court, San Mateo county; George H. Buck, Judge.

Contest by J. T. Jennings of the election of J. J. Brown to the office of county supervisor. Judgment for respondent, and contestant appeals. Affirmed.

Geo. C. Ross and Knight & Heggerty, for appellant. Sullivan & Sullivan, for respondent.

TEMPLE, J. This is a contest for the office of supervisor in the county of San Mateo. The judgment appealed from confirms

the election of defendant. The appeal is from the judgment, with a bill of exceptions.

In precinct No. 1 the record shows that 118 votes were counted without objection for contestant, and 11 votes were objected to and reserved by counsel for respondent; 134 votes were counted without objection for respondent, and 19 votes were objected to by contestant. It subsequently appears that all ballots were counted, and as counted the tally stood for Brown 154 votes, for Jennings 128. It is not expressly stated that the ballots objected to by respondent's attorney were ballots for contestant, or that those objected to by contestant were cast for respondent, but it would naturally be supposed that such was the case; and, if so, then the tally clerks must have made a wrong addition. It should have been, on that hypothesis, 153 for Brown, and 129 for Jennings. This would have changed the result as finally declared. The court was requested by the contestant to recount the votes, but declined to do so. There were also 4 ballots which had not been counted by the precinct officers. The bill of exceptions fails to show error in this respect. It surely does not show all that occurred at the trial; for, while it appears that some 30 ballots were objected to, it is impossible to find from the record how the court ruled upon one-half that many. There were two tally clerks, and the court reporter also kept tally. All agreed, and the court was satisfied that no mistake had been made.

We have carefully examined the ballots which were brought here for our inspection under a previous order. We find nothing upon any of these worthy of notice, unless it is the ballot upon which the voter has written, under the head "State Printer," the name "W. D. Craig, Independent Democrat." It is objected that the voter was only authorized to write the name of the person voted for, and that the addition "Independent Democrat" is unauthorized, and may constitute a distinguishing mark. Section 1191, Pol. Code, provides that after a candidate's name shall be printed his party designation, and they were so printed on the ballot. It would be quite natural, then, that one writing in the name of a candidate not in the list should add such designation. Perhaps the statute should be construed as requiring or permitting the name to be written in the same manner as the others are printed. The designation would then be a *descriptio personae*, and a part of the designation of the person voted for, and authorized by the statute. This state of things existed in *Tebbe v. Smith*, 108 Cal. 101, 41 Pac. 454. Upon all the ballots cast at one precinct there appeared, written under the head of "Justice of the Peace," "C. G. Brown, Republican." It was shown that the writing was all in the same hand, and that but one person voting at the precinct

was lawfully assisted. This court sanctioned the counting of the vote for the person lawfully assisted. There the word "Republican" was, or might have been, a distinguishing mark, just as "Independent Democrat" is here. The fact was disregarded as of no consequence. I am not inclined to hold that any of the requirements of the election law are directory only, but, while all of its provisions are mandatory, they should be liberally construed. The so-called "Australian Ballot System" only secures secrecy in voting when the elector desires it, and has sufficient independence to insist upon it. But a voter can—and, by one who has sufficient power over him, be forced to—so mark his ballot that it can be identified. Many ways could be suggested in which this could be done without destroying the legality of the ballot. It is quite manifest in this case that the words were not intended as a distinguishing mark, and, as the law may be construed as permitting it, I see no reason for changing the rule followed in *Tebbe v. Smith*. The judgment is affirmed.

We concur: MCFARLAND, J.; GAROUTTE, J.

PEYCKE et al. v. KEEFE et al. (S. F. 115.)
(Supreme Court of California. Sept. 15, 1896.)

APPEAL.—STAT OF PROCEEDINGS IN COURT BELOW.

Under Code Civ. Proc. § 946, which provides that whenever an appeal is perfected "it stays all further proceedings in the court below upon the judgment or order appealed from," where a party has perfected his appeal to the supreme court from the judgment against him, and from the order of the superior court made on his motion to set aside such judgment, the court below so far loses jurisdiction of the cause that it cannot, pending such appeal, set aside the judgment of its own motion.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; Eugene R. Garber, Judge.

Action by Ernest Peycke and Julius Peycke against D. Keefe and others. From a judgment in favor of plaintiffs, and an order refusing to set the same aside, defendant Keefe appealed. Pending the appeal, the trial court of its own motion set aside the judgment as against defendant Keefe, and plaintiffs appeal. Keefe's appeal dismissed. Order appealed from by plaintiffs reversed.

T. M. Osmont and Peri E. Allen, for appellants. A. D. Splivalo and Jos. M. Nougues, for respondents.

SEARLS, C. This is an action to recover from the defendants, as co-partners under the firm name of D. Keefe & Co., the sum of \$443.87 as a balance for money advanced by plaintiffs to defendants. Defendant Keefe answered, averring that he was the sole member of the firm of D. Keefe & Co., denied the indebted-

1 Rehearing denied.

edness to plaintiffs, and by way of cross complaint, upon the facts therein stated, demanded a judgment against the plaintiffs for \$136.35. Pending the case, and before a trial on the merits, such proceedings were had that, on the 4th day of April, 1896, the court below, on motion of counsel for plaintiffs, struck out the answer and cross complaint of defendant Keefe, and entered judgment in favor of plaintiffs as prayed for in their complaint. Defendant Keefe moved the court, on affidavit, and upon the papers on file, to set aside the judgment entered against him, and to restore his answer and cross complaint. This motion was denied by the court June 20, 1896. On June 26, 1896, defendant Keefe took and perfected an appeal to this court from the judgment and order refusing to set the same aside, etc. Thereafter, and on the 30th day of October, 1896, the court, upon its own motion, and without any application therefor or notice thereof, set aside the judgment against defendant and restored his answer and cross complaint. Plaintiffs in due time appealed from this last order, and, as defendant Keefe has never filed his transcript on appeal in this court, plaintiffs also move to dismiss this appeal. The motion to dismiss the appeal of Keefe should be granted.

Touching the appeal of plaintiffs from the order setting aside the judgment and restoring the answer, etc., we are of opinion, from the showing made by the bill of exceptions, (1) that the court was justified in making the order striking out the defendant's answer and rendering judgment against him, upon the ground that he willfully refused to give his deposition in the cause; (2) but these matters are so far within the discretion of the trial court that, inasmuch as it is the policy of the law to favor a fair and impartial trial of every cause upon its merits, we are not at liberty, under the circumstances of this case, to reverse the action of the court looking to that end, provided, always, the court below possessed the power to make the order at the time and in the manner pursued by the court. Addressing, then, our attention to the question of the authority of the court to make the order setting aside the judgment, etc., appealed from, the objections urged thereto are: (1) The judgment set aside had been appealed from, and (as is claimed) the court had lost all jurisdiction in relation thereto. (2) The judgment was entered more than six months prior to the order of October 30, 1896, setting it aside; hence, the court had no authority in the premises. (3) That the court had no authority to act in the premises on its own motion, and without a showing as to the justice thereof.

Touching the first proposition, section 246 of the Code of Civil Procedure provides that, "whenever an appeal is perfected, as provided in the preceding sections of this chapter (chapter 1, tit. 13, pt. 2), it stays all further proceedings in the court below upon the judgment or order appealed from or upon the matters embraced therein, * * * but the court be-

low may proceed upon any other matter embraced in the action and not affected by the order appealed from." In *Kirby v. Superior Court*, 68 Cal. 604, 10 Pac. 119, it was held that, pending an appeal, the trial court has no jurisdiction to allow an amendment to any pleading. In *Bryan v. Berry*, 8 Cal. 130, it was held that, where a judgment is rendered and an appeal taken to this court, the court below loses control over the judgment, and an order amending the judgment is erroneous. In *Reynolds v. Reynolds*, 67 Cal. 176, 7 Pac. 480, it was held that, after a case has been appealed, the trial court has no power to so change the judgment appealed from as in effect to prevent the review of alleged errors brought up by a bill of exceptions. In *Savings Union v. Myers*, 72 Cal. 161, 13 Pac. 403, it was held that the superior court cannot deprive the supreme court of jurisdiction of an appeal from a judgment by amending it while the appeal is pending. In *Stewart v. Taylor*, 68 Cal. 5, 8 Pac. 605, it was held that, pending an appeal from an order denying a motion for a new trial, the lower court has no authority to vacate or set aside the same. Upon the authority of these cases we are of opinion that, when the defendant Keefe perfected his appeal to this court from the judgment against him, and from the order of the superior court made upon his motion to set aside such judgment, the court below so far lost jurisdiction of the cause that it could not, pending such appeal, set aside the judgment on its own motion, and that to do so was error, for which the order setting aside the judgment should be reversed.

These views render an examination of the other points unnecessary. We recommend (1) that the order appealed from by plaintiffs be reversed; (2) that the appeal of defendant D. Keefe be dismissed.

We concur: BELCHER, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from by plaintiffs is reversed, and the appeal of defendant D. Keefe is dismissed.

ROBINSON v. THORNTON. (S. F. 29.)¹
(Supreme Court of California. Sept. 17, 1896.)

APPEAL—DECISION—CONSTRUCTION.

Where a judgment is reversed on appeal, and remanded for a new trial, the holding of the appellate court on a question of fact, based on the evidence in the record, is not conclusive as to such question on a subsequent trial on new evidence; hence it is error for the trial court to take it from the jury, and determine it as a matter of law.

Department 2. Appeal from superior court, San Mateo county; A. A. Sanderson, Judge.

Action by O. P. Robinson against R. S. Thornton. From a judgment for defendant, and an order denying a new trial, plaintiff appeals. Reversed.

¹ Rehearing denied.

T. M. Osmont, for appellant. R. F. Fitzpatrick, B. B. Newman, and Fox, Kellogg & Gray, for respondent.

PER CURIAM. This case has been here before, and is reported in 102 Cal., commencing at page 675 (34 Pac. 120). In the opinion then delivered, the history of the case is fully stated, and for the purpose of this present decision it is not necessary to restate it. At the retrial, out of which this present appeal arises, the court, when the evidence had all been offered, instructed the jury as follows: "The court instructs you, as a matter of law, to wit, the law in this case as declared by the supreme court of this state in this case, that the title claimed by the plaintiff in this case has been shown to be extinguished; and that, as a matter of law aforesaid, the plaintiff has no title to the lands in dispute in this action, and your verdict must be for the defendant. The court instructs you as a matter of law, to wit, the law of this case, declared so by the supreme court in this case, that the plaintiff is not entitled to recover herein; and you are hereby directed to bring in a verdict in favor of the defendant, Thornton." In accordance with these instructions, the jury returned a verdict for the defendant. These instructions were erroneous, and were given, no doubt, through a misunderstanding of what this court decided on the former appeal. It was there decided that, by the foreclosure sale under the Wilson and Jordan mortgage, the interest of the Greens in the disputed premises became extinguished, and therefore no title to said premises was acquired by the plaintiff, Robinson, under the attachment or execution sale set forth in the record. It was decided further, however, that the Greens, who were in possession at the time of the execution sale, and also Thornton, who was a vendee of the Greens, were estopped to show that the Greens had no title at the time of such execution sale. But it was further decided that Thornton was not estopped to set up an adverse possession and title by prescription, by establishing an adverse possession for the statutory period of limitation; and, further, that the evidence taken at the former trial was sufficient to warrant the finding that Thornton did have such possession for said statutory period; and the judgment was reversed on account of said adverse possession of Thornton. But the question of such adverse possession is one of fact, and upon a subsequent trial the jury were not estopped by the decision of this court from finding the issue of such adverse possession differently from the finding at the former trial. They might have found that issue differently, even though the testimony was the same as at the former trial; but, as a matter of fact, there was at the latter trial additional testimony on that point. It was for the jury, therefore, to determine whether or not there was such adverse possession; and the court erred in taking that question

away from the jury. The questions of law arising out of the documentary evidence which established undisputed facts, of course, were determined by the former decision; but that decision is not final as to the question of Thornton's adverse possession for the statutory period, which is purely a question of fact to be determined by a court or jury upon the evidence brought before it upon a subsequent trial. *Benson v. Shotwell*, 103 Cal. 165, 37 Pac. 147; *Mahan v. Wood*, 79 Cal. 259, 21 Pac. 757; *Wallace v. Sisson* (Cal.) 45 Pac. 1000. The verdict of the jury upon this question of adverse possession for the statutory period might have been the same as the finding at the former trial, but we cannot say as a matter of law that such should have been the verdict. For these reasons, the judgment must be reversed, and a new trial ordered. Judgment and order denying a new trial reversed.

AMADOR GOLD MINE, Limited, v. AMADOR GOLD MINE et al. (S. F. 95.)

(Supreme Court of California. Sept. 19, 1896.)

FORCIBLE ENTRY AND DETAINER—VARIANCE—FINDING—JUDGMENT.

1. In an action for forcible entry and detainer, where the complaint alleged that defendants entered on the premises July 14th, and the proof was that they entered June 26th, there was no material variance.

2. A finding that defendants "took possession on June 26, 1893," negatives the allegation that they were in continuous possession from May 1, 1893.

3. Error in the admission and exclusion of evidence under one count is without prejudice where the judgment for plaintiff may stand on another count.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; W. R. Daingerfield, Judge.

Action by the Amador Gold Mine, Limited, against the Amador Gold Mine, J. H. Tibbits, and Edward Tibbits. From a judgment in favor of plaintiff, and an order denying their motion for a new trial, defendants appeal. Affirmed.

Lindley & Elckhoff, for appellants. Vincent Neale, for respondent.

VANOLIEF, C. The plaintiff, an English corporation, brought this action against the defendants, a California corporation, for a forcible detainer (as defined by section 1160 of the Code of Civil Procedure) of a certain tract of mineral land on which is a quartz lode, a 60-stamp quartz mill, and other improvements, situate in the county of Amador. The complaint consists of two counts, —the first, under the second division of section 1160, alleging an unlawful entry upon said premises on July 14, 1893, in the absence of plaintiff, and a refusal to surrender possession for the period of five days after demand by plaintiff for such surrender; and

the second, under the first division of said section, alleging that the defendants, by force and with strong hand and threats of violence, unlawfully hold and keep possession of said land and appurtenances. The answer of defendants to the first count denies that plaintiff was ever entitled to the possession of any part of the premises described in the complaint, and denies that on July 14, 1893, or at any time within five days previous thereto, plaintiff was in peaceable or actual possession or occupation of any part of said premises, as alleged in the complaint. In answer to the second count, defendants deny that the corporation defendant has ever unlawfully, or with force or threats of violence, held or kept possession of said premises, or any part thereof, at any time since July 14, 1893, "contrary to the form of the statute." After the close of the evidence, and by leave of the court, defendants amended their answer to each count of the complaint by inserting the following: "That on the first day of May, 1893, said defendant Amador Gold Mine, as was its right, did peaceably and quietly enter upon said pieces and parcels of land, and all thereof, and thence hitherto has continued to be, and now is, in the peaceable and quiet possession of said pieces and parcels of land, and all thereof." The cause, having been tried without a jury, the court found for plaintiff on both counts of the complaint, and rendered judgment for restitution of possession, and for treble damages, amounting to \$450. The court denied defendants' motion for a new trial on the condition that plaintiff would remit the damages, and plaintiff performed this condition according to the order of the court. The defendants have appealed from the judgment of restitution, and from the order denying their motion for a new trial.

1. Counsel for appellants contend that the finding of the court that the defendants entered upon and took possession of the premises on the 26th day of June is a fatal variance from the complaint, in which it is alleged that defendants entered on July 14, 1893. But, since such variance could not have misled defendants to their prejudice, it is immaterial. Code Civ. Proc. § 469. The only suggestion of its materiality is that the finding brings the date of defendants' entry within one year next before the commencement of the action, and thus defeats the defense pleaded after the close of the evidence, to the effect that defendants had entered and peaceably held possession more than one year next before the action was commenced. Code Civ. Proc. § 1172. But, surely, the plaintiff, under the allegation that defendants entered July 14, 1893, was entitled to prove that they entered at any time within one year next before the commencement of the action. Within that period no variation from the date alleged in the complaint was material. *Norris v. El-*

lott, 39 Cal. 72; *Davis v. Baugh*, 59 Cal. 568; *Kidder v. Stevens*, 60 Cal. 420; *Biven v. Bostwick*, 70 Cal. 639, 11 Pac. 790. The action was commenced May 7, 1894, and the finding is that defendants entered June 26, 1893. Counsel for appellants are mistaken in saying "the complaint says defendants did not take the premises until July 14, 1893."

2. Appellants contend that there is no sufficient finding on the issue tendered by the aforesaid amendment of the answer, namely, that defendants took possession of the premises on May 1, 1893, and continuously thereafter held such possession. The plaintiff alleged the date of defendants' entry to have been July 14, 1893. Defendants alleged, it to have been May 1, 1893. The court found it to have been June 26, 1893. Conceding that the finding does not necessarily negative defendants' allegation that they entered on May 1, 1893, yet it does negative the continuance of such possession until June 26th; for, unless the defendants had abandoned or lost the alleged possession taken on May 1st, they could not have taken possession on June 26th; and if, as found by the court, they took the possession complained of on June 26th, they must have abandoned or lost any possession taken by them prior to June 26th. Such prior possession, if it existed, was entirely distinct from that initiated on June 26th, and, having been interrupted between May 1st and June 26th, could not have been counted as a part of that quiet possession "for the space of one whole year together next before the commencement of the proceedings," which is required by section 1172 of the Code of Civil Procedure to constitute a defense to the action. It was therefore immaterial whether or not the defendants had taken or held possession for a period of time prior to June 26th distinct from and disconnected with that which the court found to have been initiated on the 26th day of June, 1893; and, since the defendants could not have been injured by the failure of the court to find upon that issue, the judgment should not be reversed for such failure. *Roberts v. Haley*, 65 Cal. 397, 4 Pac. 385; *Johnson v. Vance*, 86 Cal. 123, 24 Pac. 863; *Miller v. Hicken*, 92 Cal. 229, 28 Pac. 339.

3. The finding that defendants entered on June 26, 1893, and thence forcibly withheld the possession until the commencement of the proceeding, is justified by a great preponderance of the evidence. Nor is there any evidence substantially tending to support the contention of appellants that plaintiff abandoned the premises in question, or was not in actual possession up to and at the time defendants entered, and within five days before, though plaintiff's agents were absent from the premises at the time defendants entered.

4. In the bill of exceptions are specified 35 alleged errors in law occurring at the

trial, as to which counsel for appellants say: "Under this head, appellants respectfully direct the attention of this court to the various rulings made during the trial to which defendants duly excepted, because these show quite clearly how the mind of the trial court was moved during the proceedings before it. Some of the rulings, standing alone, would perhaps be of little consequence one way or another; but the development of the court's view of the case in the direction indicated by its line of rulings we believe to have been wrong and to the prejudice of defendants." Although having read the record carefully, I have discovered no valid or even plausible ground upon which any of these specified errors can be maintained, except that perhaps it may be questionable whether the court ruled correctly in admitting and excluding evidence as to the force, menaces, and threats of violence necessary to constitute the cause of action alleged in the second count; but errors in such rulings could not have affected the finding of the forcible detainer necessary to support a judgment for plaintiff on the first count, upon which alone the judgment may stand. I think the order and judgment should be affirmed.

We concur: SEARLS, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order and judgment are affirmed.

MCCULLY v. COOPER. (L. A. 144.)

(Supreme Court of California. Sept. 16, 1896.)

ANCILLARY ADMINISTRATORS—RIGHT TO COLLECT LOCAL DEBTS.

Where the domiciliary administration of a decedent is in another state, but an ancillary administratrix has been duly appointed in California, the latter may recover from the general administrator possession of a certificate of deposit in a California bank, belonging to the estate, of which payment has been refused, on which the general administrator cannot maintain suit in California, it being a paramount object of an ancillary administration to collect local debts due the estate.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

Action by Jane Mason McCully, administratrix of the estate of James L. Mason, deceased, against George H. Cooper. From a judgment for defendant, and an order denying a new trial, plaintiff appeals. Reversed.

Trippet & Neale, for appellant. J. W. Hughes, for respondent.

SEARLS, C. This is an action to recover possession from George H. Cooper, the defendant, of a certificate of deposit, issued by the Consolidated National Bank of San Diego, located in San Diego, Cal., for \$3,000, dated

April 2, 1892, payable to the order of James L. Mason, and upon which certificate there is indorsed a credit of \$2,200. Defendant had judgment, from which judgment, and from an order denying her motion for a new trial, plaintiff appeals.

James L. Mason, the holder and owner of the certificate of deposit, was a resident of the county of Hancock, in the state of Indiana, at which place he died on the 2d day of January, 1894, leaving a large amount of property, real and personal, situate and being in said county and state. On the 20th day of January, 1894, George H. Cooper was, by an order of the circuit court in and for said county of Hancock, state of Indiana, duly appointed administrator of the estate of said James L. Mason, deceased, duly qualified as such administrator, and letters of administration were duly issued to him, and he is still such administrator. At the time of his death the said James L. Mason was the owner of, and in possession of, said certificate of deposit, in said county and state; and the same came into the possession of said Cooper, as his administrator, on the 20th day of January, 1894. In June, 1893, the Consolidated National Bank of San Diego became insolvent, closed its doors, and refused to pay its depositors; and thereafter, in said year 1893, Andrew J. O'Connor was duly appointed and qualified as receiver of said bank, and is still acting as such receiver. On the 24th day of January, 1894, defendant, Cooper, as such administrator, sent by mail the said certificate of deposit to said Andrew J. O'Connor, receiver, at San Diego, Cal., for the purpose of proving up his claim as said administrator of said Mason, deceased, against said insolvent bank; and thereupon the receiver of the bank declined either to permit Cooper to prove up the claim, or to return the certificate of deposit to him upon demand. On the 9th day of March, 1895, the said receiver, upon a second demand, returned the certificate of deposit to Cooper, as administrator, at the county of San Diego, Cal., where it was retained when this action was brought, and for 20 days thereafter, and then was returned to the state of Indiana, where it has since been held by said Cooper, as administrator of said Mason, deceased. Under the laws of the state of Indiana, administrators appointed therein may, by order of the circuit court of said state, sell and dispose of all certificates of deposit in the state of Indiana, lawfully in their possession as such administrators. The status of Jane Mason McCully, the plaintiff herein, may be thus stated: On the 20th day of March, 1894, said plaintiff was duly appointed, by order of the superior court in and for the county of San Diego, state of California, the administratrix of the estate of said James L. Mason, and thereupon duly qualified as such administratrix, and letters of administration were duly issued to her; and she ever since has been, and still is, the administratrix of the

estate of said Mason. The estate of said James L. Mason had not, so far as appears in this action, any property or assets in the county of San Diego, or state of California, save and except the demand hereinbefore mentioned against the Consolidated National Bank of San Diego, evidenced by the certificate of deposit hereinbefore mentioned. Before this action was brought, plaintiff demanded possession of said certificate of deposit from defendant Cooper, but defendant refused, and still does refuse, to deliver the same to her. Plaintiff sought judgment for possession of the certificate, if such possession could be had, and, if not, for \$5,800, the value thereof, and for damages and costs.

The question involved is this: Can the California administratrix recover from the domiciliary administrator, appointed in the state of Indiana, who is temporarily in this jurisdiction, with the evidence of a simple contract debt, which contract debt is due and owing here, the certificate of deposit which is the evidence of such debt? There are a number of propositions bearing more or less upon the question, which are either universally conceded, or established by such a preponderance of authority as not to call for comment. Among these are:

1. Save as otherwise provided by statute, the proper jurisdiction in which to obtain letters testamentary or of administration is in the state and place of the decedent's domicile at the time of his death. *Williams, Ex'r's* (6th Am. Ed.) 495 et seq.; *Wilkins v. Ellett*, 108 U. S. 256, 2 Sup. Ct. 641; *Crosby v. Leavitt*, 4 Allen, 410.

2. The authority of an executor or administrator does not extend beyond the jurisdiction of the state or government under which he is invested with his authority. *Code Civ. Proc.* § 1913; *Story, Conf. Laws*, § 512, and cases there cited.

3. Where there are no debts owing by the estate in the jurisdiction where the foreign debtor resides, and no ancillary administration has been granted there, the principal administrator may, in such foreign state, receive a voluntary payment from the debtor, which will be a good acquittance to him, even if an ancillary administrator should be subsequently appointed. *Klein v. French*, 57 Miss. 662; *Wilkins v. Ellett*, supra; *Schluter v. Bank*, 117 N. Y. 125, 22 N. E. 572; *Reynolds v. McMullen*, 55 Mich. 568, 22 N. W. 41; *Appeal of Gray*, 116 Pa. St. 256, 11 Atl. 66, 70.

4. So an administrator who has, within the jurisdiction of his appointment, obtained a judgment against a debtor of a foreign state, or has reduced the personal property of the estate to possession, so as to acquire the legal title thereto, and it is wrongfully taken from him and carried to a foreign state, he may in such foreign state maintain an action, not officially, but in his individual capacity, upon such judgment, or to recover such personal property so wrongfully taken from him. *Talimage v. Chapel*, 16 Mass. 71; *Biddle v. Wil-*

kins, 1 Pet. 636; *Greasons v. Davis*, 9 Iowa, 219; *Lewis v. Adams*, 70 Cal. 403, 11 Pac. 833; *Fox v. Tay*, 89 Cal. 339, 24 Pac. 855, and 26 Pac. 897; *Low v. Burrows*, 12 Cal. 188; *Story, Conf. Laws*, § 516.

5. If there be assets in another state or states than that in which the principal letters are granted, an administration may be obtained there, and such administration will be regarded as ancillary to the administration of the domicile; and, as a general rule, the excess of the assets resulting from such ancillary administration, after the payment of local debts, expenses of administering, and local legacies, if any, in the jurisdiction of the ancillary administration, will be transmitted to the administrator of the domicile, to be there distributed according to the law of the vicinage. *In re Apple's Estate*, 66 Cal. 432, 6 Pac. 7.

6. A certificate of deposit is a negotiable security, and to that extent is upon the same footing with promissory notes. *Welton v. Adams*, 4 Cal. 37; *Brummagin v. Tallant*, 29 Cal. 503; *Mills v. Barney*, 22 Cal. 240; *Poorman v. Mills*, 35 Cal. 118.

7. An executor or administrator duly qualified to act as such may assign negotiable securities due and owing to his decedent at the time of his death, which have come to him by virtue of his office; and his assignee may sue the maker thereof in another state without the necessity of letters testamentary or of administration being had in such latter state, if by the law of the forum actions are maintainable by the assignees of negotiable securities. *Harper v. Butler*, 2 Pet. 239; *Sanford v. McCreedy*, 28 Wis. 102; *Robinson v. Crandall*, 9 Wend. 425; *Patchen v. Willson*, 4 Hill (N. Y.) 57. There are some authorities in opposition to the proposition last enunciated, but it is thought that the cases cited, and others to like effect, are, upon principle, correct.

8. For the purpose of founding administration, a simple-contract debt is assets where the debtor resides, even if a bill of exchange or promissory note has been given for it, and without regard to the place where the bill or note is found payable. *Wyman v. Halstead*, 109 U. S. 654, 3 Sup. Ct. 417.

Under this state of the law, and upon the facts of the case as demonstrated in the bill of exceptions and findings, what was the duty of the defendant when plaintiff was appointed administratrix in California? He had not indorsed or assigned the certificate. The receiver had refused to allow it as a valid claim against the bank. Defendant could not maintain an action to establish it as a claim in this state. The very object of the ancillary administration in this state is to collect assets of the estate here, and it is the bounden duty of plaintiff to so collect them. A paramount object of the local or ancillary administration is to collect the assets locally situated, and to pay therefrom the demand of local creditors, if any there be. Whether there are any

such creditors can only be determined by giving the notice to creditors required by our law. It would seem that, upon principle, it became the duty of defendant, when plaintiff was appointed and qualified, to surrender to the latter the evidence of the debt in question, which is upon simple contract, the payment of which can only be enforced here. We concur in the views of the supreme court of the state of Mississippi, as expressed in *Klein v. French*, 57 Miss., at pages 670, 671, where, after discussing cognate questions, and enunciating the general principles applicable, it is said of the domiciliary administrator: "He has the title and the possession. He has the right to receive voluntary payment. He has the right to apply for and receive the appointment of ancillary administration, or to secure it to his nominee. He cannot, therefore, hold the evidence of debt, and do nothing, for this would be most unjust to the distributees, and would result in a loss of the debt to them," etc.; and after pointing out his duty to secure his own appointment, if practicable, and, if not, it is said, "He should then take proper steps to have another appointed, and turn over to him the collection of the debt." We conclude that when, after her appointment, plaintiff demanded from defendant possession of the certificate of deposit, it was the duty of the latter to have delivered the same to her, and that upon his refusal so to do, as against plaintiff, he was the wrongful holder thereof. It follows that the findings of the court that plaintiff at the time of the filing of the complaint was not, never has been, and is not now the owner of, or entitled to the possession of, the certificate of deposit, and that defendant was and is the owner of, and lawfully entitled to the possession of, said certificate of deposit, are not supported by the evidence. We recommend that the judgment and order appealed from be reversed, and a new trial ordered.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are reversed, and a new trial ordered.

EBERHARDT v. COYNE. (Sac. 44.)

(Supreme Court of California. Sept. 17, 1896.)

ADVERSE POSSESSION—PAYMENT OF TAXES—SUFFICIENCY OF FINDINGS.

Under Code Civ. Proc. § 325, making the payment of taxes by an adverse holder an essential element to establish title by adverse possession, where a complaint alleged title by adverse possession to a strip of ground in dispute between the owners of adjoining lots, a judgment for plaintiff is not supported by a finding that plaintiff paid taxes on her lot, in the absence of a finding that the strip in dispute was a part of such lot. *McFarland, J.*, dissenting.

Commissioners' decision. In bank. Appeal from superior court, Sacramento county; A. P. Catlin, Judge.

Action by Delia Eberhardt against M. J. Coyne. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Reversed.

Frank D. Ryan and James B. Devine, for appellant. Armstrong & Bruner and R. Platnauer, for respondent.

BRITT, C. Ejectment for a piece of land about 80 feet long and 4 feet wide in a certain block in the city of Sacramento. It is admitted that plaintiff has the paper title to the "west 32 feet" of lot 2 in said block, and that she has paid the taxes thereon since the year 1871; also, that defendant has like title to the south half of lot 1 in the same block, and that he and his predecessors in interest have paid the taxes thereon since that year. The west line of plaintiff's land and the east line of defendant's are coincident for the length of the parcel in dispute, which lies along such common boundary. In her complaint, filed December 23, 1892, plaintiff alleged herself to be the owner of the demanded premises, describing the same by reference to monuments, courses, and distances; that she and those under whom she claims have been in the adverse possession thereof, claiming title, for more than 20 years, and until she was ousted by defendant in December, 1892; that by reason of such possession "the plaintiff became and is the owner of said premises by prescription." These allegations, excepting that of ouster, were denied by defendant. At the trial defendant produced evidence tending to show that the land sued for is within the boundaries of the south half of said lot 1. The court found that plaintiff was, at the time of the commencement of the action, "and for many years prior thereto," the owner of the premises described as "commencing at the north end of a fence constructed by the defendant on lot 2," etc., the line of such fence being the east boundary of the parcel described, and no further reference being made to the lines of either lot 1 or lot 2; also, that plaintiff was in the adverse possession of such premises for 10 years next before the entry of defendant in December, 1892.

The complaint proceeds and the trial was had, apparently, on the theory that plaintiff's right to the land depends upon adverse possession thereof for the prescriptive period of five years. Since the amendment to section 325, Code Civ. Proc., which took effect May 31, 1878, the payment of the taxes by the adverse holder, if any are assessed against the land, is a necessary element in the establishment of title by means of adverse possession. The finding here has no relation to the time before May 31, 1878, when payment of taxes was not required in order to make out such possession, for it is

limited to the space of 10 years next before defendant's entry; and as to such period of 10 years it is not sustained by the evidence, for the admission at the trial was that the taxes paid by plaintiff have been those assessed upon the "west 32 feet of said lot 2." This was not effectual to complete the prescriptive right to land not included within that designation. *McDonald v. Drew*, 97 Cal. 266, 32 Pac. 173; *Baldwin v. Temple*, 101 Cal. 398, 35 Pac. 1008. Respondent contends here that the land in suit is really parcel of the said west portion of lot 2, to which she admittedly has paper title. Allowing that she may thus assert an origin of her title different from that set forth in the complaint (as to which question see *Eagan v. Delaney*, 18 Cal. 85), then, if the assertion is sustained by the record, of course the matter of adverse possession is of no moment in the case; but it was not so alleged in the complaint, or proved at the trial, or found by the court. The respondent's argument in this particular rests on the reference in the finding to the "fence constructed by the defendant on lot 2," but plainly the land described, lying west of the fence, may be wholly within lot 1. The judgment and order denying defendant's motion for a new trial should be reversed.

We concur: VANOLIEF, C.; BELOHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order denying defendant's motion for new trial are reversed.

McFARLAND, J. I dissent. The action is ejectment to recover a small strip of land, about 4 feet wide, lying along the line between lots 1 and 2 in a certain block in the city of Sacramento. The court found that at the commencement of the action plaintiff was entitled to the possession of the disputed premises, and had been in the actual, exclusive, and adverse possession thereof for 10 years (and it might justly have been 20 years) next before December, 1892, at which last-mentioned time defendant took possession thereof, and rendered judgment in favor of plaintiff for the possession of said premises. I see no reason for disturbing the judgment. The record shows that the regular paper title to the west 32 feet of lot 2 was conveyed to plaintiff in 1872; and the evidence is amply sufficient to show that, within a year or two thereafter, she inclosed by a fence the land thus conveyed to her; that the fence included the strip now here in contest; that since 1872 she continuously had a barn on her land which extended entirely over said strip; and that for a period much longer than 10 years next preceding December, 1892, she was thus in the actual, exclusive, and adverse possession of said strip of land, openly

and notoriously claiming it as her own. Defendant owns a part of lot 1 lying to the west of plaintiff's land. In 1892 a storm blew down a part of plaintiff's fence between her land and that of defendant, whereupon defendant pulled down the rest of said fence, and built a new fence about 4 or 4½ feet to the east of the old one, thus taking possession of the strip in contest. This new fence takes in the west part of plaintiff's barn, some of the boards of which defendant took off. (From the diagram in evidence it seems that the new line also runs through plaintiff's house.) The facts leave to the defendant only the defense that plaintiff has not complied with the provisions of section 325, Code Civ. Proc., relating to the payment of taxes. Payment of taxes has no natural relation whatever to the matter of actual adverse possession of land, and therefore the provision of said section should not be applied as a mere technical defense founded on an alleged slight defect in the description of land. In the present case this defense is highly technical, for it is based upon the strict letter, and not upon the spirit and intent, of the law. There is no pretense that plaintiff tried to evade the payment of her taxes, or that she did not believe that she had paid all the taxes upon her land as inclosed and claimed by her. She did actually pay all the taxes on her lot from 1872 to the present time; but the assessments for taxes on it were made in the form of the "west 32 feet of lot 2"; and it is contended that therefore she did not pay taxes upon the small strip within her inclosure which is now in contest. But, if we should concede that if the strip were actually not a part of lot 2, this would be such a want of compliance with section 325 as to be fatal, still the whole theory of the appellant on this point is based upon the assumption that the strip in contest is not a part of lot 2, but is a part of lot 1. That assumption, however, is entirely unwarranted. On the contrary, it is alleged in the complaint that the new fence built by defendant was "on the land of the plaintiff claimed by her to be a part of lot 2," and in the finding of the court the said fence is described as "constructed by defendant in December, 1892, on lot 2." It may be said that this finding is rather in the form of recital, and not direct; but there is no exception to it. Moreover, there is no averment in the answer that the strip is on lot 1, or that it is not on lot 2; and there is no exception to the findings on the ground that they do not fully enough find that the strip is a part of lot 2. It is expressly admitted by stipulation that plaintiff paid taxes as hereinbefore stated, and there was no need of a finding on that subject. These views make it unnecessary to discuss other points made by respondent in support of the judgment. In my opinion the judgment should be affirmed.

Indeed, as appears from appellant's witness, the surveyor, it is impracticable to determine with any accuracy where the true line between the two lots is, if it can be said that there is any such true line; and, in the case at bar, I cannot see any stronger evidence of the correct location of that line than is afforded by the fact that a fence on what respondent claimed to be the true line has stood for a period several times longer than the statutory period of limitation, without any objection by the coterminous owners. And, for the purpose of the payment of taxes, this fence, in my opinion, establishes the western line of lot 2.

Ex parte STEPHEN. (Cr. 160.)

(Supreme Court of California. Sept. 17, 1896.)

JUDGMENT—CONCLUSIVENESS—HABEAS CORPUS—INTOXICATING LIQUORS.

1. Where, in a criminal action in the superior court, which is a court of general jurisdiction, a question of fact upon which the court's jurisdiction depended was litigated, and decided in favor of the prosecution, the question is judicially decided as between the parties, and the decision cannot be attacked in habeas corpus proceedings brought by defendant in another court.

2. In an ordinance by a county board fixing saloon licenses, a discrimination between those doing business in incorporated cities and those without their limits is not unlawful.

3. A provision of a county ordinance, which undertakes to prescribe the punishment of a person conducting a saloon without a license, and which is void as being in contravention of Pen. Code, §§ 19, 435, which fix such punishment, does not invalidate the other provisions of the ordinance; hence, on a conviction thereunder, the punishment fixed by the statute may be imposed.

In bank. Petition by Leo Stephen for a writ of habeas corpus. Writ denied.

McKelvey & Bowes, for petitioner. J. W. Ballard, for respondent.

VAN FLEET, J. Petitioner, convicted in the superior court of the county of Orange of a misdemeanor in carrying on a saloon and selling liquor without procuring a license therefor, as required by Ordinance No. 35 of the board of supervisors of said county, asks to be discharged on habeas corpus, on the ground, principally, that the ordinance is void for various alleged reasons. Several of the grounds of invalidity assigned may be passed over without further notice than to say that they relate to special features of the ordinance not here involved, and upon the sufficiency of which the validity of the particular provision under which petitioner was prosecuted and convicted in no way depends. One or more features of an ordinance may be void, and yet those parts not subject to the vice, and which are not dependent upon the provisions which are, will stand unaffected. *Ex parte Massfield*, 106 Cal. 406, 29 Pac. 775; *Ex parte Haskell* (Cal.) 41 Pac. 725. We shall therefore confine ourselves to a consideration of those objections

only which affect either the ordinance as a whole or section 1 thereof,—for a violation of which petitioner is held,—and certain objections made to the sufficiency of the judgment.

1. The first and main objection urged is that the ordinance was not passed at a regular meeting of the board of supervisors, as required by law, and is therefore wholly void. This claim is based upon the alleged fact that the board has never established by ordinance a time for its regular meetings; and it is argued that, no such time having been fixed, there could be, in legal contemplation, no such thing as a regular meeting of the board. But, assuming that such omission on the part of the board, if shown, would render void the ordinance here involved, the inquiry is one which does not competently arise. The question whether Ordinance No. 35 was regularly passed is dependent upon certain facts as to the existence of which it was within the province of the superior court, at the trial of petitioner, to inquire. One of those facts was whether the ordinance was passed at a regular meeting, and this fact involved the further one as to whether the time for such meeting had been competently established. The jurisdiction of the court to punish petitioner for the alleged infraction of the ordinance depended upon the existence of these facts, and, this being so, the judgment of conviction must be taken, upon this collateral view, as conclusively establishing such facts. We are bound to presume, in support of that judgment, that the fact about which question is really made—whether Ordinance No. 1, found in the records of the board of supervisors, fixing the time of regular meetings, was published, so as to take effect—was established to the satisfaction of the court by competent evidence. Unlike a court of limited jurisdiction, every intendment is to be indulged in favor of the regularity of the proceedings and judgment of the superior court, acting within its jurisdiction, and this whether the jurisdiction exercised be original, or, as in this instance, appellate. "After its appellate jurisdiction has once been acquired, its action within the limits of that jurisdiction, unless in direct contravention of some positive statute, is entitled to all the presumptions of regularity that attach to the exercise of its original jurisdiction." *Sherer v. Superior Court*, 94 Cal. 354, 29 Pac. 716. The judgment of the superior court is, as was said of the judgment in *Ex parte Sternes*, 77 Cal. 156, 162, 19 Pac. 275, 276, in considering a similar objection, "the record of the court, acting within its legitimate powers, and that record must be considered as speaking the truth, and as conclusive, until it has been in some way set aside or vacated. No evidence can be received to contradict it. *Freem. Judgm.* §§ 619, 126; *Lewis v. Dutton*, 8 How. Prac. 103; *Cooley, Const. Lim.* p. 407. "When jurisdiction depends on a fact that is litigated in a suit, and is adjudged in favor of that party who avers jurisdiction, then the question of jurisdiction is judicially decided, and the judgment record is conclusive evidence

of jurisdiction until set aside or reversed by a direct proceeding.' *Bloom v. Burdick*, 1 Hill, 138." And see *Ex parte Cottrell*, 59 Cal. 421. Habeas corpus is a collateral, and not a direct, proceeding, when regarded as a means of attack upon the judgment, and so long as the judgment is regular upon its face, and was given in an action or proceeding of which the superior court had jurisdiction, no extrinsic evidence is admissible here to show its invalidity.

2. It is contended that the ordinance discriminates unlawfully between those engaged in the liquor business in Orange county, in that it imposes a much heavier license tax upon those conducting such business outside of incorporated cities and towns than upon those within such municipalities, and is for this reason void. But, while this discrimination exists, it is not unlawful. It is no doubt based upon the fact that those carrying on the business within incorporated cities and towns are compelled to pay a municipal license tax, while those without are not, or for other good reason affecting the business. Such discrimination the board has a right to make. *Amador Co. v. Kennedy*, 70 Cal. 458, 11 Pac. 757; *Ex parte Haskell* (Cal.) 44 Pac. 725. Nor can the ordinance be said to be unreasonable or oppressive. *Ex parte Haskell*, supra.

3. Section 1 of the ordinance provides that any person opening, keeping, or carrying on, etc., such liquor business, without first procuring a license, shall be guilty of a misdemeanor, and makes such misdemeanor punishable by a fine of not less than \$50 nor more than \$200, or by imprisonment for not less than 100 days, or by both such fine and imprisonment, and also provides that any judgment that defendant pay a fine shall direct that, in default of payment, he shall be imprisoned in the county jail until the fine is satisfied, not to exceed 1 day's imprisonment for every \$2 of the fine. The judgment in this instance imposed a fine upon petitioner of \$250, or, in default of payment, confinement in the county jail at the rate of 1 day for every \$2 of the fine. Petitioner contends that this punishment, being greater than that prescribed by the ordinance, was in excess of the power of the court, and renders the judgment void ab initio. The punishment is undoubtedly in excess of the maximum prescribed by the ordinance, and the only question is, therefore, what effect has this upon the judgment? It is unnecessary to determine what its effect would be if the penal clause of section 1 were valid,—whether it would render the judgment void in toto, or only to the extent to which the maximum limit is exceeded,—for that portion of section 1 prescribing the punishment must be held void as in contravention of the general law of the state. It undertakes to punish the same act—carrying on a business without having a license therefor—which is punishable under section 435 of the Penal Code.

That section provides: "Every person who commences or carries on any business, trade, profession or calling, for the transaction or carrying on of which a license is required by any law of this state, without taking out or procuring the license prescribed by such law, is guilty of a misdemeanor." The last section does not itself fix the punishment for such misdemeanor, but section 19 of the same Code declares: "Except in cases where a different punishment is prescribed by this Code, every offense declared to be a misdemeanor is punishable by imprisonment in a county jail, not exceeding six months, or by a fine not exceeding five hundred dollars, or by both." In *Ex parte Sic*, 73 Cal. 142, 14 Pac. 405, it is held that a provision in an ordinance undertaking to punish precisely the same acts which are punishable under the general law of the state is to be deemed in conflict with such general law, and for that reason void. And this principle was affirmed in the recent case of *Ex parte Mansfield*, 106 Cal. 400, 405, 39 Pac. 775. But the invalidity of the penal clause of section 1 of the ordinance did not affect the other portions of that section, being wholly severable therefrom; and defendant, having been convicted of the misdemeanor therein provided against, was punishable therefor under the general statute. *Ex parte Mansfield*, supra. The judgment is not in excess of the punishment prescribed by the latter, and is consequently valid. Of course, what is here said has no reference to the other penal clauses to be found in the ordinance, as they are not involved.

4. There is nothing in the objection that the judgment does not show of what offense petitioner was convicted. The recital in the judgment is: "That whereas, the said Leo Stephen having been duly convicted in this court of the crime of establishing and carrying on a saloon, and there selling and giving away malt liquor without a license," etc. This is quite sufficient to designate the general nature of the offense. *Ex parte Murray*, 43 Cal. 455; *Ex parte Turner*, 75 Cal. 220, 16 Pac. 898; *Church, Hab. Corp.* § 365. We discover nothing in the objections entitling petitioner to his discharge, and the writ is accordingly dismissed, and the petitioner remanded.

We concur: GAROUTTE, J.; McFARLAND, J.; HARRISON, J.; HENSHAW, J.; TEMPLE, J.

KAHN v. SUTRO et al. (S. F. 534.)¹
(Supreme Court of California. Sept. 16, 1896.)
COUNTY GOVERNMENT ACT—APPLICATION TO CITY AND COUNTY OF SAN FRANCISCO.

1. Under the consolidation act (St. 1856, p. 145), which provided that the corporation known as the "City of San Francisco" "shall remain and continue to be a body politic and corporate in name and in fact, by the name of the City and County of San Francisco," such corpora-

¹ Rehearing denied.

tion, in matters of government, must be regarded as a city.

2. The territory within which a municipal government is exercised is still a part of the state, and, for all purposes other than municipal government, is subject to the state's control, with the right on the part of the state to authorize the election therein of such officers as may be required to execute its general laws, or to perform such functions, disconnected with the municipal government, as may pertain to the government of the state; hence, as to such officers, the city and county of San Francisco is within the provisions of the county government act of 1893, declaring what county officers shall be elected, prescribing their duties, and fixing their tenure of office at four years. *Beatty, C. J., and Temple J., dissenting.*

3. Officers whose election is authorized in the corporation of the city and county of San Francisco by the county government act of 1893, and who are the same in name, and are given the same or similar functions, as are officers authorized by the consolidation act (St. 1856, p. 145) to be elected in San Francisco, do not cease to be municipal officers, since the legislature cannot abridge the constitutional right given by its charter to said corporation to change its officers every two years if it shall so elect.

4. The city and county of San Francisco being under a municipal government, there is no authority for its division into townships; hence the provisions in the county government act of 1893, fixing the term of office of justices of the peace for the townships into which the several counties are divided at four years, do not apply to the justices of the peace elected for the city and county of San Francisco.

5. Act March 18, 1885, creating a police court for the city and county of San Francisco, confers upon that court certain jurisdiction, which is elsewhere exercised by justices' courts; hence its judges' terms of office were not changed by the county government act of 1893, since that act does not apply to justices of the peace in San Francisco.

In bank. Appeal from the superior court, city and county of San Francisco; *J. M. Seawell, Judge.*

Action by Julius Kahn against Adolph Suttro and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

W. H. L. Barnes, W. W. Foote, T. O. Coogan, and Rodgers & Paterson, for appellant. F. Adams, for county clerk. Garrett W. McEnerney, for other respondents. Reddy, Campbell & Metson, amici curiæ.

HARRISON, J. The plaintiff brought this action to restrain the board of election commissioners of San Francisco from calling an election for city and county officers at the coming general election, and from incurring the expenses attendant thereon; claiming that under the provisions of the county government act of 1893, as construed in the case of *Hale v. McGettigan* (recently decided) 45 Pac. 1049, there can be no election for such officers until the general election in 1898. Judgment was rendered in favor of the defendants upon a demurrer to the complaint, and the plaintiff has appealed therefrom.

The question presented for determination is whether the above act of 1893 applies to the city and county of San Francisco, and the determination of this question depends

upon the character of that body corporate in its relation to the other portions of the state,—whether it is to be regarded as a city or as a county. One feature by which a city is distinguished from a county, in this state, is the source from which its authority is derived. The powers to be exercised under a county government are conferred by the legislature, irrespective of the will of the inhabitants of the county, whereas the inhabitants of a city are authorized to determine whether they will accept the corporate powers offered them, to be exercised by officers of their own selection. In *Hamilton Co. v. Mighels*, 7 Ohio St. 109, the distinction between these two bodies was given in these words: "Municipal corporations proper are called into existence through the direct solicitation, or by the free consent, of the people who compose them. Counties are legal subdivisions of a state, created by the sovereign power of a state, of its own sovereign will, without the particular solicitation, consent, or concurrent action of the people who inhabit them. The former organization is asked for, or at least assented to, by the people it embraces. The latter is superimposed by a sovereign and paramount authority." While the corporate name of this body politic is "The City and County of San Francisco," it is recognized by the constitution as having the attributes of both a city and a county, and also as having attributes distinguishing it from either. Geographically, it is one of the legal subdivisions of the state, and in that respect is recognized in section 1 of article 11 of the constitution, as one of the counties of the state. Politically, it is regarded in that instrument as a municipal corporation. It was held in *People v. McFadden*, 81 Cal. 499, 22 Pac. 851, that a county is not a corporation for municipal purposes, within the meaning of section 7 of article 11 of the constitution. The provision in this section that "city and county governments may be merged and consolidated into one municipal government, with one set of officers, and may be incorporated under general laws providing for the incorporation and organization of corporations for municipal purposes," implies that such political body is a municipal corporation, and that its government is a municipal, and not a county, government. At its first session after the adoption of the constitution, the legislature passed an act known as the "McClure Charter," purporting to provide for the government of San Francisco, and to be carried into effect irrespective of any action by the inhabitants of the city. St. 1890, p. 137. In *Desmond v. Dunn*, 55 Cal. 242, it was held that under the constitution the act could not have any effect, except with the consent of a majority of the electors of San Francisco. If it had been considered that the government for San Francisco was a county government, this argument would have been inapplicable, and

the court would have regarded the provisions of section 4 of article 11 as sufficient to sustain the validity of the act, but the act was held invalid on the ground that the charter of the city then existing should remain in force until superseded or changed in the mode prescribed by the constitution. The charter of San Francisco is made up of the consolidation act and the various amendments thereto, together with such other statutes relating to the government of the city and county, or conferring powers upon its officers, as were in force at the adoption of the present constitution. It was urged by counsel in the case last cited that the "cities" mentioned in section 6 were corporations other than consolidated cities and counties, and, therefore, that the clause was not applicable to San Francisco; but it was held that the clause in section 7, "the provisions of this constitution applicable to cities, and also those applicable to counties, so far as not inconsistent or not prohibited to cities, shall be applicable to such consolidated government," meant that such consolidated governments are to be regarded as cities, and that "all the provisions of the constitution which are applicable to cities are likewise applicable to consolidated governments."

The city of San Francisco was created, and its limits defined, by the act of April 15, 1850 (St. 1850, p. 223); and section 2 of that act declared that "the inhabitants of the city of San Francisco, within the limits above described, shall be, and they are hereby constituted, a body politic and corporate in fact and in law, by the name and style of the 'City of San Francisco.'" Section 1 of the act of April 19, 1856 (St. 1856, p. 145), commonly known as the "Consolidation Act," by virtue of which the present corporate character of San Francisco exists, declares, "The corporation or body politic and corporate now existing and known as the City of San Francisco shall remain and continue to be a body politic and corporate in name and in fact, by the name of the City and County of San Francisco," etc. The effect of this legislative action was merely to continue, with extended boundaries and additional powers, the city of San Francisco, which had been incorporated in 1850; and, although the provisions of the charter were in many respects appropriate for a county, the corporation thus created remained a city, under a different name, but the inhabitants of the territory thus brought under the provisions of the city charter were not invested with county government. *People v. Supervisors*, 21 Cal. 668; *Wood v. Election Com'rs*, 58 Cal. 561. Section 8 of article 11, of the constitution, as originally adopted, provided that any "city" containing a population of more than 100,000 inhabitants might cause a freeholders' charter to be framed for its own government. Under this provision of the constitution the inhabitants of San Francisco

elected a board of freeholders in 1880; and the validity of this election, and the power of the board to frame a charter, were upheld in *People v. Hoge*, 55 Cal. 612, upon the ground that, under this section of the constitution, San Francisco was a city. In *Staudé v. Election Com'rs*, 61 Cal. 313, it was held that the provisions of section 4109 of the Political Code, as amended in 1881, by which the time for the election of city and county, as well as other officers throughout the state, was changed, were applicable to San Francisco, by virtue of the clause in section 6 of article 11, that "cities or towns heretofore organized shall be subject to and controlled by general laws." It may therefore be regarded as settled by the decisions of this court that the city and county of San Francisco is a municipal corporation, and, in matters of government, is to be regarded as a city. But, while the people of San Francisco are thus to be regarded as under a municipal government, with the right to select officers to execute the powers of that government according to the terms of its charter, the territory over which that government is exercised is at the same time a county; and for those purposes for which county officers exercise authority not derived from the charter, and disconnected with municipal government, its officers are properly termed "county officers." Considered in its political and judicial relations to other portions of the state, the officers elected by its voters, to the extent that they exercise only such powers as are given by laws relating merely to counties, and who do not derive any of their authority from the charter, are to be regarded as county officers, as distinguished from city officers.

It is not possible to make a harmonious construction of the terms "county," "city," and "city and county," as they are used in the constitution. The term "county" is sometimes used therein as a geographical subdivision of the state; sometimes as a political division for the exercise of governmental functions, and in the latter use it is sometimes employed as the equivalent of "city and county," and sometimes as distinguished therefrom; and the term "city and county" is sometimes used as the equivalent of "city." San Francisco is distinctly recognized therein as the geographical equivalent of a county, as in the provision for the election of judges of the superior court, and for the formation of a district for the election of a railroad commissioner; and to hold that it is not a county for any purpose would render inoperative many provisions of the constitution, and of the statutes of the state which have heretofore been recognized as applicable to it, with the result that unsuspected difficulties and perplexities would arise in the administration of justice. Without enumerating many instances, it is sufficient to call attention to the fact that there would be in that city no provision for a

grand jury, or for a board of equalization, or for the exercise of any appellate jurisdiction by the superior court, or for the exercise of eminent domain, or for creating the lien of a judgment upon real estate, or for the probate of wills, or for filing articles of incorporation; and the practitioner will readily perceive the confusion that would result in criminal jurisprudence, as well as in civil practice, if the city and county of San Francisco is to be excluded wherever the term "county" is used.

The constitution of Missouri provided for the extension of the limits of the city of St. Louis, and its incorporation into a separate and distinct body politic, under a charter to be framed by a board of freeholders, and that it should be independent of the county of St. Louis. After its organization under a charter thus framed, the governor appointed a sheriff for it, upon the ground that by its organization it became a new county, or political subdivision of the state. The right of this appointee to exercise the office was presented in *State v. Finn*, 4 Mo. App. 347, and in discussing the character of the new body politic the court said: "The question in this case is not whether the city of St. Louis, as now organized under the scheme and charter, is a county, in the sense in which that word is used in the constitution to describe the normal county of the state. It is not such a county. It has not, nor was it intended to have, a county court, and it has a chief executive and two houses of legislation. In spite of these and other features which distinguish it from the normal county, it may be a county so far as to keep up a relation as such to the rest of the state. It may be a part of the general county system, and it is so unless the framers of the constitution intended to segregate it, and to disavow in the case of St. Louis that county relation which every other portion of the state bears to the state. Because the organization of this body as a city is pronounced, and its features strongly marked, and because they thus reduce its attributes as a county into comparative insignificance, it does not follow that the latter do not exist; and it cannot be denied that it is a county, in the sense in which that term is used, when, if not a definition, at least the nearest approach to a definition which the constitution affords, is attempted, — 'a legal subdivision of the state.' Unless the words are plain, it cannot be held that the convention intended to create a political body which should be outside of that county system which prevails, not only in this state, but throughout the country. The researches of the counsel for the relator have not enabled them to find any instance in the United States of a municipal corporation which is not either within some county, or which does not itself bear a county relation to the state. Much of the reasoning of the relator implies that the city of St. Louis

cannot be a county because it is a city, but it will readily be admitted that the framers of the constitution could have made it a city, and also have made it a county. That they have not done so must be shown by the provisions of the constitution, not by arguing that it cannot be a county because it is a city. The fact that a county essentially differs from a city does not prove that a city may not contain the features of a county organization. Cities and counties may be distinct organizations in the state generally, but the constitution may by special provisions establish a body which shall have the peculiar powers and obligations of a municipal corporation, properly so called, and yet shall bear those relations to the sovereign power which constitute a county."

Prior to the enactment of the consolidation act the county of San Francisco extended to San Francisco creek on the south, but by that act the boundaries of the city were enlarged to their present extent; and section 9 of the schedule annexed to the act provided that "there shall be formed out of the southern portion of the county of San Francisco a new county, to be called San Mateo." There was no express declaration that the remaining territory which was placed under municipal government should cease to be the county of San Francisco, nor was there any further designation by the legislature of the county boundaries until the adoption of the Political Code in 1872, but the limitation of the new county to the "southern portion" of the county of San Francisco implies that the other portion continued to remain the county of San Francisco as before. Section 3901 of the Political Code defines a county as "the largest division of the state having corporate powers," and section 3902 declares, "This state is divided into counties, named, bounded and constituted as provided in this title," and the names and boundaries of the several counties are given in section 3909, and the succeeding sections. Section 3950 gives the boundaries of the territory which remained of the county of San Francisco after its inhabitants had been incorporated into a municipal corporation under the consolidation act, and the name given to this territory is "San Francisco (City and County)." By these sections this territory was declared to be one of the counties of the state, and continued to be such county until the adoption of the present constitution, in which (article 11, § 1) it is declared, "The several counties as they now exist are hereby recognized as legal subdivisions of the state." Title 2 of part 4 of the Political Code is devoted to "the government of counties," and in chapter 3 of that title are found provisions designating the officers of a county, and prescribing their powers and duties. Until this portion of the Political Code was superseded by the county government act, it was the only statute of the state which defined the powers and duties of certain officers elected by the voters of San Francisco, and upon the enactment of the coun-

ty government act that statute alone became the source from which these officers have derived their powers. San Francisco is therefore both a city and a county, and, although the boundaries of the two bodies corporate are coincident, the electors within this territory vote for officers whose authority and functions are derived exclusively from the charter of the city, and also for officers whose powers and duties are prescribed by general laws, and upon which the charter is silent. It must follow from this that some of its officers are city officers, and others are county officers. There is nothing unusual or inconsistent in this. The "government" of the city is municipal, and the officers who are to exercise that government are municipal officers; but the territory in which that government is exercised is still a part of the state, and, for all purposes other than municipal government, is subject to its control, with the right on the part of the state to authorize the election therein of such officers as may be required to execute its general laws, or to perform such functions disconnected with the municipal government as may pertain to the government of the state. It would not be contended, if the city was only a portion of the county, or if a county should be composed entirely of incorporated cities, that the state would be precluded from authorizing the election by the voters of the county of officers to carry out those provisions of its laws which pertain to the state at large, and which have no connection with municipal affairs, and this rule is not changed where the county consists of a single city instead of several. Although the same body of voters choose the different officers, the functions of the officers chosen by them are distinct in their nature, and the character of the officers must be determined by the source of their authority and the functions they are to exercise.

Section 5 of article 11 of the constitution declares, "The legislature by general and uniform laws shall provide for the election or appointment in the several counties of boards of supervisors, sheriffs, county clerks, district attorneys, and such other county, township and municipal officers as public convenience may require." In obedience to this direction the legislature passed the county government act of 1893, declaring what county officers shall be elected, in which are included those designated in the above section, prescribing their duties, and fixing their term of office at four years. Some of the officers whose election is thus authorized are the same in name, and are given the same or similar functions, as are officers authorized by the consolidation act to be elected in San Francisco, while others whose election is authorized by each of these statutes have no authority except that which is given in the county government act. On the other hand, the consolidation act authorizes the election of several officers whose election is not authorized by the county government act, and who are not named therein as county officers. Those officers whose election is author-

ized by each of these statutes, but who are required by the consolidation act to perform the duties therein prescribed, do not cease to be municipal officers because, under the county government act, similar duties are prescribed for county officers of the same name. To the extent that these officers are a component part of the municipal government, they are municipal officers, and do not cease to be such by reason of the fact that other functions which pertain to county officers are imposed upon them. The guaranty given to the city and county of San Francisco by the constitution, of the right to continue its government under the charter which it held at the adoption of that instrument until it shall adopt another, including the right given by that charter to change its officers every two years if it shall so elect, cannot be taken away by the legislature under the form of imposing upon these officers certain functions exercised by county officers in other counties of the state, and fixing the term of such county officers at four years. But, as the territory thus placed under municipal government still remains a county, and is not taken out of the control of the state for all purposes not embraced within the scope of municipal government, the authorization by the legislature of an election by the voters of that territory for officers to carry out these laws does not make the persons so elected city officers. The constitution has declared that certain officers shall be elected within each county, and, if San Francisco is a county, the legislature is authorized to provide for the election of these officers by its voters, and is not precluded therefrom by the fact that they are voted for by the electors of the municipality at the same time with the election of its municipal officers. Prior to 1876 the voters of San Francisco elected one of the members of the board of state harbor commissioners, but that fact did not constitute him a city officer.

The officers of the city and county of San Francisco are designated in the act of April 2, 1866 (St. 1865-66, p. 718), as follows: "There shall be elected hereafter for the city and county of San Francisco, by the qualified electors thereof, at the times hereinafter mentioned, and in the manner prescribed by law for the election of state and county officers, one mayor, who shall be ex officio president of the board of supervisors, a county judge, police judge, an attorney and counsellor, probate judge, district attorney, sheriff, county clerk, recorder, treasurer, auditor, tax collector, assessor, coroner, public administrator, surveyor, superintendent of common schools, superintendent of public streets, highways and squares, chief of police, harbor master and state harbor commissioner. There shall be elected in each of the twelve present election districts of said city and county, which shall hereafter constitute municipal districts, and be designated and known in law as wards, by the qualified electors thereof, one supervisor and one school director." The term of office for these officers was fixed

by the act at two years. The time for their election was subsequently changed, and is now fixed by section 4109 of the Political Code. The offices of county judge and probate judge were abolished by the constitution, and that of harbor master by statute. The police judge has been superseded by the judges of the police court, and certain changes have been made in the mode of electing supervisors. The chief of police and the state harbor commissioner have ceased to be elective officers. It will be observed that this statute does not declare that these are city officers, or are officers of the city and county, but merely that these officers "shall be elected for the city and county of San Francisco, by the qualified electors thereof"; leaving the character of the officer, whether he is to be denominated a county officer or a municipal officer, to be determined by the nature of the duties he is to perform, and the source from which he derives his authority. Of the officers above enumerated, the mayor, attorney, and counselor, sometimes styled "City and County Attorney" (see St. 1871-72, p. 232), superintendent of public streets, highways, and squares, and school directors, are not named in the county government act as county officers, and consequently cannot be subject to the provisions of that statute. Judges of the police court are not named in the county government act either as county or township officers, and no provision is found therein relative to their duties or term of office. This court has its existence by virtue of section 1 of article 6 of the constitution, which authorizes the legislature to establish inferior courts in any incorporated city, town, or city and county; and the act establishing it in the city and county of San Francisco (St. 1893, p. 9) declares that the court "shall consist of four judges, who shall be elected at the general election held according to law, each of whom shall hold office for the term of two years." The treasurer, auditor, tax collector, and surveyor are designated in the consolidation act as officers of the municipality, and are required to perform certain municipal duties which are not required from county officers who are elected for these offices in their respective counties. In addition to these duties the treasurer is constituted a part of the appointing power for the license collector (St. 1871-72, p. 736); the auditor is made a member of the board of new city hall commissioners (St. 1875-76, p. 461); and the auditor, the tax collector, and the city and county surveyor are members of the board of election commissioners for the city and county (St. 1877-78, p. 299). If it should be held that these are merely the officers designated by those names in the county government act, it would follow that their functions would be solely those given in that act, and not those given in the consolidation act; otherwise the county government act would cease to be uniform in its application to these officers in all the coun-

ties of the state, and would have the effect to repeal the provisions of the charter requiring them to exercise these municipal functions. The supervisors authorized by the consolidation act to be elected do not constitute the same body as that authorized by the county government act, although they bear the same name. The board of supervisors authorized by the consolidation act is for the government of the city and county, and consists of 12 members, while the board of supervisors authorized for a county consists of only 5 members, and exercises functions peculiarly appropriate to a county, but has not the authority required for providing for the wants of a city.

Section 11 of article 6 of the constitution vests in justices of the peace a part of the judicial power of the state, and makes them a part of the judicial department of the state (People v. Ransom, 58 Cal. 558); and section 11 of the same article declares, "The legislature shall determine the number of justices of the peace to be elected in townships, incorporated cities and towns, or cities and counties, and shall fix by law the powers, duties and responsibilities of justices of the peace." Section 3 of article 22 declares, "All courts now existing, save justices' and police courts, are hereby abolished"; and section 11 of the same article declares: "All laws relative to the present judicial system of the state shall be applicable to the judicial system created by this constitution until changed by legislation." By these provisions the justices' courts in existence at the adoption of the constitution were continued as a part of the judicial system of the state established by that instrument, and the laws relative to those courts, as well those providing for their organization as those which define their powers and duties, were continued in force until they should be changed by the legislature. By the act of March 26, 1866 (St. 1865-66, p. 423), a justices' court was created for the city and county of San Francisco, for which five justices of the peace were to be elected by the electors of the city and county at large for the term of two years; and the division of the city and county into townships for the purpose of electing justices of the peace and constables, which was authorized by section 6 of the consolidation act, as amended by the act of April 18, 1857 (St. 1857, p. 210), was abolished. This act was further amended by the act of February 10, 1870 (St. 1869-70, p. 56), and by section 12 thereof the office of constable in said city and county was abolished. These acts were in force at the adoption of the constitution, and, as seen above, are yet in force, unless they have been changed by the legislature. Section 11 of article 6, above quoted, recognizes the propriety of different provisions for justices of the peace in townships and incorporated cities, or cities and counties; and, at the first session of the legislature after the adoption of the consti-

tution, that body revised title 1 of part 1 of the Code of Civil Procedure, and in chapter 5 assumed to comply with the directions of the above section of the constitution, and fixed the term of office of justices of the peace at two years. Section 85 declares, "There shall be in every city and county of more than one hundred thousand population a justice's court, for which five justices of the peace shall be elected, by the qualified electors of such city and county, at the general election next preceding the expiration of the terms of office of their predecessors." It is suggested, rather than argued, by counsel herein, that this act is unconstitutional; but, without passing upon this question, it is sufficient to say that, if it should be so held, it would follow that the above laws relative to San Francisco in force at the adoption of the constitution were not thereby changed, but still remain in force, unless they have been superseded by other legislation. This act was considered by this court in *People v. Ransom*, supra, and was held constitutional, so far as the matter then before the court was concerned.

Section 58 of the county government act of 1893 (St. 1893, p. 366) declares the officers of a township to be two justices of the peace and two constables, and directs the board of supervisors of each county to divide their respective counties into townships for the purpose of electing justices of the peace and constables. The legislature has never made the provision for township organization authorized by section 4 of article 11, and the township which is authorized by section 58 of the county government act is only a geographical subdivision of the county "for the purpose of electing justices of the peace and constables," and does not possess any attributes of government to be exercised by an officer. See *Ex parte Wall*, 48 Cal. 279. As the city and county of San Francisco is under a municipal government, and as there is no board of supervisors for the "county" of San Francisco, there is no authority for the division of the city and county into townships, and there has been no such division, and consequently these provisions of section 58 for the officers of a township, as well as the provisions of section 60 for the election of township officers, are inapplicable. It is not contended that there is any authority for the election of a constable in San Francisco. Even if a justice of the peace could, by any construction, be styled a "county officer," he has not been classed with the county officers enumerated in section 57 of the county government act, but, by section 58 of that act, has been specifically declared a township officer. But, as we have above seen, there is no provision for township officers in San Francisco.

Being a part of the judicial system of the state, justices of the peace are not included in the system of county government which the legislature is directed to establish and

cause to be uniform throughout the state, and provisions relating to their election and term of office, as well as those relating to their powers and duties, are more appropriately placed in laws relating to the judicial department than in those relating to the system of county government. The different provisions in the constitution relating to the powers, duties, responsibilities, and election of justices of the peace are found in article 6, which treats exclusively of the judicial department. There is no provision in this article, or in the article relating to the legislative department, which requires that the term of office of a justice of the peace shall be the same in all parts of the state; and there are many reasons why the powers and duties of this officer, as well as his term of office, should be different in an incorporated city from those applicable to a sparsely-settled township. Section 10 of article 22 declares that judicial officers shall be elected at the time and in the manner that state officers are elected, but there is no requirement that the term of office of such judicial officers as the legislature may authorize to be elected shall be uniform throughout the state. The provision in section 11 of article 6 that the legislature shall determine the number of justices of the peace to be elected in townships, incorporated cities, and towns, or incorporated cities and counties, shows that it was not intended that the laws relating to this portion of the judicial system should be uniform throughout the state, but the number for each of these subdivisions or bodies corporate is to be fixed by the legislature as it may deem applicable to their respective needs. This provision recognizes the necessity of different provisions for these bodies, and, in the absence of constitutional restriction, gives to the legislature the power to adapt its laws to their respective conditions. The further provision in section 11 that the legislature shall "fix by law the powers, duties and responsibilities of justices of the peace," is limited by section 25 of article 4, which prohibits that body from passing a local or special law "regulating the jurisdiction and duties of justices of the peace, police judges and constables," and by section 11 of article 1, that "All laws of a general nature shall have a uniform operation." The term of office of an officer is, however, entirely distinct from his jurisdiction or duties; and a law of a general nature has a uniform operation, if it affects all the individuals of a class for which the legislature is authorized to make specific laws. The act of March 18, 1885 (St. 1885, p. 213), gives to the police courts therein created certain exclusive jurisdiction of matters which by the general law is vested in justices of the peace; and in *People v. Henshaw*, 76 Cal. 436, 18 Pac. 413, this act was sustained and held not to be a local or special law. The act creating the police court for the city and county of San

Francisco confers upon it certain jurisdiction which is elsewhere exercised by justices' courts. From these considerations it must be held that the provision in the county government act fixing the term of office of justices of the peace for the townships into which the several counties are divided at four years does not apply to the justices of the peace elected for the city and county of San Francisco.

We hold, therefore, that the term of office of the foregoing municipal officers, and also of the judges of the police court, and of the justices of the peace who were elected at the general election in 1894, has not been changed by the county government act, and that an election for their successors must be held at the coming general election. The term of office of the assessor was made four years by section 4109 of the Political Code, upon its adoption in 1872, and by section 3 of article 9 of the constitution the superintendent of schools is to be elected at each gubernatorial election. Under these provisions these officers were elected in 1894 for the term of four years. The district attorney, sheriff, county clerk, county recorder, coroner, and public administrator are officers whose powers and duties are given by the county government act, or by other general laws, and do not derive any authority from the consolidation act, or exercise any function in the municipal government of San Francisco. These officers are therefore county officers, and their term of office, as well as the time of their election, are those provided by the county government act. The demurrer to the complaint was therefore properly sustained, upon the ground that it was necessary for the defendants to make preparation for the election of municipal officers at the coming general election. The judgment is affirmed.

We concur: McFARLAND, J.; HENSHAW, J.; VAN FLEET, J.; GAROUTTE, J.

TEMPLE, J. (dissenting). I am unable to agree with the conclusion reached by my associates. I fully concur, however, in the view that the consolidated city and county is a municipal corporation. The consolidation act of 1856 realized the intention stated in its title. It repealed the several charters theretofore existing of the city, and it consolidated the government of the city and the county. The two governments were merged, and both, so far as rights and liabilities and public functions were concerned, were continued in a new corporation then created,—the consolidated city and county. It succeeded to all the property rights and liabilities of both, and its officers performed all the functions which had been performed by county officers, and also all the functions imposed upon them which were purely municipal. All were, however, the officers of the municipal corporation. In no sense can it be said that some were county officers, and that

some were city officers. The sheriff and county clerk are as much officers of the municipal corporation as the mayor or the police judge. Whatever may be said of their powers and duties, they are part and parcel of the corporate organization known as the "City and County of San Francisco." Any one officer is no less so than another. The legislature could then have made of the new corporation anything it chose, and it chose to create a consolidated government, upon which it imposed the duties, and to which it granted the powers, both of a city and of a county. It was thus enabled to maintain the relation of the state to the territory as a county, and to give to the inhabitants the benefit of a city government. But the officers of the consolidated government, who had the powers and performed the duties elsewhere performed by county officers, did so as officers of the new consolidated municipality. These powers and duties were expressly conferred upon them in the act of 1856 as officers of the municipality. Section 4 of that act provides, "All the existing provisions of law defining the powers and duties of county officers, except those relating to supervisors and boards of supervisors, so far as the same are not repealed or altered by the provisions of this act, shall be considered as applicable to officers of the said city and county of San Francisco, acting or elected under this act." We cannot, therefore, select certain officers, and say that they are county officers, and of others that they are city officers; for all are municipal officers, and municipal officers only. Therefore, if it be true that the legislature cannot in this mode change the terms of the officers of the municipality, because that would be to alter the charter, this law can have no application to the city and county of San Francisco. It would not follow from this that general laws affecting the powers and duties of county officers would not apply to the officers of the consolidated city and county. The idea of a consolidated government of this character is that thereby the state provides for the inhabitants of the included territory the benefit of a county government. To do this effectually such laws must apply to the consolidated government. As to the corporate existence of the municipality and the officers through whom the corporate functions shall be discharged, no reason exists why such interference should be allowed; and, if it were conceded that the legislature could so change the municipal charter, we cannot presume that it was intended. It was not necessary that the act shall include the consolidated city and county, in order that the law shall have a general and uniform operation. The city and county of San Francisco is not a mere county, but is recognized in the constitution itself, again and again, as constituting a class apart. Of course, if it is a municipal corporation, and therefore the legislature cannot thus change its charter, this point need not be further discussed. In my opinion, the legislature did not intend to ordain that some of the officers should hold office for four years, and

others for two, there being no reason for the difference.

I concur: BEATTY, C. J.

DUBOIS v. SPINKS et al. (Sac. 100.)
(Supreme Court of California. Sept. 18, 1896.)
SALE—STATUTE OF FRAUDS—SUFFICIENCY OF DELIVERY.

Plaintiff purchased and took a bill of sale for wood piled on land of a third person, and subject to a lien for the cutting. The wood was measured and formally delivered, but was not moved. Within 3½ hours thereafter, the seller paid off the lien of the choppers out of the money received from plaintiff. *Held*, that there was a sufficient delivery and change of possession, within Civ. Code, § 3440, declaring void, as against creditors, a transfer of personality, unless there is an immediate delivery, followed by a continued change of possession.

Commissioners' decision. Department 2. Appeal from superior court, Sacramento county; A. P. Catlin, Judge.

Action by M. Dubois against Alfred Spinks and D. Dierssen. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Affirmed.

Holl & Dunn, for appellants. White, Hughes & Seymour, for respondent.

VANOLIEF, C. Action to recover damages for the conversion of 120 cords of wood. On October 12, 1894, John A. Meyer and his wife entered into a contract with two Japanese, by which the latter agreed to cut wood on land belonging to the former. The Japanese on the same day leased from T. D. Sriver a portion of his land, and by the agreement they were to haul the wood from the land where it was to be cut and pile it upon said leased land, and retain the possession of the wood until the price for cutting the same should be fully paid. Subsequently there was a change in the agreement as to the hauling, it being modified, verbally, so that the hauling might be done by the Meyers, and they were to be allowed a reduction therefor. Under the agreement about 126 cords of wood were hauled prior to November 20, 1894, and piled by Sriver's direction in two tiers outside and along and near his fence. On November 20, 1894, while the wood was so placed, the Meyers, for the purpose of raising money to pay the Japanese, borrowed the sum of \$220 from the plaintiff, delivering to him their promissory note therefor; and, at the same time, and as security for its payment, they executed to him a bill of sale for said wood. After the bill of sale to plaintiff was signed, Meyer and his wife went with plaintiff and pointed out the wood to him, and measured it with a tape line. Meyer then said: "Mr. Dubois, there is the wood. It is yours. Do what you like with it." Within 3½ hours thereafter Mrs. Meyer paid the Japanese for the cutting of the wood, and they released

their lien and possession. The wood was not marked in any way, nor was it moved. It was understood by plaintiff and the Meyers that whatever security the Japanese had on the wood should inure to the benefit of plaintiff. On November 23, 1894, the wood was seized by the defendant Spinks, a constable, on a writ of execution issued out of a justice's court upon a judgment in favor of defendant Dierssen against said J. A. Meyer. No notice of garnishment was served on plaintiff. On December 4, 1894, plaintiff served upon defendant Spinks a verified claim in writing, stating that he claimed the wood under a bill of sale from John A. and Agnes M. Meyer. On December 6, 1894, and before the sale of the wood on execution, plaintiff informed defendant Spinks that he had loaned the Meyers \$220 on the wood, and held a promissory note dated November 20, 1894, payable 60 days from date. The wood was sold in pursuance of said levy, and purchased by the defendant Dierssen. The court below gave judgment in favor of plaintiff for \$312.50. The appeal is from the judgment, and from an order denying defendants' motion for a new trial.

1. Appellants contend that the transfer of the wood was void against them, for want of an immediate delivery, followed by an actual and continued change of possession, as required by section 3440 of the Civil Code, and decisions construing it. What constitutes an immediate delivery, or an actual and continued change of possession, in the sense of section 3440 of the Civil Code, is a question of fact to be determined on the evidence; and where, as in this case, the evidence tends to prove such delivery and change of possession, the finding of the court will not be disturbed. *Porter v. Bucher*, 98 Cal. 459, 33 Pac. 335; *Claudius v. Aguirre*, 89 Cal. 503, 26 Pac. 1077. In *Samuels v. Gorham*, 5 Cal. 228, it was said: "By immediate delivery is not meant a delivery instant, but the character of the property, and its situation, and all the circumstances must be taken into consideration in determining whether there was a delivery within a reasonable time, so as to meet the requirement of the statute." This case was cited and approved in the case of *Carpenter v. Clark*, 2 Nev. 246, in which *Lewis, C. J.*, said: "Perhaps a delay of two or three days in making a delivery, after the sale is otherwise complete, might not be sufficiently immediate to meet the requirements of the statute. That is a fact, however, which is to be determined by a consideration of all the circumstances of each case." *Bassinger v. Spangler*, 9 Colo. 189, 10 Pac. 809, is to the same effect, wherein the court said: "The fact that the property was sold one day to the plaintiff, and not delivered until the next day, does not render the sale void, if it appears in evidence that the delivery was impossible on the day of sale; and it is properly a question for the jury to answer wheth-

er the property was so situated and the parties were so located at the time of the making of the sale that instant delivery could not be made, and whether it was made as soon thereafter as practicable." See, also, *Parks v. Barney*, 55 Cal. 239; *Hesthal v. Myles*, 53 Cal. 623; *Redington v. Nunan*, 60 Cal. 632. Considering the ponderous and bulky nature of the 128 cords of wood, it was not necessary to change its situation for the purpose of effecting a delivery of possession (*Hutchins v. Gilchrist*, 23 Vt. 86); and, had the order of the acts constituting the whole transaction been reversed, there could have been no question that they constituted an immediate delivery. But, since all those acts were done within $3\frac{1}{2}$ consecutive hours, I think that, under the circumstances, the court may have properly considered the satisfaction and release of the lien held by the Japanese, and the delivery of the wood to plaintiff, as parts of the same transaction, and substantially contemporaneous. As soon as practicable after the money loaned by plaintiff was received by the Meyers, Mrs. Meyer paid the demand for which the wood was held in pledge by the Japanese, and they released their lien, thus removing all valid objections to plaintiff's rightful possession of the wood. It makes no difference whether the transaction be a sale or a pledge, since, in either case, it is a "transfer of personal property," in the sense of the statute. *Woods v. Bugby*, 29 Cal. 476; *Hilliker v. Kuhn*, 71 Cal. 214, 16 Pac. 707.

2. It is next contended by appellants that, if in plaintiff's favor at all, the judgment should have been limited to the amount of the debt due from the Meyers to him. The only case cited to sustain this view is *Treadwell v. Davis*, 34 Cal. 601. But in that case it was held that the plaintiff, a pledgee, was entitled to recover the full value of the property, in an action against the sheriff, on the ground that the sheriff, instead of seizing the property itself, should have served a notice of garnishment. The interest of the pledgor may be reached under an execution, but it can only be done by serving a garnishment on the pledgee, and not by a seizure of the pledge. By pursuing the latter course the sheriff became a trespasser, and therefore could not be said to be in privity with the pledgor. The same rule should apply here.

3. Appellants claim that plaintiff was not entitled to judgment because he did not make such a claim upon the defendant constable as is required by section 689 of the Code of Civil Procedure. The claim did not state that the plaintiff had taken the wood in pledge. It stated, however, that he was entitled to possession under the bill of sale. And that was true. I think the notice was sufficiently explicit. Section 689 is intended solely for the protection of the officer making the levy, and the notice was sufficient for that purpose.

4. The view of the case above taken renders it unnecessary to discuss in detail the alleged errors in the admission of evidence. It need only be said that such evidence was relevant for the purpose of showing the situation of the wood, as bearing upon the questions of delivery and change of possession. I think the judgment and order should be affirmed.

We concur: SEARLS, C.; BELOHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

WELLS v. WOOD. (S. F. 246.)

(Supreme Court of California. Sept. 16, 1896.)

MUNICIPAL CORPORATIONS—STREET IMPROVEMENT—ASSESSMENT.

1. A description of a street improvement, in a resolution of intention and subsequent proceedings, as "grading and macadamizing," is sufficient to authorize a regrading and remacadamizing, where the street for a part of its width had been graded and macadamized some 15 years previously.

2. Where a lot is assessed for more than its proper proportion of the cost of a street improvement, and the owner fails to appeal from the assessment, the error is waived.

3. The failure of the superintendent of streets of a municipal corporation to record a contract for a street improvement at the proper time does not affect the right of the contractor to enforce the lien of a street assessment levied to pay the contract price.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. O. B. Hebbard, Judge.

Action by Joseph Wells against Joseph M. Wood. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

Joseph M. Wood, in pro. per. Edwin O. Knapp and William H. Chapman, for respondent.

VANCLIEF, C. Action to enforce lien of street assessment in the sum of \$101.46 for labor and material performed and furnished by plaintiff's assignor under contract with the superintendent of streets in improving Mission street, in the city of San Francisco, from Cortland avenue to West avenue. The judgment was in favor of the plaintiff for the sum demanded, and defendant appeals from the judgment, and from an order denying his motion for a new trial.

1. On the trial defendant proved that the portion of Mission street to which said contract related had been graded, curbed, and macadamized to official grade in March, 1877, about 14 years prior to the letting of the contract in question, and also proved that in 1888, by order of the board of supervisors, that part of Mission street involved in this action had been widened by adding 16½ feet to the eastern side thereof. On June

1, 1891, the board of supervisors passed a resolution of intention to order the improvement in question, describing it as follows: "That Mission street, from Cortland avenue to West avenue, be graded to the official line and grade, that redwood curbs and rock gutterways be laid thereon, and that the roadway and sidewalks thereof be macadamized." In all the subsequent proceedings, including the contract, the improvement was described as in the resolution of intention, except that certain specifications, in accordance with general orders of the board, were added to the contract. The principal ground upon which appellant claims a reversal of the judgment is that the improvements were not properly nor sufficiently described in the resolution of intention nor in the subsequent proceedings; that while the work done on the addition of 16½ feet to the east side of the street may have been grading and macadamizing, that done on the old part of the street was regrading and remacadamizing, and should have been so denominated. Waiving other possible answers to this objection, I think the description of the proposed work was sufficient. The substantial nature of the work of grading and that of regrading is the same, namely, grading. The latter is only a repetition of the former. The statute requires only a description of the work; that is to say, an intelligible description, sufficient to notify owners of lots fronting on the proposed improvement of the nature and extent of the work of which the improvement is to consist. It would add nothing material to such notice to inform the lot owners that work of the same kind, in the same place, had been done 10 or 15 years before, since they are bound to pay for a repetition of the work whenever, in the discretion of the board of supervisors, such repetition is deemed necessary. *McVerry v. Boyd*, 89 Cal. 304, 26 Pac. 885. The fact that the street had been graded and macadamized 15 years before the proposed repetition of such grading and macadamizing constituted no defense to this action, even if it had been pleaded as such; nor, as evidence, did it tend to rebut the prima facie case of plaintiff, as proved by the assessment, warrant, diagram, etc.

2. It is contended that the amount of the whole assessment was not equally distributed to the lots fronting on the improvement, and that defendant's lot was assessed for more than its proper proportion. Defendant's lot fronted on the improvement, and was lawfully assessable. If it was assessed for more than its lawful proportion, the defendant waived the error by failing to appeal to the board of supervisors, and the error cannot be corrected on this appeal. *Perine v. Forbush*, 97 Cal. 305, 32 Pac. 226; *McDonald v. Conniff*, 99 Cal. 386, 34 Pac. 71; *Dowling v. Conniff*, 103 Cal. 75, 36 Pac. 1034; *Warren v. Riddell*, 106 Cal. 352, 39 Pac. 781.

3. The point that the superintendent of

streets failed to record the entire contract at the proper time, even if conceded, is of no consequence as affecting any right of the contractor. *Diggins v. Hartshorne*, 108 Cal. 154, 41 Pac. 283; *McVerry v. Boyd*, 89 Cal. 304, 26 Pac. 885. But the record furnishes no ground for this point, since due recordation of the contract is alleged in the complaint and is not denied in the answer. I think the judgment and order should be affirmed.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

PEOPLE v. EPPINGER. (Cr. 131.)

(Supreme Court of California. Sept. 19, 1896.)

CRIMINAL LAW—JUDGMENT—NEW TRIAL.

1. On a conviction under an indictment charging the making and passing of a fictitious check with intent to defraud (Pen. Code, § 476), it is error to enter judgment of conviction of forgery (section 470), though the penalty is the same for both offenses.

2. A motion for new trial, or permission to make such motion, on the ground of newly-discovered evidence, is properly denied,—no affidavits being produced or offered, or statement made of the nature, character, or time of discovery of the evidence.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco, William T. Wallace, Judge.

W. L. Eppinger appeals from a judgment entered on a conviction under an indictment charging the making and passing of a fictitious check with intent to defraud. Reversed.

W. M. Cannon, for appellant. Atty. Gen. Fitzgerald, for the People.

HAYNES, C. On April 4, 1895, the defendant was convicted under an indictment for passing and publishing a fictitious check, with intent to defraud, and which also charged a prior conviction for petit larceny. A verdict of guilty was returned by the jury as to making and passing the fictitious check, but the verdict was silent as to the prior conviction for petit larceny. An appeal was taken from that judgment to this court, and the court below was directed to treat the verdict as a finding against the defendant upon the crime charged and in favor of the defendant upon the question of prior conviction, and the judgment was reversed, with directions to the trial court to pronounce a judgment and sentence upon defendant, in the exercise of his discretion, upon the facts and circumstances of the case, as provided for by section 476 of the Penal Code, and further directing the court that the judgment should designate the offense as the making, passing, and publishing a fictitious check with intent to defraud. 109 Cal. 294, 41 Pac. 1037. On No-

vember 8, 1895, after the remittitur had gone down from this court, the defendant was called for judgment, and was asked if he had any legal cause to show why judgment should not be pronounced against him. As to what then occurred the bill of exceptions taken by the defendant shows the following facts: "The defendant thereupon, through his counsel, did not make a motion for a new trial, but offered and requested permission to make a motion for a new trial, upon the ground that, since the taking of the last appeal, new evidence had been discovered material to the defendant, and which he could not with reasonable diligence have discovered and produced at the trial. The defendant did not offer or request permission to read in support of said motion any affidavit, and, being called on to state what the newly-discovered evidence was, the counsel declined to do so." The court refused to allow the said motion for a new trial, and to its refusal the defendant excepted, and assigns the same as error. The court thereupon rendered judgment as follows: "That, whereas, the said W. L. Eppinger having been duly convicted in this court of the crime of felony, to wit, forgery, it is therefore ordered, adjudged, and decreed that the said W. L. Eppinger be punished by imprisonment in the state prison of the state of California, at San Quentin, for the term of fourteen years." And from this judgment the defendant appeals, upon the judgment roll and a bill of exceptions. Upon this record two questions are made and argued by appellant: (1) That the charge upon which he was tried and convicted was for making and passing a fictitious check with intent to defraud, while the judgment is for a different offense, namely, "forgery." (2) That the court erred in refusing to permit him to make a motion for a new trial.

1. The indictment upon which the defendant was tried and found guilty was held, upon the former appeal, to charge the crime of making and passing a fictitious check, with intent to defraud. As to the correctness of that ruling no question is made by either party. That the crime of forgery as defined in section 470 of the Penal Code, and that of making and passing a fictitious check with intent to defraud, under section 476 of the same Code, are different offenses was held in *People v. Elliott*, 90 Cal. 586, 27 Pac. 453. In that case the defendant was charged with forging a certain check signed "A. F. Rice & Co." This court said: "If we assume that there was such a firm in existence, then the judgment must be reversed, and a new trial ordered, by reason of the insufficiency of the evidence in not showing that the check was not signed by such firm. If we assume there was no such firm in existence, then the check was a fictitious check, and the prosecution should have been had under section 476 of the Penal Code, and the case must be reversed upon that ground. From the facts set forth

in the information, it is apparent that it was filed and conviction had under section 470 of the Penal Code, which section is quite broad in its scope, but not sufficiently broad to include matters contained in section 476." See, also, *People v. Eppinger*, 105 Cal. 36, 38 Pac. 538. In *People v. Johnson*, 71 Cal., at page 388, 12 Pac., at page 262, it is said: "The clerk has no power to enter, and it is at least error in the court to direct, a judgment declaring that a defendant has been convicted of one offense when in fact he has been convicted of another and distinct offense. The entry of a judgment declaring that a defendant has been convicted of an offense of which he has not been convicted is more than a mere 'technical' error. A judgment is a solemn record, which is ordinarily conclusive evidence of the facts recited in it, and we ought not to permit such evidence to stand, when, on direct appeal, it appears that the matters recited in it are not true. Inasmuch as no proper judgment has been entered in the court below, the judgment in form must be set aside, and a proper judgment entered." In that case the information charged an embezzlement, while the judgment was for grand larceny; and there, as in this case, the penalty is the same for the offense charged as for that named in the judgment, and it was contended that the error in the judgment did not affect any substantial right of the parties; but this court cited section 1207 of the Penal Code, which provides: "When judgment upon a conviction is rendered the clerk must enter the same in the minutes, stating briefly the offense for which the conviction was had," etc.,—and said: "There can be no doubt that this statement of the offense is part of the judgment." It may be added that accuracy in the designation of the offense is rendered more important under the provisions of the Penal Code, which authorizes the fact of a previous conviction of another designated offense to be charged in the indictment or information, and which requires the jury to find upon it, unless the defendant admits it. If the record of the previous conviction should show that the indictment charged a forgery, and the judgment was for a different offense, which of the different offenses should be charged in the indictment, and which would be sustained by the record? These are questions which we do not propose to answer now, but which we may have to answer if the judgment in its present form is permitted to stand.

2. It is not quite clear, from the record, whether the defendant made a motion for a new trial, or asked permission to make such motion. The bill of exceptions is not clear upon the point, while the judgment recites that a motion for a new trial was made, and denied by the court. In either case, however, the ruling was right. The grounds of the motion, or proposed motion, were stated by counsel to be the discovery of new evidence after the former appeal had been taken.

No affidavits, either of the defendant or his counsel, or of the persons by whom the newly-discovered evidence could be given, were produced or offered; nor was there any statement by counsel of the nature or the character of the newly-discovered evidence, or when it was discovered, or that its discovery was so recent as to prevent the obtaining of the affidavits by the use of reasonable diligence. The question discussed by counsel as to the right of a defendant to show cause against a new judgment need not be considered. That question does not necessarily arise upon this appeal. Appellant, however, asks that the judgment be reversed, with permission to show cause against a new judgment in the manner provided by sections 1200 and 1201 of the Penal Code. Without considering or deciding the question of defendant's right under those sections to show cause why a proper judgment should not be rendered, it is sufficient to say that there is nothing in the record before us which indicates that the defendant has any grounds for such motion, and the request of counsel should therefore be denied.

The judgment appealed from should be reversed, with directions to the court below to render judgment against the defendant for the offense of making and passing a fictitious check with intent to defraud.

We concur: SEARLES, C.; BELOHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is reversed, with directions to the court below to render judgment against the defendant for the offense of making and passing a fictitious check with intent to defraud.

PEOPLE v. WHITEMAN. (Cr. 119.)

(Supreme Court of California. Sept. 19, 1896.)

FORGERY—EVIDENCE—GUILTY KNOWLEDGE—ORDER OF ADMITTING EVIDENCE.

1. In a prosecution for forging and uttering a check, the admission in evidence of the certificate of protest of the check, while erroneous, was not prejudicial, where the fact of nonpayment of the check was admitted.

2. On a trial for forging and uttering a check, other checks, signed by different names, though shown to have been issued by defendant at about the same time, and to have been protested, are not admissible to prove guilty knowledge, without proof that they were forged.

3. The fact that letters of a defendant, containing admissions, were admitted in evidence before the corpus delicti had been proven, will not authorize the reversal of a judgment of conviction, the order of testimony being largely discretionary with the trial court.

Department 2. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

A. J. Whiteman was convicted of forgery, and from the judgment, and an order denying a new trial, he appeals. Reversed.

W. S. Hinkle, for appellant. Atty. Gen. Fitzgerald, for the People.

TEMPLE, J. The defendant was convicted of forging and uttering a check which purported to be the check of one Frank Dixon. The check as described was drawn in favor of defendant upon the Traders' & Importers' Bank of New York. The appeal is from the judgment and an order refusing a new trial.

The first point made by appellant is that the court erred in admitting in evidence the protest which accompanied the check which it is charged was forged and uttered by the defendant. It is not seriously denied that this ruling was error, but it seems impossible that injury could have resulted therefrom to defendant. The only materiality in the evidence, and the only way in which injury could have resulted, is that it tended to show that the check was not paid upon presentation in New York. But this was never a fact in controversy. It was proven in many ways, and was admitted by the defendant.

The next point relates to the admission of four other checks which there was evidence tending to show defendant negotiated, and upon which he obtained money, and which were not paid by the drawees. They were each objected to as incompetent, irrelevant, and immaterial, and also upon the ground that there was no proof even tending to show that the check set out in the indictment was a forgery. The checks all purported to be drawn upon banks of the city of New York. The first was as follows: "No. 878. New York, M'ch 27, 1894. \$200. The Importers' and Traders' National Bank of New York, through the New York Clearing House Association: Pay to A. J. Whiteman, or order, two hundred dollars. \$200. G. S. Hyman." Indorsed: "A. J. Whiteman." It was accompanied by a protest for nonpayment which was also read in evidence. It was shown that the defendant had procured money upon this check from one Maxwell, who is the same person upon whom the check mentioned in the indictment had been passed; also, that the check had been presented to the bank in New York, and payment was refused, and that defendant, upon being informed of the fact, had repaid the money to Maxwell. The prosecution produced no evidence whatever tending to show that the check was forged, and none to show G. S. Hyman was a real person, and, of course, none to show that, if he was a real person, he had not authorized defendant to use his name in that way. Possibly this statement should be qualified in one respect, for, after all the checks had been read in evidence, as well as certain letters which it was admitted defendant wrote, an expert upon the examination of the handwriting testified that in his opinion they were all in the same handwriting. But, if this evidence tended to

prove that they were all written by the defendant, there was still wanting evidence that the apparent drawer was a real person, or, if he was, that he had not authorized such use of his name. Another of the checks was for \$250, drawn on the Bank of Commerce of New York, March 27, 1894. It purported to have been signed by S. W. Williams, and was payable to E. A. Delafield, or order. Delafield, it was proven, was an alias by which defendant was then known. The check was indorsed, "Pay to the order of A. J. Whiteman. E. A. Delafield," and had upon it the indorsement, "A. J. Whiteman." There was proof that the defendant had passed this at the Bank of California, and had been enabled to do so through the indorsement of Thomas Day & Co., who ultimately had to pay the check to the Bank of California. As to this check, also, there was a total lack of evidence as to its being a forgery, except as in the case of the last-mentioned check. Another check, dated April 1, 1894, was drawn upon the Importers' & Traders' Bank of New York, and purported to have been signed by Ensign & Carney. Defendant procured money upon it from W. F. Roeder. It was shown that the check had been presented to the drawee, and that payment was refused. The proof in regard to its being a forgery was exactly as in regard to the first-mentioned check. Still another of the checks was dated New York, March 24, 1894. It purported to have been drawn by E. A. Delafield. It was indorsed by defendant in that name, and by him negotiated. It was shown that payment had been refused. As in the case of the other checks, there was no proof of the forgery, or the existence of the apparent drawer, or of lack of authority.

The prosecution was also permitted to prove that defendant was registered at the Occidental Hotel under the name of E. A. Delafield, and while there he procured money from the cashier of the hotel upon three checks drawn on the Importers' & Traders' Bank of New York. The checks purported to be drawn by J. A. Delafield & Co. in favor of E. A. Delafield, and were indorsed by him in that name. There was also some effort to show that in all of the checks put in evidence the same blank forms had been used. One of the three last-named checks was forwarded to New York, and presented to the bank, and payment was refused. Upon being informed of this, the defendant refunded the money, and took them all up. They were, therefore, not produced, and, of course, as to them, there was not the slightest attempt to prove that they had been forged. As Delafield was confessedly an assumed name, it is probable that the signature J. A. Delafield & Co. was a fictitious firm. There was, however, no proof upon that subject.

We have here, then, including the check described in the indictment, eight different checks, for small sums, purporting to have been

drawn by five different drawers upon New York banks. They were all negotiated within a few days in San Francisco, and none were paid on presentation. Letters written by the defendant were also read, in which he seems to admit that he did not think they would be paid. But as to none of them was there evidence that they had been forged. No evidence short of conclusive proof of guilt could have been more damaging. At least, this evidence tended very strongly to prove that the defendant was a cheat and reckless swindler. The evidence was admitted only for a limited purpose, and, in the charge of the court, its effect was expressly restricted to that purpose. When one of the checks was offered, and had been objected to, the court said: "I understand that all these matters are simply to show guilty knowledge in the transaction mentioned here, and for no other purpose." To which the prosecuting attorney responded, "Yes, sir." In the charge the court said: "Now, in order to show guilty knowledge, the prosecution have been allowed to introduce before you cases of other checks alleged by them to have been forged; but you will be careful to remember that such evidence is applicable only to the question of guilty knowledge." The jury was also told, as to the principal check, that the fact that there were no funds to meet it did not tend to prove that the check was forged. These checks were not, then, offered or received for the indorsements which were admitted to be in the handwriting of defendant, for the purpose of comparison, nor as the basis of a theory tending to show that all the checks were forged, but to show guilty knowledge only. But there was no proof that the other checks were forged, and, therefore, it was not shown, nor was there evidence tending to show, that about the same time the defendant had passed other forged checks. When the fact of guilty knowledge becomes material, it must appear that the check described in the indictment was itself a forgery. Proof that defendant passed other checks which were forged cannot be introduced, when unaccompanied with other inculcating facts, to establish the corpus delicti. And, when the body of the offense has been established, and that defendant passed the check, and it is sought to show guilty knowledge by the fact that defendant also passed other forged paper, the prosecution assumes the same burden as to all the other checks introduced. It must show that such checks were forged.

The evidence did tend very strongly to prove the defendant a swindler, and I have no doubt that it would be much easier to convince a jury that defendant forged the Dixon check after they had been convinced that he was a swindler. And such an impression is natural and reasonable. But to allow proof of the bad character of a defendant as a step in the proof of guilt has never been the policy of the law. On the contrary, pains is sometimes taken to prevent knowledge of the bad character of the defendant from reaching the jury. Thus, where a

defendant has been previously convicted of an infamous offense, and such fact is charged in an indictment, a method is devised by which a defendant may prevent that part of the indictment from being read to the jury. As to the three checks which were not produced there was no evidence of their genuineness, and, as to the others, none except that the expert testified that all were in the same handwriting, as were also certain letters which it is admitted defendant wrote. There was no evidence that the persons by whom the checks purported to be drawn were real persons, and none that, if they were real persons, defendant was not authorized to use their names.

It is stated—perhaps through some misapprehension—that the learned judge of the trial court ruled that it was incumbent on the defendant to show that he had such authority, after it has been shown that he has drawn checks in the name of another. The attorney general does not contend for any such doctrine, and it is repudiated in the charge of the court in this case. The jury were told: "When an accused man pleads not guilty, as he has pleaded here, immediately there arises a presumption of innocence in his favor, which accompanies him all through the trial, and never deserts him." To prove that an accused person signed the name of another to an instrument, and that he passed such instrument as genuine, does not prove the commission of a crime. It must still be shown that it was a false instrument, and this is not proven until it is shown that the person who signed another's name did so without authority. Until this proof is made, it is not shown to be a false instrument, and the defendant is not put to his proof at all. The defendant, when on the stand, admitted that he drew two of the four checks which were produced at the trial, and that he negotiated them. He claimed, however, that he had authority from the drawers to so use their names. Waiving the necessity of corroborating evidence as to the corpus delicti, would any one contend that this proved forgery? Suppose that he had admitted that he drew the Dixon check, and claimed that he had authority from Dixon to draw it, would this admission have put the burden upon him to show such authority? It would be a new departure in criminal law. It arises from a difficulty which is inherent in our system. We have inherited the idea, which we carefully place in all our constitutions, that an accused person must be confronted by his witnesses in court. State process cannot cross state borders, and hence justice is sometimes defeated. The courts have not created the difficulty, and cannot provide a remedy by depriving a defendant of the presumption of innocence, and putting the burden upon him.

I do not think there was reversible error in admitting letters of the defendant which contained certain admissions before there was proof of the corpus delicti. The rule is that there must be other and independent proof that a crime has been committed by some one.

Then it can be shown by the extrajudicial confessions that defendant is the guilty party. In some cases it has been held that the order of proof is material. That it is the fairer course that there should be independent proof, first, as to the body of the offense, cannot be doubted. But I do not think a case should be reversed merely because of a departure from the natural and just order of evidence.

It is said that the case must be reversed because the prosecution produced no evidence that defendant was not authorized to use Dixon's name, and also because they did not show that Dixon was a real person. Perhaps there was no such evidence when the prosecution rested, but, after the court had refused an application to instruct the jury to acquit the defendant, he voluntarily took the stand as a witness, and supplied the evidence which had been lacking. If there was error, it was thus cured. For the error above indicated, however, the cause is remanded and a new trial ordered.

We concur: HENSHAW, J.; McFARLAND, J.

ROBRECHT v. REID et al. (S. F. 305.)
(Supreme Court of California. Sept. 19, 1896.)

EJECTMENT—TITLE TO DEFEAT RECOVERY.

Recovery by plaintiff in ejectment of premises which he claims under foreclosure of mortgage cannot be defeated by one not connecting himself with the title, by a showing that, three years before execution of the mortgage, the mortgagor was declared a bankrupt under the federal laws, and that the register in bankruptcy then conveyed to the assignee in bankruptcy the bankrupt's property,—notice of the assignee's appointment not having been published, and the assignment to him not having been filed for seven years, though Rev. St. U. S. § 5054, required immediate publication of the notice, and recording of the assignment within six months; and it appearing that the mortgagee never had notice of the bankruptcy proceedings till after the foreclosure, and that nothing was done by the court or assignee in bankruptcy till nearly seven years after appointment of the assignee, when he sold out his claim to the property, worth \$7,000, for \$50, and the mortgagor having till then remained in undisturbed possession, claiming the property as his homestead.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Ejectment by Anthon Robrecht against George W. Reid and others. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Affirmed.

Scrivner & Schell and Horace Hawes, for appellants. E. R. Taylor, for respondent.

BELCHER, C. This is an action of ejectment to recover possession of a lot of land in the city of San Francisco. The complaint is in the usual form, alleging ownership and right of possession in the plaintiff, and his ouster by defendants, and the damages sustained. The answer admits that defend-

ants are in possession of the lot, but denies that plaintiff is the owner or entitled to the possession thereof, and alleges ownership and right of possession in the defendant Heidl. The case was tried by the court without a jury, and the findings and judgment were in favor of the plaintiff, from which judgment, and an order denying their motion for a new trial, defendants appeal.

The facts proved are, in substance, as follows: The lot in question is situated between Seventh and Eighth streets and Folsom and Clementina streets. It has a width of 25 feet, facing on the two last-named streets, and a length of 160 feet between them. There are two two-story buildings on the lot, one fronting on Folsom and the other on Clementina street, and there is a fence, between them, with a gate or opening through it for passage from one house to the other. Both houses were constructed for use as flats, except the lower story of the one on Folsom street. The front part of that story was intended for a store, and in the rear were rooms for family use. In March, 1874, one P. F. Cusick became the owner of the said lot, and on July 26, 1873, he, his wife joining with him, executed in proper form a declaration of homestead thereon, and on the next day caused the same to be duly recorded. At that time he was residing with his family on Langton street, but, the night before executing the declaration of homestead, he and his wife went to the Folsom street house and slept there, on a mattress, in one of the back rooms in the lower story. They took their supper that night and their breakfast the next morning at their house on Langton street, but a few days later they moved into the Folsom street house, and thereafter made it their place of residence. On July 30, 1873, Cusick filed, in the United States district court for California, his petition in bankruptcy, with accompanying schedules, showing, among other things, that the property here in controversy was incumbered by a mortgage to one Portal for \$5,000, bearing interest at the rate of 12 per cent. per annum, and on August 7th he was regularly adjudged to be a bankrupt under the federal bankrupt laws then in force. Thereafter, on September 2d, one J. H. B. Wilkins was regularly chosen and appointed assignee of the estate of said bankrupt, and on that day the register in bankruptcy, by an instrument in writing, assigned and conveyed to the said assignee all the estate, real and personal, of the said bankrupt. No notice of the assignee's appointment was published, and the assignment to him was not filed in the office of the clerk of the court or recorded in the office of the county recorder until April, 1885, though the immediate publication of such notice and the recording of such assignment within six months were required by the bankrupt act (Rev. St. U. S. § 5054). Cusick remained in possession of the said property, using a por-

tion thereof as a place of residence for himself and family, and collecting the rents for the portions leased to tenants, until March 3, 1881, when, to pay off the mortgage thereon to Portal for \$5,000 he borrowed from plaintiff the sum of \$5,100, for which he and his wife executed to plaintiff their promissory note, payable two years after date, with interest at the rate of 10 per cent. per annum, and also at the same time executed to him a mortgage on the said premises to secure payment of the said note. To complete the transaction all the parties met at the city hall, and the plaintiff then, at the request of Cusick, paid the money loaned to Portal, who then satisfied his mortgage. Before making the loan plaintiff employed an attorney to examine the title, and after an investigation the attorney reported to him that it was good. Neither the plaintiff nor his attorney had ever had any knowledge or notice of any of the said bankruptcy proceedings. The said note not being paid, plaintiff commenced an action in the superior court of the city and county of San Francisco against Cusick and his wife to foreclose his mortgage, and such proceedings were had therein that on March 26, 1885, a judgment and decree was duly given and made foreclosing the same, and adjudging that the whole amount of principal and interest due thereon was unpaid and owing from the defendants to plaintiff, and directing that the mortgaged premises be sold for the purpose of satisfying the mortgage lien. Under this decree the said premises were regularly sold by the sheriff and bid in by the plaintiff, and on September 29, 1885, he obtained a sheriff's deed therefor, which was duly executed, acknowledged, and recorded. So far as appears, nothing, except as above stated, was done by the court or the assignee in the bankruptcy proceedings until April 6, 1885, when the assignee executed to the defendant a deed of the said premises, who thereupon took possession of the same, and thereafter retained such possession up to the time of the trial. The consideration for the deed was \$50; and it was proved that the value of the said property at that time was more than \$7,000. Shortly after obtaining his deed the defendant commenced an action against the plaintiff herein to quiet his title to the property, and on appeal to this court it was held that the deed was void and conveyed no title. *Reid v. Robrecht*, 102 Cal. 520, 38 Pac. 875.

Upon these facts the appellant contends that the findings of the court were not justified, and that the judgment should therefore be reversed. This contention is based upon the following propositions: (1) That the declaration of homestead executed and filed by Cusick and his wife was invalid and of no effect, because the declarants were not at the time of executing the same actually residing upon the property. (2) That, when the register assigned the property of the bankrupt to the assignee, the

assignment related back to the commencement of the proceedings in bankruptcy, and vested the title to the property in the assignee as of that time. (3) That, when Cusick and his wife executed the mortgage to the plaintiff, they had no estate or interest in the property, and could not incumber or convey the same in any way whatever, and hence the mortgage created no lien on the property. (4) That the fact that the plaintiff loaned his money to pay off a pre-existing valid mortgage on the property did not in any way subrogate him to the rights of the prior mortgagees. (5) That it is immaterial whether the plaintiff had notice of the bankruptcy proceedings when he took his mortgage, as under the bankrupt law a purchaser from the bankrupt can acquire no right to property vested in the assignee, whether he has notice of the proceedings or not. (6) That it was competent for the defendant to defeat the plaintiff's title by showing, as he did, that the title was outstanding in the assignee.

We do not deem it necessary to discuss these several propositions at length, for, conceding that each one of them is sound, still they are not, in our opinion, controlling in this case. It is true that in an action of ejectment, when the plaintiff relies upon a paper title, the defendant may show the true title with right of possession to be outstanding in a third person, without connecting himself with it, and may thus defeat the action. *Moore v. Tice*, 22 Cal. 514; *Simson v. Eckstein*, 22 Cal. 581; *Dyson v. Bradshaw*, 23 Cal. 528; *Cranmer v. Porter*, 41 Cal. 462. Here it appears that Cusick and his wife remained in undisturbed possession of the property, claiming it as their homestead, for nearly seven years after the bankruptcy proceedings were commenced. This possession was evidence of an admitted right on their part to the possession of the property, and was certainly sufficient to have enabled them to maintain an action to dispossess any mere intruder upon it. And that this right was recognized by the assignee is shown by the fact that, during all the time named, he took no steps to obtain possession of the property himself, as it would otherwise have been his duty to do, and at the end simply sold out his claim thereto for \$50, when the property was in fact then worth more than \$7,000. But, when the plaintiff obtained the sheriff's deed under the foreclosure proceedings, he succeeded to all the rights of the mortgagors, whether existing at the time the mortgage was executed or subsequently acquired, and was therefore entitled to maintain his action against the defendant, who in no way connected himself with the title. The bankrupt law provided as follows: "No suit, either at law or in equity, shall be maintainable in any court between an assignee in bankruptcy and a third person claiming an adverse interest, touching any property or rights of property transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee." Rev. St. U. S. § 5067. Whether, in view of this

statute, the assignee, at the time he made his deed to the defendant, could have maintained an action to recover possession of the property, is a question which does not arise here, and need not be considered. In any event, however, the defendant should not be permitted to defeat this action by the showing made as to the title of the assignee. It follows, in our opinion, that the findings of the court were justified, and that the judgment and order should be affirmed.

We concur: HAYNES, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

TONINI v. CEVASCO et al. (S. F. 220.)¹
(Supreme Court of California. Sept. 17, 1896.)
LIBEL — PLEADING DAMAGES — CONSTRUCTION —
HARMLESS ERROR.

1. Sustaining an objection to a question, the purpose of which was to show that witness was unfriendly to defendant, if error, is harmless; witness having already testified that he was unfriendly to him.

2. Publishing, concerning one engaged in the railway and steamship ticket business, that a certain firm engaged in that business were compelled to discharge him for "conduct not irreprehensible," followed by a publication that while such person gives notice in a circular that he is no longer with such firm, but has moved his business, "as a matter of truth, and to guard the public against any surprise, we must confirm the statement, already publicly made," that he "has not moved away, but has been discharged" by said firm "for conduct not irreprehensible," is libelous per se, so that special damages need not be averred or proved; Civ. Code, § 45, defining "libel" as a false publication "which exposes any person to * * * obloquy."

3. That the court, in an action for libel, left to the jury the determination of the meaning of the publications, with instructions that they were to be taken in the sense that is most natural and obvious, and in that sense in which those persons to whom the publications should come would be most likely to understand them, cannot be complained of by defendant; the publications being such as might properly be construed as defamatory.

Department 2. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by M. G. Tonini against Cevasco & Crespi. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Affirmed.

Wm. J. McGee and Jos. F. Cavagnaro, for appellants. Gordon & Young, for respondent.

McFARLAND, J. This is an action to recover damages for an alleged libel by the defendants, in a newspaper owned by them, to the injury of plaintiff. The jury rendered a verdict for plaintiff in the sum of \$1,000, which, on the motion for a new trial, was reduced by the court to \$500. Defendants appeal from the judgment, and from the order denying a new trial.

¹ Rehearing denied.

Appellants' first contention is that the verdict is not sustained by the evidence, but this contention cannot be maintained. The main issues of fact were whether or not the respondent was discharged as an employé by the firm of Cevasco & Co., and whether the alleged libelous matter was true. While the evidence upon these two issues was conflicting, there certainly was sufficient evidence to warrant the jury in finding in favor of the respondent upon both said issues.

Appellants contend that the judgment should be reversed on account of errors committed by the trial court with respect to the admissibility of evidence, but we think that this position taken by appellants is not tenable. When the defendant Crespi was on the stand as a witness for respondent, he was asked by the appellants whether or not the alleged libelous article was true, and an objection by respondent that this question was not in cross-examination was sustained; and this ruling is claimed to have been erroneous. But nothing was asked witness on the examination in chief about the truth of the article, and we do not think the court erred in holding the question not proper on cross-examination. Afterwards the said witness was examined on the part of the appellants, when the whole matter of the truth of the article might have been properly gone into by the appellants, and was, to a considerable extent. Upon cross-examination of the same witness by appellants, he was asked whether or not the appellants Cevasco had not sued him on a certain note, and attached his interest in the paper, and an objection to this question by respondent was sustained. Whether or not this ruling was technically correct, it is evident that no harm could have been done to appellants by the ruling. The only purpose of the question was to show an unfriendly feeling on the part of the witness to the appellant Cevasco, but the witness had already testified that he was unfriendly with said Cevasco. When the respondent, Tonini, was being examined on his own behalf in rebuttal, and at the very close of the evidence, he was asked on cross-examination if, after the second publication made by the appellants, and set forth in the complaint, he had not also had an advertisement in a certain paper called the "L'Elvezia"; and the respondent objected to the question as not rebuttal, irrelevant, incompetent, and immaterial, and that the advertisement spoken of was after the commencement of the suit. The court sustained the objection, and appellants contend that this ruling is reversible error. We do not think that the ruling was erroneous. We do not see how the matter proposed to be proven was competent, or that the court abused its discretion in not allowing it at that stage of the trial. The foregoing are the only objections to rulings of the court as to the admissibility of evidence which are presented in the brief.

Appellants contend that the language alleged

in the complaint to have been published is not libelous per se, and that, as no special damages were proved, respondent should not have recovered. At common law there was great difficulty in determining, in actions of either slander or libel, when language was actionable per se,—that is, language from which the law would presume damage,—and when it was actionable only upon averment and proof of special damage. It is quite evident that such an action can rarely be successful where the plaintiff is compelled to plead, and specifically point out and prove, the time, place, mode, and circumstance of his damage. Under the earlier decisions in actions of slander, words were held not to be actionable per se unless they imputed a crime involving moral turpitude, although, even in actions of slander, the rule was afterwards greatly relaxed. But there was always a distinction running through the cases between actions of slander and actions of libel,—between words spoken and words written or printed; and, in actions of libel, language was held actionable per se which would not have been so held in actions of slander. Some few judges thought this distinction not sound, but they admitted that it was well established by the authorities. See notes to section 18, p. 71, of Townshend on Slander and Libel. Townshend says (section 18): "To language in writing is attributed, in most cases, a greater capacity for injury than is attributable to language spoken or speech, so that language which, if spoken, gives no right to redress, may, if reduced to writing, give a cause of action." In Broom, Com. Law, 760, it is said, "There is, however, this great distinction between the two actions: that from a libel damage is always implied by law, whereas only some kinds of slander are actionable without proof of special damage"; and in 1 Chit. Gen. Prac. 45, it is said that the distinctions between slanders and libels "proceed upon the principle that the former are often spoken in heat, upon sudden provocations, and are fleeting and soon forgotten, and therefore less likely to be permanently injurious, but that written slander is more deliberate and more malicious, more capable of circulation in distant places, and consequently more likely to be permanently injurious." For the same reasons, no doubt, libel is, in most countries, a public offense, and its perpetrator may be punished criminally, while the author of spoken slander is liable only to damages in a civil action. However, in most of the states there is a statutory definition of libel, and in such case language which is fairly included in such definition is libelous per se. It is only when the libelous meaning of the publication is covert—not apparent on the face of the language used—that averment and proof of special damage is required. Our Code defines "libel" as follows: "Libel is a false and unprivileged publication by writing, pictures, effigy or other fixed representation to the eye, which ex-

poses any person to hatred, contempt, ridicule or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." Civ. Code, § 45. This definition is very broad, and includes almost any language which upon its face has a natural tendency to injure a man's reputation either generally, or with respect to his occupation.

In the case at bar it is alleged in the complaint that the parties are all Italians by race, and members of what is known as the "Italian Colony" of the city of San Francisco; that for many years plaintiff had been engaged in San Francisco in the business of railway and steamship agency, selling railway and steamship tickets, and doing all business incidental thereto; that such business was done principally with Italians; that such business required mutual confidence, and that great reliance was placed in plaintiff's honesty, honor, and trustworthiness; and that defendants are also engaged in the same business, and are business rivals of plaintiff, having their place of business at No. 632 Montgomery street, in said city. It is further averred that defendants are also the proprietors and publishers of a certain newspaper of general circulation, called "*La Voce del Popolo*," which circulates among, and is read by a large number of, the Italian residents of said city, and is declared by defendants to be the organ of the Italian population in California, and that on November 16, 1893, and on several other occasions, the defendants published in the Italian language, in said newspaper, concerning plaintiff, certain words, which, being translated into English, are as follows: "The agency of G. B. Cevasco & Co. must state, besides, as a matter of truth, that since the first of November they were compelled to discharge Mr. M. G. Tonini for his conduct not irreprehensible." It was further averred that afterwards, on December 6, 1893, the defendants made the further publication of language, which, being translated into English, is as follows: "We have received from the agency of G. B. Cevasco & Co. the following: 'Mr. M. G. Tonini gives notice in a circular that he is no more at 632 Montgomery street, but that he has moved to another place his business.' As a matter of truth, and to guard the public against any surprise, we must confirm the statement already publicly made; that is, that Mr. Tonini has not moved away, but has been discharged by the firm of G. B. Cevasco & Co. for conduct not irreprehensible." The complaint also contains the usual averments as to defendants' intent in publishing said language; how it was understood by those who read it, etc. We think that the language charged, upon its face, tended naturally, necessarily, and proximately to produce some, at least, of the results mentioned in section 45 of the Code above quoted; that its natural effect was to expose plaintiff to

"obloquy,"—among the definitions of which given by Webster are "blame, reprehension,"—and to "injure him in his occupation"; and that, therefore, no averment or proof of special damage was necessary. "To expose one to obloquy is to expose him to censure and reproach, as the latter terms are synonymous with the word 'obloquy.'" *Bettner v. Holt*, 70 Cal. 275, 11 Pac. 713. Surely no intelligent man could read these publications without understanding them to mean that plaintiff was not an honorable person, and had been guilty of such reprehensible misconduct as should deter people from trusting him in his occupation. It cannot be justly said that the language does not import anything of a defamatory character concerning the plaintiff. See *Bettner v. Holt*, 70 Cal. 270, 11 Pac. 713; *Lick v. Owen*, 47 Cal. 252; *Edwards v. Society*, 99 Cal. 431, 34 Pac. 128; *Fitch v. De Young*, 66 Cal. 339, 5 Pac. 364.

We do not see that, in the matter of instructing the jury, any error was committed prejudicial to appellants. It is no doubt the law that, where the language of an alleged libel is unambiguous, it is the province of the judge to determine its construction, and that where it is capable of two constructions the jury are to determine in what sense it was used. *Van Vactor v. Walkup*, 46 Cal. 124; *Townsh. Sland. & L.* §§ 281, 286. In the case at bar, while the judge did not expressly state upon which of these two theories he proceeded, still he actually left to the jury the determination of the meaning of the publications. In that state of the case, if the verdict had been for defendants the plaintiff might have plausibly made the point that he had been injured because the judge had not himself construed the language as defamatory. The verdict, however, was for plaintiff; and defendants were not prejudiced, unless upon the proposition that the language was not defamatory, and that the jury should not, and could not rightly, have found it to be of that character,—a proposition which cannot be maintained. The judge gave a large number of instructions requested by defendants, which stated their side of the case fully and fairly, and we do not think that any prejudicial injury arose out of the refusal to give a few other instructions which they asked. These latter, so far as they were correct, were fairly included in the instructions given. The jury were told, among other things, that "the publications alleged to be libelous are to be taken in the sense that is most natural and obvious, and in that sense in which those persons to whom the publications should come would be most likely to understand them"; and this was certainly putting the case as favorably for defendants as it could rightfully have been put if the judge had himself construed the language. Upon the whole, we see no good reason for reversing the judgment. The

judgment and order appealed from are affirmed.

We concur: HENSHAW, J.; TEMPLE, J.

WILSON v. WELCH.¹

(Court of Appeals of Colorado. June 8, 1896.)

APPEAL BOND—PARTIES TO ACTION—EVIDENCE—
MOTION TO DISMISS—WAIVER.

1. A motion to dismiss on the ground that others should have been joined as defendants is waived by going to trial without ruling on it.

2. Code, § 13, providing that persons jointly or severally liable on the same obligation or instrument may all or any of them be included in the same action at plaintiff's option, applies to actions on appeal bonds.

3. In an action against a surety on an appeal bond, plaintiff must prove nonpayment of the judgment and costs, and evidence merely of issue of execution after dismissal of the appeal is not even prima facie proof.

Appeal from Arapahoe county court.

Action by Andrew Welch against George W. Wilson. Judgment for plaintiff, and defendant appeals. Reversed.

Fred L. Shaw, for appellant.

THOMSON, J. This suit was brought before a justice of the peace by Andrew Welch against George W. Wilson, upon an appeal bond executed by Byron L. Miller, Edwin J. Miller, and Oliver B. Merrill, as principals, and C. F. Cabeen and George W. Wilson as sureties, and conditioned as follows: "Whereas, the said Andrew Welch did, on the twenty-seventh day of May, A. D. 1893, at a term of the district court then being holden within and for the county of Park and state of Colorado, obtain a judgment against the above-bounden Byron L. Miller, Edwin J. Miller, and Oliver B. Merrill, for the possession of the horse replevined, and for the sum of one hundred and fifty-one dollars damages, and costs of suit, from which judgment the said Byron L. Miller and Oliver B. Merrill have prayed for and obtained an appeal to the court of appeals of the state of Colorado: Now, if the above-bounden Byron L. Miller, Edwin J. Miller, and Oliver B. Merrill, shall prosecute said appeal, and shall, moreover, pay the amount of the said judgment, costs, interest, and damages rendered and to be rendered against them, the said Byron L. Miller, Edwin J. Miller, and Oliver B. Merrill, in case the said judgment shall be affirmed in the said court of appeals, then the above obligation to be null and void; otherwise, to remain in full force and virtue." The appeal was not prosecuted, and it was dismissed by this court for failure to file a transcript of the record. The defendant appeared before the justice and moved to dismiss the cause because the other obligors were not made parties defendant. The justice denied the motion, and rendered judgment against

the defendant, from which he appealed to the county court. In the latter court no action seems to have been taken on the motion, and the record does not indicate what became of it. Upon the trial in the county court the plaintiff had judgment, from which the defendant prosecutes this appeal.

The errors alleged are that the cause was tried without any disposition of the motion to dismiss, which counsel styles a "plea in abatement"; that the action did not lie against Wilson alone; and that the judgment was rendered upon insufficient evidence. The record does not show that the defendant insisted upon his motion; and, by going to trial without previous ruling upon it, he waived it. But there was no merit in the motion, and, if it had been heard, it must have been overruled. Section 13 of the Code provides that persons jointly or severally liable upon the same obligation or instrument, may all or any of them be included in the same action, at the option of the plaintiff. This provision applies to actions on appeal bonds. *Lux v. McLeod*, 19 Colo. 465, 38 Pac. 246. The suit was therefore properly brought against this defendant alone.

The evidence at the trial consisted of the judgment in the case against Miller and others; the appeal bond, to which the name of the defendant was subscribed as surety; the judgment of this court, dismissing the appeal for failure in its prosecution, and awarding damages and costs to the appellee; an execution and a fee bill from this court for the damages adjudged and the costs of the appeal; and an execution on the judgment appealed from, issued upon a remittitur from this court after the dismissal of the appeal, for the amount of the judgment and costs. There was no return upon either of the executions or the fee bill. There was no other evidence. Upon this evidence the court rendered judgment against the defendant for the amount of the original judgment, and also of the judgment and costs in this court. The defendant is here by appeal. We do not think the evidence warranted the judgment. The dismissal of the appeal operated to affirm the judgment, and the liability upon the bond is the same as if the judgment had been directly affirmed by this court. *McMichael v. Groves*, 14 Colo. 540, 23 Pac. 1006; *Shannon v. Dodge*, 18 Colo. 164, 32 Pac. 61. There was no proof that the money which the bond was given to secure had not been paid by the appellants, Miller and others, who were the principal obligors. In the case of contracts for the absolute and unconditional payment of money, payment is a defense, and nonpayment need not be proven by a plaintiff to establish his cause of action; but, where payment is conditional, the rule is otherwise. In such case the existence of the condition upon which the liability depends must be shown before the plaintiff is entitled to a recovery. If this case had been commenced in a court of record, a complaint would have

¹ Rehearing denied September 16, 1896.

been necessary, and the complaint must have alleged, as a breach of the conditions of the bond, not only the failure to prosecute the appeal, but the further failure of the appellants to pay the amount of the judgment, costs, interest, and damages; otherwise, a cause of action would not have been stated. And the allegation of nonpayment, being material and necessary, must have been supported by evidence, or a cause of action would not have been proved. This suit was brought in a justice's court, where no written pleadings are required, and there were none; but the fact that there were no written pleadings did not authorize a recovery upon any less evidence than would have been necessary otherwise. If the executions and fee bill had been returned unsatisfied, the return would perhaps have been, *prima facie*, sufficient evidence of nonpayment; but they showed no return. They were evidence of the fact of their issuance, but farther than this they were not evidence of anything.

There are no presumptions by which the plaintiff's case can be aided, and, as the evidence produced did not authorize the judgment, it must be reversed. Reversed.

**BOARD OF COM'RS OF GRAND COUNTY
et al. v. PEOPLE ex rel. NEW HAMPSHIRE SAV. BANK OF
CONCORD.¹**

(Court of Appeals of Colorado. April 18, 1896.)

MANDAMUS — COMPELLING LEVY OF TAX — EVIDENCE.

1. A board of county commissioners has not a discretion with regard to the levy of a tax to pay outstanding judgments which cannot be controlled by the courts.

2. On review of a judgment for relator on mandamus to compel county commissioners to levy a tax to pay a judgment, the question whether the discretion of the court in granting a peremptory writ can properly be affected by matters of defense, in bar or abatement, to the warrants on which judgment was obtained against the county, cannot be considered, no such matters having been pleaded or proved below.

3. A judgment for relator on mandamus to compel county commissioners to levy a tax to pay a judgment on a warrant cannot be sustained, in the absence of proof to support the averment of a refusal to make the levy; the answer having denied such refusal, and it not being shown that the refusal of the chairman of the board was authorized or ratified by the board, or that an appropriation and levy, subsequent to demand, "for paying outstanding warrants," was not intended for payment of judgments on warrants.

Error to district court, Arapahoe county.

Petition of the New Hampshire Savings Bank of Concord, N. H., for mandamus to the board of county commissioners of the county of Grand, Colo., and others. Judgment for relator. Defendants bring error. Reversed.

Chas. G. Clements, Sam W. Jones, and L. B. France, for plaintiffs in error. Daniel E. Parks, for defendant in error.

¹ Rehearing denied September 16, 1896.

BISSELL, J. This matter is almost identical, in its most salient features, with those presented in the case of *People ex rel. Rollins v. Board of Com'rs of Rio Grande Co.* (decided at the December term of this court) 42 Pac. 1062. Rollins brought suit against Grand county, in 1890, in the district court of Arapahoe county, and recovered judgment for \$9,947.87 and costs. He afterwards transferred the judgment to the New Hampshire Savings Bank, which filed the petition in mandamus. The petition contained the usual averments of the recovery of the judgment, the title of the bank, and stated two written demands on the county commissioners,—one on the 10th of December, 1890, and the other on the 1st of September, 1893,—demanding the levy of a tax for the payment of the judgment. It was alleged that there were no moneys in the treasury applicable to the payment of the judgment, and a refusal of the board to comply with the demand. The value of the taxable property was stated, and the petition concluded with the usual prayer. To the alternative writ the board made answer; denying the alleged valuation of the property of the county, and averring that it was less than \$300,000. The refusal to levy the tax was denied, and the county set up the existence of an outstanding indebtedness of about \$60,000, of which a little more than half was said to be in judgments. The county also alleged that it had levied a tax for 1894 of three mills on the dollar, which was to be applied to the payment of the plaintiff's debt, as well as the other judgments against the county, and that this levy was all that could be reasonably made, with due regard to the financial situation of the county, and its current indebtedness. On these issues the case went to trial. There was a replication to the answer, which set up the appropriation and levy in October, 1896, for the year 1894, which contained this item, "For paying outstanding warrants and interest, three mills on the dollar." The plaintiff likewise stated the appropriation made in January, 1894, for the current expenses of the county. In this list there was no statement respecting the outstanding judgments or warrants, or an appropriation of funds for their payment, or the payment of interest. There was no proof presented, except certified copies of these papers, with the transcript of judgment, and the evidence given by Mr. Parks on behalf of the plaintiff, and Mr. Jones on behalf of the defendants. The plaintiff did not attempt to show that the county had refused to levy a tax to pay any part or portion of his judgment, or the collection of interest on it, other than what was stated as the result of an interview between Parks, on behalf of the bank, and Mr. Rohan, the chairman of the board. This discussion was had in Denver, at the office of Rollins & Sons, at a meeting apparently arranged to discuss the matter of levying a tax. According to this testimony, Rohan refused to make the levy. The case is silent, however, as to any direct action by the board, as a body, on this matter, other

than what may be taken to appear from the levy and appropriation which were made in October, 1893. Whether Rohan had authority to act for the board, or whether what he did was called to the board's attention, and they ratified it, is neither stated nor proved. The tax rolls were exhibited. The financial condition of the county was stated in a general way by Mr. Jones, though what knowledge he had of it is not very clear. Proof was made of the various outstanding judgments, and at the conclusion of the evidence there was a judgment for the relator, directing a levy of five mills for the year 1894 and each year thereafter, and the application of the funds derived from this tax to the payment of the relator's judgment.

The principal question suggested by counsel for the county has been settled adversely to their contention in the case referred to at the commencement of this opinion. In the court below, as well as here, the chief reliance was on the assumed existence of a discretion with regard to the levy of a tax to pay outstanding judgments which could not be controlled by the courts. Since we do not accept this conclusion, the case necessarily turns on a less important proposition. We are asked to go back to the judgment which was recovered by Rollins, and, from an inspection of the record, ascertain the cause of action stated, and, when we have deduced it, decide whether judgment ought to have been rendered in that suit on the warrants which were the subject-matter of the action. This claim is based on some decisions of the supreme court of the United States in what is assumed to be analogous cases. *Louisiana v. Mayor, etc.*, of New Orleans, 109 U. S. 285, 3 Sup. Ct. 211; *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 8 Sup. Ct. 1370; *Boynton v. Ball*, 121 U. S. 457, 7 Sup. Ct. 931. The *Louisiana* Case was a proceeding by mandamus against the city of New Orleans to compel the payment of a judgment which had been recovered for damages inflicted by rioters. There was legislation which deprived the judgment creditors of any means of enforcing their judgment, and they brought mandamus to compel the city to pay the claims. When the matter came before the federal tribunal, the principal contention of the relators was that the legislation which deprived them of a remedy impaired the obligation of their contract, which was a judgment, and was consequently a violation of that provision of the federal constitution which forbids any legislation which shall impair such obligations. The court took the view that, though put into judgment, the claim did not grow out of a contract, and was therefore not within the purview of this constitutional provision. It held it to be entirely proper for the court to go behind the entry, and look into the record to ascertain the cause of action which resulted in the judgment, and, if therefrom it was seen the case was not one of contract, it could then be adjudged within the power of the legislature to deprive the judgment cred-

itor of his execution remedy, or of any other means which the statute might theretofore have provided for the collection of judgments. The result was not arrived at by an undivided court, some of the judges inclining to the opinion that the reduction of the claim to judgment put it into one of the well-known legal forms of contract, whereby the case was brought directly within the constitutional inhibition. We are not compelled to follow the majority, or express our views as to the strength of the reasoning contained in the dissenting opinions. We do not deem these authorities applicable. If the record of the judgment in the *Rollins* Case is examined, it only discloses that the suit was brought on county warrants, which are legal obligations of the county, and which, of course, that body must pay, unless they have a defense either against the warrant itself, or can abate the suit because at the time it was brought the parties suing had no right to begin their action. We are unable to determine from the inspection of the record that either one of these two circumstances existed. As was said in the *Wisconsin* Case, *supra*, we are bound by the judgment, nor can we go behind it to examine into the validity of the claim, but only to ascertain "whether the claim is really one of such a nature that the court is authorized to enforce it." In the present case, we cannot say the judgment which Rollins obtained was invalid. On inspection, it appears to be a claim which the court has a right to enforce. The argument that by putting the warrants into judgment the holders thereby obtain a preference, and are enabled to enforce payment contrary to the right which they acquired when their warrants were presented to the treasurer for registration, is inapplicable in the present case. The warrants are in judgment. The judgment is a claim which the courts have a right to enforce. We have decided that collection may be enforced by mandamus when the county authorities refuse to levy a tax in the exercise of the discretion which has been confided to them. We cannot go behind the judgment, and ascertain on what it was rendered. Inspection reveals nothing. The county tendered no issue by their return which would justify or permit any investigation of this question. There is nothing wherefrom we can discover that the warrants sued on were inferior in right to any which had been antecedently registered, nor can we ascertain that they are illegal, or that there is any legal defense to them, either in bar or in abatement. Whether these things may be made the subject of a plea, and, if proven, can legitimately control or affect the exercise of the discretion of the court which must determine what tax shall be levied, cannot, without writing what would be obiter dicta, be considered on this hearing. There was neither plea nor proof on this matter. If there were defenses which might have prevented the recovery of the judgment at all,

and the antecedent board negligently permitted the judgment to go when it ought to have been defended, we are unable to see how the present board can avail themselves of the neglect or failure of their predecessors. If, on the other hand, there were matters dehors the record, of which there was competent proof, which would have stayed the writ, or limited its force and terms, it does not appear in this record. The county neither attempted to plead nor to prove it. If hardship results, the citizens may only condemn their county government. In any event, we are precluded from passing on the question.

There is a matter, however, wherein the case seems to us to be radically defective, and we are compelled to send it back for proof on this question. Wherever a petition is addressed to the court, which can only be granted in the exercise of its reasonable discretion, the relator is bound to make out a case which calls on the court to exercise its broad powers in this direction. Nothing can be left to presumption or inference. Full proof must be made of all the matters which must be taken into consideration, in order to enable the court to enforce the claims of the relator, and protect the rights of the respondent. The petition averred a demand and a refusal. The demand was proven, but there was no evidence of a refusal by the county to levy a tax which should be applied to the payment of the judgment. The answer took issue with the averment. To support his claim to the peremptory writ, the relator was bound to show a refusal of the constituted authorities to act as a board. The certified copies of the proceedings in October, 1893, and January, 1894, did not fill the gap. It has been recently decided by this court, at the January term, in the case of *Beshoar v. Board*, 43 Pac. 912, that the levy and appropriation provided for by the statute may be made in the most general terms, and that any language or phraseology which by construction can be taken to cover the appropriation contended for is enough. In other words, when the board makes its appropriation it need resort to the use of no technical terms or stated forms, if from what they do their action can be deduced. In the present case, at the meeting in October there was a provision for paying outstanding warrants and interest. The levy was three mills on the dollar. It may have been the intention of the board to make this levy for the express purpose of paying outstanding judgments and accrued interest. We are not advised whether the action can be taken to cover warrants which were not in judgment. The proceedings do not show, and there was no proof about it. In any event, it was for the relator to prove a refusal to act. This does not necessarily appear from the production of those two certified copies. What Mr. Rohan did in no manner bound the

board. It was not in evidence that the board had any knowledge of his acts, or concurred in what he did. The necessity to show a refusal is conceded by all the authorities. High, Extr. Rem. §§ 13, 27, et seq. It may be, this will appear to be a very technical reason on which to reverse this judgment; but in cases of this description we must hold parties to very strict procedure, when they call on the courts to exercise their prerogative, and compel the county to levy taxes to pay judgments. We are not entirely clear, nor does this case call for the expression of an opinion, as to the extent to which courts should go in this direction. The power of the courts is somewhat circumscribed, and the limits of their authority are not well marked nor clearly defined, though frequently the subject of judicial inquiry. *Bright v. Reservoir Co.*, 3 Colo. App. 170, 32 Pac. 433. While we insist that the county cannot so exercise the discretion committed to it by the legislature as to entirely defeat the collection of the debts which have been put into judgment, we cannot, on the proof before us, nor with the light afforded by any case submitted to us, indicate, much less announce, the rule by which courts must be guided in their attempts to control the action of the county authorities. Counties must not be bankrupted, nor can they be permitted to repudiate their legitimate debts. To enforce the right without accomplishing injustice is the very delicate task set to the courts. The creditor must not be permitted to turn the lever of the press to the destruction of the county organization; nor may the county drive the creditor out of its borders, and out of the courts, in the assumption of a right to exercise a discretion which is another name for the gaunt specter of repudiation. Both creditor and county must be mindful of their pleadings and their proofs, and see to it that the courts have exact, full, and legal basis for their judgments. In all of these cases great regard must be had to the financial condition of the county, the amount of its taxable property, the necessary annual current expenses of the bodies, and the extent of the burden which the taxpayer can be legitimately called on to endure. These matters cannot be determined without full proof before the court as to the amount of taxable property on which taxes are levied and assessed, the necessary current expenditures, the amount of the outstanding debts and obligations, and the priorities, if any, which the claims have, and the extent of the tax which, under these circumstances, should properly be levied. We are not able, from this record, to see there was before the court enough data on which to render its judgment for the levy of a tax of five mills. It is quite possible, if the proof had been ample in these particulars, and the judgment appeared to be wise, discreet, and proper, we might not have felt so strongly the

force of the objection that the proof was insufficient to warrant the judgment. This may result in considerable delay, and the creditor may suffer, but it is unavoidable. We cannot indicate to the court our judgment of the proper amount of tax to be provided for, nor are we able to say we deem the amount which the court arrived at to be justified by the situation, nor that the amount should be greater or less. The condition of the record prevents any expression of our opinion. What we have said about it is simply to suggest to the trial court the necessity and propriety of requiring full proof of all these matters before entering judgment. The court erred in entering judgment on the proofs. It will be reversed, and the case remanded for further proceedings in conformity with this opinion. Reversed.

HALLACK et al. v. TRABER et al.
(Supreme Court of Colorado. April 6, 1896.)
TRUSTEE FOR ACQUIRING MINING CLAIM—ACQUISITION OF ADDITIONAL TERRITORY.

Under Gen. St. 1883, § 2409, permitting the locator of a mining claim to file an amended certificate of location, which may include additional territory, an amended certificate is based on the original, and relates to the first location; hence, a tenant in common with others, to whom his co-tenants have conveyed their interests in trust for the purpose of having him procure the patent, who files an amended certificate, and thus acquires additional territory, holds it in trust for all.

Appeal from district court, Lake county.

Action by Lafayette Traber and others against Erastus F. Hallack and John H. Martin. Judgment for plaintiffs, and defendants appeal. Affirmed.

Rogers, Outhbert & Ellis, for appellants.
J. M. Havens, for appellees.

HAYT, C. J. This is an appeal from a judgment upon pleadings, consisting of a complaint and answer. The undisputed facts are that the Little Nell lode-mining claim, this being the property in dispute, was originally located by E. O. Cavanaugh and others, the location certificate being duly filed on June 11, 1889. Afterwards, by various conveyances, the title passed into the parties to this action, plaintiffs and defendants, who held the property as tenants in common. While the property was so held, it was deeded to Erastus F. Hallack, appellant, in trust, for the purpose of obtaining a patent thereto for the benefit of all the owners. Hallack, while so acting as a tenant in common and as trustee, filed an additional location certificate of the claim, taking in additional territory. Afterwards a patent was issued to Hallack for the Little Nell mining claim, as described in this amended or additional location certificate, and we are to determine, upon these facts, whether the additional territory is the sole property of

appellant Hallack, discharged from any trust in reference thereto, or whether he holds the same in trust, and can be required to deed to his co-tenants interests in the additional territory upon the basis of their ownership in the Little Nell lode as originally located. The second cause of action is dependent upon the first. It grows out of the same facts, and the further fact that lessees of Hallack, the trustee, have paid to him certain amounts as royalties for ore taken from this additional territory. Plaintiffs ask to recover their proportionate share of such royalties. Judgment having been rendered in their favor in the court below upon both counts, the defendants appeal.

The amended location certificate filed by Hallack, the trustee, was filed by virtue of the following provision of our statute: "If at any time the locator of any mining claim heretofore or hereafter located, or his assigns, shall apprehend that his original certificate was defective, erroneous, or that the requirements of the law had not been complied with before filing, or shall be desirous of changing his surface boundaries, or of taking in any part of an overlapping claim which has been abandoned, or in case the original certificate was made prior to the passage of this law, and he shall be desirous of securing the benefits of this act, such locator, or his assigns, may file an additional certificate, subject to the provisions of this act: provided, that such relocation does not interfere with the existing rights of others at the time of such relocation, and no such relocation or other record thereof shall preclude the claimant or claimants from proving any such title or titles as he or they may have held under previous location." Gen. St. 1883, § 2409. The amended location certificate presupposes and is based upon an original. Hallack was only able to file an amended location certificate by reason of the fact that the original had been filed by his grantors. Under the statute he was permitted to take in additional territory without making a new discovery, and patent the same, without any additional outlay in the way of labor and improvements. He took advantage of the title held in common by himself and his co-tenants, and the common expenditure made by all, for the purpose of securing additional territory. If this had been done by reason of his being a tenant in common alone, there can be no question but that the title thus acquired would have inured for the benefit of all, but it is claimed in this case that he is relieved of this duty by reason of his position as trustee; it being urged that, as such trustee, his duty to his cestui que trust was fully discharged by compliance with the letter of his contract, which letter, it is said, required him to deed to them their proportionate interests in the Little Nell lode-mining claim, as the same was located at the time he assumed the duties of trustee with reference to the property. The answer to

this contention of counsel is found in the manner and means resorted to by Hallack in acquiring title to the additional territory. As we have seen, he was enabled to do this by reason of his trusteeship. In the absence of such relation, he could not have filed an additional location certificate, unless for the benefit and in the names of all. An additional location certificate must be based upon an original, and relate back to the first location. *Strepey v. Stark*, 7 Colo. 614, 5 Pac. 111. To permit Hallack to retain in his own right and for his individual use this additional territory would be to allow him to reap an advantage from the trust property, and from his relation to it as trustee. This cannot be permitted. A trustee will not be allowed to reap any profit or gain any advantage, directly or indirectly, from a trust estate, or his relation to it. This rule is necessary for the protection of trust estates. It has its foundation in the soundest principles, and is approved by all the authorities. *Perry, Trusts*, § 427 et seq., and cases cited; *Lewin, Trusts*, p. 225 et seq., and cases cited.

There is no basis for the claim that the plaintiffs are chargeable with laches in the bringing of this suit. The deed to Hallack in trust was for the purpose of obtaining a patent to the Little Nell lode-mining claim, and this suit was instituted as soon as the patent reached the local land office, and before its delivery. It was at the time being held for delivery upon application by Hallack, and this suit was instituted in apt time. The judgment will be affirmed. Affirmed.

MILLER et al. v. PEOPLE.

(Supreme Court of Colorado. June 29, 1896.)

CRIMINAL LAW — APPEAL — PRESUMPTIONS — INSTRUCTIONS — EXCEPTIONS.

1. On appeal from a judgment of conviction, where defendant fails to bring up the evidence, the supreme court will assume that the evidence fully justifies the verdict.

2. Error cannot be predicated on the court's failure, on a trial for robbery, to give unrequested instructions as to grand and petit larceny, and as to a defense of alibi.

3. Where exceptions are taken to the charge, the court's attention should be called to any particular error in law of which counsel desire to complain; and an exception in terms, "to which instructions and each and all thereof, and to each and every paragraph thereof, the defendants then and there duly excepted," is too general.

Error to district court, Arapahoe county.

Henry A. Miller, Joseph Vernon, and Mike O'Brien were convicted of robbery, and bring error. Affirmed.

Plaintiffs in error, Henry A. Miller, Joseph Vernon, and Mike O'Brien were convicted in the district court of the crime of robbery, and each sentenced to three years' confinement in the state penitentiary. It is alleged in the information that the crime

was committed on the 10th day of July, A. D. 1895, one Nels Christian being the victim. The defendants were arrested shortly after the offense was committed, and taken before a justice of the peace for preliminary examination. As a result of an investigation, they were bound over to await the action of the district court. The trial in the district court was had on the 27th day of August, 1895, and the same day the jury returned a verdict of guilty. Upon September 9th, sentences were imposed. To reverse these judgments the defendants bring the case here upon error.

J. W. Taylor, for plaintiffs in error. B. L. Carr, Atty. Gen., and Calvin E. Reed, Asst. Atty. Gen., for the People.

HAYT, C. J. (after stating the facts). The defendants stand convicted of a very grave and heinous crime. They have not brought the evidence to this court for our inspection or review. In these circumstances, we must assume that the evidence fully justifies the verdict of the jury. Under similar circumstances the supreme court of Illinois, in the case of *Cochlin v. People*, 93 Ill. 410, uses the following language: "We are unable to say what the evidence against the defendant in error was, for the reason he has not preserved it in the record. But we are justified in assuming that it was conclusive of his guilt, and contained nothing of a palliating character; otherwise his counsel would have taken advantage of it, by preserving it in the bill of exceptions. * * * We must therefore start out with the crime confessed upon the record, without a single circumstance to mitigate its enormity." Upon this record, we think we are justified in holding plaintiffs in error strictly to the rules governing reviews in this court.

A large number of errors are assigned, but only two are relied upon, namely: First, the failure of the court to instruct as to the law concerning grand or petit larceny; second, the instruction upon the defense of alibi. As to the first of these assignments of error, it is only necessary to say that the district court was not requested to instruct the jury in reference to either grand or petit larceny. If the defendants desired an instruction as to these offenses, they should have asked for it. It was not the duty of the court to instruct upon these matters, in the absence of such request. Whether it would have been proper to have given such instructions, if requested, is a question not now before the court.

As to the second assignment of error, the defendants have entirely failed to comply with rule 11 of this court (38 Pac. vi.), which provides, *inter alia*: " * * * When the error alleged is to the charge of the court, the part of the charge referred to shall be quoted *totidem verbis* in the specifications: provided, where the charge is di-

vided into separate paragraphs or instructions, which are each duly numbered, and error is assigned as to one or more entire paragraphs or instructions, it shall be sufficient to designate the part of the charge referred to by giving the number prefixed to each paragraph or instruction so assigned for error." Of course, the court may waive this requirement, and it may also, in its discretion, notice any error not assigned, but it would be of doubtful propriety to waive any requirement where the guilt of the defendants is established. Aside from this, no proper objection or exception was taken in the trial court to the instructions. It is as well settled as any principle of practice that, in criminal as well as in civil cases, courts of review only sit for the purpose of reviewing questions which were presented below. Any practice which would permit counsel to sit by and permit the trial court, through inadvertence or otherwise, to fall into error, without making some effort to correct the same, is certainly not to be encouraged. To this practice is due much of the adverse criticism upon the delays incident to the administration of the criminal law in the American states,—delays which often result in shielding criminals from merited punishment, and work a miscarriage of justice. We think, where defendants are represented by able counsel, they should be held to a compliance with those salutary rules which experience has shown necessary to the due administration of justice, and the protection of the state. For a statement of such of these rules as are applicable to the record under consideration, we quote from the decided cases: In *Wray v. Carpenter*, 16 Colo. 271, 27 Pac. 249, it is said: "Appellant is not in position to raise this question. * * * The record should * * * show that by some proper objection he invited the trial court's attention to the alleged error, and thus gave an opportunity for its correction at the time." In *Railway Co. v. Ward*, 4 Colo. 30, the instructions were in the nature of a general charge, and the exception was taken as follows: "To the giving of which instructions, and each and every of them, the defendant, by its counsel, then and there excepted." It was held insufficient. In reference to a similar charge, this court, in the case of *Keith v. Wells*, 14 Colo. 321, 23 Pac. 993, said: "Where the charge is given orally, as in this case, the judge will often fall into errors which would be corrected if his attention was called to them at the time; and counsel, being listeners, are more apt to notice such errors than the judge himself, and, failing to call his attention thereto, they will be considered as waived. * * * The exceptions, taken singly or together, did not call the attention of the court to any particular error in law of which counsel desired to complain." See, also, *Lincoln v. Claffin*, 7 Wall. 132; *Beaver v. Taylor*, 98 U. S. 46;

Ayrault v. Bank, 47 N. Y. 570. The general rule in criminal cases is the same as in civil, and in criminal cases errors may be waived by failing to object at the proper time. *Ryan v. People*, 21 Colo. 119, 40 Pac. 775; *Bish. Cr. Proc.* 117-126; *Elliot*, App. Proc. § 290 et seq. By consent the charge of the court in this case was given orally, and afterwards reduced to writing. It occupies several typewritten pages, and the only exception taken to such charge was at its conclusion, when counsel said, "To which instructions, and each and all thereof, and to each and every paragraph thereof, the defendants then and there duly excepted." This manner of taking exceptions has been repeatedly condemned, as we have shown. It does not direct the attention of a court to any particular one of the many legal propositions enunciated in the charge. So far as enlightening the trial court as to the particular objection now relied upon, counsel might as well have remained silent. In criminal as well as in civil cases, a bona fide effort should be made in the trial court to correct errors, in order that assignments thereon may be available upon review. Of the nature, amount, or character of the evidence of an alibi, or whether it covers the whole, or only a portion, of the time of the commission of the offense charged, we are not advised. Therefore the guilt of these defendants must be presumed, upon this appeal, in the absence of the evidence from the record, and the judgment will be affirmed. Affirmed.

WATERS v. PEOPLE.

(Supreme Court of Colorado. June 16, 1896.)

CRUELTY TO ANIMALS—SHOOTING DOVES FROM TRAP.

Under *Mills' Ann. St.* § 104, providing that every person who "tortures, torments, * * * or needlessly mutilates or kills" any animal, shall, on conviction, be punished, etc., a member of a gun club, shooting for amusement doves from a trap, some of which were wounded and afterwards killed, and others escaped apparently unhurt, those killed being used for food, is liable.

Error to El Paso county court.

Frank A. Waters was convicted of cruelty to animals, and appeals. Affirmed.

Rhett & Jones and Wells, Taylor & Taylor, for plaintiff in error. J. C. Helm, Byron L. Carr, Atty. Gen., and Calvin E. Reed, Asst. Atty. Gen., for the People.

CAMPBELL, J. This prosecution, instituted by the humane society before a justice of the peace of El Paso county, where the plaintiff in error (defendant below) was found guilty and sentenced to pay a fine, resulted in a conviction and a fine in the county court of that county in the trial upon defendant's appeal. To this latter judgment the defendant prosecutes his writ of error in this court.

In the county court, by an agreement of parties, the cause was submitted to the decision of the court, without a jury, upon this agreed statement of facts: "The defendant was at the time of the matter complained of in this case a member of what is known as the 'Country Club,' the same being an organization of gentlemen for the purpose of amusement, and its operations were carried on in El Paso county, Colorado. That on or about the 12th day of January, 1895, the defendant, together with other members of said club, owned forty (40) live doves, which they had obtained and kept in confinement for the purpose of using them as targets to shoot at for their amusement. That at said time the doves were placed in traps singly, and released therefrom, and then and there shot by the defendant as targets for sport and amusement of himself and other members of the club. That some of the doves were shot and killed outright by defendant, while some were wounded, and then captured and immediately killed by persons employed for that purpose. Others shot by defendant escaped apparently unhurt. It was impossible to know whether all were unhurt or not, or whether they were seriously injured or not. That the wounding of said doves was not for the purpose of inflicting pain or to torture the same thereby, but resulted from want of skill; the purpose of the defendant being then and there to kill the birds outright. That the doves which were killed outright or wounded, and then captured and killed, were subsequently used as food by defendant and others." The validity of the judgment below depends upon the construction of the following provisions of our statute: "Every person who * * * tortures, torments, * * * or needlessly mutilates or kills * * * any animal, or causes or procures it to be done, * * * shall, upon conviction, be punished," etc. Mills' Ann. St. § 104. "In this act the word 'animal' shall be held to include every living dumb creature; the words 'torture,' 'torment' and 'cruelty' shall be held to include every act, omission or neglect whereby unnecessary or unjustifiable pain or suffering is caused, permitted, or allowed to continue when there is a reasonable remedy or relief * * *." Mills' Ann. St. § 117. While this controversy is real, and the prosecution was instituted by the humane society in good faith, counsel for the people and the defendant, both in the court below and here, with the sole desire to obtain a decision upon the legal proposition involved, have, with commendable accord, eliminated all matters the consideration of which might tend to embarrass or obscure the one vital question in the case. It is proper further to remark that the plaintiff in error is not chargeable with moral delinquency, or with malicious intent wantonly to violate a law of the land, but, rather, as a law-abiding citizen, he has purposely done the act complained of, in order to furnish a test case wherein may

be determined his controverted right, and that of his associates, to shoot live birds from a trap for sport and amusement. At the common law the act done would not be a crime or a misdemeanor. If it is such now, it is because of our statute. As an abstract question, men of equal refinement and intelligence, either because of a difference in taste or training, or in their surroundings and occupations, might well differ as to the moral obliquity of the act of shooting live doves as they were released from a trap. The scholarly ascetic, whose chief pleasures are found in the library, or the man whose life is devoted to the welfare of the lower animals, might suffer excruciating pain if such an act was committed in his presence; while the sportsman, whose recreations are gunning and fishing, might look with pleasure upon what, to him, was "an ancient and honorable pastime." What is a popular diversion, or a harmless amusement, cannot always be accurately determined. That which was so considered in the decade past may not be so regarded to-day, and that which is so to-day may be tabooed, as such, in the near future; and so men equally conscientious, intelligent, and law-abiding, may, not only at different times, but during the same period of time, differ as to these questions. It is of common knowledge that within the past few years, as incident to the progress of civilization, and as the direct outgrowth of that tender solicitude for the brute creation which keeps pace with man's increased knowledge of their life and habits, laws, such as the one under consideration, have been enacted by the various states having the common object of protecting these dumb creatures from ill treatment by man. Their aim is not only to protect these animals, but to conserve public morals, both of which are undoubtedly proper subjects of legislation. With these general objects all right-minded people sympathize. There may be, however, and are, radical differences of opinion as to the extent to which such legislation ought to go. With the policy or wisdom of such enactments we have nothing to do. Our duty, and our only concern, is to give proper effect to such legislation, and to interpret or construe its provisions in the light of the object which the general assembly had in view when the law was passed, in response to the demand of an enlightened public sentiment. We have been much aided by the learned counsel in their briefs and by their oral arguments, and by the authorities which their research has discovered. The cases in point are *Com. v. Lewis*, 140 Pa. St. 261, 21 Atl. 396; *State v. Bogardus*, 4 Mo. App. 215; *Com. v. Turner*, 145 Mass. 296, 14 N. E. 130; *State v. Porter*, 112 N. C. 887, 16 S. E. 915. Other authorities bearing upon this statute are *Ford v. Wiley*, 23 Q. B. Div. 203; *Grise v. State*, 37 Ark. 456; *Hodge v. State*, 11 Lea, 528.

The Pennsylvania statute (P. L. 1860, p. 22) is: "Any person who shall * * * wanton-

ly or cruelly illtreat * * * any animal" shall be punished. The Missouri statute (Laws 1874, p. 112) is: "If any person shall * * * torture, torment, * * * needlessly mutilate or kill * * * any living creature, he shall be punished," etc. The Massachusetts statute (Pub. St. c. 207, § 53) is: "Every owner * * * or person having charge or custody of an animal who * * * knowingly and willfully authorizes or permits it to be subjected to unnecessary torture, suffering or cruelty of any kind, shall be punished," etc. The North Carolina Code (section 2482) is: "If any person shall willfully * * * torture, torment, * * * or needlessly mutilate or kill * * * any * * * animal," etc.

In the case before the Pennsylvania court the special verdict of the jury was that the defendant was a member of a gun club, which held pigeon-shooting matches for a test of skill of marksmanship. At one of these matches, for said purpose, the defendant with a gun fired upon pigeons liberated from a trap, and killed one and wounded another. The wounded bird alighted upon a tree, when it was soon killed by a member of the club, according to the prevailing custom, and the two pigeons thus killed were then sold for food, as the rule of the club provided. Upon these facts the court held that the case was not within the statute. The object of the defendant being to acquire skill and perfect himself in shooting on the wing, the fact that in such exercise he wounded, but did not kill, one of the birds, was held not to constitute the act an unlawful, wanton, or cruel shooting or wounding. The learned chief justice who wrote the opinion concludes by saying: "We do not say there might not be a violation of the act at a shooting match, but, in our view, the facts found by the jury do not bring this case within it."

So far as we are advised, the Missouri statute has not been before the supreme court of that state, but in the case cited *supra* the St. Louis court of appeals has passed upon it. The facts were that as a man threw up pigeons, two at a time, the defendant shot and killed them in the air with a gun, to show his skill, and the pigeons so killed were eaten as food. The court, speaking by Hayden, J., held that the pigeons were not "needlessly or unnecessarily" killed, but that the killing, done in the indulgence of a healthful recreation, and during "an exercise tending to promote a strength, bodily agility, and courage," cannot be considered as a violation of the statute. The court refers to and emphasizes the fact that there was "no mutilation, or anything approaching to it." What would have been the decision of the court had there been in that case, as there was here, a wounding and mutilating of a number of the birds, we can only conjecture. Upon a rehearing, Lewis, P. J., said that the test of judicial interpretation of the statute was what application of the descriptive words employed was intended by the legislature. While the learned judge found

no moral justification for the acts charged in the general truth that the policy of a good government was not to suppress innocent manly exercise, nevertheless he could not believe that it was within the legislative contemplation, by an indefinite prohibition, to interfere with pigeon shooting from traps, which for so long a time had been identified with a mere popular diversion that was not considered needless.

These are the only cases cited by plaintiff in error which support his construction of our statute. It will be observed that the Pennsylvania statute is not so broad as ours, and contains no prohibition against needlessly mutilating or torturing, as does our statute, and is aimed only at wanton and cruel ill treatment. Had it, in these particulars, contained provisions like, or similar to, ours, and had the facts been the same as in the case at bar, the court might have considered the statute violated. The Missouri statute in its specific inhibitions is very much like ours,—substantially the same,—and were the facts of the *Bogardus* case and the one under consideration the same, the former would be on all fours with this, and a precedent precisely in point; but, as there was no mutilation of the pigeons, as in the case at bar, we are justified in the inference that the decision might have been different, as the court called special attention to the fact that there was nothing approaching to a mutilation of the birds. In the *Turner* case, *supra*, the defendant had charge of a fox, and permitted it to be turned loose to be hunted by dogs, which pursued, caught, and mangled the fox. This was held to be a violation of the statute, and against public morals, which the statute sought to protect. The reasoning of the court is instructive, and, as it seems to us, conclusive. At the common law fox hunting and shooting pigeons from a trap were equally lawful, and if fox hunting, in the circumstances stated, is prohibited, so, too, is shooting at captive pigeons liberated from a trap. In the North Carolina case the facts were identical with the facts in this. Indeed, the agreed statement of facts in this record seems to have been copied literally from the special verdict in that case, with such changes only as were necessary as to the name of the club and the county, and using the word "doves" in this statement instead of "pigeons" in the special verdict. The North Carolina statute, unlike the others quoted, contains the same definition of "torture," "torment," and "cruelty" as does our statute, and the decision there was that the statute was violated.

The holding of the Massachusetts and North Carolina courts is, in our judgment, not only warranted under their respective statutes, but is in harmony with the advance in enlightened public opinion at this day as to the protection of dumb animals, which, we think, was unquestionably within the contemplation of the legislative mind at the time of the enactment of our statute. Indeed, it would seem that the

language of our statute is too plain for construction. In the North Carolina statute, like ours, the words "torment," "torture," and "cruelty" include every act whereby unnecessary or unjustifiable pain or suffering is caused. The shooting of wild animals in the forest and fishing in the streams do not come within the statute. We have other laws covering these things, and they are permitted at certain seasons of the year. Every act that causes pain and suffering to animals is not prohibited. Where the end or object in view is reasonable and adequate, the act resulting in pain is, in the sense of the statute, necessary or justifiable, as where a surgical operation is performed to save life, or where the act is done to protect life or property, or to minister to some of the necessities of man. But the killing of captive doves as they are released from a trap, merely to improve one's skill of marksmanship, or for sport and amusement, though there is no specific intention to inflict pain or torture, is, within the meaning of this act, unnecessary and unjustifiable. The same degree of skill may otherwise be readily acquired, and so there was no necessity for the shooting of these doves. Other rational sport and amusement are within easy access of the gentlemen of the Country Club, and so the avowed object of this shooting is neither adequate nor reasonable; hence, under this act, unjustifiable.

Where, as here, the acts charged are admittedly done, not to furnish food, but merely for the sport and amusement of the defendant and his associates, the facts clearly bring the case within the ban of the statute. In contemplation of this law, the pain and suffering caused by such acts are disproportionate to the end sought to be attained, and furnish no adequate or reasonable excuse for the acts which, to be necessary or justifiable, must be prompted by a worthy motive and a reasonable object. The judgment, for the reasons given, is affirmed. Affirmed.

SHARP v. McINTIRE.

(Supreme Court of Colorado. June 29, 1896.)
ELECTIONS—VOTERS—RESIDENCE—DECLARATIONS—
RES GESTÆ—WITNESS—COMPETENCY.

1. Const. art. 7, § 1 (Mills' Ann. St. § 1571), which requires a voter to reside in the state six months immediately preceding an election, to be entitled to vote, means an actual settlement within the state, adopted as a fixed habitation.

2. On the issue of residence of voters, declarations made by them at the time of voting, in the presence of the judges of election, are admissible as a part of the res gestæ.

3. Where declarations were made through an interpreter, a witness is competent to testify to such declarations only as he understood without the aid of the interpreter.

Appeal from Lincoln county court.

Action by Robert B. Sharp against Archibald McIntire, to contest an election as county commissioner. From a judgment in favor of defendant, plaintiff appeals. Reversed.

At the general election of 1895 in Lincoln county, Colo., Robert B. Sharp and Archibald McIntire were rival candidates for the office of county commissioner of said county. Upon the canvass of the votes cast at such election for that office, McIntire was elected by a majority of four votes, and a certificate of election issued to him. His election is contested by Sharp upon the sole ground that there were cast in Rush Creek voting precinct, No. 5, in said county, nine votes for McIntire which were illegal, by reason of the lack of the residence qualification of the voters casting the same, in this, to wit: that the true place of residence of eight of said illegal voters—Trinidad Gomez, Nazarus Gallegos, Andreas Medina, Victor Anallina, Vincent Garcia, Juan Martinez, Antonio Martinez, and Francisco Quintana—was at the date of said election in the territory of New Mexico, and the true residence of one Alario Medina was at the time in Costilla county, Colo. It is admitted in the pleadings that said votes were cast for McIntire. Trinidad Gomez was introduced as a witness on the part of contestor. His testimony was to the effect that his home, and also that of Francisco Quintana, Nazarus Gallegos, and Antonio Martinez, was at Cerro, N. M., where their wives and families lived; that they came to Lincoln county, Colo., in the spring, to work during the summer, and at the close of their season's work returned to their homes and families, at Cerro, N. M.; that he (Gomez) had been in the habit of so coming to Colorado since 1890; that the others had also been doing the same for several years; that in 1895 he came on March 27th, to remain eight months; that when he was subpoenaed as a witness in the case he was on his way home, having received word that his wife was sick; that the other parties named had then returned to their homes, in New Mexico; that these parties did not bring their wives or families to Lincoln county. He testified that he did not know Andreas Medina, Alario Medina, or Juan Martinez. Sharp was sworn in his own behalf, and testified that he was appointed watcher and challenger at the polls in Rush Creek voting precinct, No. 5, at the election on November 5, 1895, and that he challenged the above-named parties' right to vote at such election. Upon objection by counsel for contestee, witness was not allowed to testify to the conversation he had with these parties. His counsel thereupon offered to prove by him that he (Sharp), at the time these parties appeared to cast their vote, had the following conversation with them: That when Trinidad Gomez, Francisco Quintana, and Nazarus Gallegos appeared at the polls to cast their vote, he asked each of them the following question: "Q. Are you a married man?" That they, and each one of them, answered: "A. Yes; I am." That Sharp then said to them, and each one of them: "Q.

"Where do you live?" That they, and each one of them, answered the said Sharp: "A. At Cerro, New Mexico." That said Sharp then asked them, and each one of them: "Q. Where do your wife and family live?" And that they, and each one of them, answered said Sharp that they lived at Cerro, N. M. He also offered to show by this witness that the same conversation occurred, in the same interval before they voted, with Andreas Medina, Vincent Garcia, Juan Martinez, and Antonio Martinez, and that the conversations were identically the same, except that said voters did not state the name of the town, but limited their answers to the fact that they and their wives and children lived and resided in New Mexico. Counsel offered to show by the same witness that he had a similar conversation, under similar circumstances, with Alario Medina, who stated that his residence and the residence of his family was in the San Luis Valley, in Costilla county, Colo. Upon objection of counsel for contestee this evidence was excluded. The determination of the court below was adverse to contestor, and in favor of contestee. From this judgment, Sharp prosecutes this appeal.

Talbot & Denison, for appellant. Kinkaid, Eddy & Hart and T. J. Edwards, for appellee.

GODDARD, J. (after stating the facts). One of the essential qualifications of a voter prescribed by our constitution and statute is that he shall reside in the state 6 months immediately preceding the election at which he offers to vote, in the county 90 days, and in the ward or precinct 10 days. Section 1, art. 7, of the constitution (section 1571, Mills' Ann. St.). The merits of this controversy, therefore, depend upon the construction to be given to the residence qualification thus prescribed. It is contended by counsel for contestee that the word "reside," as therein used, signifies to dwell, abide, or live in the state, and that when a person has actually lived in the state the specified time he meets this requirement. With this construction of the word we cannot agree. We think the residence therein contemplated is synonymous with "home" or "domicile," and means an actual settlement within the state, and its adoption as a fixed and permanent habitation, and requires, not only a personal presence for the requisite time, but a concurrence therewith of an intention to make the place of inhabitancy the true home, and that one who has made a home or domicile in some other state or territory, where his family reside, cannot, by a sojourn here on business or pleasure, however long, without abandoning such former domicile, acquire a residence, in the constitutional and statutory sense. Such is the meaning and signification given to the word by the courts of other states, when used for a like pur-

pose in their constitutions. Fry's Election Case, 71 Pa. St. 302; 5 Metc. (Mass.) 587; French v. Lighty, 9 Ind. 475; State v. Aldrich, 14 R. I. 171. In 5 Metc., supra, in answer to a question propounded by the house of representatives, the supreme court of Massachusetts, construing a similar provision of their constitution, held that the words "shall have resided" meant the same as "shall have had his domicile, or home," and that a student had no right to vote at the place where he resided for purposes of education, though he had been there more than a year, unless his domicile was also there. In Fry's Election Case, supra, Judge Agnew, speaking for the court, said: "No one doubts that one domiciled in another state, but resident here for a special purpose of business or pleasure, is ineligible to election. * * *. It is equally clear that the electors of the state are those who have their homes within it, and not elsewhere. Their domicile is there, and their home is the place where they permanently reside, and to which they intend to return when away from it. It is also clear that one domiciled in another state cannot be an elector here, though he be resident here for some temporary purpose, or on some special business, and though his stay may be prolonged upwards of a year. Therefore, when the constitution declares that the elector must be a resident of the state for one year, it refers, beyond question, to the state as his home or domicile, and not as the place of a temporary sojourn." We think there can be no doubt that, in adopting this constitutional provision, the convention intended to adopt it with the construction that had theretofore been given it. And we think the court below erred in ignoring, as it evidently did, this necessary qualification of some of the voters challenged. It is further urged that the court also erred in excluding the alleged declarations of the parties. While it is held in some of the authorities that the unsworn declarations of a voter are inadmissible to impeach his qualification to vote, when made prior or subsequent to the time of voting, upon the ground that they are hearsay, and among them the case of People v. Com'rs of Grand Co., 7 Colo. 190, 2 Pac. 912, we know of no case that holds that such declarations are inadmissible when made concurrently with the act of voting, and constitute a part of the *res gestæ*. Abundant authority is found that upholds the admissibility of declarations made under such circumstances. Among them, see City of Beardstown v. City of Virginia, 81 Ill. 541; Rucks v. Renfrow, 54 Ark. 409, 16 S. W. 6; Patton v. Coates, 41 Ark. 111. In Gilleland v. Schuyler, 9 Kan. 560, wherein it was held that statements of third parties as to the number of times and the names under which they voted were hearsay and incompetent, and were excluded because relating to past transactions, yet the court say, "These declarations were not

made at the polls by persons conducting the election, and so as to make part of the res gestæ; nor do they accompany a principal fact which they serve to qualify or explain." We think, therefore, that the declarations sought to be introduced in evidence in this case, having been made at the immediate time of voting, in the presence of the judges of election, were admissible, if properly proven; and the court erred in excluding them on the ground, solely, that they were hearsay. It appears that the conversation had with some of the parties was through an interpreter, and their answers were in Spanish. The witness, therefore, was competent to testify only to such declarations as he understood without the aid of an interpreter. For the foregoing reasons the judgment of the county court is reversed, and the cause remanded. Reversed and remanded.

In re HOUSE.

WILLIAMSON v. BOARD OF COM'RS OF ARAPAHOE COUNTY.

(Supreme Court of Colorado. June 29, 1896.)

CONSTITUTIONAL LAW—TREATMENT OF INEBRIATES AT COUNTY EXPENSE.

1. Const. art. 5, § 34, which declares that "no appropriation shall be made for charitable, industrial, educational, or benevolent purposes, to any person, corporation, or community, not under the absolute control of the state, nor to any denominational or sectarian institution or association," relates to the disbursement of state funds only, and is not violated, therefore, by an act conferring on counties the power to use county funds in the treatment and cure of their indigent inebriates in the manner provided thereby.

2. Sess. Laws 1895, c. 74, which provides for the sending of indigent inebriates to an institute for treatment and cure, on petition of 10 freeholders of the county, did not extend any governmental powers to the institute, within the meaning of Const. art. 5, § 35, which declares that "the general assembly shall not delegate to any special commission, private corporation, or association, any power to make, supervise, or interfere with any municipal improvements, money, property, or effects, whether held in trust or otherwise, or to levy taxes, or perform any municipal function whatever."

Error to Arapahoe county court.

Application, on the petition of John D. Williamson, to send William T. House to the Keeley Institute for treatment at the county expense. From a judgment denying the application, the applicant brings error. Reversed.

Mullahey & Rice, H. T. Sale, and Charles M. Rigley, for plaintiff in error. Goudy & Twitcheil, for defendant in error.

GODDARD, J. An application was made to the county court of Arapahoe county, asking for an order to send William T. House to the Keeley Institute, at Denver, Colo., at the expense of the county, for treatment and cure, as a drunkard, under the provisions of chapter 74, Sess. Laws 1895. The proceeding is in

conformity with the requirements of the act, and the facts disclosed in the record clearly bring the case within its provisions. The court below denied the order solely upon the ground that the statute was unconstitutional, and this is the only question presented for our determination. The act, by its first section, provides: "Any friend of an habitual drunkard, * * * or any officer of any charitable organization, may file a petition in the county court in the county where such drunkard may reside, setting forth the sex, financial condition, the age, as near as may be, and the nature and extent of the disease of such drunkard in reference to the use of alcoholic, narcotic or other stimulants, and stating the belief of petitioner or affiant that such disease has passed beyond the control of said drunkard, and asking for an order to send such drunkard to an institution for the treatment of such disease at the expense of the county. The petition or affidavit may also contain such other facts as the applicant may deem proper in order to inform the court of the condition of such drunkard. Such petition shall be verified by the petitioner, and the petition or affidavit shall be approved and signed by ten (10) freeholders of the county." Section 2 provides for the hearing of such petition upon notice to the county attorney, and to the drunkard, unless he voluntarily appears, and that, if it appear to the county judge that the matters set forth in the petition are true, and that the said drunkard has been a bona fide resident of the county at least six months preceding, and is financially unable to pay for the treatment of said disease, and has consented and agreed thereto, the county judge shall immediately make an order directing that he be sent to an institution for the cure of drunkenness within the state, at the expense of the county. Section 4 provides for the verification and presentation of its claim for the treatment of such drunkard, by the manager or person in charge of the institution furnishing such treatment. Section 5 provides that, upon presentation of such claim "to the board of county commissioners of the county of the drunkard's residence, they shall allow the same, as in case of other claims against the county, and make an order on the county treasurer for the payment of the same: provided, all such claims shall be reasonable and not in excess of current rates; that no such claim shall be allowed for a greater amount than twenty-five (25) dollars per week for the treatment, including medical attendance and medicines of such drunkard, nor for a greater amount than seven (7) dollars per week for his board, lodging and keeping." Section 6 defines a drunkard as "any person who has acquired the desire of using alcoholic or malt drinks, morphine, opium, cocaine or other narcotic substance used for the purpose of producing intoxication, to such a degree as to deprive him or her of reasonable self-control."

The object sought to be attained by this act is to provide for a class of its poor who have

become helpless, and unable to care for themselves, and is clearly within the governmental functions of the state, and a proper exercise of legislative power, unless inhibited by some constitutional limitation. The duty of the state to make provision for the care and maintenance of those who, through misfortune or disease, are unable to take care of themselves, has been too long recognized and established by the legislation of this country to admit of question. The indigent poor and infirm, the insane, orphaned and dependent children, and all destitute and helpless persons within its sovereignty, have ever been recognized as legitimate recipients of its bounty, and their welfare as a proper subject of its solicitude and care. The proper exercise of this humane duty ought not to be interfered with unless some constitutional limitation plainly and unequivocally requires it. As was said by Mr. Justice Mulkey, in the case of *McLean Co. v. Humphreys*, 104 Ill. 378: "It is the unquestioned right and imperative duty of every enlightened government, in its character of *paterfamilias*, to protect and provide for the comfort and well-being of such of its citizens as, by reason of infancy, defective understanding, or other misfortune or infirmity, are unable to take care of themselves. The performance of this duty is justly regarded as one of the most important of governmental functions, and all constitutional limitations must be so understood and construed as not to interfere with its proper and legitimate exercise." It is contended by the county attorney that this act offends against section 34, art. 5, of our constitution, which declares: "No appropriation shall be made for charitable, industrial, educational or benevolent purposes, to any person, corporation or community not under the absolute control of the state, nor to and denominational or sectarian institution or association." And also against section 35, which provides: "The general assembly shall not delegate to any special commission, private corporation or association, any power to make, supervise or interfere with any municipal improvements, money, property or effects, whether held in trust or otherwise, or to levy taxes, or perform any municipal function whatever." The contention is that section 34 prohibits, not only the appropriation of state money for the purposes mentioned, but as well money belonging to the county; the argument being that a county is a mere political subdivision of the state, created for the purpose of keeping the machinery of government in motion, for the convenience of the general public,—in other words, that the county is a mere agency and a part of the state government. Hence, if the legislature is prohibited from making such appropriations as specified in section 34, it cannot authorize or require counties—creatures of its own making—to pay money for the inhibited purposes. We think this claim is unsound. The appropriation contemplated in section 34 is of state money only. Its language does not, in terms or by intendment,

limit the power of the legislature in disposing of county money. That article 5, in defining and limiting the powers of the legislature in the matter of appropriations, had in contemplation the disbursement of state funds only, and their disposition by the state in its corporate capacity, is apparent from an examination of other provisions therein contained, which relate to the subject of revenue. They treat strictly of state matters, and the payment of money out of the state treasury. The manner prescribed by section 32 in which appropriations must be made in itself precludes the idea that the appropriation of other than state money was contemplated by the framers of the constitution. We cannot doubt that, had they intended, by section 34, to inhibit the application of county and municipal, as well as state funds, to the specified purposes, they would have said so in express terms, as they did in cognate sections in the same instrument,—notably section 7, art. 9, which inhibits not only the general assembly, but counties, cities, towns, townships, schools, and other public corporations expressly from making any appropriation from any public fund in aid of any church or sectarian society, etc.; and section 1, art. 9, that expressly forbids any county or city, as well as the state, from lending or pledging their credit to any person, company, or corporation, etc. Although, in section 3 of this article, they limit the state indebtedness, by section 6 they also limit the county indebtedness. If, in these instances, it was deemed necessary, in order to extend the inhibition to those municipalities, to expressly name them, it is reasonable to infer that, if it had been the intention to include within the inhibition of section 34 counties and other public corporations, equally comprehensive language would have been used.

In the case of *Clark v. City of Janesville*, 10 Wis. 136, bonds issued by the city of Janesville in aid of a railroad company were attacked, on the ground that the constitution prohibited the state from giving aid to such corporation, and from contracting any debt for works of internal improvement, etc. And it was argued there as here, that such inhibition applied to cities, towns, and counties also, they being parts of the state. Speaking upon the question involved here, Paine, J., said: "It is said that cities, counties, and towns are parts of the state, constituting its political divisions, and that, as such, they come within the spirit and intent of these prohibitions; that for the state to authorize them to loan their credit in carrying on internal improvements is to do indirectly what it cannot do directly; and that to sustain such a law is to say that the state may grant to a part of itself the power to do what the whole cannot, and that power may be derived from a source where it does not exist. It is manifest that the whole question is whether for a city, town, or county to loan its credit is a loan of the credit of the state,—whether, if either became a party in carrying on works of internal

improvement, that makes the state a party to such work. Clearly, they are not within the letter of the constitution. A city is not the state. Neither is a town or county. The question then is whether they are within the spirit of the provision, and it seems to me beyond doubt that they are not. On the contrary, these two sections, like nearly all in article 13, relate exclusively to the state as a whole, and were not designed to regulate or limit the powers of counties, cities, or towns." And in the case of *Pattison v. Supervisors*, 13 Cal. 175, the court, speaking upon a like question, said: "The argument, more fully developed by the learned counsel, seems to be this: The state is forbidden by the eighth article of the constitution to create debts over three hundred thousand dollars, or to loan its credit, etc. The counties are component parts of the state. The state cannot authorize the creation of this debt by its separate subdivisions any more than by itself as a whole. If this argument were sound, it would seem to follow that all indebtedness of every sort incurred by all the counties of the state—the state having exceeded its privileged limit—is void. But the radical error of the argument is, this provision only applies to the state as a corporation,—as a political sovereign, represented by her lawmaking power. * * * The intent of this clause of the constitution is plain enough. It was designed as a check on legislation, and such legislation as might create a charge upon the property of the entire state. But it is not only unwarranted by the words of the constitution to suppose that counties were included in this inhibition, but it might well have been foreseen that the provision would prove extremely embarrassing, if it did not entirely stop the operations of those local governments." Section 10, art. 8, of the constitution of New York, as amended in 1874, provides that "neither the credit nor the money of the state shall be given or loaned to, or in aid of, any association, corporation or private undertaking. This section shall not, however, prevent the legislature from making such provision for the education and support of the blind, the deaf and dumb, and juvenile delinquents as it may deem proper. Nor shall it apply to any fund or property now held, or which may hereafter be held, by the state for educational purposes." By an act of the legislature, passed in 1871, the supervisors of the county of New York were authorized to levy and collect, by a tax upon the taxable property of the city and county of New York, the sum of \$5,000, and to pay the same to the "Shepherd's Fold," a private corporation organized for the purpose of caring for orphaned and friendless children. In the case of *Shepherd's Fold v. Mayor, etc.*, 98 N. Y. 137, the validity of this act was assailed as being in contravention of the foregoing provision of the constitution, upon the ground that the money authorized to be raised was money of the state, and its payment inhibited thereby.

Upon this contention the court say: "The first question which arises is whether the money authorized to be raised by the supervisors to be paid over to this institution was money of the state, within the meaning of section 10 of article 8 of the constitution. It seems to us that the section had reference to money raised by general taxation throughout the state, or revenues of the state, or moneys otherwise belonging in the state treasury, or payable out of it, and not to money raised by ordinary local taxation for local purposes, and to be disbursed by local authorities." To the same effect are *White v. Boody*, 74 Hun, 39, 28 N. Y. Supp. 294; *White v. Inebriate Home*, 141 N. Y. 123, 35 N. E. 1092; *People v. Flagg*, 46 N. Y. 401; *State v. Selbert*, 123 Mo. 424, 24 S. W. 750, and 27 S. W. 624.

We think it would be doing violence to the express letter and manifest intent of section 34 to hold that it inhibits the legislature from conferring upon counties the power to use county funds in the treatment and cure of their indigent inebriates in the manner provided in the act in question, and more clearly untenable is the claim that the act contravenes the provisions of section 35. The design and purpose of this section is to prohibit the delegation to private corporations of the exercise of powers strictly governmental, and we are unable to perceive where in the act delegates any such power to the institute. The service it renders in the treatment and cure of inebriates is in no sense the performance of any of the inhibited municipal functions. While the act may in some respects be defective, and subject to some of the criticisms urged against it, it is not, in our opinion, obnoxious to any of the constitutional objections urged, and must be upheld as a legitimate exercise of legislative power.

We have carefully considered all the other constitutional objections so ably and exhaustively urged by counsel, but deem it unnecessary to specifically comment upon them, since our conclusion is that they in no way affect the validity of the statute. The judgment of the county court is accordingly reversed, and the cause remanded. Reversed and remanded.

SIMPSON v. LANGLEY.

(Supreme Court of Colorado. June 29, 1896.)

PLEADING—SHAM ANSWERS—MOTION TO STRIKE OUT.

In an action on a note, on motion to strike out as sham an answer alleging that the note was only to be paid out of money to be paid defendant on another note which had not yet been paid, affidavits of plaintiff showing an absolute liability on defendant's part, and of a third person alleging an acknowledgment by defendant of absolute liability, make a *prima facie* case authorizing the court to strike out the answer.

Appeal from district court, Arapahoe county.

Action by Lawrence B. Langley against John H. Simpson. There was a judgment for plaintiff, and defendant appeals. Affirmed.

Baxter & Fillins, for appellant. Clay B. Whitford and H. A. Lindsley, for appellee.

PER CURIAM. This suit was instituted by appellee, Lawrence B. Langley, against appellant, John H. Simpson, upon a promissory note executed by the latter to the former, under date of November 18, 1892, and payable 90 days thereafter. The note is for the sum of \$2,500, with interest at 8 per cent. per annum. It is alleged that both principal and interest are due and unpaid. The defendant, in his answer, avers that the note was given in settlement of a commission for the sale of real estate, earned by plaintiff and defendant jointly; that, as a part of the consideration, the purchaser had executed to the defendant a note for \$9,000, payable one year after date; that this amount represented the balance due upon the commission, out of which plaintiff was to receive \$2,500; that, although the larger note was not, by its terms, to become due until one year after date, the maker verbally agreed with plaintiff and defendant to pay the same in a short time; and that the \$2,500 note was executed and delivered with the understanding that it was only to be paid out of the proceeds of the \$9,000 note. It is further averred that no part of the \$9,000 note has been paid. A motion was interposed by plaintiff to strike out this answer for the following, among other, reasons: "Because the same is sham, frivolous, and filed for the purpose of delay only." In support of this motion, the affidavits of plaintiff and another were filed. After argument, the court sustained the motion, ordered the answer stricken from the files, and rendered judgment for plaintiff. To reverse this judgment, the cause is brought here by appeal.

The affidavits filed in support of the motion purport to set forth in detail the entire transaction between the plaintiff and defendant, which culminated in the execution of the \$2,500 note in suit. These affidavits show an absolute liability upon the defendant to pay such note. In the one made by plaintiff, it is stated that the promissory note for \$9,000 was then past due, and that, notwithstanding this fact, no attempt had been made to present the same for payment, but that the defendant had received satisfaction therefor, and had agreed to surrender up and deliver the note to the maker. The affidavits further show that, after the \$2,500 note fell due, appellant confessed his liability thereon, and also that appellee, shortly before bringing suit, presented this note to the defendant for payment, and he then said, in the presence of a witness, that he had no defense, and prom-

ised to pay the note as soon as he could raise the money with which to do so. These affidavits certainly make a prima facie case against the truth of the answer, and are sufficient to call for some explanation on the part of the defendant. The defendant having failed to make any showing in support of the answer, the trial court was justified in sustaining the motion to strike out the plea as sham, and in rendering judgment for plaintiff. *Patrick v. McManus*, 14 Colo. 65, 23 Pac. 90; *Dobson v. Hallowell* (Minn.) 54 N. W. 939; *Seldman v. Gelb* (Com. Pl.) 11 N. Y. Supp. 705. The judgment of the district court will be affirmed. Affirmed.

HEISKELL v. LANDRUM.

(Supreme Court of Colorado. June 29, 1896.)

ELECTIONS—BALLOTS—MARKINGS.

Under Australian Ballot Law 1891, p. 143, providing that when a cross is marked in ink against a party device, indicating a vote for the entire set of candidates, and also another cross in ink against one or more named in another list, such ballot shall only be invalid as to any officer so doubly marked, a ballot so marked cannot be counted for either candidate for the office so doubly marked.

Appeal from Morgan county court.

Election contest instituted by Tyler D. Heiskell against Thomas J. Landrum for the office of clerk and recorder of Morgan county. Judgment for defendant. Plaintiff appeals. Affirmed.

J. E. Garrigues and W. A. Hill, for appellant. A. C. Patton and D. J. Davies, for appellee.

HAYT, C. J. The election was held under what is commonly known as the "Australian Ballot Law" (Sess. Laws 1891, p. 143). There were three candidates for the office of clerk and recorder at this election, whose names were printed upon the official ballots, namely, Heiskell, Democrat; Landrum, People's party; and Richardson, Republican,—the rooster being the emblem of the Democratic party, the cottage home the emblem of the People's party, and the eagle the emblem of the Republican party. The official canvass gave Landrum a plurality of seven votes over Heiskell, these candidates being the two highest upon the list. Upon the canvass, Landrum was given a certificate of election, whereupon Heiskell instituted this contest. As a result of the trial in the court below, the plurality of Landrum was reduced by five; but, as the general result was not thereby changed, the court refused to cancel his certificate. So far as the assignments of error by appellant are concerned, there are but six votes in dispute upon this appeal. Of these, four are ballots marked, respectively, Exhibits 7, 8, 12, and 15. These ballots were not counted by the lower court, but ballots marked 11, 13, and 14 were counted for appellant, although the

same objection exists to the entire seven ballots. The counting of ballots marked Exhibits 11, 13, and 14, in favor of appellant, is assigned as cross error. The objection to all these ballots arises out of the following facts: Each of these ballots is marked by a cross in ink placed by the voter in the square opposite the Republican party's emblem, while in the list of the candidates following a cross is also placed upon each ballot opposite the name of Helskell, the Democratic candidate for county clerk and recorder. Under our statute, a cross marked in ink against the device of an emblem of a party indicates a vote for the entire set of candidates for that party, while a cross opposite the name of an individual candidate indicates an intention to vote for that individual; so that the cross opposite the eagle upon the seven ballots under consideration indicates an intention on the part of the voters to vote the entire list of Republican nominees printed on the official ticket, while the cross opposite the name of Helskell, the Democratic candidate, would, if standing alone, indicate an intention on the part of the voter to vote for that individual for the office of county clerk and recorder. Counsel agree that the principle governing these seven ballots is the same, and that all should be received, or all rejected. The claim of appellant is that there are two distinct methods of voting,—one general, and the other particular; the general method being by placing a cross opposite the emblem of the party of the voter's choice, and the particular method being by making a cross opposite the name of the favored candidates only. It is further contended that, if a voter has been so thoughtless or ignorant as to adopt both these methods, the particular should govern the general, and his ballot should be counted accordingly. Appellee contends that, where both methods of marking the vote are resorted to, one neutralizes the other. In other words, it is said that the voter, by placing a cross opposite the eagle, thereby signified an intention to vote for Richardson, the Republican candidate for clerk and recorder, while by placing a cross opposite the name of Helskell he also voted for the nominee of the Democratic party for that office; hence it is argued that, the two votes being contradictory, one nullifies the other, and neither should be counted.

The statute provides, "Where a cross is marked in ink against a device indicating a vote for the entire set of candidates, and also another cross in ink against one or more names in another list, such ballot shall only be held invalid as to any office so doubly marked." It is true, as stated by appellant, that this court has held in a number of cases that where the intention of the voter can be ascertained the vote should be counted, but this intention can never be given effect against the positive provisions of the

statute. As has been heretofore said by this court, the principal object of the rules for voting prescribed by the statute is to protect the voter, prevent fraud, and secure a fair count; but where the statute prescribes a form, and declares a compliance therewith essential in order to have the ballot counted, the statute must govern. The act says the ballot shall only be held invalid as to any office so doubly marked, but this is equivalent to a legislative declaration that as to any office so doubly marked the ballot shall not be counted. The language admits of no other construction. This particular provision of the statute did not apply in the case of *Young v. Simpson*, 21 Colo. 460, 42 Pac. 666, for the reason that no person on another list was there voted for; the double marking in that case consisting of a cross opposite the emblem of the People's party, and crosses opposite the names of certain candidates of that party. Ballots marked 7, 8, 12, and 15 were properly rejected, and the court should have likewise rejected ballots marked 11, 13, and 14. By counting the latter, appellant's vote was erroneously increased by three. It follows that three votes must be deducted from the number counted for him, thereby increasing appellee's plurality from two to five. There are only two other votes challenged by appellant's assignments of error, and, should both of these assignments be sustained, appellant would still be short of a plurality. As no possible disposition of the remaining assignments of error can overthrow the judgment of the county court, it will be affirmed without further comment. Affirmed.

HASKELL v. DENVER TRAMWAY CO. et al.

(Supreme Court of Colorado. May 18, 1896.)

STREET RAILROADS—INJUNCTION AGAINST LAYING TRACKS—NUISANCE.

Street-railway companies own two lots in a city block, which front on the streets on opposite sides of the block, and are separated at the rear by an alley extending across the block at right angles to them. By an ordinance the companies were granted permission to build and operate double tracks through the block, over their lots and the streets bounding the block, so as to form a loop for their lines. Held, that the owner of a lot and hotel adjoining one of the companies' lots cannot maintain an action to enjoin the companies from constructing the tracks, on the ground that they will create an obstruction of his right of ingress to and egress from his hotel by way of the alley, street, and sidewalk crossed by such tracks, his remedy at law being adequate. *Railroad Co. v. Domke*, 17 Pac. 777, 11 Colo. 247, followed.

On Rehearing.

(June 20, 1896.)

The construction by a street-railway company, under municipal authority, of tracks on its own land, or the operation of a railway thereover under such authority, it is not per se a nuisance which will be enjoined at the instance of an adjoining property owner.

Error to district court, Arapahoe county.

Action by Otis L. Haskell against the Denver Tramway Company and another. There was a judgment sustaining a demurrer to the complaint, and dismissing the action, and plaintiff brings error. Affirmed.

J. P. Brockway and H. E. Luthe, for plaintiff in error. A. M. Stevenson, for defendants in error.

CAMPBELL, J. The plaintiff brought this suit to restrain the defendant companies from building and operating that portion of their line of street railway hereinafter particularly described. Upon the filing of the original complaint a temporary restraining order was issued, without notice to the defendants, according to the prayer of the complaint. To the complaint an answer was filed, and upon the hearing of an application therefor, based upon these pleadings, an order was made dissolving the preliminary writ. An amended complaint was thereupon filed, the sole object of which, apparently, was to secure the same kind of relief asked in the original complaint. To this amended complaint the defendants filed a general demurrer, which was sustained by the trial court, and the action was thereupon dismissed. It is to this ruling that the plaintiff prosecutes his writ of error here. The pleadings disclose the following facts: The defendants are corporations organized under the general laws to build and operate street railroads in Arapahoe county, and own and (under an ordinance of the city of Denver granting such franchise) operate in the city an extensive system of street railways, composed of a number of distinct lines, cable power and electricity being the motive powers, all of which center at, and the cars running over these various lines depart from and return to, a so-called central station, over and by means of a loop, the course and location of which are described in the pleadings. Arapahoe and Lawrence streets are parallel public streets in the city of Denver, running easterly and westerly, and are intersected at right angles by Fourteenth and Fifteenth streets, running northerly and southerly. Bounded by these four streets is block No. 74 in East Denver. The plaintiff owns lot 10 in said block, upon which there is a building used as an hotel. This lot, 25 feet in width, fronts on Lawrence street, and extends back 125 feet to the alley running through the center of block 74 from Fourteenth to Fifteenth streets. The defendants bought lot 9 in this block, which immediately adjoins plaintiff's lot, and they also bought a similarly situated lot in the same block, facing upon Arapahoe street, and extending back therefrom to the said alley. Defendants, under permission granted by said ordinance of the city, proposed to build, maintain, and operate their double line or track of street railway passing through the said block, and

over and across said lot 9 and said similarly situated lot in the same block facing upon Arapahoe street, so as to form a loop consisting of a continuous line of railway extending from a point in the center of Fifteenth street, where the same is intersected by Arapahoe street, passing therefrom down Fifteenth street to Lawrence street; thence through Lawrence street to a point opposite and fronting said lot 9; thence across the sidewalk, and over said lot 9 and the similarly situated lot immediately to the rear thereof, and passing into Arapahoe street; and thence along the middle of Arapahoe street to the place of beginning. This loop was constructed so as to provide a convenient way or track upon which all the cars of the defendants' different lines were to be made to pass in going from and returning to the central station of the system, and this loop seems to be well adapted for that purpose. The plaintiff's theory is that the maintaining and operating of this loop was and is an unlawful interference with, or an obstruction of, his right of ingress and egress to and from his premises by way of the said alley, street, and sidewalk, and that he is entitled to an injunction to restrain defendants from operating such portion of their system. The objection is to that portion of defendants' loop which extends from the middle of Lawrence street across the sidewalk, and over these two lots and the alley between them. The defendants are the owners of lot 9 and the similarly situated lot facing Arapahoe street in the same block. The fee in this street and alley is not in the plaintiff. It is in the municipality, in trust for the use of the public. For the purposes of their loop, the defendants do not threaten or propose to take the fee therein, or the fee of any property belonging to the plaintiff, or the right of way over any of the plaintiff's premises. The only property right which he himself claims will be impaired is the easement or right of ingress and egress to and from his premises, which necessarily will be obstructed by the construction and operation of defendants' loop. In this state the rule is settled that, in these circumstances, injunctive relief will not be given, because damages furnish a complete remedy, and that the abutting owner, for such injuries, cannot enjoin the construction and operation of a railroad merely because damages are not compensated in advance, if the railway company be acting under sufficient legislative or municipal authority. *Railroad Co. v. Domke*, 11 Colo. 247, 17 Pac. 777.

The reasons for this rule are clearly set forth in this leading case, and we do not deem it necessary to repeat the argument. The doctrine of that case has been followed by this court in the cases of *Railway Co. v. Barsaloux*, 15 Colo. 290, 25 Pac. 165, and *Railway Co. v. Toohey*, 15 Colo. 297, 25 Pac. 168.

There is a suggestion that the ordinance of the city purporting to license the acts of the defendants complained of is invalid, and that under their certificates of incorporation the defendants have not the authority to build this loop. This suggestion appears as a statement of a legal conclusion which the plaintiff draws from a construction of the ordinance and the certificates of incorporation of the defendant companies, which, however, are not set out in the pleadings so as to enable us to determine the correctness of this conclusion. In the absence, therefore, of any showing to the contrary, we must assume the validity of this ordinance, and the possession by the companies of the necessary power to build this loop. The foregoing is the law, even upon the supposition that the plaintiff is entitled to some damages for the injuries alleged to have been caused by the defendants, but our decision is based solely upon the absence of the right in the plaintiff to enjoin the operation of this road. If it be assumed that plaintiff's property has been damaged by the defendants (as to which we express no opinion), he has mistaken his remedy. The trial court dismissed his complaint on the ground that for injuries, if any, sustained by the plaintiff, he had an adequate and complete remedy by way of compensation in damages recoverable in a single action. Under the authorities already cited, this ruling was right. Plaintiff, however, declined to avail himself of the kind of relief to which the court held he was entitled, but elected to test his right to injunctive relief by a review of the final judgment dismissing his complaint. He cannot, therefore, and in fact does not, complain that the trial court should have ascertained the amount of damages, instead of dismissing the action. The judgment of the district court should be affirmed. Affirmed.

On Petition for Rehearing.

PER CURIAM. Plaintiff in error has filed a petition for a rehearing, in which no authorities are cited and no reasons advanced that were not presented or considered at the former hearing. He now concedes that the case of *Railroad Co. v. Domke*, 11 Colo. 247, 17 Pac. 777, is authority for our decision in this case, but insists that the question involved here was not necessary to the decision there, but that, if it was, then the case announced bad law, although sustained by the Illinois authorities, and should be overruled. We have re-examined the *Domke* Case, and are satisfied with its doctrine, and that the questions decided were properly before the court for determination. It has been followed in the two cases cited in the opinion from 15 Colo. and 25 Pac. (*Railway Co. v. Barsaloux*, 15 Colo. 290, 25 Pac. 165; *Railway Co. v. Toobey*, 15 Colo. 297, 25 Pac. 166), and we again affirm it.

Complaint is also made that in its opinion the court ignored the point made by the plaintiff, that the operation of defendants' road on their own lot, adjoining that of the plain-

tiff, would constitute a private nuisance which should be enjoined. In their original brief apparently so little reliance was had by counsel upon this branch of the case that, acting upon this assumption, it was deemed unnecessary to notice it in the opinion, although we did not overlook it. We are not now impressed with its merit. In this state, when duly licensed by the municipal authorities, the operation of a street railway in the streets of a town or a populous city, or of a steam railroad upon private property therein, is not per se a nuisance. It is unquestionably within the jurisdiction of courts of equity to prevent a nuisance, but the courts are inclined to limit its exercise to cases of nuisance per se. Where the erection or operation of a certain thing may or may not become a nuisance, according to circumstances, or where it is impossible to tell until the thing threatened is erected or brought into being, and put into operation, whether or not it will be a nuisance, or where the benefit therefrom to the public outweighs the inconvenience or damage to the plaintiff, or where the latter has a complete remedy at law, by way of damages, ordinarily equity declines to interfere by injunction to restrain its construction or operation; and, in all cases where application is made to restrain a threatened nuisance, the allegations of the complaint must clearly show that the thing complained of will, not that it possibly may, constitute a nuisance, and the mere allegation of the pleader that a private nuisance will ensue is not sufficient. See, generally, upon this question, 1 High. Inj. (2d Ed.) c. 13, §§ 742, 745; Wood, Nuis. (3d Ed.) § 745, p. 991; Id., §§ 786, 789, 796, 797, et seq. It would manifestly be improper, therefore, to restrain the construction of defendants' railroad upon their own property, or to enjoin the operation of the road when constructed, upon the showing made in the pleadings, as it is not made to appear that it will constitute a nuisance to plaintiff's property, or that he has no adequate remedy at law for any damages he may sustain. The rehearing is denied. Rehearing denied.

MULNIX, State Treasurer, v. MUTUAL BEN. LIFE INS. CO.

(Supreme Court of Colorado. June 29, 1896.)

STATES AND STATE OFFICERS—SUPPLIES FOR STATE OFFICES—CONTRACT BY SECRETARY MADE WITH OTHER THAN LOWEST BIDDER—VALIDITY—STATUTES—TITLES OF ACTS.

1. Const. art. 5, § 29, provides that all stationery, printing, paper, and fuel used in the departments of government shall be furnished, and the repairing and furnishing the halls and rooms shall be performed, under contract, given to the lowest responsible bidder, below such maximum price and under such regulations as may be prescribed by law. Sess. Laws 1879, p. 61 (Gen. St. 1883, §§ 1338-1341, 1343; Mill's Ann. St. §§ 1777-1780, 1782), makes it the duty of the secretary of state to secure suitable apartments for the departments of state, and have the same supplied with furniture and such other articles as may be required, and provides that, before each session of the general assembly, he

shall advertise for four weeks for bids for the articles required, with power to reject any and all bids. *Held*, that the provisions of the constitution and statute are mandatory, and a contract by the secretary of state not let to the lowest bidder for furnishing such supplies is invalid.

2. Sess. Laws 1885, p. 49, is entitled "An act to provide for the filing of duplicate contracts pertaining to the state government, and to provide for auditing accounts thereunder." *Held* that, if such statute authorizes the secretary of state to make contracts for supplies for the government departments without advertising for bids, the provision is not within the title of the act, and is invalid.

3. Const. art. 5, § 29, provides that all stationery, printing, paper, and fuel used within the departments of the government shall be furnished, and repairing and furnishing halls and rooms shall be performed, under contract given to the lowest responsible bidder, below such maximum price and under such regulations as may be prescribed by law. *Held*, that Sess. Laws 1885, p. 49, entitled "An act to provide for the filing of duplicate contracts pertaining to the state government, and to provide for auditing accounts thereunder," if it authorizes the secretary of state to make contracts for such supplies without advertising for bids, is in conflict with the constitution and invalid.

4. A contract by the secretary of state, invalid because executed by him in express violation of the statute, cannot be ratified by the state.

Error to district court, Arapahoe county.

Petition by the Mutual Benefit Life Insurance Company for a writ of mandamus to compel Harry E. Mulinix, state treasurer, to pay a state warrant. There was a judgment in favor of petitioner, and respondent brings error. Reversed.

Byron L. Carr, Atty. Gen., and Calvin E. Reed, Asst. Atty. Gen., for plaintiff in error. F. A. Williams, A. M. Stevenson, and A. S. Blake, for defendant in error.

CAMPBELL, J. The insurance company, as petitioner, by mandamus, seeks to enforce the payment of a state warrant drawn by the state auditor upon the state treasurer. Prior to the convening of the Seventh general assembly, the secretary of state, in pursuance of the statute, by an advertisement duly made, invited sealed proposals for stationery and certain other articles required by said general assembly and the executive departments of state for the two years commencing on the 2d of January, 1889. Lawrence & Co. tendered a bid, which, upon investigation, was accepted by the secretary of state, and a contract was duly entered into with them for supplying such articles as were covered by their bid. Thereafter they furnished stationery and certain other articles to the general assembly, and to the various executive departments, which were received and used by the state. The statements of accounts for the same were rendered to the then auditor of state, and by him audited, settled, approved, and allowed; and thereupon the auditor drew upon the treasurer the warrant which is the subject-matter of the controversy here, the same being on account for the articles so furnished. This warrant, before the beginning of this proceeding, was duly indorsed to the petitioner, and pre-

sented by it to the then treasurer of the state, who refused payment. An appropriation has been duly made by the general assembly for the payment of this claim, and the money to pay the warrant was in the state treasury at the time of its presentation, and is still there. The treasurer made answer to the petition, from which, and the brief of the attorney general, it appears that the sole defense relied upon is the illegality of the warrant, which illegality is said to consist in the fact that a part of the consideration therefor was illegal, in this: that some of the articles furnished to the general assembly by the petitioner's assignors were not included in the advertisement, in their bid or contract, as is required by law in such cases. The court below awarded the peremptory writ, to which judgment the treasurer prosecutes his writ of error.

The constitutional and statutory provisions involved in this controversy, and which are referred to in the opinion, are section 29 of article 5 of the constitution, the act approved February 12, 1879 (Sess. Laws 1879, pp. 61, 62, being sections 1338 to 1343 of the General Statutes of 1883, which are the same as sections 1777 to 1782 of Mills' Annotated Statutes), and the act of 1885 (Sess. Laws 1885, p. 49). Section 29 of article 5, in substance, provides that "all stationery, printing, paper and fuel used in the legislative and other departments of government, shall be furnished; * * * and the repairing and furnishing the halls and rooms * * * shall be performed under contract; to be given to the lowest responsible bidder, below such maximum price and under such regulations as may be prescribed by law." In carrying out this provision the general assembly, by the act of 1879, makes the secretary of state the purchasing agent for the three great departments of state, and makes it his duty to procure suitable apartments for them, and to have the same supplied with furniture, and such other articles as may be required. Fifty days immediately preceding each regular session of the general assembly, he is directed to advertise for four weeks successively for bids for the articles required; and he is given the power to reject any or all bids, if he deem it for the best interests of the state to do so. Specific provisions for opening the bids and awarding contracts thereunder are made, and the maximum prices fixed, below which all bids must come. The contention of plaintiff in error is that section 29 of article 5 is mandatory, not only to the general assembly, but, per se, operates absolutely to prohibit and make void any contract of purchase of articles enumerated therein, unless furnished under a contract let to the lowest responsible bidder. But, if not, still the general assembly has passed a law carrying into effect this section, whose provisions are mandatory upon the secretary of state; and they prohibit him, as the purchasing agent, from purchasing supplies except from such bidder. Upon the other hand, the defendant in error contends that this section is mandatory only

to the general assembly, is not self-executing, and, until given life by the legislature, is dormant; and as the statute referred to is itself, by a fair construction, only directory or advisory in its nature, the secretary of state may altogether omit to advertise for bids, or if he does, and rejects them, or if he omits from his advertisement some necessary article or articles, or if no bids are offered by responsible bidders, nevertheless he may go into the open market and purchase supplies, and thus impose a valid obligation upon the state to pay for them. There is no charge in these pleadings of fraudulent conduct on the part of the secretary of state in advertising for bids, or of fraud in the bid itself, or in the auditing of the account. The sole defense is that some of the articles furnished and received and used by the state were not embraced in the advertisement, or included in the bid of petitioner's assignors, or covered by their contract, but were purchased by the secretary of state in the open market. This is conceded by the petitioner, and upon this fact the claim is made, on the one side, that this purchase was without authority of law, and *ultra vires* the secretary of state, while upon the other side the contention is that he had the implied power to make this purchase. The parties agree that the warrant does not possess the qualities of negotiable paper, but is open to the same defenses as though the proceeding were to compel the auditor to allow the account, and draw his warrant therefor. It is also agreed that if any part of the consideration is illegal the warrant is void. The rule is fundamental that "in cases of public agents, the government, or other public authority, is not bound, unless it manifestly appears that the agent is acting within the scope of his authority, or he is held out as having authority to do the act." Story, Ag. (8th Ed.) § 307a; Mechem, Pub. Off. § 834; *Whiteside v. U. S.*, 93 U. S. 247; *Hawkins v. U. S.*, 96 U. S. 689; *Town of Durango v. Pennington*, 8 Colo. 257, 7 Pac. 14; *Sullivan v. City of Leadville*, 11 Colo. 483, 18 Pac. 736. As expressed in another form, it is said, "Every person who seeks to obtain, through his dealings with the officer, the obligation of the public, must, at his peril, ascertain that the proposed act is within the scope of the authority which the law has conferred upon the officer." Mechem, Pub. Off. § 829 et seq., citing *The Floyd Acceptances*, 7 Wall. 606, and other cases.

Whether section 29 is mandatory only to the legislature, and is not self-executing, or whether, without supplemental legislation, it is a positive and effective prohibition against the purchase of supplies, except under contract to the lowest bidder, is not necessarily before us. The authorities cited pro and con, among others, are *Groves v. Slaughter*, 15 Pet. 449; *Spinney v. Griffith* (Cal.) 32 Pac. 974; *Speidel v. Schlosser*, 13 W. Va. 686; *Cooley*, Const. Lim. (5th Ed.) pp. 98-102; *In re Breene*, 14 Colo. 401, 24 Pac. 3; *Brien v. Williamson*, 7 How. (Miss.) 14; *Bass v. May-*

or of Nashville, Meigs, 421; *Law v. People*, 87 Ill. 385; 3 Am. & Eng. Enc. Law, 680; *Yerger v. Rains*, 4 Humph. 259. In passing we may, however, with propriety, say that courts are not astute to discover reasons for holding directory, merely, constitutional provisions manifestly intended as salutary checks upon improvident conduct of governmental affairs. Important as this question might otherwise be, in this case it is not controlling; for our general assembly, in 1879 (Sess. Laws 1879, p. 61; Gen. St. 1883, *supra*), recognizing its mandate, gave life to this constitutional provision. By this act it is conceded that an attempt, at least, was made on the part of the general assembly to carry out the constitutional provision. It expressly directs the secretary of state to advertise for bids for all supplies needed, and to let the contract therefor to the lowest responsible bidder, and fixes the maximum price below which the bids must come. But we are asked to declare this statute directory only, and the argument is this: Were there no other provisions than those prescribing the mode of entering into a contract, it might fairly be said that all other methods are prohibited; but section 3 of the act empowers the secretary of state to reject all bids, and section 6 makes it his duty to furnish apartments for the legislature, and supply it with all necessary articles. Given this duty, he must necessarily have the authority to perform it. If, therefore, he advertise for bids, and none are tendered, and he has no time to readvertise, or if he reject all bids offered, or if, for a good excuse, he fails to advertise, or does so, and fails to include all necessary articles in his advertisement, or in the contract, if made, still, as his duty requires that he furnish necessary supplies, this statute impliedly gives him the discretion either to depart from the statutory method of securing supplies, or, upon a failure, for any of the reasons just given, to obtain, under the prescribed method, all or any of the supplies needed, he may go into the open market and buy them. If this be not so, we are told that the "wheels of government will be blocked," for these departments cannot run unless supplied with certain articles for their use. The secretary of state is required to furnish them, but if he be confined to the statutory method in securing them, and that method prove ineffectual, the departments must stop, and the functions of government will be paralyzed. There is force in this argument, at least in furnishing a reason why such a contingency should have been provided for by the constitutional convention, but we think it not conclusive of the question before us. It is too plain for argument that the object of this constitutional provision was to protect the state against extortion and oppression from unscrupulous contractors, and, as far as possible, to withdraw from its own officers the opportunity and power to assist in such schemes. When the

act of 1879 was passed, it was in obedience to the command of the constitution, and it provided in detail the necessary regulations for effectuating these constitutional safeguards. These regulations, if in harmony with the constitution, we hold to be mandatory,—as much so as if expressed in the constitution itself. If the general assembly had expressly enacted that the secretary of state, in certain contingencies, might disregard the method of obtaining supplies enjoined by the constitution, and go into the open market and buy them, such a provision would be repugnant to the constitution. It follows that the power to reject bids, or the duty to supply the departments of state with articles necessary for their use, which this act contains, does not carry with it, nor do both combined carry, by implication, the power to disregard both the statute and the constitution, or confer the power to go into the open market and buy. The duty to secure these things might, by implication, give authority to buy in any reasonable way, were it not that this power is otherwise limited by the constitution and the statute; and this method, being the essential thing to protect the state, must be held to be exclusive and mandatory. The various other arguments adduced in support of the contrary rule do not address themselves to us with any degree of force. That just as satisfactory results may be accomplished if the agent buy in the open market is no reason why he should do so, when his only authority to buy at all limits him to a different method. Nor is the argument convincing that the secretary of state ought to be vested with the power thus to buy in case no bids are received, or in case he rejects all bids. The fact that the wheels of government may be blocked if the departments of state have not the necessary articles with which to do their work may be persuasive to induce the people to change their constitution, and the general assembly to modify the statutes; but, when advanced by one who makes with the public official a contract which he knows is beyond the latter's power to make, it is unavailing to secure from a court its enforcement. So, too, the argument that the credit of the state will be impaired if its outstanding warrants are not paid may appeal to us as citizens, but it is without merit as a reason why the court should override the plain provisions of the constitution and statutes in its endeavor to protect the public credit. A sufficient reply to all such arguments is that the persons who furnished these articles to the state knew when they were furnished that the secretary had no power to purchase them and bind the state. An additional reason why these safeguards should be rigidly adhered to and enforced, outweighing all considerations of inconvenience and imaginary paralysis of the functions of government, is the opportunities for corruption which any other rule would afford. A single illustration will show this:

If, without advertising for bids, the secretary of state has the power to purchase one of the articles required by the state, upon principle he could altogether neglect or refuse to advertise, or omit from his advertisement all but one of the many necessary articles, and then go into the open market and buy them, and pay any price he saw fit to offer, and so bind the state. To give a construction to these statutory and constitutional requirements which would permit of this would be practically to annul and break down all of the safeguards which the people and their representatives deemed necessary to erect to protect the interests of the state.

The case of *Dement v. Rokker*, 126 Ill. 174, 19 N. E. 40, is in point. Under a constitution which directed that the general assembly should provide by law that certain printing, etc., should be let by contract to the lowest responsible bidder, the general assembly of that state passed an act to carry into execution this section, and constituted certain state officials commissioners of state contracts. In pursuance of this act these commissioners advertised for bids, and awarded a contract to the lowest responsible bidder. The latter did the work called for by the contract, but the commissioners refused to certify their account because they secured their contract by an unlawful conspiracy to prevent competition. The court upheld this refusal. While this contract was held void because of the fraudulent act of the bidder, the court, by Scholfield, J., in discussing the power of the commissioners to bind the state, says: "The law requires that every prerequisite to the exercise of such a power, as stated in the statute, must actually precede its exercise. * * * It would therefore seem clear that, under the authorities previously referred to, an indispensable condition to their power [the power of the commissioners] to contract is that there shall be a public letting, in which there is entire freedom of competition. * * * They can no more contract with one who is not the lowest responsible bidder, than they can contract without advertising for bids." The court also held that, inasmuch as the only power of these commissioners to contract was that derived from the statute, contracts made in violation of its provisions were void, although the statute itself did not expressly so declare. The same principle applies here. The secretary of state has no inherent power to make contracts or buy goods that binds the state. The only power to contract which he has is derived from the statute, and it is incumbent upon one seeking to bind the state through a contract with him to see to it that the method of contracting prescribed by the statute is observed. In reply to the argument made in that case, as was made in the case at bar,—that there was no necessity for a strict observance of the requirements of the statute, because the interests

of the state were protected by a provision that the contract must be approved by the governor and attorney general, and must be less than the maximum rate fixed by the statute,—the court says: "Plainly, they [meaning such provisions] are intended as distinct and successive safeguards to protect the state against imposition and extortion. Where the provision of the statute is the essence of the thing required to be done, and by which jurisdiction to do it is obtained, it is held to be mandatory."

The claim is further made that the state has had the benefit of the goods purchased, and should be liable as under an implied contract, or upon a quantum meruit. It has been held that a municipal corporation may be bound upon an implied contract made by its agent. Such contract, however, must be within the scope of the corporate powers, and must not be one which the charter or law governing the corporation requires should be made in a particular way or manner. So, also, a corporation may be liable upon a quantum meruit, the same as an individual, when it has received and used the goods purchased, when no statute forbids or limits to a certain method the exercise of its power to make a contract therefor. See the authorities already cited, and, in addition, *McDonald v. Mayor*, 68 N. Y. 23; *Wells v. Town of Salina*, 119 N. Y. 280, 23 N. E. 870; *Kramrath v. City of Albany*, 127 N. Y. 575, 28 N. E. 400. If this principle is applicable to the state, even if a suit to enforce its liability was permissible, the case at bar does not fall within it, for the prescribed mode of contracting for the goods was not observed; and even if contracts of purchase, when made in the prescribed way, are within the scope of the officer's authority, this contract was ultra vires, because executed by him in express violation of the law. Being so, it is not susceptible of ratification, no implied liability arises, nor is the state bound upon a quantum meruit in this proceeding.

Thus far we have not noticed the act of 1885. The title of that act is, "An act to provide for the filing of duplicate contracts pertaining to the state government, and to provide for auditing accounts thereunder." This act was under consideration by this court in the case of *Miller v. Edwards*, 8 Colo. 528, 9 Pac. 682. It was there said: "Authority to officers, not previously empowered so to do, to purchase supplies, and thus incur debts for or on behalf of the state government, or a department thereof, is certainly not clearly expressed in the foregoing title. Nor can it, in our judgment, be considered germane to the subject therein mentioned." For the same reason it may be said that authority to the secretary of state, if any such there be in this act, to make contracts without advertising for bids, is not within the title; and, if it were, such authority would be in violation

of section 29 of article 5. This act adds nothing to the power conferred upon the secretary of state by the act of 1878. For the foregoing reasons the judgment of the district court is reversed, and the cause remanded, with directions to dismiss the proceeding. Reversed.

MULNIX, State Treasurer, v. MUTUAL BEN. LIFE INS. CO.

(Supreme Court of Colorado. June 29, 1896.)

STATE WARRANTS—PRESUMPTION—MANDAMUS.

It is proper to grant a peremptory writ to the treasurer to pay a state warrant regular and valid on its face; there being nothing before the court, by way of proof or admissions in the pleadings, to overcome the presumption that the warrant was lawfully issued for a valid indebtedness of the state.

Error to district court, Arapahoe county.

Petition by the Mutual Benefit Life Insurance Company for mandamus to Harry E. Mulnix, state treasurer. Judgment for petitioner, and respondent brings error. Affirmed.

Byron L. Carr, Atty. Gen., and Calvin E. Reed, Asst. Atty. Gen., for plaintiff in error. F. A. Williams, A. M. Stevenson, and A. S. Blake, for defendant in error.

CAMPBELL, J. This petition for a writ of mandamus was filed in the district court to compel the state treasurer to pay a state warrant drawn upon him by the state auditor. This warrant was drawn in favor of Collier & Cleaveland, upon an account for services rendered in doing certain printing for the state departments under a contract therefor entered into between them and the secretary of state. The general assembly had made an appropriation to cover the costs of such printing, and when this warrant was presented by the petitioner (to whom it had previously been assigned) there was, and still is, money in the treasury to pay it. The petition sets forth facts which, if true, constitute the warrant a legal obligation of the state. In his answer the state treasurer admits the issuing of the warrant, and sets up a number of defenses to show its invalidity, alleging that the constitutional and statutory method for letting the contract was not adhered to; that the printing for which the warrant was given was not covered by the advertisement of the secretary of state, or included in the bid of Collier & Cleaveland, or in their contract; that the prices charged were different from those specified in their bid, and were extortionate and excessive; and that the measurement of the work was incorrect and exaggerated. These defenses were all denied in the petitioner's replication. In the replication it is also alleged that the Ninth general assembly, by virtue of certain action taken by that body, adjusted the account for which this warrant was given, and

ratified, and authorized the payment of, the same. In the view, however, we take of the case, it is not necessary to determine the effect of such action by the general assembly. Upon the trial the only evidence was that introduced by the petitioner, included in which was the warrant in controversy. When the petitioner rested its case the respondent interposed a motion to dismiss the proceeding on the ground of the insufficiency of the evidence. The language of the assistant attorney general, who conducted the trial below, gives the grounds of the motion. He said: "As far as the position of the attorney general is concerned, we are depending entirely upon the invalidity of this contract. The answer attacks the validity of the contract from its very inception, and sets up the fact that there is an utter disregard of the constitution and statutory provision, and we will rely upon that entirely. As far as the matter of fact is concerned, we don't know as there is any dispute but what there were advertisements made, and bids and proposals submitted, certain contracts made, and articles received. * * * We are placed in a position that we must raise all of the legal questions that can be raised upon the question, and we shall base our action purely upon a matter of law; and if the contract was legal, which we deny, then there can be no question about it." The court below overruled this motion, and, the respondent declining or neglecting to introduce any evidence, judgment was rendered for the petitioner, awarding the peremptory writ, to which the treasurer prosecutes this writ of error.

As just stated, the respondent introduced no testimony, either to rebut that offered by the petitioner, or in support of his affirmative defenses. The state of the case, therefore, was that there was in evidence before the court the warrant in controversy, with nothing in the record to cast any suspicion upon it. The allegations of the answer that there was some fraud in connection with this contract were disclaimed at the trial, and the averments that the constitutional and statutory methods of entering into it were not complied with were expressly denied; and, as respondent offered no evidence at all to support them, the court properly found against him. The warrant was regular and valid on its face, and there was nothing before the court, either by way of proof or admission in the pleadings, that in any degree tended to overcome the presumption that it was issued for a valid indebtedness of the state. Such being the case before the trial court, the respondent expressly confining his defense to the alleged irregularity in letting the contract, and the warrant being valid upon its face, with no evidence at all in support of the only defect claimed to impair its validity, upon principle it would seem that the judgment should be in favor of the holder. But we are not without au-

thority in this state directly in point. In a recent case decided by the court of appeals (Board v. Oliver, 44 Pac. 362, 7 Colo. App. 515), where suit was brought against the board of county commissioners on county warrants, the court, speaking by Mr. Justice Thompson, said: "If they are valid upon their face, the presumption is that they were lawfully issued. This presumption could be overthrown only by positive evidence of their illegality, and the burden was upon the defendant to show the facts which invalidated them." The case at bar is not governed by the doctrine announced by this court in a case between the same parties, decided this term (46 Pac. 123), as the attorney general erroneously contends, for the facts of the two cases are essentially different. There certain facts were admitted by the holder of the warrant which brought the contract within the inhibition of the constitution and the statute, the effect of which was to constitute a part of the consideration for the warrant invalid, but here there is no such admission or proof. We are, of course, precluded from speculating that the real facts may be, as suggested by the present attorney general, who did not conduct the defense below, different from what the present record shows. The province of the court is not to frame the issues or collect the evidence. We must take the case as made by the parties, and decide it upon the record before us, and not upon another state of facts, that may or may not be correct. It follows that the judgment of the district court should be affirmed, and it is so ordered. Affirmed.

SMITH et al. v. SMITH.

(Supreme Court of Colorado. May 18, 1896.)

CONVEYANCE BY HUSBAND IN FRAUD OF WIFE—
CANCELLATION—CONSOLIDATION OF ACTIONS.

1. Mills' Ann. St. § 1524, provides that when either spouse shall die intestate, leaving a husband or wife and children, one-half of the decedent's realty shall descend to the survivor; section 1534 provides that a surviving widow residing in the state shall be entitled to certain described personal property, free from liability for the husband's debts; and section 3011 declares that, in case a husband deprives his wife of more than one-half his property by will, she may, after his decease, elect to accept the will or one-half the whole estate. *Held*, that these provisions were designed to provide the widow with the necessary means for her support; and, hence, though curtesy and dower have been abolished in Colorado, if a husband during coverture secretly, and for the purpose of depriving his wife of her rights as heir, conveys his entire property to his children by a former marriage, by three separate deeds, which are withheld from record for four years, and until the day before the death of the grantor, who in the meanwhile retains control of the property conveyed, equity will, on the widow's application, set aside such deeds in so far as they deprive her of more than one-half of decedent's property. Campbell, J., dissenting.

2. Under Civ. Code, § 20, authorizing the court to consolidate two or more actions pending at one time "between the same parties," etc.,

the consolidation of three suits brought by one person, but each against different defendants, whereby each defendant—under Mills' Ann. St. § 4816, excluding parties in certain cases from testifying in their own behalf—is deprived of the evidence of the other defendants, is reversible error.

Appeal from district court, Arapahoe county.

In this one appeal are embraced three several actions, commenced in the district court by Jane H. Smith, as plaintiff, against Horace G. Smith, Jr., Ralph Smith, and Jessie F. Smith, defendants, respectively. In the court below the actions were consolidated, and tried as one action. The complaints are alike in each of the three cases, except as to the party defendant. It is alleged that appellee, Jane H. Smith, was married to Horace G. Smith in November, 1884, and that she remained his lawful wife until the 17th day of August, 1892, upon which last-mentioned date he died, at the age of 75 years; that at the time of the intermarriage of plaintiff and the deceased he had three children living, the defendants in these several cases; that on the 28th day of August, 1888, the deceased, being the owner of a large amount of real estate in the city of Denver, to the value of \$40,000, free and clear from all liens and incumbrances of any kind and nature whatsoever, executed deeds to all of such real estate to the defendants in severalty. Plaintiff alleges that these deeds, which bear date August 28, 1888, were made secretly, without her knowledge, and without consideration, with the intent and design to defraud plaintiff in the event of her husband's death. It is further alleged that by these deeds the deceased conveyed to each of the defendants about a one-third portion in value of all his real estate; that the deeds were acknowledged on the 28th day of August, 1888, but that none of them were filed for record until the 16th day of August, 1892, this being the day before the death of the grantor. It is further alleged that at the time the deeds were filed for record the said Horace G. Smith was in extremis, and expected to die, and also that from the time of the execution of these deeds until the same were recorded they remained under the exclusive care and control of the grantor; that during all this time he retained the possession, dominion, and absolute control over all the property thus deeded, receiving all the rents, income, and revenues therefrom, the same as if the deeds had never been made, and in all respects exercised the exclusive rights of ownership over all the property. It is further alleged that these deeds are testamentary in character, and were made by the grantor, acting in collusion with the grantees, for the purpose of defrauding plaintiff of her right as heir of her husband. It is further alleged that plaintiff was thereby left without means for her support, and that she was physically frail, and in delicate health, and unable to work for a living. To these complaints a

general demurrer was in each instance interposed and overruled. Thereupon the defendants each answered separately. The answers are the same in all the cases. In their answers, the defendants admitted that Horace G. Smith was the owner of the real estate described in the complaints, but denied that the real estate was of the value of \$40,000, and allege that it was only of the value of \$15,000. They deny that on the 16th day of August, 1892, Horace G. Smith was pronounced to be in extremis, or that his death was then and there expected. They deny that the deeds were in his possession, as alleged in the complaint, and allege that the deeds, as soon as executed, were delivered to the defendants, respectively, and retained by them. It is denied that the grantor, after the execution of the deeds, retained possession or control over the property, and also that he received the rents, income, or revenues therefrom. After the answers were filed, the causes were consolidated upon the motion of plaintiff, and against the objection of the defendants, and each of them. Upon these issues the cause was tried to the court without a jury. Upon the evidence the court determined the issues in favor of the plaintiff, and decreed that the defendants, and each of them, be compelled to convey to her the one-half of all the real estate described in the complaint, and conveyed to the defendants, respectively, by the quitclaim deeds of August 28, 1888. The defendants, having excepted to the findings and decree, bring the case here by appeal. Reversed.

David Mitchell and N. M. Laws, for appellants. V. D. Markham and Bartels & Blood, for appellee.

HAYT, C. J. (after stating the facts as above). The record in this case discloses that the real estate deeded to his children, the issue by a former wife, was all the real estate owned by Horace G. Smith, Sr.; that, aside from this, he had no other property or choses in action, except a few hundred dollars in cash, deposited to his credit in a bank; and that a few hours before his death he executed a check for this to one of his sons. As a result of these transactions, he left his widow absolutely penniless at his death. She was then old and infirm, and has since been dependent upon the charity of friends for her support. Appellants contend that under the statutes of this state the obligation of the husband to provide for his wife upon his decease is simply a moral obligation, and one that cannot be enforced by the courts. Wherever the common law has prevailed, it has from the earliest times required the husband to support the wife so long as the marriage relation existed between them, and she remained true to her marital vows. Moreover, it imposes the duty upon the husband having property to provide for the support and comfort of his

widow after his demise. The obligation in this latter respect is to a large extent mutual, and the books are full of authorities to the effect that, where either husband or wife attempts secretly to convey property on the eve of marriage, such conveyances would be set aside for the benefit of the defrauded party. So, also, where the husband has attempted to convey real estate in fraud of his wife's right of dower, the courts have never been called upon in vain to protect such rights. Although in this state dower and the tenancy by curtesy are abolished, the statute provides that whenever either party shall die intestate, possessed of real estate, if such intestate leave a husband or wife and children, one-half of such estate shall descend to such surviving husband or wife. Mills' Ann. St. § 1524. It is also provided that, if any decedent leaves a widow, residing in this state, she shall be entitled to certain personal property, particularly describing the same, and that she may have the same set apart for her, not subject to the payment of his debts. Id. § 1534. It is further provided that, when an inventory shall have been made of such personal estate, the widow may relinquish her rights to all property allowed to her, and that in lieu thereof she may claim the value of such property in money or other personal property, at her election. Id. § 1535. It is also provided: "In case any married man shall hereafter deprive his wife of over one-half his property, by will, it shall be optional with such married woman, after the death of her husband, to accept the condition of such will, or one-half of his whole estate, both real and personal." Id. § 3011. It is the obvious intent and purpose of the foregoing acts to provide the widow with the necessary means for her support in case of the death of the husband, whenever his property is sufficient for that purpose. Under these statutes, appellee contends that where the husband, during coverture, secretly makes conveyance of all his property, and keeps the knowledge thereof from his wife, thereafter retaining control and management of the same, such conveyance should be treated and considered as testamentary in character, and not as a deed; and, in so far as the wife is deprived thereby of more than one-half the real property, it should be held void as to her. To this proposition the zeal and ability of counsel have been largely directed, and our attention has been called to numerous authorities upon either side of the controversy; some of them directly in point, and others bearing more or less upon the question presented. Our examination of the cases cited, however, does not disclose one showing a parallel to the heartlessness and inhumanity manifested by the deceased. In many of the cases the husband has attempted to convey his personal property by a gift, to the exclusion of his widow, leaving for her reliance such interest as she

might be entitled to in his real estate under the law. In other instances the husband has attempted to convey his real estate, leaving his personal property to be shared by his widow and other heirs; but this decedent has attempted to strip his widow, at his death, of all his property, both real and personal. As to whether such a transaction should be upheld, the authorities are not uniform, and to reconcile them would be impossible. In *Stewart v. Stewart*, 5 Conn. 316, the husband executed a deed conveying all his real estate to his children, placing the conveyance in the hands of a third person, to be delivered to them upon his death, on the happening of which event, two years after the execution of the deed, it was delivered pursuant to the trust, and the court held that the instrument was strictly a deed, and not a testamentary disposition; second, that it was not fraudulent in relation to the widow's right of dower. The case is the strongest we have found in favor of appellants' position. The action was, however, at law, and not in equity, and the court in the course of the opinion mentions the fact that that may be a fraud in equity which is not at law. The case of *Small v. Small* (Kan. Sup.) 42 Pac. 327, is strongly relied upon by appellants. It is held in that case that, subject to certain limitations, and against any claim of the widow made after death, a married man in Illinois or Kansas may, during coverture, give away to his children the bulk of his property, although the well-known effect of the gift will be to deprive the widow of a fair share of the property, which would otherwise have fallen to her. In the course of the opinion the Kansas court quotes with approval the following language from the case of *Williams v. Williams*, 40 Fed. 521: "The main question is simply this: Can a married man give away his property, during coverture, for the purpose of preventing his wife from acquiring an interest therein after his death? The law seems to be that, if such gift is bona fide, and accompanied by delivery, the widow cannot reach the property after the donor's death. * * * Neither the wife nor children have any tangible interest in the property of the husband or father during his lifetime, except so far as he is liable for their support; and hence he can sell it or give it away without let or hindrance from them. Of course, the sale or gift must be absolute and bona fide, and not colorable only. And if the sale or gift would bind the grantor it would bind his heirs." The writer of the foregoing seems to have understood that a colorable sale could be set aside. Set aside by whom? If made for the purpose of defrauding an heir, it could only be set aside at the suit of the party defrauded, while the grantor, being a party to the fraud, would be refused relief by the courts; hence it does not necessarily follow.

as stated by him, that all sales or gifts which are binding upon the grantor are likewise binding upon his heirs.

As our statutes are borrowed from Illinois, decisions in that state are entitled to great weight. The case of *Padfield v. Padfield* was before the supreme court of Illinois three times. 68 Ill. 219, 72 Ill. 322, 78 Ill. 18. The conclusion of the court is, we think, fairly expressed in the following from *Kerr on Fraud and Mistake*, which is quoted with approval in the last opinion: "There can be no doubt of the power of a husband to dispose absolutely of his property during his life, independently of the concurrence, and exonerated from the claim, of his wife, provided the transaction is not merely colorable, and be unattended with circumstances indicative of fraud upon the rights of the wife. If the disposition of the husband be bona fide, and no right is reserved to him, though made to defeat the right of the wife, it will be good against her." *Kerr, Fraud & M. p. 220*. Accepting this as a correct statement of the law, we think the case made by the pleadings and proofs before us brings the present case within the exception; for here, as we have shown, the transaction was merely colorable, and made under circumstances strongly indicative of fraud upon the rights of the wife. The proof shows that these three several deeds were held from record for the period of four years after their execution. If one of these deeds had been withheld from record for that length of time, this would be a suspicious circumstance, while the fact that all were thus withheld leads very strongly to the conclusion that they were so withheld as a result of an understanding between the grantor and the three grantees, and that these grantees were guilty of collusion in the matter for the purpose of preventing information of the transfer from reaching the wife of the grantor, and to permit the grantor in the meantime to continue to exercise exclusive dominion and control over the property. In the case of *Youngs v. Carter*, 10 Hun, 194, the facts were that Daniel Youngs, a widower, was engaged to be married to the plaintiff in August, but in consequence of his sickness the marriage was put off until September. In the interim he, without the knowledge of the plaintiff, conveyed nearly the whole of his real estate to two daughters by a former marriage, and took back from them a lease for his life. The plaintiff did not learn of this conveyance until after marriage, and then immediately brought suit to have the same set aside. The court held that the conveyance was a fraud upon the inchoate right of the wife to dower, and adjudged her entitled to dower in the land so conveyed. In the course of the opinion, which is an instructive one, the court advances the following argument: "When the conveyance in controversy was executed, the relation of the grantor to the plaintiff was of a strictly confidential nature, and a natural expectation inspired as well as implied by it was that, upon its consummation, she should succeed to all the legal

rights of a wife in the property owned by him. She acquired, by means of it, an equitable claim upon him to that extent. But at the same time it was not so entirely controlling as to prevent him from discharging such other equitable obligations as he might have previously incurred to his children. It simply restrained him from disposing of his property fraudulently, for the purpose of preventing it from becoming subservient to the rights which the laws of the state secured to a wife." This principle is announced and carried to its logical result in the case of *Manly v. Adm'r v. Beard*, 85 Ky. 29, 2 S. W. 545, where the husband, in contemplation of death, gave to his children the whole of his personal estate, with the fraudulent intent to deprive his wife of the interest therein to which she would be entitled as his widow; and the court did not hesitate to set aside the gift at the suit of the widow. This case is a much stronger one in favor of the widow than that case, for the reason that there the gift was of personal property only, over which the owner has, by the commercial law, greater freedom than over his real estate; and her dower interest remained in the lands left by the husband at his demise, and this dower interest was sufficient to support her. Here, by the fraudulent conduct of the husband, the wife was stripped of all her rights as heir to his personal estate and to his real estate as well. It is not necessary in this case, and it is not our intention, to say anything that will prevent the husband, during his lifetime, from selling his personal property or transferring his real estate for such consideration as he may be willing to accept, or without consideration, provided always that the transaction shall be absolute and bona fide, and not colorable only; but what we do say is, where, as here, the complaint charges, and the evidence shows, that the transaction complained of is colorable merely, and resorted to by the husband for the purpose of defeating his wife's rights as his heir, he hoping thereby to obtain the full benefit of the property to the last hour of his life, and at the same time to be able to deprive her of all interest therein as his heir, is as much of a fraud on the part of the husband as it is for a debtor having in contemplation the incurring of an indebtedness to put his property beyond his control, and the courts have universally declared the latter to be in violation of the statute of frauds. The same principle should govern in this case. The transaction is shown to have had its inception in a desire on the part of both the grantor and grantees to deprive the wife and stepmother of the benefits conferred upon her as an heir of her husband under our statutes, and the action of the district court in characterizing the transaction a fraud upon the rights of the wife as an heir is founded upon the plainest principles of justice and equity, and must be sustained.

We have thus far considered the cause as made by the pleadings and evidence. We are satisfied, however, that a great injustice was

None the defendants by the order of consolidation, made by the district court, as thereby they were prevented from fully presenting their defenses. The cases were consolidated upon the motion of the plaintiff and against the objection of the defendants and each of them, and by reason of such consolidation each defendant was deprived of the evidence of the defendants in the other suits; i. e. of the evidence of his co-defendants after the consolidation. The ruling excluding these witnesses is based upon section 4816, Mills' Ann. St., which provides, among other things: "That no party to any civil action, suit or proceeding, or person directly interested in the event thereof, shall be allowed to testify therein, of his own motion, or in his own behalf, * * * when any adverse party sues or defends as the trustee or conservator of an idiot, * * * of any deceased person," etc. The argument of appellee in support of the ruling of the court below proceeds upon the basis that, after the consolidation, there was but one suit, to which all the defendants were parties. If the suits were properly consolidated, the exclusion of the witnesses must be upheld; but, if the order of consolidation was not proper, the subsequent exclusion of the witnesses was also erroneous. The Civil Code provides at section 20 that: "Whenever two or more actions are pending at one time between the same parties, and in the same court, upon causes of action which might have been joined, the court may order the actions to be consolidated into one." At least one of the essential conditions to consolidation under this provision was lacking in these suits, namely, they were not between the same parties. It is urged, however, by appellees, that courts have the inherent right, independent of statute, to consolidate suits at law and actions in equity, where the interest of the parties and the public may be subserved by such consolidation. An examination of the authorities leads to the conclusion that, in the absence of legislation, the power of consolidation of actions has been exercised with the greatest freedom according to the will of the particular judge before whom the actions may have been pending, without any definite rule having been established for the guidance of the courts with reference thereto. The provisions of our Code with reference to consolidation are similar to those to be found in many of the other code states. See 4 Enc. Pl. & Prac. p. 676. No case has been cited, and we know of none, where a consolidation has been permitted under such a statute, unless all the prescribed conditions existed; and in a number of states the code provision has been referred to as controlling. In the case of *Mayor v. Coffin*, 90 N. Y. 312, the court says: "The order of consolidation must be reversed, because the special term had no power to make it. The authority to consolidate actions is given by section 817 of the Code, and permits it only where both actions are pending between the same plaintiff and the same defendants for causes of action which might have been joined." See, also, *Kipp v. Delamater*, 58 How.

Prac. 183; *Blesch v. Railway Co.*, 44 Wis. 593. For error in ordering the consolidation, and in depriving each of the defendants of the evidence of the others, the judgment must be reversed, and the cause remanded. Judgment reversed.

CAMPBELL, J. (concurring specially). Upon the ground that the order of consolidation was erroneous, I concur in the judgment of reversal. From that portion of the opinion in which the Chief Justice holds the conveyance by the husband to be a fraud upon the property rights of the wife, I dissent. While joining with my associates in characterizing the husband's conduct, from a moral standpoint, as most reprehensible, I am not, as at present advised, prepared to say that the law of this state does not permit him to do what the evidence in the case shows that he has done. My reading of the authorities is that the rule announced in the majority opinion should prevail where tenancy by the curtesy and dower exist; but the application of the principle to the case at bar, where, as in our state, dower and tenancy by the curtesy have been abolished, does not seem to me to be warranted.

PEOPLE ex rel. STRAUB et al. v. BOUGHTON, District Judge.

(Supreme Court of Colorado. June 16, 1896.)

BILL OF EXCEPTIONS—RECITALS—REFUSAL TO SIGN.

Plaintiffs' bill of exceptions contained none of the evidence, but recited that evidence was admitted tending to prove plaintiffs' case, under their pleadings, and that evidence was given by defendants tending to establish their case, under their pleadings, and that plaintiffs duly excepted to the giving and refusing of certain instructions. The contention of plaintiffs being that the action of the court in giving and refusing the instructions referred to was reversible error, provided the evidence was inharmonious, they inserted an additional recital that "the testimony was conflicting." *Held*, that the judge was not required to give his opinion as to a conflict in the evidence generally, and his refusal to sign the bill because of the insertion of the latter recital was not ground for mandamus.

Mandamus, on the relation of Frank Straub and others, to compel J. H. Boughton, district judge, to sign and seal a bill of exceptions. Writ denied.

E. A. Ballard and Louis K. Pratt, for petitioners. John S. MacBeth, for respondent.

PER OURIAM. In the district court of Boulder county a money judgment was rendered against the relators. An appeal to this court was granted, and time fixed for filing a bill of exceptions. Within the time limited, relators (as appellants) tendered to the trial judge a skeleton bill of exceptions, which he refused to sign and seal. Thereupon relators filed in this court their petition asking for a peremptory writ of mandamus ordering the respondent (the trial judge) to sign and seal the bill. To this petition the respondent interposed a demurrer on the ground that the facts stated do not entitle

the relators to any relief. The case was presented, and a hearing had, upon this demurrer. It appears from the bill of exceptions attached as an exhibit to the petition that it contains none of the evidence produced at the trial, but in it there is a recital that evidence tending to prove the allegations of the complaint and of the amended replication was introduced by the plaintiffs, and at its close the defendants' motion for a nonsuit was overruled by the court; thereupon the defendants produced evidence tending to prove the allegations of their answer and cross complaint, and to disprove the averments of plaintiffs' complaint and amended replication, and then rested; after which plaintiffs introduced evidence in rebuttal, and the case was closed,—following which recital is this sentence, "The testimony was conflicting." There is an additional recital that the court gave to the jury certain instructions requested by the defendants' counsel, to the giving of which the plaintiffs at the time duly excepted. The court also gave two instructions asked by the plaintiffs' counsel, and refused another, to which refusal an exception at the time was duly taken.

From the foregoing summary of the contents of the bill of exceptions, as well as from the argument of counsel for relators, it is apparent that they will rely for a reversal, in part at least, because of the giving and refusing of the instructions referred to, which action of the court, according to their contention, constituted reversible error, provided the evidence was inharmonious. In their view, it became necessary to show to the appellate court, as a matter of fact, that there was such conflict. This fact the relators, as appellants, sought to establish by embodying in the bill a statement of the trial judge that the evidence was conflicting. They were not satisfied with the recital therein that evidence was admitted tending to prove the plaintiffs' case, under their pleadings, and that evidence was given by the defendants to establish their case, under their pleadings (which recital, in some of the cases, it is held, is sufficient, for certain purposes, in a bill of exceptions); but they insisted before the trial judge, as well as here, that they are entitled to a further statement by the judge that there was a conflict in the evidence. Without intending to prejudice the appeal upon its merits, we may, with propriety, say that there are two sufficient reasons why such a recital in the bill of exceptions is not proper. It is not a statement of a fact, but, if inserted, is merely the opinion or conclusion of the trial judge, drawn from the evidence given at the trial. If such was not his opinion, of course he ought not to be compelled to give it; but, if it was his opinion, it ought not to be made to usurp the function of a fact, for, while it may be sound, it would not necessarily bind a court of review, and the latter, upon a consideration of the same evidence, might arrive at an entirely different conclusion, or, if it found a slight antagonism in the

evidence, still it might conclude that the instructions given—applicable strictly only in case of no conflict—were technically erroneous, nevertheless the error was not of sufficient importance to work a reversal. But, if this could be accepted as the statement of a fact by which the court of review is to be bound, it is not sufficiently definite. We can readily conceive of a record where, as to some issue or issues, there was a conflict in the evidence, and as to some other issue or issues there was none at all. If the instructions related to the latter, there might be no prejudicial error, whereas, if they were applicable to the former, the error might be a reversible one. We must not be understood as holding that all the evidence in a voluminous record need be brought up, where the errors assigned relate only to the instructions. We held, however, that a trial judge is not required to give his opinion as to whether or not there was a conflict in the evidence generally. We are cited to no case exactly in point, and find none; but, upon principle, we think it would establish a bad practice to grant the writ prayed for. The utmost to which any of the cases go is that, in some circumstances, a bill may recite that "the evidence tended to show" a given fact, but in no case to which our attention is called has it been held that the judge may express his opinion upon the evidence. The nearest case in point is *Worthington v. Mason*, 101 U. S. 149, wherein it was said: "As we understand the principles on which judgments here are reviewed by writ of error, that error must appear by some ruling on the pleadings, or on a state of facts presented to this court. Those facts, apart from the pleadings, can only be shown here by a special verdict, an agreed statement duly signed and submitted to the court below, or by bill of exceptions. When, in the latter, complaint is made of the instructions of the court given or refused, it must be accompanied by a distinct statement of testimony given or offered which raises the question to which the instructions apply." The court further says that the proof of such facts must not be sought for in the comments of the court to the jury on the testimony, or on the recitation of facts supposed to be proved, found in such comment, or because the judge was of the opinion that a fact was proved which the jury refused to believe. In principle, we think this decision in harmony with the conclusion which we have reached. Bearing more or less upon kindred propositions, but not upon the precise question involved, see *Hoagland v. Cole*, 18 Colo. 426, 33 Pac. 151; *Andrews v. Carlile*, 20 Colo. 370, 38 Pac. 465; 2 *Thomp. Trials*, §§ 2401, 2777, and cases cited; *Insurance Co. v. Rad-din*, 120 U. S. 183, 7 Sup. Ct. 500; 2 *Enc. Pl. & Prac.* p. 367 et seq.; *People v. Bourke*, 66 Cal. 455, 6 Pac. 89; *Railway Co. v. Harris*, 12 O. C. A. 508, 63 Fed. 800; *Schmidt v. Railway Co.*, 83 Ill. 406; *Gaines v. Harvin*, 19 Ala. 491. For the reasons given, the writ is denied. Writ denied.

FARMERS' HIGH LINE CANAL & RESERVOIR CO. v. WESTLAKE.

(Supreme Court of Colorado. June 18, 1896.)

HIGHWAY—BRIDGES OVER DITCHES—PROXIMATE CAUSE.

1. Mills' Ann. St. § 3962, providing that any person constructing or owning any ditch in, upon, or across any highway shall keep the highway open for safe travel by constructing bridges across the ditch within five days after the ditch is constructed, does not apply to a ditch running parallel to a highway for 1,000 feet.

2. Such statute applies only to ditches constructed after the passage of the act.

3. In an action against a ditch company for the death of plaintiff's decedent, it appeared that decedent was driving along a highway running along the side of a mountain; that above and parallel with the highway was a railway track, and below and parallel with the same was a ditch maintained by defendant; that decedent's horse became frightened by a train, and precipitated decedent's buggy into the ditch, where he was drowned, having become entangled in the buggy. *Held*, that the fright of the horse was the proximate cause of the accident, and not the ditch.

Appeal from district court, Jefferson county.

Action by Sarah J. Westlake against the Farmers' High Line Canal & Reservoir Company. There was a judgment for plaintiff, and defendant appeals. Reversed.

This action was instituted by Sarah J. Westlake, appellee, as plaintiff below, to recover from the Farmers' High Line Canal & Reservoir Company damages for the death of her husband, Andrew Westlake, caused, as it is averred, by the negligence of the defendant company. In the district court a verdict and judgment for \$4,500 was rendered. The defendant brings the case here by appeal. The following provision of the statute is referred to in the opinion: "Any person or persons, corporation or company, owning or constructing any ditch, race, drain or flume in, upon or across any highway, shall keep the highway open for safe and convenient travel by constructing bridges over such ditch, race, drain or flume; and, within five days after any ditch is constructed across, in or upon any highway, at any point thereof, so as to interfere with or obstruct such highway, the person or persons owning or constructing such ditch shall erect a good and substantial bridge, of not less than twenty feet in width, across the same, which shall thereafter be maintained by the county: Provided, that all such bridges which shall be of greater length than twenty (20) feet shall be constructed as herein provided, and thereafter maintained in proper condition for safe travel by the owner or owners of said ditch. Any person or persons, corporation or company, constructing any ditch, race, drain or flume in, upon or across any highway, and failing to keep the highway open for safe and convenient travel, as in this act provided, shall forfeit the sum of

twenty-five dollars, to the county, for each and every day of failure to keep the same open for safe and convenient travel, as aforesaid. And any person or persons, corporation or company, who shall fail to erect a good and substantial bridge across any ditch, race, drain or flume, within five days after the same is constructed, in, upon or across any highway, and keep the same in proper condition and repair, as herein provided, shall forfeit the sum of twenty-five dollars to the county for each and every day of failure to erect such bridge and keep the same in repair, as aforesaid, together with the cost of constructing there a good and substantial bridge, or making necessary repairs, which the road overseer of the district shall at once proceed to build or repair, and such party or parties so neglecting shall also be liable in damages to any person or persons damaged by such neglect." Mills' Ann. St. § 3962.

Osborn & Taylor and W. A. Dier, for appellant. N. Q. Tanquary and Howard & Howard, for appellee.

HAYT, C. J. (after stating the facts). The facts upon which the case must be determined are practically uncontroverted. Andrew Westlake, the deceased, was drowned in appellant's ditch. The place of the accident is near to, or within, the corporate limits of the city of Golden, at a place where the wagon road from Denver to Golden passes along the steep side of one of the foot hills of the Rocky Mountains; the road at the point rapidly descending towards the town of Golden. Just below this road the defendant company was operating a ditch about 20 feet in width and several feet in depth, the descent of the ditch being to the east, towards the city of Denver. A few feet above the ditch and wagon road are the tracks of the Colorado Central Railroad Company. Upon the day of the accident, the deceased, with a companion, was driving a horse harnessed to a covered carriage along the highway in the direction of the city of Golden. As he approached the brow of the hill, a regular train due in Golden at 9:45 a. m. was proceeding towards Denver, having just left the station at Golden. Although this train, when first observed, was some distance away, the horse became greatly frightened by its approach, and manifested much restlessness, but in a short time apparently came under the control of the driver. When the carriage with its occupants had reached a point part way down the hill, the train at that time being nearly opposite to them, the engineer blew the whistle for a highway crossing. This so frightened the horse that the driver lost all control over him, and he plunged down the hill, precipitating the buggy into the ditch, where it was overturned in part by the force of the swift current, and Mr. Westlake, becoming entangled in the top, was

drowned before assistance could reach him. The evidence leaves it in doubt as to whether, at the place of the accident, the wagon road or the ditch was first constructed. The origin of both go back to the earliest settlement of the territory; the road being in existence as early as 1860 and the ditch as early as 1861. In 1862 appellant's grantor obtained a special charter from the legislature for the construction of this ditch. This charter gave the ditch company, subject to accrued rights, a right of way for the ditch one rod in width upon each side of the center. The ditch, as originally constructed, was only a few feet in width, while the wagon road was barely sufficient for the passage of vehicles. With the settlement of the country, and consequent increase of travel and an increased demand for water, the ditch was enlarged, and the road widened from time to time, to meet the growing demands of the community. In view of the uncertainties surrounding the history of the two enterprises, we shall not attempt to determine which right of way has priority. It is sufficient to say that each was lawfully in the place where found at the time of the accident.

It is apparent from the averments of the complaint that the pleader originally based plaintiff's right of action upon the statute, which requires ditch companies, under certain circumstances, to keep highways open. *Mills' Ann. St. § 3962*. An examination of this statute discloses that it has no application, for, although it says that ditch companies, in certain circumstances, must keep highways open for safe and convenient travel, it requires this to be done only by constructing bridges. The provision of the statute only becomes applicable where a ditch crosses a highway, or, at least, encroaches so much upon it as to interfere with travel. It was never intended to cover cases like this, where the ditch and the roadway are parallel for 1,000 feet. It is quite common in this state to construct highways and ditches near together and parallel for miles. Moreover, the statute applies only to ditches constructed after its passage. This is apparent from subsequent portions of the act, making it the duty of the county in which the bridge is situate to maintain the same after it is once constructed, and fixing a penalty in case the bridge is not built within five days after the ditch is constructed across the highway, etc. This construction is in harmony with the charge of the district court to the jury, which proceeds upon the theory of a common-law liability only. At common law, as a general rule, a person is responsible only for such consequences of his fault as are the natural result thereof; and, where the fault concurs with something that is extraordinary, he will not be answerable for the extraordinary result. This principle has been applied in many cases in which suits have been instituted against

the public authorities charged with the duty of keeping a highway in repair, and where the accident is charged to have resulted from their negligence; and it has been repeatedly held that, if there are two efficient independent causes uniting to produce injury to the traveler upon a highway, the primary cause being one for which the authorities are not responsible, the injury cannot be said to have resulted from their negligence in failing to keep the highway in repair, though the traveler be himself without fault.

The evidence in this case fails to show negligence either in the construction or enlargement of defendant's ditch. The roadway at the point of the accident was suitable for all ordinary purposes, and safe for the passage of horses that could be controlled. The location of the ditch and roadway has been practically the same for many years, and teams were at the time daily passing back and forth without accident, and presumably without serious risk of accident. The roadway was reasonably safe for the passage of ordinary teams. In the frenzied condition of the horse that was being driven by the deceased, it is doubtful if any reasonable precaution that the public officers or the defendant company could have taken would have insured safety. The injury sued for was primarily caused by the fright of the horse, and that fright was not caused by any defect in the roadway or in the construction or operation of defendant's ditch.

The record is replete with evidence with reference to the character of the horse; many witnesses testifying that he was vicious and uncontrollable in temperament, other witnesses testifying that they regarded him as kind and gentle in disposition. This evidence becomes unimportant, however, in view of the fact that at the time of the accident the horse, by reason of the passage of the train or the blowing of the whistle, or both, was seized with a sudden frenzy, so that he was entirely beyond the control of the driver, and, blinded by fright, left the road, and ran into the defendant's ditch, where the driver was drowned. It is apparent that the passage of the train and the blowing of the whistle were the primary causes of the accident, and for this reason the plaintiff is not entitled to a recovery against this defendant.

In the case of *Moulton v. Inhabitants*, 51 Me. 127, it is said: "When a horse becomes unmanageable, unless his condition is caused by a defect in the highway, such defect is not the primary cause of an accident to which it contributes. A witness, on being asked to state the cause of such an accident, would give that which caused the condition of the horse. So long as the primary cause continues in operation, it may occasion the damage; and, if it happen upon a defective road, it is by no means thereby rendered

certain that it would not otherwise have occurred upon one not defective." This language was used in a suit against the inhabitants of a town for negligence in not keeping a highway in repair. The plaintiff at the time of the accident was crossing a bridge over a narrow stream, when his horse became frightened by some animal jumping into the water. The bridge was well built, except there was no railing. The horse, by reason of his fright, ran so near the edge of the bridge that the body of the wagon was detached from the forward wheels and thrown into the stream, and the court held that the town was not liable.

In the case of *Jackson v. Town of Bellevue*, 30 Wis. 250, the damages sued for were for injuries to a horse and vehicle, which occurred at a point in a highway where the road was defective. The evidence showed that the horse, at the time of the accident, was in a condition of fright, and uncontrollable. The condition of the horse was caused by the smell of blood from a slaughterhouse, and not from any defect in the highway. If the horse had been under control, and driven with ordinary care and skill, the injury might not have happened, and the court held that the town was not liable. The opinion was prepared by the late lamented Chief Justice Dixon, and is written with his usual clearness and force.

The case of *Schaeffer v. Jackson Tp.* (Pa. Sup.) reported in 24 Atl. 629, is also strongly in point. The decisions in some of the foregoing cases were rendered upon statutes, but these do not change the common-law liability in respect to the question under consideration. They are based upon general principles of the common law, and require no vindication at our hands, and we shall leave the subject with the following additional citations: *Perkins v. Fayette*, 68 Me. 152; *Spaulding v. Inhabitants*, 74 Me. 528; *Aldrich v. Inhabitants of Gorham*, 77 Me. 287; *Beall v. Athens Tp.*, 81 Mich. 536, 45 N. W. 1014; *Titus v. Inhabitants*, 97 Mass. 258; *Horton v. City of Taunton*, Id. 266, note.

Not every sudden shying of a horse will constitute a primary cause of an accident resulting from such shying and a defective highway, but where, as here, the horse, as a result of fright caused by a passing train, becomes unmanageable, and leaves the road, and, plunging down the side of a mountain, throws the driver into an irrigating ditch, where he is drowned, the fright of the horse must be taken as the primary and efficient cause of the accident.

It is urged that the roadway at the place of the accident was narrowed by seepage from a spring at the upper side of the road, and that this contributed to the result; but we fail to see how the ditch company can be mulcted in damages for the negligence of the public authorities in not protecting the road against this seepage.

Upon the record, no case has been made

against the appellant, and the judgment must be reversed, and the case remanded. Reversed.

SMITH v. CITY & SUBURBAN RY. CO.¹

(Supreme Court of Oregon. Sept. 21, 1896.)

STREET RAILROAD—INJURY TO PERSON ON TRACK—CONTRIBUTORY NEGLIGENCE—RELATION OF PASSENGER AND CARRIER.

1. A person who, in the daytime, and in a place where the view is unobstructed, attempts to cross a street-railway track immediately in front of an approaching car, without looking to see whether a car is near, and is struck and injured, is guilty of such contributory negligence as will bar a recovery for the injuries.

2. When a passenger on a street car steps from the car to the street, the relation of passenger and carrier ceases.

Appeal from circuit court, Multnomah county; H. Hurley, Judge.

Action by Sarah Smith against the City & Suburban Railway Company. Judgment for plaintiff, and defendant appeals. Reversed.

Rufus Mallory, for appellant. A. H. Tanner, for respondent.

BEAN, J. This is an action to recover damages for an injury caused by the alleged negligence of the defendant in the operation and management of one of its electric cars, and comes here on an appeal from a judgment in favor of the plaintiff. The defendant's car line on Morrison street, in the city of Portland, consists of two tracks, about four feet apart. The cars going east use the south, and those going west the north, track. On August 11, 1892, the plaintiff boarded an east-bound car, intending to ride to Union avenue, her destination being a point thereon south of Morrison street. At the time she took passage on the car the conductor was requested to put her off at Union avenue, but, through some mistake or carelessness, carried her by that point. On the return trip of the car she was safely landed in the street at the intersection of said avenue, as desired, whereupon she walked around the rear end of the car upon which she had been riding, started across the street, and in attempting to cross the south track was struck and injured by a car going east. The plaintiff's version of the accident is as follows: "I got into the car, and went until they stopped, and told me to get out. He [the conductor] put me off the car. I stepped to one side a little. He [the conductor] said, 'This is the place where you get off,' and he put me off. He helped me down. I turned myself around to look, for I felt like I was turned around; did not know which way to go. Then I made a few steps eastward, and made a quick pass, right back to the end of the car, right close to the car. I saw nothing, and heard no bell. I looked to see— I turned around to see where I was, and when I saw where, I was going to go up south. I looked again, to see if I

¹ For opinion on rehearing, see 46 Pac. 780.

could see anything. Seeing nothing, I thought now I will go past right quick, and when I passed the car looked as if it was an arm's length from me,—the one that hit me. I had never seen it before it was that near to me. Heard no bell or any warning given to me at all; heard nothing. My hearing is good. If there had been a bell rung, I could have heard. My hearing is pretty good. The car I got out of was still standing there. I waited a short time, and it still stood there, and I thought then, I will go past behind the car. I don't remember a thing that happened afterwards. When I saw the car so near me, I think I made an effort to get out of the way, but it was so close I could do nothing. Don't know how the car struck me." The motorman in charge of the latter car says the first time he saw the plaintiff she was about 25 feet away from the car. "She stepped from behind the west-bound car into the middle of the track on which my car was going. She stood in the middle of the track for a few seconds, and looked very much bewildered and frightened. She then recovered herself, and started to go back; but it was too late." The plaintiff claims and alleges that her injury was caused by the negligence of defendant in running its cars at a dangerous and unlawful rate of speed, in not giving timely signals of its approach to the street crossings, and in not providing it with suitable brakes. The defendant denies these allegations of negligence on its part, and avers that the injury was caused solely by the plaintiff's own negligence in attempting to cross the track without looking or listening for the approaching car. There was sufficient evidence to go to the jury on the question of defendant's negligence, and the principal question on this appeal is the alleged error of the trial court in refusing to instruct the jury that: "If plaintiff failed to look to see if a car was approaching before she attempted to cross the track, and by reason of such failure stepped upon the track, and was struck by an approaching car, which she could have seen and avoided by looking, then she was guilty of contributory negligence, and cannot recover in this action." That this proposed instruction is good law, under the facts of this case, it seems to us can admit of no reasonable question. Counsel for plaintiff seek to justify the rulings of the trial court by claiming that the imperative rule for railway crossings, that a traveler must look and listen, is not applicable as a hard and fast rule to crossings of street-car tracks in the public streets of a city, but the question of care in such cases is always for the jury. Upon this subject there is some conflict in the decisions, but the doctrine which seems to be supported by authority and reason, at least with reference to electric and cable railways, is that "it is presumptively negligent on the part of a pedestrian to attempt to cross the track without looking or listening, when, if he had looked and listened, he

could have discovered the approach of the car in ample time to avoid injury." Booth, St. Ry. Law, § 312; *Fenton v. Railroad Co.*, 128 N. Y. 625, 28 N. E. 987; *Meyer v. Railway Co.*, 6 Mo. App. 27; *Scott v. Railroad Co.* (Sup.) 16 N. Y. Supp. 350; *Davenport v. Railroad Co.*, 100 N. Y. 632, 3 N. E. 305; *Carson v. Railway Co.*, 147 Pa. St. 219, 23 Atl. 369; *Buzby v. Traction Co.*, 126 Pa. St. 559, 17 Atl. 895; *Sheets v. Railway Co.*, 54 N. J. Law, 518, 24 Atl. 483; *Schulte v. Railroad Co.*, 44 La. Ann. 509, 10 South. 811. This doctrine is but an application of the universal rule which requires due and ordinary care in crossing a public street as in all other transactions of life. It is manifestly dangerous for a pedestrian about to cross a street-car track to omit to exercise his ordinary senses, and a failure to do so is everywhere regarded as negligence on his part. He may not be required to stop, look, and listen before crossing, but it is certainly necessary for him to look where he is going, unless there is something in the circumstances of the case or in his surroundings which will excuse him. "Even on the sidewalk, specially devoted to the use of foot passengers," says Mitchell, J., "a man is bound to look where he is going; and this duty is still more imperative when he is about to cross the middle of the street, where horses, wagons, and cars have equal rights with himself, and where he is bound to take notice of such other rights, and to use his own with due regard thereto." *Buzby v. Traction Co.*, supra. In the case before us there was nothing in the facts to excuse the plaintiff from exercising her senses. The accident occurred in the daytime, at a place where the view of the track was not obstructed for a space of three or four blocks, except where the car from which she had just alighted would obstruct the vision, and, if she had waited until the car moved on, she would have had an uninterrupted view of this space. She did not do so, but, according to her own statement, passed hurriedly along and around the rear end of the car, across the space between the two tracks, from which the approaching car could readily have been seen, and on to the track immediately in front of the car. If she did all this without looking to see where she was going, or whether a car was approaching, she was guilty of such contributory negligence as will, in our opinion, bar a recovery, and the jury should have been so instructed even if it be conceded that it may not be negligence in all cases for a pedestrian to attempt to cross a street-car track without looking and listening for approaching cars.

The defendant also requested the court to instruct the jury that the relation of passenger and carrier ended when the plaintiff had safely landed from the car, and thereafter the defendant owed her no duty other or different from that which it owed to any other pedestrian on the street. The court refused to give this instruction, and charged the jury

that, as a general rule, "the duty of the carrier is completed when he takes a passenger to the point of destination, and stops a sufficient time to allow him to alight and free himself from the car and track of the carrier; and until such relation of the passenger and carrier ceases it is the duty of the carrier to use the highest degree of care and diligence to protect the passenger from injury, and to land him safely at his destination. And if you find from the evidence that the plaintiff had not been properly landed by the defendant, and freed from the car or track upon which she was a passenger, then it was the duty of the employes of the defendant upon the car in which she was a passenger to use all reasonable means to prevent the car coming in the opposite direction from running upon or striking her or doing her injury, and, if they neglected their duty in that respect, and the injuries of plaintiff were occasioned thereby, the defendant would be liable, and your verdict should be for the plaintiff." By this instruction the jury were left to determine as a matter of fact whether the relation of passenger and carrier existed at the time of the accident, although the pleadings and evidence both show—and about this there is no dispute—that plaintiff had alighted from the car in a place of safety, and had started on her journey across the street, before she was struck by the car going east. Under the facts thus admitted, she was clearly not a passenger when the accident occurred, and the court should have so instructed the jury. The relation of passenger and carrier ceased when she alighted from the car, and thereafter the defendant owed her no other or different duty than it owed to any other ordinary traveler. *Booth, St. Ry. Law, § 328; Creamer v. Street Ry. Co., 156 Mass. 820, 81 N. E. 301; Buzby v. Traction Co., 126 Pa. St. 559, 17 Atl. 895.* A public street is in no sense an approach or passenger station for the condition or safety of which a street-railway company is responsible; and when a passenger steps from a car to the street he becomes a mere traveler upon the highway, and the company is not responsible to him as a carrier for his safety thereafter. Under the pleadings and the admitted facts, the plaintiff had ceased to be a passenger before the accident occurred, and the case presented is that of an ordinary traveler upon the highway.

There are several other errors assigned in the record, but it is thought unnecessary to consider them at this time. Judgment reversed, and a new trial ordered.

**AMERICAN BRIDGE & CONTRACT CO.
v. BULLEN BRIDGE CO. et al.**

(Supreme Court of Oregon. Sept. 21, 1896.)

CONTRACT—PAROL EVIDENCE—PLEADING—DAMAGES.

1. It may be shown by parol that an offer by plaintiff to furnish rock at a bridge site at a

certain amount per yard, and an acceptance thereof by defendant, both in writing, did not constitute a complete contract, but that the amount to be furnished was the quantity required for the bridge.

2. Damages for breach of contract to accept and pay for certain material are the difference between the contract price and what it would have cost the party contracting to furnish it to perform his obligation.

3. In an action for breach of a contract, a part only of which has been reduced to writing, plaintiff should allege execution of a parol agreement.

Appeal from circuit court, Multnomah county; E. D. Shattuck, Judge.

Action by the American Bridge & Contract Company against the Bullen Bridge Company and another. Judgment for defendants. Plaintiff appeals. Reversed.

This is an action to recover damages for the alleged breach of a contract. The plaintiff alleges, in substance, that the defendants, having entered into a contract with the bridge commission of the city of Portland, whereby they agreed to furnish the necessary material and construct across the Willamette river at that city a bridge, the specifications for which demanded crushed rock for the concrete filling to be used in the piers supporting the structure, represented to the plaintiff that it would require for such purpose between 3,500 and 4,000 cubic yards of crushed rock, and applied for terms upon which it would furnish the same; that the reasonable value of such material was \$1.75 per cubic yard, but plaintiff, in consideration of being allowed to supply the quantity required, proposed to furnish the same on scows at the bridge site at \$1.35 per cubic yard, to be measured in bulk on the barge, allowing 24 hours for unloading each 60 cubic yards thereof, which offer the defendants accepted, with the proviso that the material should be acceptable to the engineer in charge of the work; that the plaintiff immediately entered upon the performance of the contract, and furnished for and delivered to the defendants 683 yards of such material, and was ready, able, willing, and offered to furnish the balance thereof, but the defendants refused to receive or accept, or to allow the plaintiff to furnish or deliver, any more of said crushed rock; that the quantity of crushed rock required to fill said piers was 3,500 yards, and, after supplying the amount so furnished, there remained 2,817 cubic yards, which, by reason of the breach of the contract, the plaintiff was prevented from delivering; that the profit which could have been made on such balance, if accepted, was 65 cents per cubic yard; and that, by reason of the defendants' refusal to accept the same, plaintiff suffered a loss of \$1,831.05, for which it demanded judgment. The defendants, after denying the material allegations of the complaint, allege, in substance: That on March 13, 1893, the said plaintiff submitted to them a proposition in writing in substance as follows, to wit: "Portland, Oregon, March 13, 1893. Bullen

Bridge Co.: The undersigned will furnish you crushed rock on scows at bridge site for \$1.35 per cubic yard, measured in bulk on barge, and allow you twenty-four hours for unloading each sixty cubic yards. Yours, truly, American Bridge & Contract Company, by W. S. Chapman, Sec." That they accepted the said offer on the day following in writing as follows, to wit: "Portland, Ore., March 14, 1893. The American Bridge & Contract Co.—Gentlemen: Your letter of the 13th, proposing to furnish us crushed rock on scows at bridge site for \$1.35 per cubic yard, measured in bulk on barges, and allow us twenty-four hours for unloading each sixty cubic yards, has been received, and the proposal is hereby accepted, providing, however, that the crushed stone is to be acceptable to the engineer in charge of bridge construction. Yours, truly, The Bullen Bridge Co., J. E. Willard, Agent." That in pursuance of the said proposition and acceptance thereof, and not otherwise, the plaintiff furnished 683 cubic yards of crushed rock as in the complaint stated. That they accepted the same, and paid said plaintiff therefor at the rate of \$1.35 per cubic yard. And that the quantity so received and paid for was all that was acceptable to the engineer of the said bridge commission, in charge of the construction of the said bridge. The plaintiff, replying, admitted the making and acceptance of said offer, but denied that they constituted the contract under which the material was delivered, or that the amount paid was in full or any satisfaction of the rock furnished the defendants, or that the quantity delivered was the whole of said rock which was acceptable to said engineer. The issues having been thus joined, the court, upon motion, gave judgment upon the pleadings in favor of defendants, from which the plaintiff appeals.

A. H. Tanner, for appellant. Rufus Malory, for respondents.

MOORE, C. J. (after stating the facts). The question presented for consideration by this appeal is whether the offer and acceptance, under the allegations of the pleadings, constitute the entire contract between the parties; for, if so, no ambiguity appearing therein, evidence outside the writings would be inadmissible to explain the terms thereof. "A contract," says Mr. Chief Justice Marshall, in *Sturges v. Crowninshield*, 4 Wheat. 197, "is an agreement in which a party undertakes to do or not to do a particular thing." Tested by this definition, it will be observed that the offer and its acceptance do not constitute an undertaking on the part of either party to do anything, except to pay and accept \$1.35 per cubic yard for crushed rock; for, there being no obligation to deliver or accept any given quantity of material, upon which the offer to pay and accept depended, it follows that there was no undertaking to do anything, and hence no contract existed

between the parties, if it must depend upon the written evidence thereof. But the plaintiff delivered, and the defendants accepted, 683 cubic yards of crushed rock, thus clearly showing that some contract existed between them, and, this being so, the question is narrowed to a consideration of whether evidence allunde the writings is admissible to prove the terms of such contract.

The rule of law is settled beyond controversy that parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument (1 Greenl. Ev. § 274); but this rule does not apply in cases where a part only of the contract was reduced to writing (Id. § 284; 2 Pars. Cont. *553; Whart. Ev. § 1015). In *Cobb v. Wallace*, 5 Cold. 539, the defendants, in order to transport a quantity of coal from Howesville, Ky., to Nashville, Tenn., hired plaintiff's barge, agreeing by parol to return it as soon as the voyage could be made, and gave plaintiff's agent a written memorandum to the effect that they would pay \$3 per day for its use until it should be returned in good order, without stating therein when this should be done. The defendants, after discharging the coal, retained the barge, and used it in transporting wood, and when returning it to plaintiff it was seized and detained by persons in the military service of the United States. In an action to recover its value and for the hire thereof, the trial court charged the jury, in effect, that under the contract the defendants had it in their option to say when the contract was at an end; but, so long as they paid the stipulated hire, they might continue to use it, and that the contract for its use would not terminate until they so elected. The court, in reversing the judgment, say: "The written memorandum in this case, so far as it includes a contract, is merely an agreement to pay for the hire of the barge at a certain rate until she should be returned to the plaintiff; and parol evidence of the circumstances under which and the purpose for which it was hired, and of the terms of the previous verbal contract as to the length of time during which it might be retained and employed, does not contradict or vary the terms of the written instrument." In *Machine Co. v. Holcomb*, 40 Iowa, 33, it was held that parol evidence was admissible to prove that, upon the performance of the conditions of a written lease of a sewing machine, which provided for the payment within a given time of an amount equal to the value thereof, the title vested in the lessee. In *Keen v. Beckman*, 65 Iowa, 872, 24 N. W. 270, the plaintiff brought an action to recover a balance alleged to be due upon the following instrument in writing: "\$700. Clayton, Iowa, June 1, 1882. Received of Mrs. C. Keen seven hundred dollars on deposit, in currency. [Signed] Beckman Bros. & Co." The defendants, answering, alleged that they were merchants, and that the money for which the receipt was given had been

deposited with them for the accommodation of the plaintiff, in pursuance of an oral agreement to keep it in their safe without compensation, or any right to use the same; that, while so being kept, their safe was broken open by some persons unknown, and the said money feloniously carried away, without any fault or neglect on their part. A demurrer to this answer, upon the ground that it set up as a defense a parol agreement altering the written contract, having been sustained, the court, in reversing the judgment, say: "It is a familiar rule that a contract may be partly reduced to writing and partly exist by verbal agreement. In such a case the whole contract may be shown, and the rule that a written contract cannot be varied by oral evidence is not violated by the introduction of such evidence, showing the parts of the contract not reduced to writing."

So, too, in *Peterson v. Railway Co.*, 80 Iowa, 92, 45 N. W. 573, it is held that parol testimony is admissible to show the terms of an agreement evidenced in part by a railroad passenger ticket which does not import a completed contract. In *Steamboat Co. v. Brown*, 54 Pa. St. 77, it was held that a bill of lading was on its face but a memorandum, and not in form a contract inter partes, and that parol evidence was admissible to interpret the terms of the contract, so as to qualify the tribunal passing upon the writing to interpret it according to the intent of the parties. In *Nissen v. Mining Co.*, 104 N. C. 309, 10 S. E. 512, it is held that, where it is found as a fact that a contract was partly in writing and partly oral, parol testimony is admissible to prove the oral part. "If the instrument," says Dargan, C. J., in *West v. Kelly's Ex'rs*, 19 Ala. 353, "is perfect and complete,—that is, if it contains the entire contract,—then the rule is inflexible that parol evidence cannot be received to add another term to the written instrument, or to change its legal effect. * * * But if it be apparent that the instrument in writing contains but a part of the agreement entered into by the parties, then parol proof may be received to prove the entire contract; otherwise, the contract could not be brought before the court. * * * But the parts of the agreement proposed to be proved by parol must not be inconsistent with or repugnant to the intention of the parties as shown by the written instrument; for to receive parol proof of a part not reduced to writing, which is directly repugnant to the intention of the parties as expressed in the written instrument, would at once annul the rule that parol evidence cannot be received to contradict or vary the terms of a written agreement." In *Machine Co. v. Anderson*, 23 Minn. 57, the defendant gave to the plaintiff a written instrument acknowledging the receipt of a sewing machine, tools, etc., which were to be returned upon demand, but until such demand was made the defendant agreed to make certain payments and to

take good care of the machine. The defendant having, upon demand, refused to deliver to plaintiff the machine and other articles, an action was brought to recover the same, at the trial of which it was claimed by plaintiff that the written memorandum constituted the contract between the parties, and was the exclusive evidence of their rights in respect to the subject-matter; but it was held that the defendant might show by parol evidence the nature of the oral agreement of which the written memorandum formed but a part. "The rule," says Harrison, J., in *Sivers v. Sivers*, 97 Cal. 518, 32 Pac. 572, "which excludes evidence affecting the terms of a written instrument, does not apply when the parties have not incorporated into the instrument all of the terms of their agreement, and when the evidence offered or the agreement sought to be proved is not inconsistent with the terms embodied in the instrument. Evidence of a contemporaneous oral agreement as to any matter upon which the instrument is silent, and which is not inconsistent with its terms, cannot be said to contradict or vary the terms of the written instrument." In *Church v. Proctor*, 13 C. C. A. 426, 66 Fed. 240, the parties entered into a written agreement which, so far as it relates to the matter in dispute, is as follows: "Tiverton, R. I., Aug. 3, 1888. We agree to pay Joseph Church & Co. for what menhaden they land at Still's wharf, Tiverton, R. I., \$1.00 per barrel, cash on demand. * * * J. O. Proctor, Jr." "Tiverton, R. I., Aug. 3, 1888. We agree to furnish menhaden to J. O. Proctor, Jr., alongside Still's wharf, Tiverton, R. I., at \$1.00 per barrel, from now until he gets through slivering for the year 1888. Joseph Church & Co." In an action to recover damages for an alleged breach of the agreement, it was contended in the trial court that the written contract did not contain the entire oral agreement between the parties, and evidence was introduced tending to show that Church & Co. had agreed to deliver at least 100 barrels of menhaden on each day during the slivering season of 1888. Mr. Justice Aldrich, in reviewing the judgment on appeal, says: "We think the writings, taken together, constitute a complete legal engagement, and that evidence of an express oral agreement between the parties at an earlier day was incompetent, for the reason that it reads into the written contract an element not necessarily a part thereof. It seems to us that the writings constitute one of those common agreements whereby one person agrees to supply for a stated price, and another person agrees to buy, all the articles in a certain line required for his family's use or for his business during a certain period. Such a contract is not indefinite, for the reason that the requirements of the family or business may be approximately known, and the quantities are to be determined by the reasonable demands of such family or business. By the terms of

the contract expressed in writing, Church & Co. in effect agreed to deliver, and Proctor in effect agreed to receive, such quantities of menhaden as might be reasonably required by his business, to be delivered and received during the period and at the place and price designated in the contract. Proctor was not bound to receive, and Church & Co. were not bound to deliver, more than was reasonably required by the business to which the contract had reference. From the nature of the subject-matter to which the contract related, the quantity was necessarily uncertain, Proctor's requirements were subject to the fluctuations incident to the season and the demands of the market, and Church & Co.'s catch was subject to the weather and other elements of uncertainty incident to their enterprise. The undertakings of the parties, therefore, like all contracts of this character, were subject to the contingencies which ordinarily affect catching and using fresh fish. Interpreting the writings, therefore, with reference to the subject-matter, and the understood situations of the parties, the contract was complete on its face, in the sense, of course, that it was as complete as contracts regulating undertakings of this character can well be made. The meaning was that one of the parties should receive such quantities as his business required, and the obligation of the other party was to answer such requirements, but in no event to exceed their catch, as their undertaking was subject to the contingencies ordinarily incident to an enterprise of the character of that in which Church & Co. were engaged. In such sense, the contract was a complete obligation, and evidence of a prior oral agreement to deliver daily a specific quantity of fish was inconsistent with its meaning, and therefore incompetent."

If the offer and acceptance in the case at bar constitute a complete contract, and the rule announced in the preceding case be applicable thereto, the plaintiff agreed to furnish and the defendants to accept such an amount of crushed rock as might be necessary to complete the concrete filling of the piers; and, as an issue was made upon the quantity required for that purpose, the court erred in rendering judgment on the pleadings. But, if the writings constitute a part only of an oral agreement entered into between the parties, parol evidence was admissible to prove the terms and conditions of that part of the agreement not embraced within or in conflict with the offer and its acceptance, and hence the judgment complained of was erroneous. See the compilation of authorities on this subject in the notes to *Ferguson v. Rafferty* (Pa. Sup.) 6 Lawy. Rep. Ann. 33; s. c., 18 Atl. 484.

A party to a contract is entitled to recover from the party who violates it an amount in damages equal to the profits he would have made by the performance of the agreement, the measure of which is the difference be-

tween the contract price agreed upon and what it would have cost the party to perform his obligation. 1 *Suth. Dam.* (2d Ed.) § 63; *Morrison v. Lovejoy*, 6 Minn. 224 (Gil. 224); *U. S. v. Speed*, 8 Wall. 77; *Hoy v. Gronoble*, 34 Pa. St. 9; *Masterson v. Mayor*, 7 Hill, 61.

When a contract consists of an oral agreement, a part of which only has been reduced to writing, it is proper to allege in the complaint, as a basis for the recovery of damages resulting from its breach, the execution of a parol agreement. 4 *Enc. Pl. & Prac.* 922; *Railway Co. v. Reynolds*, 118 Ind. 170, 20 N. E. 711. Having complied with this rule, the action cannot be defeated by setting out copies of that part of the agreement which is in writing. It follows that the judgment is reversed, and the cause remanded for trial.

HARRIS v. HARSCH.

(Supreme Court of Oregon. Sept. 21, 1896.)

TAXATION—STATUTE CHANGING EFFECT OF TAX DEED AS EVIDENCE—REGULARITY OF ASSESSMENT—APPEAL.

1. *Hill's Ann. Laws*, § 2823, making a tax deed prima facie evidence only of title in the grantee, when by a former statute it was made conclusive of the regularity of the assessment and levy, except in certain cases, relates only to a matter of evidence, and does not impair the obligation of the contract between the state and a purchaser who bought lands at tax sale before its passage, but received the deed therefor afterwards.

2. Where land was assessed under *Deady & Lane's Code*, p. 750, § 7, which authorizes its assessment, when owned by one person and occupied by another, in the name of either owner or occupant, the introduction of a tax deed, which is prima facie evidence of the regularity of the assessment, raises a presumption that the person to whom it was assessed was either the owner or occupant, which, however, is overcome by a finding that another person was the owner and in the actual possession when the assessment was made; and the assessment in that case is void.

3. Where a question which is not put in issue by the pleadings becomes important as bearing on the issues to be determined, a finding thereon by the trial court should be requested, and an exception saved, if refused, else the failure to make a finding cannot be reviewed on appeal.

Appeal from circuit court, Multnomah county; H. Hurley, Judge.

Action by M. M. Harris against Charles Harsch. Judgment for defendant, and plaintiff appeals. Affirmed.

E. B. Watson, for appellant. W. Y. Masters, for respondent.

WOLVERTON, J. This is an action to recover possession of lot 8 and the north half of lot 7, block 112, Stephens' addition to East Portland, Or. Each party thereto alleges that he is the owner, and entitled to possession. The defendant further alleges that plaintiff's claim to said premises is based upon an alleged tax sale, and that said sale is invalid. Upon filing his answer, he paid into court the sum of \$10.50, the supposed amount of the

tax paid by plaintiff as purchaser at said tax sale, including interest and cost of the tax certificate and deed. A trial being had without the intervention of a jury, the court, among others, made the following findings: "(1) That between the 6th day of April, 1881, and the 19th day of February, 1891, Harriett Bennett was the owner in fee simple of lots seven (7) and eight (8) in block numbered one hundred and twelve (112) in Stephens' addition to the city of East Portland, Multnomah county, Oregon. (2) That for the state and county taxes for the year 1881 said lots seven and eight were listed and assessed by the assessor of Multnomah county, Oregon, for the purposes of taxation upon the assessment roll for said year, in the name of Erastus Bennett, and said lots were not separately assessed, but were assessed together at the sum of \$175, and improvements \$75, and no separate valuation of either lot was made in said assessment. (3) That at the time of said assessment Harriett Bennett was the owner and in the actual possession of said lots seven and eight." Other findings follow, showing tax sale, the issuance of a certificate and deed to plaintiff, the tender into court by defendant of the amount of tax paid by plaintiff, with interest, etc., and the succession of defendant to the title of Harriett Bennett. As a conclusion of law it was found that the tax deed was void, and that plaintiff had no title or interest in the premises, but that the defendant was the owner in fee, and judgment followed for defendant. The case was heard here upon the abstract, which purports to contain all the evidence offered or admitted at the trial except a tax deed and a certified copy of the assessment roll, filed as exhibits.

Error is predicated of the court's deduction as a conclusion of law from findings of fact 2 and 3 that the assessment of lots 7 and 8 as a single parcel and in the name of Erastus Bennett, instead of Harriett Bennett, the owner, rendered the tax sale and deed void. At the outset plaintiff contends that the tax deed is conclusive of the regularity of the assessment and levy, except that it may be shown there was (1) fraud in the assessment, and (2) that no part of the tax was levied or assessed upon the property sold; and in support of this contention cites section 6 of the act of December 18, 1865, being section 90, pp. 767, 768, Dedy & Lane's Code. This statute was so amended February 21, 1887, as to make a tax deed *prima facie* evidence only of title in the grantee. Hill's Ann. Laws Or. § 2823. The sale of the premises was made June 23, 1882, for delinquent taxes of 1881, and the deed there-to on July 16, 1890. Thus it appears that plaintiff's purchase was made while the old statute was in force, but the deed under which he claims was not executed until after the amendment had taken effect. The point is made that plaintiff's purchase at the tax sale constituted a contract with the state, and that in pursuance thereof his title is protected by the conclusive presumptions incident to a deed

executed under the act of 1865, and that effect should not be given to the subsequent act of 1887, as it would operate as an impairment of such contract in contravention of the fourteenth amendment of the constitution of the United States, which forbids the state "to deprive any person of property without due process of law." But the point is directly decided in *Strode v. Washer*, 17 Or. 50, 16 Pac. 926, against the contention, upon two grounds: First, that the statute of 1865 was a nullity, because the legislature was without competent power to make a tax deed conclusive evidence of the performance of any act, or of the existence of any fact essential to the due assessment of property and the levy of a tax thereon; and, second, that the amendment of 1887 does not impair the obligation of such contracts as arise from purchases at tax sales made prior thereto, but simply changes the rule of evidence touching the establishment of the regularity of the assessment and levy. This question disposed of, let us consider whether the conclusions of law are deducible from the findings of fact. The finding that Harriett Bennett was the owner and in the actual possession is equivalent to a finding that she is both the owner and occupant. *Bouv. Dict.*; *Hussey v. Smith*, 1 Utah, 129; *City of Bangor v. Rowe*, 57 Me. 439. The statute in force at the time of the assessment (section 7, p. 750, Dedy & Lane's Code) provided that "land owned by one person and occupied by another may be assessed in the name of the owner or occupant." It is claimed for this statute that where the wife is the owner of real property, and the husband is living with her, and is in the actual possession and management of such property, it is sufficient to assess it in the name of the husband, as he is an occupant; and there is authority in support of the proposition. See *Massing v. Ames*, 37 Wis. 645, and *Emos v. Bemis*, 61 Wis. 658, 21 N. W. 812. But the question does not arise here. The findings show that the lots were assessed in the name of Erastus Bennett, and that Harriett Bennett was the owner, and, in effect, the occupant also; but it does not appear therefrom that Erastus and Harriett were husband and wife, nor that Erastus was then in the actual possession or occupancy as well as Harriett, although the evidence contained in the abstract tends strongly, and perhaps conclusively, to the establishment of such facts. The intentment of section 2823, *supra*, however, raises a presumption with the execution and delivery of the deed that the assessment and levy were duly and regularly made, and all in accordance with law. This would imply that the property was listed or assessed either in the name of the owner or occupant, the owner being known, and that Erastus Bennett possessed one or the other of these needful qualifications. The court has found that Harriett Bennett was at the time the owner in fee, which undeniably precludes the idea that Erastus Bennett held in the same capacity, and therefore it is determined that he

was not the owner. The presumption remains that he was the occupant, and, being shorn of its alternative aspect, is perhaps strengthened, at least its bearing is definitely located, so that it must be regarded as carrying with it the full weight of prima facie establishment. But we think the presumption is overcome by the court's finding that Harriett Bennett was in the actual possession, under the maxim, "*Expressio unius exclusio alterius*," thus excluding the idea that Erastus was the occupant. This renders the assessment void, as it appears not to have been made in the name of either the owner or occupant. The court's conclusion of law that the deed is void, and defendant the owner of the premises, is therefore a legitimate deduction from its findings of fact, and it can make no difference that the court may have regarded the assessment void by reason of the two lots not having been separately assessed. Hence it is unnecessary to discuss the latter proposition here.

Plaintiff made a request of the court to find that he was the owner, and entitled to possession. This is a conclusion of law, and it is plain that, if the court's conclusion was proper, this one could not be approved. In order to present the question upon the record, it would have been pertinent to have requested the court to find that Erastus Bennett was the husband of Harriett, and was also in the actual possession or the occupant of the premises, which, if refused, an exception could have been saved, and the action of the court in this regard assigned as error. The necessity for such a finding is not suggested by the issues made by the pleadings, and, if deemed essential to a full determination of the cause presented by the testimony and proofs offered and admitted, the proper practice seems to be to request the court to make such findings of fact as are deemed important for a presentation of the questions involved, and then, by saving exceptions to the rulings touching them, error may be assigned here; otherwise the action of the court below is not reviewable, for the very good reason that it has never had the opportunity of passing upon the questions mooted here for the first time. *Hicklin v. McClellan*, 18 Or. 137, 22 Pac. 1057; *Noland v. Bull*, 24 Or. 481, 33 Pac. 983; *Irrigation Co. v. Barnhart*, 22 Or. 389, 30 Pac. 37; *Tatum v. Massie* (Or.) 44 Pac. 494; and *Moody v. Richards* (just decided) 45 Pac. 777. Let an order be entered affirming the judgment below.

DALY v. LARSEN.

(Supreme Court of Oregon. Sept. 21, 1896.)

ASSUMPSIT—FINDINGS—SUFFICIENCY.

In an action by an assignee it was alleged that his assignor, at the special request of defendant, performed work for defendant of a certain value, and that before the bringing of the action such claim was duly assigned to plaintiff. The answer controverted every allegation of the complaint. The court found merely that the claim was represented by a time check issued by

defendant, which was duly assigned, and that defendant was liable thereon. *Held*, that to support a judgment for plaintiff there should have been further findings that the work was performed, and that it was done at defendant's request, and was of the value alleged.

Appeal from circuit court, Multnomah county; E. D. Shattuck, Judge.

Action by F. A. Daly against E. S. Larsen on assigned claims for work and labor. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Milton W. Smith, for appellant. George W. Hazen, for respondent.

WOLVERTON, J. The complaint herein contains 27 separate causes of action, all similarly stated. The defense to each of said causes set up in the answer is also of a like nature, so that it will only be necessary to an understanding of the case to summarize the pleadings of a single cause. By the complaint in the one selected it is set forth, in effect, that between the 1st and the 24th days of July, 1894, one Joe Barhara, at the special instance and request of defendant, performed work, labor, and services on his (defendant's) contract to dig and construct an irrigating ditch or canal and to clear certain lands in Wasco county, Or., of the reasonable value of \$10.50, no part of which sum has been paid except \$3.33, leaving a balance due from defendant to Barhara of \$7.17; that before the bringing of this action the last-named sum and claim was for a valuable consideration duly assigned to plaintiff. The answer consists of denials only, and controverts each and every allegation of the complaint. Trial was had before the court without a jury, which made but two findings of fact. The first is, in effect, that the assignment of four of the claims was not properly evidenced; hence the plaintiff was without title thereto. By the second the court finds: "That the following claims were duly issued by the agents of the defendant, and properly indorsed and transferred to the plaintiff by the parties to whom they were issued, and therefore the said defendant is liable for the several amounts due on the said following claims, to wit:

No.	Name.	Countersigned by	Amount.
1.	E. S. Burlingame.	J. H. Crawford.	\$50 00
6.	E. S. Burlingame.	J. H. Crawford.	50 00

—Then follow 14 other names, with the name of the person by whom countersigned and the amount of each claim, making a total of \$731.58. From this finding the court deduces the following conclusion of law: That the plaintiff is entitled to a judgment against the defendant for the sum of \$731.38, and for costs and disbursements of the action. Judgment was rendered accordingly, and the defendant appeals.

There is but one question in the case, and that is, do the findings support the judgment? We think not. The several causes of action are for work and labor done and performed at the instance and request of the defendant, and

the statement of each contains all the allegations necessary to a recovery upon an implied contract. These were all controverted by the answer, and the findings of fact should have been as broad as the material issues made by the pleadings. Drainage Dist. No. 4 v. Crow, 20 Or. 535, 28 Pac. 845; Pengra v. Wheeler, 24 Or. 539, 34 Pac. 354; Jameson v. Coldwell, 25 Or. 205, 35 Pac. 245; and Moody v. Richards (just decided) 45 Pac. 777. The court below seems to have treated the action as based upon the so-called "time checks," and finds that they were duly issued, etc., but the plaintiff does not count upon these checks. They are evidence of indebtedness, and no doubt arose out of the transactions which plaintiff sets up; yet it is not deducible from the fact of their issuance that the alleged work and labor was done and performed, or that it was so performed at the instance of defendant, all of which plaintiff was called upon to prove in establishing the implied contract to pay the reasonable worth of such services, as well as to produce evidence from which its value might be determined. These are facts to be established in invitum, and it was therefore incumbent upon the court below to make its findings respecting them so that the law may be applied and judgment entered accordingly. Let an order be entered reversing the judgment, and remanding the cause for further proceedings.

FIORE v. LADD et al.¹

(Supreme Court of Oregon. Sept. 21, 1896.)

ACTION PREMATURELY BROUGHT—WAIVER OF OBJECTION—EVIDENCE—COMPETENCY—AMENDMENT OF VERDICT.

1. Pleading to the merits is a waiver of the objection that the action is prematurely brought.

2. In an action against a banking partnership on a certificate of deposit, in which there was a plea of payment, the evidence showed that, after the money had been paid on the certificate to a third party, witness held a conversation concerning the matter with one of defendants, who referred witness to the receiving teller for the particulars, and that witness went to the teller's window, and held a conversation with some person at that officer's desk, who assumed to be teller of the bank, and to know all about the transaction in suit. *Held*, that whether such person was the teller who issued the certificate of deposit was a question for the jury, and, accordingly, evidence of the conversation held with him was competent, although witness could not positively identify him as the person who issued the certificate.

3. Under Hill's Code, § 217, which provides that when the verdict is for plaintiff in an action to recover money "the jury shall also assess the amount of the recovery," where a verdict has been returned by a jury which expresses their intention in regard to the amount recovered, and they have been discharged, the court is powerless to amend it as to amount, however erroneous it may be.

Appeal from circuit court, Multnomah county; E. D. Shattuck, Judge.

Action by Saverio Fiore against W. M. Ladd and others. From a judgment in favor of

plaintiff, defendants appeal. Modified and affirmed on condition.

Geo. H. Williams and S. B. Linthicum, for appellants. E. B. Watson, for respondent.

BEAN, J. This action was commenced on the 8th day of May, 1891, against W. S. Ladd and W. M. Ladd, bankers doing business as Ladd & Tilton, for the recovery of the sum of \$800. The complaint avers, in substance, that on April 13, 1891, plaintiff deposited with defendants \$800; that they thereupon issued to him a certificate of deposit therefor, payable in three months, on return of the certificate; that on the same day defendants wrongfully obtained possession of said certificate, and wrongfully paid and canceled the same; that plaintiff was the owner thereof at the time, and never indorsed it, or received payment therefor; that on April 20th he demanded of defendants the said sum of \$800, but they refused, and still refuse, to pay or deliver the same, or any part thereof, and that there is due and owing to the plaintiff from the defendants the sum of \$800, with interest from the 20th of April, 1891, at 8 per cent. per annum, for which judgment is demanded. The answer denies the material allegations of the complaint, except the receipt of the money, and plaintiff's demand therefor, and sets up, as a further and separate defense, matter which goes to the merits, but which, for the purposes of this appeal, need not be stated here. The judgment now appealed from is the third rendered in this cause. The first was reversed on defendants' appeal, and a new trial ordered. 22 Or. 202, 29 Pac. 435. The second was in favor of defendants. At the time of the entry of judgment on that trial the death of W. S. Ladd was suggested by the surviving defendant, and on his motion W. M. Ladd, Charles E. Ladd, and John Wesley Ladd were substituted as defendants in place of W. S. Ladd and W. M. Ladd, partners as Ladd & Tilton, and the action afterwards proceeded against them. Subsequently the plaintiff appealed, and, the judgment being reversed, a new trial was again ordered. 25 Or. 423, 38 Pac. 572. Upon such trial, in July, 1895, the jury rendered a verdict as follows, omitting title and signature: "We, the jury in the above action, find for plaintiff, and assess his damages in the sum of ~~\$1,070.00~~ eight hundred (\$800) dollars." The defendants filed a motion for a new trial, which, being overruled, they moved for judgment notwithstanding the verdict on the ground that the complaint does not state facts sufficient to constitute a cause of action. This motion was likewise overruled, and on motion of the plaintiff the verdict was amended so as to include interest from the 20th of April, 1891, and judgment rendered accordingly against W. M. Ladd, Charles E. Ladd, and John W. Ladd, substituted as defendants in place of W. S. Ladd and William M. Ladd as Ladd & Tilton. From the judgment thus rendered this appeal is taken.

¹ Rehearing pending.

It is first contended that the court erred in overruling the defendants' motion for judgment notwithstanding the verdict, and in entering judgment in favor of plaintiff, for the reason that the complaint on its face shows that the action was commenced prior to the maturity of the certificate of deposit referred to and set out in the complaint. Although this cause has been three times tried before as many juries, and has been to this court twice before on appeal, the objection that it was prematurely brought was never raised or suggested in any way until after the verdict above referred to was rendered. It therefore, in our opinion, comes too late. The objection that an action is prematurely brought is mere matter of abatement, and should be taken by demurrer if it so appears upon the face of the complaint, otherwise by answer before pleading to the merits, or it is waived. 1 Enc. Pl. & Prac. 22, 32; *Carter v. Turner*, 2 Head, 52; *Moore v. Sargent*, 112 Ind. 484, 14 N. E. 466; *Railway Co. v. Stevenson*, 6 Ind. App. 207, 33 N. E. 254; *Collette v. Weed*, 68 Wis. 428, 32 N. W. 753.

It is next contended that the court erred in overruling defendants' motion to strike out the testimony of the witness Ferrara concerning a conversation he had with some person at the desk of the defendants' receiving teller about the deposit of the money in question, shortly after its payment to Antone, on the ground that the testimony was incompetent and immaterial, because the statements "were not shown to have been made by Bates," the person with whom the transaction was had. This is the only objection to the admission of such testimony made in the court below or presented to this court, and the only one considered. In our opinion, it is not well taken. The evidence shows that, after the money had been paid to Antone the witness went to the bank, at the request of plaintiff, to see about the matter; that he had a talk with W. M. Ladd, one of defendants, who said he knew nothing about it, but referred witness to the receiving teller for the particulars; that he went to the receiving teller's window, and had the conversation in question with some person at the desk of that officer, who assumed to be the teller of the bank, and to know all about the transaction, and who related his version of it to the witness. Whether this person was the teller with whom the business referred to was transacted, if material at all, was a question for the jury, and the evidence was competent for whatever they might consider it worth, although the witness could not positively identify the person with whom he had the conversation as the teller of the bank who received the money and issued the certificate of deposit.

It is next contended that the court erred in amending the verdict of the jury by adding interest from the 20th of April, 1891. The answer does not deny that the \$800 in question was deposited with the defendants, or that plaintiff demanded its return on the 20th of April, 1891, but puts in issue only its owner-

ship, so that under the pleading plaintiff was entitled to recover, if at all, the entire sum, and interest from the date of the demand. The court could therefore have properly instructed the jury to that effect, or refused to receive a verdict less favorable to the plaintiff; but it did neither, and the jury assessed the amount of plaintiff's damages at the sum of \$800, and expressly refused to allow interest, as is evident from the verdict itself. The form of verdict as prepared and submitted to the jury was for \$1,070, the principal sum and interest; but the jury deliberately erased that amount, and of their own motion placed the sum at \$800, and rendered their verdict accordingly. This verdict was received and filed without objection, and the jury discharged. It was therefore beyond the power of the court to add to or take from the amount as found by them. It is perhaps within the power of the court to amend a verdict so as to make it conform to the real intention of the jury, but certainly a judge cannot, in the exercise of such power, usurp the functions of a jury, or substitute his verdict or judgment for theirs. Our statute provides that when a verdict is found for the plaintiff in an action to recover money "the jury shall also assess the amount of the recovery." Hill's Code, § 217. Under this section it is not only the province, but the duty, of a jury to find the amount of the recovery, as well as plaintiff's right to recover, and the findings upon both questions after the verdict is received and the jury discharged are binding upon the court, unless the verdict is set aside in some manner provided by law. When, therefore, a verdict has been returned by a jury which expresses their intention, and they have been discharged, the court is powerless to amend it, however erroneous it may be. It must either enter a judgment thereon, or set it aside, and grant a new trial. 2 *Thomp. Trials*, § 2642; 2 *Elliott, Gen. Prac.* § 947; *Watson v. Damon*, 54 Cal. 278; *Mitchell v. Geisendorff*, 44 Ind. 358; *Association v. Hitchcock*, 4 Kan. 29; *Thompson v. Shea*, 4 *McCrary*, 93, 11 Fed. 847; *Hallum v. Dickinson*, 47 Ark. 120, 14 S. W. 477; *Parker v. Railway Co.*, 93 Mich. 607, 53 N. W. 834; *Buck v. Little*, 24 Miss. 463. This case affords an illustration of the importance of such a rule. The jury were able to agree on a verdict for \$800, probably as a compromise, but it is manifest that they were unwilling to render one which included interest; but by the act of the court in amending the verdict this purpose and intention of the jury has been wholly disregarded, and they have been made unwillingly to agree to a verdict which they in the first instance expressly refused to assent to. What the result of the trial would have been had the court instructed the jury that they must allow interest in case they found in favor of plaintiff no one can tell, and therefore the verdict as rendered is practically the act of the court.

The other assignments of error have been carefully examined, and we have been unable to discover anything therein which would jus-

tify a reversal of the judgment. The judgment will therefore be modified by eliminating therefrom the words "from April 20, 1891," so that the judgment for \$800 shall bear interest only from the date of its rendition, and, as thus modified, the judgment is affirmed, neither party to recover costs in this court on the appeal, provided plaintiff within 10 days signify in writing his willingness to accept of such a judgment; otherwise it will be reversed, and a new trial ordered.

FISHER et al. v. KELLY, Sheriff.

(Supreme Court of Oregon. Sept. 21, 1896.)

FRAUDULENT CONVEYANCES—RIGHT OF OFFICER TO ATTACK—FINDINGS—PLEADING—JUDGMENT.

1. In an action against an officer for conversion of chattels claimed under a mortgage, though defendant took the property under an attachment against the mortgagor, he may defend his possession, and attack the mortgage as in fraud of creditors, without alleging or proving indebtedness of the mortgagor to plaintiff in attachment; he having alleged and proved that judgment was rendered for such plaintiff in the attachment suit, and the property ordered sold, pursuant to which execution issued, and was levied by himself on the property.

2. Allegations that a certain person duly commenced an action in the circuit court (a court of competent jurisdiction) against another certain person for recovery of a certain amount, and recovered judgment for the amount demanded, are sufficient to show rendition of a valid judgment.

3. Failure of a reply to deny allegations of an answer renders unnecessary evidence of the facts alleged, or findings thereon.

4. A finding that, after execution of a mortgage on a stock of goods, the mortgagor continued to dispose of the goods for his own use and benefit, is insufficient to show that it was in fraud of creditors, without a further finding that it was done pursuant to an agreement with the mortgagee.

5. While a mere agreement between mortgagor and mortgagee that the mortgage shall not be filed does not render the mortgage fraudulent as to prior creditors of the mortgagor, unless they thereafter deal with the mortgagor as they would not had the mortgage been filed, yet a finding that the mortgage executed under such agreement, though to secure an indebtedness, was executed with intent to deceive creditors, and tended to hinder, delay, and defraud them, supports a conclusion that it was void as against prior attaching creditors.

Appeal from circuit court, Multnomah county; E. D. Shattuck, Judge.

Action by M. Fisher Sons & Co. against Penumbra Kelly. Judgment for defendant. Plaintiffs appeal. Affirmed.

This is an action to recover the value of, and damages for the alleged wrongful conversion of, a stock of goods. The plaintiffs allege that on February 4, 1893, by virtue of a chattel mortgage executed to them by one O. C. McLeod, they had a first lien upon, and were entitled to and in the possession of, a stock of woolen and other cloths, of the value of \$5,000; that on said day the defendant wrongfully took said goods from their possession, and converted the same to his own use, to their damage in

the sum of \$5,000; and that by reason of such seizure and conversion they were further damaged in the sum of \$1,000, on account of expenses and attorneys' and counselors' fees in establishing their right thereto,—for which sums they demand judgment. The defendant, after denying the material allegations of the complaint, pleaded in justification of the acts complained of the facts, in substance, as found by the court, and also alleged that plaintiffs' mortgage was fraudulent and void as to McLeod's creditors. The reply having put in issue some of the material allegations of new matter contained in the answer, a trial was had before the court, which made and filed the following findings:

"(1) That plaintiffs are partners, and were partners at the time of the several transactions herein mentioned, doing business under the firm name and style of M. Fisher Sons & Co. (2) That at the times of the several transactions herein the defendant was then the duly elected, qualified, and acting sheriff of Multnomah county, Oregon. (3) That one O. C. McLeod, in January, 1893, and until the levy of the attachment herein mentioned, was engaged in the business of a merchant tailor at Portland, Oregon, and in such business owned a stock of merchant-tailoring goods, and was indebted to the plaintiffs and others. (4) About the 12th day of January, 1893, the plaintiffs sent their claim against McLeod to a firm of attorneys in Portland for collection, or, if the same could not be collected, then that payment thereof should be secured. McLeod, being unable to pay the claim, offered to secure the same by his real estate; but plaintiffs, after being consulted, declined to accept this, and, through their attorneys, insisted on a mortgage upon the stock. This demand McLeod refused to accede to, claiming that a mortgage upon his stock must be made public, and, when made public, would have the effect of destroying his credit, and bringing down upon him all of his creditors and stopping his business, thus placing it beyond his power to pay his creditors. Thereupon the plaintiffs, through their attorneys, agreed with McLeod that if he would execute the mortgage upon the stock they would not place the same upon record, nor permit the fact that he had executed such a mortgage to become public, but would keep the mortgage in their possession, so that nothing might be known of it. McLeod accordingly, on January 12, 1893, and pursuant to this agreement, executed the mortgage, and the same was locked up in the safe of the attorneys for the plaintiffs; and meanwhile McLeod continued to do business as before, without any change of possession in the business of any kind whatsoever, and he continued to work up his stock into manufactured goods, and dispose of the same, accepting orders and doing business in all respects after the execution of the mort-

gage in like manner as before. (5) The plaintiffs, through their attorneys, on or about February 1, 1893, made demand upon McLeod that he pay them a certain sum of money on account of his indebtedness to them; but this request Mr. McLeod refused to accede to unless the plaintiffs would supply him with goods for his trade of about the same value as the sum of money which he was to pay. A controversy then arose between the plaintiffs' attorneys and McLeod, and thereupon, and on or about February 3, 1893, the plaintiffs' attorneys undertook to place some one in possession of the stock; but McLeod refused to surrender possession of the same, and continued to employ his men and to operate his business in all respects as before the plaintiffs attempted to take possession, except that the plaintiffs maintained in the store some person through whom they claimed to hold possession. Such person, however, had not the keys to the store, nor had he any power or authority over the business or over the property which he claimed to have in possession, McLeod meanwhile exercising all acts of ownership and possession thereof after such attempted seizure just as prior to the execution of the mortgage. (6) On the 4th day of February, 1893, Stein, Simon & Co., creditors of McLeod, before the execution of the mortgage above mentioned, and on said day, commenced an action in the circuit court of the state of Oregon for Multnomah county, against McLeod, to recover the sum of \$1,234, with interest and costs, and in such action duly sued out a writ of attachment, and caused the same to be placed in the hands of the defendant, as sheriff of Multnomah county. Thereupon, pursuant to the command of said writ of attachment, the sheriff of Multnomah county duly seized the stock of goods in controversy, and locked up the store, ejecting all persons therefrom. At the time of this levy, McLeod still had the keys of the store, and was doing business in all respects as before any mortgage was executed; and neither the officer who levied the writ, nor the plaintiffs in the writ, knew anything of this transaction between McLeod and the plaintiffs. Thereafter, and on the same day, one H. E. Fowler, a creditor of McLeod, commenced another action in the same court to recover the sum of \$300, with interest and costs, and duly sued out a writ of attachment in said action, and the same was placed in the hands of the defendant, the sheriff of Multnomah county, for execution, and was duly executed by such sheriff by seizing the property in controversy, the same being then in his possession under a prior writ in favor of Stein, Simon & Co.; and the sheriff, under such writs, held the stock of goods until after judgment, and under such writs and the order of court, hereinafter mentioned, held such property until sale was made thereof by him under the executions, as hereinafter alleged. (7)

Afterwards the said attaching creditors, Stein, Simon, & Co. and H. E. Fowler, each duly recovered judgment for the sum sued for against O. C. McLeod, and, as a part of such judgment, the court made an order directing that the attached property be sold; and that, thereupon, executions were issued upon such judgment, directed to the sheriff of Multnomah county, Oregon, and commanding him to sell the attached property. Accordingly the defendant, as sheriff of Multnomah county, did sell the property on the 8th day of March, 1893, for the sum of \$1,965.00. That such sale was regularly and legally made by the defendant as sheriff, and due return of the executions made to the court, and the money realized from such sale applied in satisfaction of said judgments. And this is the conversion complained of by the plaintiffs. (8) The mortgage to the plaintiffs was never placed on file, nor was any possession thereunder ever taken. (9) The mortgage to plaintiffs was executed pursuant to an understanding between the plaintiffs and O. C. McLeod that its existence should not be made public, and that no creditors of McLeod, or persons with whom he might desire to deal, might be advised thereof, so that the attaching creditors did not know, and could not have ascertained, the existence of such mortgage; and such understanding was intended to deceive creditors, and tended to hinder, delay, and defraud them, and that the mortgage was therefore executed with such intention, and received by plaintiffs, through their attorneys, with the same intention."

"And the court finds as conclusions of law: (1) That the mortgage of the plaintiffs is fraudulent and void as to the attaching creditors, Stein, Simon & Co. and H. E. Fowler, and is fraudulent and void as to the defendant, Penumbra Kelly, seizing the property under writs of attachment sued out by said creditors. (2) That the seizure of the property under the writs of attachment in favor of the creditors, Stein, Simon & Co. and H. E. Fowler, and subsequent sale by the defendant as sheriff of Multnomah county, was regularly and legally done by the defendant as sheriff, and such acts of the defendant do not constitute a conversion of which the plaintiffs can complain. (3) That the action should be dismissed, and that the defendant should have judgment for his costs and disbursements."

The court having rendered judgment on these findings in favor of the defendant, the plaintiffs appeal.

A. C. Emmons and W. A. Williams, for appellants. J. N. Teal, for respondent.

MOORE, C. J. (after stating the facts). There are two questions presented by this appeal: (1) Are the conclusions of law deducible from the findings of fact? And, (2) if so, are they, taken together, sufficient to

support the judgment? The defendant having failed to allege that McLeod was indebted to either Stein, Simon & Co., or Fowler, counsel for plaintiffs contend that, the relation of creditor not being in issue, the defendant could not attack the bona fides of their mortgage, and hence the finding of the court that it was void as to the creditors of McLeod is erroneous. If the defendant had relied upon the attachment of the property as the foundation of his right to continue to hold the possession thereof, the objection urged must necessarily prove fatal to the judgment complained of; for in such case the officer, being the agent of the persons who caused the goods to be attached, could attack plaintiffs' mortgage only upon the theory that they were creditors of McLeod, and, having obtained a lien upon the property for the security of their debts, they had been brought into privity with the goods, by which the officer could question the bona fides of plaintiffs' title. *Cobbey, Chat. Mortg.* § 749; *Bank v. Bates*, 120 U. S. 556, 7 Sup. Ct. 679. The general creditor is in no position to raise the question that the mortgage is void as to him until he has seized the property covered by the chattel mortgage, or secured some lien thereon. *Bank v. Olum* (N. D.) 54 N. W. 1034. And the officer who acts for such creditor, in justifying an attachment of the property and his right to hold the possession thereof, must allege and show a debt due to his principal from the defendant in the writ. *Damon v. Bryant*, 2 Pick. 411. The rule is universal that an officer, in justifying his right to hold the possession of attached property claimed by a stranger, must allege and prove all the facts necessary to support the writ, and also that a debt existed in favor of the attaching plaintiff against the defendant therein; and having thus established the fact that the person for whom he acted is a creditor of such defendant, and by his lien upon the property had become in privity with it, he may then attack the title of the person claiming the property so attached. *Manufacturing Co. v. Wiggin*, 14 N. H. 441; *Thornburgh v. Hand*, 7 Cal. 554; *Noble v. Holmes*, 5 Hill, 194; *Newton v. Brown*, 2 Utah, 126; *Trowbridge v. Bullard* (Mich.) 45 N. W. 1013; *Glazer v. Clift*, 10 Cal. 303; *Braley v. Byrnes*, 20 Minn. 435 (Gil. 389); *Howard v. Manderfield*, 31 Minn. 337, 17 N. W. 946. "When the officer," says Mr. Drake in his work on Attachments (6th Ed., § 185a), "attaches property found in the possession of the defendant, he can always justify the levy by the production of the attachment writ, if the same was issued by a court or officer having lawful authority to issue it, and be in legal form. But when the property is found in the possession of a stranger, claiming title, the mere production of the writ will not justify its seizure thereunder. The officer must go further, and prove, not only that the attachment defendant was indebted to the attachment plaintiff, but that the at-

tachment was regularly issued. If, in the attachment suit, judgment was rendered for the plaintiff, that will establish the indebtedness. If not, the officer must prove it otherwise, in order to justify his proceeding." The reason for this rule is found in the fact that the person causing the property of another to be attached may have done so to protect the latter's interest, and prevent a bona fide creditor from acquiring a lien thereon; and since the writ of attachment is usually issued by a ministerial officer, upon an ex parte application therefor, it is necessary for the sheriff or other officer, in justifying his proceedings thereunder, to allege and prove that the writ was properly issued, and that a debt existed, as the foundation of the right to seize property claimed by a stranger. But when a judgment has been rendered in the action in which property has been attached the relation of creditor, and the recognition of a debt, are thereby established. *Rinhey v. Stryker*, 28 N. Y. 45. And, this being so, the conclusion of the court upon the question must, upon principle, relate back to, and render unnecessary the allegation and proof of, the existence of a debt as a justification for the attachment; for the office of a writ of attachment is to hold the property of the debtor until an execution can be issued upon a judgment rendered in the action. *Trowbridge v. Bullard*, supra. And, upon the levy of the latter writ upon the property under attachment, the object of the former has been duly accomplished. Judgment having been rendered in the actions of Stein, Simon & Co. and Fowler against McLeod, and the property so attached ordered to be sold, in pursuance of which executions were issued and levied thereon, the officer no longer held the goods under the writs of attachments; and hence it was unnecessary to allege or prove the existence of a debt, as the foundation of his right to maintain possession thereof, or to enable him to question the sufficiency of plaintiffs' title thereto, since he was in a position to do this by alleging and proving the judgments that had been given.

It is also contended that the allegations of the answer are not sufficient to show the rendition of a valid judgment, and that the judgments pleaded therein are not evidence against the plaintiffs, who were strangers to the record, that either Stein, Simon & Co. or Fowler was a creditor of McLeod. In pleading a judgment of a court of special jurisdiction, it is not necessary to state the facts conferring jurisdiction, but such judgment may be stated to have been duly given or made. *Hill's Ann. Laws Or.* § 86. In *Page v. Smith*, 13 Or. 410, 10 Pac. 833, which was an action to recover the possession of a certain safe, it was alleged in the answer "that said safe was seized on attachment as the property of the said Linder in an action in justice's court, in which one August Buckler was plaintiff, and said Linder was defendant; that judgment was duly rendered against Linder, and

execution issued thereon; and that by virtue of said execution the safe was duly advertised for sale, and sold to the defendant." Thayer, J., in reviewing the pleading, says: "The subsequent allegations in the answer, that judgment was duly rendered against Linder, and execution issued thereon, and that by virtue of said execution the safe was sold, were not a sufficient statement of the facts of the recovery of a valid judgment. They do not show that any action was commenced in any court. The statute has very much simplified the pleading of judgments of justices' courts, but I think it still necessary to allege the commencement of the action in the particular court, and to specify the claim upon which it is brought, so as to show that the court had jurisdiction of the subject-matter." In the case at bar the defendant alleges that Stein, Simon & Co. duly commenced an action in the circuit court of said county and state against one O. C. McLeod for the recovery of \$1,334, and recovered judgment for the amount demanded, and that Fowler commenced an action in said court against the same party for the recovery of \$300, and obtained a like judgment. An action shall be deemed commenced, as to the defendant, when the complaint is filed, and the summons served on him. Hill's Ann. Laws Or. § 14. And hence the allegation in each case that the action was commenced against McLeod in said court was equivalent to an averment that the complaint had been filed, and the summons served on him, thus giving to the court jurisdiction to render the said judgments; and the answer, having alleged that the actions were commenced, and the judgments given by a court of competent jurisdiction, stated the existence of an indebtedness due from McLeod to the respective plaintiffs in said actions. It must be admitted that before a person can attack a transfer of personal property, either actual or constructive, he must show himself to be a creditor, or representing one, and this he cannot do merely by a production of the execution, which, taken by itself, is not evidence of an indebtedness; and an officer justifying the seizure of such property, and attacking a sale or mortgage thereof as fraudulent, must produce the execution in pursuance of which he acted, together with the judgment under which the same was issued. *Ford v. McMaster* (Mont.) 11 Pac. 669; *Paige v. O'Neal*, 12 Cal. 483; *Bickerstaff v. Doub*, 19 Cal. 109; *Goodnow v. Smith*, 97 Mass. 69. The reply did not deny the rendition of the judgments in favor of the attaching creditors, the issue of the executions thereon, the sale of the stock of goods thereunder, the return of said writs, the satisfaction of the judgment in favor of Stein, Simon & Co., or the application of the remainder of the proceeds of such sale upon the execution issued upon the Fowler judgment; and these facts, having been alleged in the answer, were thereby admitted, rendering evidence thereof, and findings by

the court thereon, unnecessary. It is true, the judgments may have been collusively obtained, and that no debt was due from McLeod to either Stein, Simon & Co. or Fowler; but the plaintiffs, having neglected to put these facts in issue, are bound thereby, and it must be presumed that an indebtedness existed, and that the judgments were properly rendered.

The remaining and most important inquiry is whether the chattel mortgage is void as to McLeod's creditors. The court found, in effect, that the mortgage was executed in accordance with the terms of an agreement entered into between plaintiffs and McLeod, in pursuance of which the instrument was not filed; that the plaintiff never obtained possession of the property covered thereby; and that the defendant, and those for whom he acted, had no knowledge of the transaction between McLeod and the plaintiffs until after the property was attached. These findings, being supported by evidence, and predicated upon issues made by the pleadings, are binding on this court; and, considering them alone, can it be said, as a matter of law, that the mortgage is void as to Stein, Simon & Co., whom the court finds were creditors of McLeod before its execution? In *Barton v. Sitlington* (Mo.) 30 S. W. 514, an agreement was entered into between the mortgagor and mortgagee to the effect that a certain chattel mortgage should not be placed upon record unless the creditors of the mortgagor proceeded to collect their debts, or took some steps that would be likely to jeopardize the interests of the mortgagee. The sheriff, in pursuance of an execution issued upon a judgment rendered against the mortgagor, levied upon the property covered by the mortgage; and, in an action brought by the mortgagee against the officer to recover the property in his possession, it was contended that such agreement, as a matter of law, rendered the mortgage fraudulent and void as to the prior creditors of the mortgagors. But it was held that such creditors could not complain of a failure to place the mortgage on record, unless they dealt with the mortgagor after its execution as they would not have dealt had it been recorded, and that, the debt upon which judgment was rendered having been incurred prior to the execution of the mortgage, the creditor was not defrauded by such agreement, or the failure to record the mortgage. See, also, *Jones, Chat. Mortg.* § 337a; *Johnson v. Stellwagen*, 67 Mich. 10, 34 N. W. 252.

It is alleged in the answer that it was understood and agreed by and between the mortgagor and mortgagee that the mortgagor should continue to run his business as he had theretofore done, buying or selling for cash or credit for his own benefit, paying bills for current expenses, and conducting said store, and taking orders for suits of clothes, and cutting the patterns up into said suits, disposing of the same, and holding the proceeds to his own use, and these allegations are put in issue by

the reply. If the court had made a finding upon this issue adverse to the plaintiffs, it must be conceded that the mortgage is void as to the creditors of McLeod. There is nothing on the face of the instrument, however, which would indicate that it was executed for the use or benefit of the mortgagor, and in such case it cannot be said to be void in law. But when it appears from extrinsic evidence that the mortgagor is to retain possession of the goods mortgaged, and sell the same in the usual course of business, the mortgage is fraudulent in fact; for the reason that it is for the mortgagor's own use and benefit, and comes within the inhibition of section 3053, Hill's Ann. Laws Or., which declares that all transfers of goods and chattels made in trust for the person making the same shall be void as against the creditors, existing or subsequent, of such person. *Orton v. Orton*, 7 Or. 478; *Jacobs v. Ervin*, 9 Or. 52; *Bremer v. Fleckenstein*, Id. 296; *Aiken v. Pascall*, 19 Or. 493, 34 Pac. 1039.

The fourth finding of fact, after stating the agreement entered into between the mortgagor and mortgagees, is as follows: "McLeod, accordingly, on January 12, 1903, and pursuant to this agreement, executed the mortgage, and the same was locked up in the safe of the attorneys for plaintiffs, and meanwhile McLeod continued to do business as before, without any change of possession in the business of any kind whatsoever; and he continued to work up his stock into manufactured goods, and dispose of the same, accepting orders and doing business in all respects after the execution of the mortgage in like manner as before." This finding is probably equivalent to a statement that McLeod disposed of the stock of goods for his own use and benefit, but it does not appear therefrom that such disposal was in pursuance of any agreement entered into between the mortgagor and mortgagees, or that the latter had knowledge of, consented to, or ratified such disposal, in the absence of which it does not show that the plaintiffs had given McLeod power to dispose of the property covered by the mortgage. Here was a failure of the court to find upon an issue made by the pleadings, the materiality of which must be determined by a consideration of the question whether it could be stricken from the answer without leaving it insufficient as a defense. Hill's Ann. Laws Or. § 95.

The ninth finding of fact is to the effect that the mortgage was given and received pursuant to an agreement which was intended to deceive creditors. The instrument not having been filed created a presumption of fraud against the creditors of McLeod, during his possession of the property, disputable only by making it to appear on the part of the plaintiffs that it was made in good faith, for a sufficient consideration, and without intent to defraud the creditors of the mortgagor. Hill's Ann. Laws Or. § 776, subd. 40. It has been held by this court that a showing of these facts overcomes such presumption, establishes the validity of

the mortgage, and renders the security superior to a subsequent attachment or mortgage of the same property, even in the absence of notice of the unified mortgage. *Marks v. Miller*, 21 Or. 317, 28 Pac. 14; *Davis v. Bowman*, 25 Or. 180, 35 Pac. 264. The defendant having alleged that the chattel mortgage had not been filed, and that he, and those for whom he acted, had no notice or knowledge thereof, the burden was thereby cast upon the plaintiffs to allege in the reply, and prove at the trial, that the mortgage was executed in good faith, for a sufficient consideration, and without intent to defraud McLeod's creditors. Examining the reply, we find that it fails to allege either of these facts, and the effect of the court's findings thereon is that McLeod was indebted to the plaintiffs, and gave a mortgage on his stock of goods as security therefor. The finding that the mortgage was executed with the intent to deceive creditors, and tended to hinder, delay, and defraud them, strengthens the presumption of fraud arising from the failure to file the instrument. This finding is predicated upon an issue tendered by the defendant, and from it the conclusion of law is deducible that the mortgage was void as to the attaching creditors, without reference to the issue that the mortgagees gave the mortgagor power to dispose of the goods for his own use and benefit, which might have been stricken from the pleading without leaving it insufficient as a defense. The conclusions of law are therefore deducible from the findings of fact, and together are sufficient to support the judgment, which is affirmed.

PEOPLE ex rel. MILLER et al. v. DAVIE et al. (S. F. 420.)

(Supreme Court of California. Sept. 21, 1896.)
CITIES—AMENDMENT OF CHARTER—SPECIAL ELECTION—OFFICERS—SHORTENING OF TERM.

1. Under Const. art. 11, § 8, providing that proposed amendments of city charters may be submitted to a vote of the electors at "a general or special election," such amendments may be legally submitted at an election held for the sole purpose of voting thereon.

2. The term of an incumbent of a city office may be shortened by an amendment of the city charter abolishing the office, or devolving its duties upon other officers.

Department 1. Appeal from superior court, Alameda county; A. L. Frick, Judge.

Quo warranto by the state on the relation of W. N. Miller and R. A. Hughes, against John L. Davie and others and the city of Oakland. Judgment for respondents, and relators appeal. Affirmed.

Atty. Gen. Fitzgerald and Geo. E. De Golia, for appellants. Reed & Nusbaum, S. F. Daniels, J. A. Johnson, and J. K. Pierson, for respondents.

GAROUTTE, J. This is an investigation instituted in the name of the people, in the nature of quo warranto, to test the title to of-

office of the present board of public works of the city of Oakland; said board consisting of three commissioners. The defendants the mayor, the city attorney, and city engineer are ex officio the commissioners, and form this board of public works. They claim title to office under and by virtue of certain amendments to the charter of the city of Oakland. Their tenure of office is attacked by plaintiff upon two grounds: First, that the election at which the amendments to the charter were submitted to the people was not authorized by law, and therefore said amendments never became part of the city charter; and, second, it is contended that, if the election was legal, and the amendments adopted in accordance with law, still Miller and Hughes, as members of the board of public works, were entitled to hold office for a full term of four years.

The amendments to the charter were submitted to the people under an election called and held by virtue of a power claimed to exist in the city council, coming from section 8, art. 11, of the constitution of the state, which provides: "The charter * * * may be amended at intervals of not less than two years by proposals therefor, submitted by the legislative authority of the city to the qualified electors thereof, at a general or special election, held at least forty days after the publication of such proposals for twenty days in a daily newspaper of general circulation in such city, and ratified by at least three-fifths of the qualified electors voting thereat, and approved by the legislature, as herein provided for the approval of the charter." Appellants' position as to this provision of the constitution is that the words "special election" refer to an election held for the purpose of filling a vacancy in office (section 1043, Pol. Code); that a special election, under the Code, is an election held for that purpose; and that the legislative mind had such an election in view when this provision of the constitution was enacted. It is further insisted that such provision is a limitation of power, and the mode there prescribed is the measure of the power. Appellants then claim that, these amendments having been voted upon at an election held solely for the purpose of voting upon them, such an election was neither a general nor special election, and hence there was no power and authority vested in the city council to call and hold the election that was so called and held. In *People v. Hoge*, 85 Cal. 612, the provision of the constitution here under consideration was before the court, and it was then held to be self-executing. As to the legal soundness of such holding we have no doubt, and, that being the fact, the sole question remaining upon this branch of the case rests upon the signification to be given the words "special election." It is urged by appellants that in the *Hoge* Case there is found an intimation that these words refer to an election at which a vacancy in office is to be filled, but there was

no such question before the court in that case. As to what constituted a special election, in the light of this constitutional provision, was not under consideration by the court. The election involved in that case was a special election, from any point of view, and the merit of that litigation was in no way dependent upon the construction to be given those words. For these reasons we hold the case is no authority in support of appellants' position. All elections are either general or special. This election was not a general election. Hence it must have been a special election. This much is conceded, but it is contended that it must be a particular kind of special election; that is, an election held to fill a vacancy in office. We find no warrant in the language used to justify such an interpretation. A special election to fill a vacancy in office contemplates haste and urgent action. The notice of election may be given for only 5 days. To adopt amendments to a charter there must be a publication of notice for 20 days, and a further lapse of time of 40 days before election day. Thus, the application of the construction contended for would be wholly impracticable, and in this regard almost nullify the law. An election held for the single purpose of voting a special tax, or for the issuance of bonds, is a special election. Yet appellants do not even contend that such an election is the special election referred to by the provision of the constitution. Again, no good reason can be urged why such an election should be held at the time and place where an election is being conducted to fill a vacancy in office. But, aside from any indirect reasons that may be invoked, looking against appellants' position, we are clear that the meaning of the provision itself, gazing squarely at it, is that the words "special election" refer to an election held for the purpose of voting upon the amendments to the charter. Such is the plain and natural construction of the language, and that such was the intention of the framers of the instrument we have no doubt.

The charter being legally amended, it is still maintained that the incumbents of the offices of commissioners of public works at the date that the amendments took effect should hold office for the balance of the four-year term for which they were appointed. Among other matters, these amendments to the charter provided: "There shall be a department of public works under the management of three commissioners, who shall constitute the board of public works. The commissioners shall consist of the mayor, city attorney and the city engineer. * * * General municipal elections shall be held biennially on the second Monday in March, commencing with the second Monday in March next after the adoption of this amendment. At each such general municipal election there shall be elected a mayor, who shall be ex officio a commissioner of public works, * * * a city attorney, who shall be ex of-

ficio a commissioner of public works, * * * and a city engineer, who shall be ex officio a commissioner of public works." The salary of a county or city officer may be reduced during his term of office by the legislative power, or his term of office shortened or even extinguished. And, when we consider the foregoing provisions of the charter as amended, which provide who shall constitute the board of commissioners of public works, and when the commissioners shall be elected, it is patent that upon such election a new board was created, and that the old members were no longer clothed with official authority. These amendments to the charter necessarily repealed by implication any provisions of the law fixing the term of office at four years. For the foregoing reasons the judgment is affirmed.

We concur: VAN FLEET, J.; HARRISON, J.

MARCH v. BARNET et al. (S. F. 436.)

(Supreme Court of California. Sept. 26, 1896.)

SUBROGATION — RIGHTS OF INDORSER OF NOTE AGAINST MAKER.

A sale on execution of the property of an indorser of a note, to satisfy a judgment against him and the maker, gives such indorser a cause of action against the maker only for the amount actually credited on the execution, after paying the costs of the sale out of the proceeds thereof, since it was the duty of the indorser to have voluntarily paid the judgment, without levy and sale.

Department 1. Appeal from superior court, Santa Cruz county; J. H. Logan, Judge.

Action by William F. March against S. B. Barnett and others for the recovery of money. From a judgment for plaintiff against defendant Jacob Steen, and an order denying a new trial, said Steen appeals. Modified.

Z. N. Goldsby, for appellant. W. D. Story, for respondents.

GAROUTTE, J. One Button recovered a judgment against Steen and March, the maker and indorser, respectively, of a certain promissory note. He assigned the judgment to Barnett. Barnett's assignee took out execution, and levied upon the property of March. Under execution sale this property, to the extent of \$770, was applied to the payment of the judgment and costs of sale. The present action is brought by March against Steen, Barnett, and others, who were assignees of the judgment at certain times, for the sum of \$1,400. The complaint alleges the value of March's property levied upon and sold to be that sum, and charges

the defendants with conspiracy in making the levy, etc. The trial court rendered judgment against Steen for the sum of \$770, and also rendered judgment in favor of the other defendants for their costs. Steen appeals from the judgment and the order denying his motion for a new trial.

The judgment being in favor of all the defendants except the appellant, Steen, it becomes unnecessary to pass upon many of the objections made to the complaint by demurrer. For the same reason, any lack of findings upon issues of fact pertaining to the defendants not appealing will not be considered. Indeed, it is somewhat difficult to determine the exact theory upon which plaintiff formulated his complaint. And, as far as this appellant is concerned, both the complaint and findings largely abound in matters of surplusage. But it does appear by both complaint and findings that a judgment was rendered against Steen, the maker, and March, the indorser, of a certain promissory note; and it further appears that March's property was levied upon, sold, and the proceeds applied to the satisfaction of that judgment. These facts created a liability against Steen, and in favor of March; for, if March had voluntarily paid the judgment, he would have had a cause of action against Steen for the amount paid, and he had the same cause of action when his property was sold by the sheriff, and the proceeds applied upon the judgment. Such liability appearing by both complaint and findings, we see no necessity for a reversal of the judgment and a new trial. It appears that while plaintiff's property brought \$770 at forced sale, still only \$596.10 were credited upon the execution returned to the court, the balance being applied to the payment of the costs of sale. As to the owner of the judgment, it was the duty of the plaintiff, March, to pay the entire amount without a levy and sale of his property, and we see no reason why Steen should be liable for the costs of the sheriff in selling March's property. See *Simpson v. Griffin*, 9 Johns. 131. Steen only received a benefit from March to the extent of the amount of money actually applied upon the judgment, and that amount measured his liability. The superior court therefore erred in giving to the plaintiff a judgment against Steen for \$770, instead of the \$596.10; and it is accordingly directed to modify the judgment, and to enter judgment in favor of the plaintiff against Steen for the sum of \$596.10, with interest thereon from June 10, 1892, and costs, and, as so modified, the judgment and order will stand affirmed.

We concur: HARRISON, J.; VAN FLEET, J.

NIOSI v. EMPIRE STEAM LAUNDRY et al. (L. A. 225.)

(Supreme Court of California. Sept. 16, 1896.)

APPEAL—FILING POINTS AND AUTHORITIES.

A motion to dismiss an appeal will be denied, notwithstanding appellant's failure to file his points and authorities within the time required by the supreme court rules, if appellant presents such points before the hearing of the motion, and it appears that the appeal is presented in good faith, and that the delay was caused in part by a misunderstanding of counsel, and in part by appellant's inability by reason of his poverty, to obtain the money necessary to pay the expenses of the appeal.

In bank. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Action by Rosario Niosi against the Empire Steam Laundry and another. From a judgment for defendants, plaintiff appeals. On motion to dismiss. Denied.

Murphey & Gottschalk, for appellant. J. S. Chapman, for respondents.

PER CURIAM. This is a motion to dismiss an appeal for the failure of appellant to file his points and authorities within the time required by the rules of this court. The points and authorities should have been filed not later than June 1, 1896. The motion to dismiss the appeal was made upon June 12th, and appellant's points and authorities were presented before the hearing of the motion. It appears that the appeal is prosecuted in good faith, and that the delay was occasioned in part by a misunderstanding between counsel for the respective parties, and in part by reason of the difficulties which the appellant by reason of his poverty, experienced in obtaining moneys necessary to pay the expenses of appeal. Altogether, sufficient is shown in excuse of the failure and neglect of appellant; and, as no hardship is worked to the respondents by reason of the delay, the motion to dismiss is denied.

PEOPLE v. SANDERS. (Cr. 95.)¹
(Supreme Court of California. Sept. 15, 1896.)**CRIMINAL LAW—CONTINUANCE—EVIDENCE TENDING TO PROVE ANOTHER CRIME—INSTRUCTIONS—CONDUCT OF COUNSEL.**

1. Where a year elapsed between the indictment of a defendant and his trial, during which both prosecution and defense searched without success for persons who were material witnesses, the court was justified in refusing a further continuance on the ground of their absence.

2. In a trial of a defendant charged with having forged and uttered a draft, evidence that the person whose name purported to be signed to such draft had, prior to its date, been murdered by defendant, is pertinent and material, both as tending to prove that the instrument was forged, and also the knowledge of its false character by defendant when he uttered it; and it is not rendered inadmissible by the fact that it tends to prove the commission by defendant of a separate crime.

3. Where evidence is properly admitted in a criminal trial, though it tends to prove the de-

fendant guilty of another crime than the one charged against him, counsel for the prosecution has the right to discuss such evidence to the jury, and to argue any theory which may legitimately be deduced therefrom.

4. Where the prosecution, to prove as a fact material to the issue that a certain person had been murdered by defendant, was permitted to introduce evidence tending to show that such person was seen riding with defendant, and that at a point further along the road defendant was riding alone, it was prejudicial error to exclude the testimony of a witness offered by defendant to the effect that at a point still further along the road the witness met the defendant and another riding with him, and tending to show that such other was the person claimed to have been murdered.

5. Testimony of witnesses shown to have been in the vicinity that they did not see a vehicle claimed by defendant to have passed along a certain road is admissible, its weight being for the jury to determine.

6. Where the existence of a certain person in regard to whom a defendant has testified is questioned by the prosecution, it may introduce testimony in rebuttal showing that efforts have been made by the officers to learn of the existence or whereabouts of such person, and that they were unsuccessful.

7. The fact that witnesses have testified that, in their opinion, a letter offered in evidence by a defendant is genuine, while there is no direct testimony in rebuttal, does not require the court to instruct the jury that they must consider the letter as genuine, where the evidence of the prosecution tends to establish other facts which disprove its genuineness.

8. Where the prosecution claimed that certain instruments executed before the defendant as a notary were forged and fictitious, while defendant testified to their genuineness, the refusal of the court to instruct as to the presumption of genuineness arising from the defendant's certificate as notary was not erroneous, as such presumption added nothing to the positive testimony of defendant, or to the presumption of his innocence, which cast the burden of proof on the prosecution.

9. In a prosecution for uttering a forged draft, where the prosecution had introduced evidence tending to show that the purported drawer had been murdered by defendant previous to the time when the draft was written and uttered, it was proper to refuse to instruct the jury that they should not presume the death of such person, as a circumstance tending to show defendant's guilt, unless such death and defendant's knowledge of it were proven beyond a reasonable doubt; defendant's guilt not being necessarily dependent on such fact, and the jury being entitled to consider the evidence in relation to it in connection with the other evidence, though they might not regard it as established beyond a reasonable doubt.

10. It is improper for a prosecuting attorney to comment in argument on the failure of a defendant to testify upon any particular point.

Department 2. Appeal from superior court, Fresno county; J. R. Webb, Judge.

W. A. Sanders was convicted of forging and uttering a draft, and appeals. Reversed.

Frank H. Short and F. E. Cook, for appellant. Atty. Gen. Fitzgerald, for the People.

HENSHAW, J. W. A. Sanders was indicted for forging the name of William Wootton in a draft upon the Kutner-Goldstein Company for the sum of \$1,400, payable to the order of said Sanders, and for uttering and passing the said draft, knowing the same to be false

¹ Rehearing denied.

and forged. From the judgment of conviction, and from the order denying him a new trial, he prosecutes these appeals.

The story, as told by the evidence in this case, is extraordinary, and in some respects without parallel. The defendant is a man nearly 60 years of age, who has resided in this state for more than half of his lifetime. For many years he was prominent in educational circles. He had been a teacher in the public schools in different parts of the state. He was well educated, and possessed of much learning, and more than local reputation as an agriculturist, horticulturist, and botanist. He was married, and the father of children, who were growing up about him in his home in Fresno county, where he had resided for many years, and where he seems to have enjoyed, up to the time of these transactions, the universal regard and respect of his fellow men. Wootton was an old man, past 70 years of age, possessed of valuable farming lands lying near the home of Sanders. Wootton was unmarried, and lived upon his land alone, saving for the presence of Charles Rohloff, who was employed as a farm hand. Sanders and Wootton were friends. For some time prior to the date of these occurrences, Sanders represented to Wootton and to others that one John Knausch had in contemplation the purchase of the Wootton land, desiring to devote so much of it as was practicable to the culture of citrus fruits. Acting, as he represented, for Knausch, who was in San Francisco or elsewhere, Sanders made an examination of the Wootton land, platted it, showing its sources of water supply, fences, and other improvements, describing the nature of its soil; in short, collating such information as a purchaser unfamiliar with the property would naturally desire to possess. This information he sent by letter to Knausch. Wootton was reluctant to sell, or at least reluctant to sell for any price which Knausch was willing to give. Sanders, by letter, suggested to Knausch that, when he should come to bargain in person with Wootton for the property, it would be well for him to bring \$20,000 in gold coin, the sight of which would tend to excite old Wootton, to stimulate his desire to sell, and enable Knausch to secure a better bargain. Knausch being unfamiliar with the Wootton land, Sanders also suggested to him that, when he came, he should not drive directly to the Wootton house, but should drive up a valley to the rear of Wootton's house, and, leaving his vehicle there, cross the steep, high hill which interposed between the valley and Wootton's home; that, by this mode of approach, he would be enabled to take from the top of the hill a comprehensive view of the Wootton property, and thus save much time which would otherwise be spent in travel and inspection.

The matter of these transactions was in agitation for over a year. Upon the 1st day of February, 1894, Sanders was at Wootton's

house, whither he had driven, as he says, to await the coming of Knausch, whom he was daily expecting. The hour for the noonday meal had arrived. Rohloff, the farm hand, came in from the field. The noonday meal was eaten, and Rohloff went back to his work, which was that of sowing grain; Sanders agreeing that when he should leave for home, as he proposed to do later in the afternoon, he would bring out to him upon his buckboard some sacks of seed grain. After Rohloff had gone, and when Sanders and Wootton were alone in Wootton's house, John Knausch appeared, accompanied by a man named Graves, the two having crossed on foot by the trail over the hill to the rear of Wootton's house, Knausch carrying with him a stout valise containing \$20,000 in gold coin, which would weigh about 73 pounds. The subject of the purchase and sale of the Wootton ranch was speedily broached. There was haggling over the terms and price, when Knausch opened his valise, and began to pour the gold upon the table. Wootton became much interested, told Knausch to keep on piling up the gold, that the table could stand it, and, with visible excitement, exclaimed, "We can trade!" The terms of the transaction were then and there agreed upon. Some papers relating to it had been brought by Knausch in anticipation of effectuating the bargain. Others were prepared upon the spot. The result was that Wootton deeded all of his property to Knausch. Knausch would have nothing to do with any of the land saving that which was fit for citrus culture, and, by an arrangement between him and Sanders, such part of the land as was unsuitable for that purpose was to be conveyed to Sanders, while Sanders, in exchange, was to convey land of his own suitable for such purposes. In addition, there was drawn up and signed by the parties a long agreement, under which the lands were to be planted with citrus-bearing trees, under the direction and management of Sanders, who was to receive a salary for his services as superintendent. Knausch was to tunnel the hills for water for irrigating purposes, and, being a practical miner, was to have charge of that work. The expenses were to be borne equally by the four, saying that Knausch was to lend to Sanders. If necessary, moneys with which Sanders was to furnish his share of the expense. This land was to be deeded to a son of Sanders, because the son was a minor, and was to be redeeded by him to the individual owners, upon demand, after he had attained his majority. Sanders was a notary public. The acknowledgments to each and all of these papers which could have been acknowledged before him were taken before Sanders. In the matter of the deed from Knausch to Sanders, and of Sanders' deed in exchange to Knausch, because Sanders could not acknowledge a deed to himself or from himself, the plan of an intermediary dummy was suggested and adopted. Knausch deeded to one Abbott, a young man of the neighborhood, Sanders taking the

acknowledgment to this deed; and he afterwards, and upon Sanders' representations and explanations, deeded the same land to Sanders. Wootton took the \$20,000 in gold. For the remaining part of the purchase price, Knausch offered Wootton a check for \$25,000. Wootton refused the check, and it was understood that he should accompany Knausch and Graves either to Fresno or to Los Angeles, where the rest of the money would be paid him. The papers were left with Sanders, with directions from all the parties that, if he heard nothing from them to the contrary in the course of a few days, he was to place them on record, which in fact he did. Wootton, dazzled with the sight of the money, and exercised over the transactions of the day, showed an ever-increasing excitement, until he acted, as Sanders said, like a man dazed or in his sleep. Knausch and Graves left the house, walking back over the hill by the trail to the valley where they had left their vehicle, with the understanding that they should drive down the valley to the county road leading to Fresno, while Sanders and Wootton should proceed down the road from Wootton's house until they overtook them, when the four were to make the rest of the journey to Fresno together. Sanders harnessed his mules to his buckboard, loaded the seed grain for Rohloff, and drove down the road, accompanied by Wootton. The money was in a valise at Wootton's feet. The farm hand, Rohloff, had used up his seed grain, and was looking to see whether Sanders was coming with more, when he noticed the buckboard and its two occupants driving hurriedly down the road. When it reached the spot where Sanders was to unload the grain, it was stopped, and, according to the testimony of Rohloff, Sanders climbed over the seat of the buckboard, holding the reins in his hand, and, without dismounting from the vehicle, kicked and thrust the grain off upon the ground, some of the sacks striking a barbed wire fence, which tore them open, and scattered their contents. The buckboard was then driven hurriedly on by Sanders to a gate, which was closed. Here Sanders dismounted, opened the gate, came back, took the reins, which he had placed upon the seat, and, holding the reins as he stood upon the ground, drove through, closed the gate, climbed into the buckboard, and drove off. Rohloff was some distance from the road, but noticed that Wootton, whose habit it was never to leave the ranch without instructing the hired man what to do in his absence, and informing him of the date of his return, upon this occasion sat with his hands in his lap, seemingly staring straight ahead. Sanders testifies that Wootton, in his nervousness and anxiety to get away, said that he did not want to see or speak to anybody, and urged Sanders to hurry up; that the mules were restive, having been without exercise for some days, and took a rapid pace of their own accord. He denies, however, that he drove through the gate, saying that Wootton took the lines himself, and drove through. A mile and

a half below the point where the two were thus seen by Rohloff, two men, Wiseman and Record, plowing near the county road, saw Sanders, and recognized him, and testified that he was driving alone. This Sanders denies, insisting that, at the time, Wootton accompanied him. Some miles further on, Sanders was again seen by an acquaintance, Gobin, who testifies that, when he passed him, Sanders was driving alone. This is admitted by Sanders in his testimony, and explained as follows: He said that he drove on with Wootton until they overtook Knausch and Graves; that Wootton, in his nervousness, became exercised over the way in which Knausch was driving the buggy, fearing a breakdown, which would prevent their arrival at Fresno, and insisted upon getting out of Sanders' buckboard, and into Knausch's vehicle, to drive for them. This he did. It was while he was so driving in Knausch's buggy that Sanders, pursuing the journey upon another road, was met and passed by the acquaintance who testified to seeing him alone. Thereafter Wootton returned to Sanders' buckboard, and rode with him. While so riding with him, Sanders, who was much elated at the outcome of the day's work, and at the prospect of receiving \$500 commission for effecting the sale, indulged in some jocose remarks to Wootton, such as, "Another milestone is passed, and your money is safe." These remarks roused the old man to great indignation. He declined to travel further with Sanders, and insisted upon dismounting, and getting into the vehicle with Knausch and Graves. This he did, carrying the gold with him. Sanders, realizing from the old man's indignation that it was idle for him to continue the proposed journey to Fresno with them, turned off to his home. This is the last, so far as the evidence goes, that was ever seen of Wootton, even according to the testimony of Sanders. The last statement, however, is to be taken with this reservation: A witness testifies that he saw Wootton in San Francisco on or about the 10th of February, 1894. He is certain that it was Wootton, but not certain of the date.

Of Graves, Sanders himself could tell little, and no one else anything at all. He was a friend of Knausch, whom Sanders had casually met two or three times before. Upon one occasion he recognized Knausch in San Francisco, followed him into a church, and sat in the pew adjoining that occupied by Knausch and his companion, whom he afterwards knew as Graves. The only thing that he remembered was that Graves upon that occasion "made a splendid, good prayer." Concerning Knausch the evidence is much fuller, though not much more satisfactory. Sanders had known him for many years. He had "grub-staked" him in the early days, when Knausch was a miner, and Sanders a school teacher. He had lost track of him until some years before, when Knausch appeared in the section of the country where Sanders resided. He was a tall,

dark man, and wore an enormous mustache. Knausch informed Sanders that he had made a good deal of money, and was looking about for an investment in fruit lands. He was with Knausch once in San Diego, and spent the night with him in his room. Upon the occasion of this trip they inspected citrus lands. Knausch was solitary, retiring in deportment, a recluse by habit; seldom, if ever, stopped at hotels; had no fixed abiding place of which Sanders knew; wrote him occasionally, rarely or never directing where the replies should be addressed. Knausch was in the neighborhood of Sanders' home upon one occasion, but would not visit his home, because he had met a woman in Oregon who had formerly worked for defendant, and this woman said that defendant's wife had given him "such a setting out it made him chill." For this reason he never wanted to see defendant's wife, and would not therefore go to defendant's house. One George Sargent testified that in 1884 or 1885 he was introduced to John Knausch by Sanders. The credibility of Sargent's evidence is impeached by the testimony of witnesses who testified that he is unworthy of belief. A. G. Sanders, son of the defendant, 17 years of age, testified that he had seen John Knausch while his mother was East, five, six, or seven years before. There is no other or further evidence of the existence or whereabouts of Knausch or of Graves, saving the testimony of Sanders, to the effect that after these occurrences, and in pursuance of a letter which he had received from Knausch, he went to Mojave, to meet Knausch, Graves, and Wootton. He found neither Knausch nor Wootton, but only Graves, who represented to him that Knausch and Wootton were in the country, looking at mining property. Graves urged him to go with him and join them, but there was an undefinable something about Graves, a suspicious air and bearing, which caused Sanders to mistrust him, without defining why; and, in consequence, Sanders refused to go, and took the next train home. Letters, however, were received by Sanders and others through the United States mail, purporting to come from and to be written by Wootton. The genuineness of these is claimed by the defendant, and disputed by the prosecution.

It was not disputed that Sanders presented and obtained money upon the draft, it being claimed by Sanders that the draft was an inclosure in a registered letter received by him from Wootton, which letter was mailed at San Fernando; that he believed it to be the genuine writing of Wootton, and had no cause or reason to believe otherwise. The expert evidence is, as usual, conflicting; the witnesses for the prosecution testifying that the writing of the draft was not the handwriting of Wootton; others, for the defense, testifying to their belief in its genuineness. It was proved that the letter was, in fact,

mailed at San Fernando, but by whom is not established.

The theory and argument of the prosecution is that Knausch and Graves were myths; that Wootton was done to death by Sanders upon the 1st day of February, and his body concealed; that each and all of these acts were part of a preconceived and elaborately executed design to obtain the property, real and personal, of William Wootton. On the 19th of May, 1894, this indictment was presented against the defendant. On May 21, 1894, the defendant was arraigned. Upon March 9, 1895, defendant moved for a postponement and continuance of the trial, upon the ground of the absence of material witnesses, Knausch, Wootton, and Graves. On April 8, 1895, the trial was actually commenced. There had thus elapsed between the date of the indictment and the date of the trial nearly one year, all of which time was available to defendant to procure the attendance of these witnesses. Their importance was known to the defendant and to his counsel. It appears also that the prosecuting officers during this time were making diligent search for them. The failure of both sides thus to learn the whereabouts of these witnesses, and to procure their attendance, gave reasonable cause to believe that no further postponement would secure their attendance, and the court was justified in refusing a continuance.

The draft in question was dated Los Angeles, February 5, 1894. Evidence was introduced by the prosecution, over the objection and exception of the defendant, tending to show that William Wootton, upon February 5, 1894, was dead; that upon the 1st day of February, 1894, he had been murdered by the defendant, Sanders. The point most strongly urged by appellant is that the court erred in admitting this evidence, in that it was evidence of a separate and distinct crime from the one charged in the indictment, and that a defendant may be charged with but one crime in a single indictment, and tried for but one offense thereunder. An indictment, it is true, must charge but one offense; and, generally speaking, evidence of a separate and distinct offense is not admissible in proof of the one charged. Thus, it will not be permitted generally to prove that a defendant committed some other, independent, and distinct crime from the one charged, as the basis of inference and argument that he may have committed the particular one for which he is on trial; for—First, the defendant shall be charged with and tried for but one crime under a single indictment; second, he may and probably will be unprepared to meet with evidence the offense undisclosed by the pleadings; and, third, there being no logical connection between the two offenses, the first does not tend to elucidate or prove any material fact connected with the second, and does tend strongly to distract the minds of the

jury from the issue which they are called upon to decide, and to subject the defendant to unjust suspicion and discredit. *People v. Jones*, 32 Cal. 80. But so far the rule goes, and no further. Carefully as the law guards the rights of a defendant charged with crime, to see that he is not exposed to unwarranted aspersion or attack, it does not extend that care into indulgence. A defendant in a criminal case is treated with fairness, but not with favor. If the evidence of another crime is necessary or pertinent to the proof of the one charged, the law will not thwart justice by excluding that evidence, simply because it involves the commission of another crime. *People v. Tucker*, 104 Cal. 440, 38 Pac. 195. The general tests of the admissibility of evidence in a criminal case are: First. Is it a part of the *res gestæ*? Second. If not, does it tend logically, naturally, and by reasonable inference to establish any fact material for the people, or to overcome any material matter sought to be proved by the defense? If it does, then it is admissible, whether it embraces the commission of another crime or does not, whether the other crime be similar in kind or not, whether it be part of a single design or not. The commonest instance of the admission of evidence of another crime is where it becomes pertinent to prove the scienter or guilty knowledge under the particular charge. Thus, where a man is charged with passing counterfeit coin, it is allowable, in order to prove his knowledge that the coin was counterfeit, to show that upon other occasions, with knowledge of the false character of the money, he has passed similar coins. In *People v. Cunningham*, 66 Cal. 668, 4 Pac. 1144, and 6 Pac. 700, 846, in the prosecution of the defendant for the larceny of cattle, to rebut the presumption that the defendant came innocently into the possession of the cattle, it was permitted to be shown that a steer belonging to a third person, which was found in the defendant's possession with the cattle of the complaining witness, was stolen. In *People v. Lane*, 101 Cal. 514, 38 Pac. 16, where the charge was murder, the defense pleaded insanity, claiming that the deflowering of defendant's daughter by deceased had upset his reason. The people, in rebuttal, were permitted to show that the defendant had committed incest with that very daughter, as combating the view that deceased's acts could have deranged defendant's mind.

In the case at bar it was incumbent upon the prosecution to show that the instrument purporting to be executed by William Wootton was in fact a forgery. One mode by which they undertook to establish this was by evidence that Wootton was dead before the day upon which the instrument bore date. True, this would not conclusively establish the false character of the draft, for a man might postdate such an instrument. Nevertheless, it would be evidence tending to show its false character. Again, it was a proper

part of the case of the prosecution to show that the defendant uttered and passed the instrument knowing it to be forged; and if the prosecution could establish to the satisfaction of the jury that Wootton had died before the day upon which the instrument bore date, and that Sanders knew of his death, it would, unquestionably, be strong evidence tending to show that he knowingly passed a forged instrument. But the prosecution, having the undoubted right to prove these things, was not to be deprived of that right merely because the proving of the death involved evidence of the crime of murder against the defendant. The prosecution, in proving the death of Wootton, was entitled to show the manner of his death; and if, in so showing, it was made to appear that he had been foully dealt with, and had come to his end at the hands of the defendant, it was not for that reason to be excluded from the consideration of the jury. The evidence was thus not introduced to beamirch the defendant, or cast unwarranted suspicion upon him. It was necessarily introduced in proof of a material fact, which it was competent for the prosecution to show.

As to the argument of the counsel for the people, of which appellant bitterly complains, it need but be said that, with the evidence properly before the court and the jury, the prosecution was entitled to base thereon any reasonable argument or theory within the legitimate purview of that evidence, being controlled therein by the sound discretion of the court.

For the reasons we have already discussed, the evidence of Rohloff, Wiseman, Record, and Gobin, tending to show that on and prior to the 5th day of February, 1894, Wootton was dead, was admissible, even though it also tended to show that he was murdered by Sanders.

It will be remembered that in explanation of the fact that, at the time he was seen by the witness Gobin, he was driving alone, Sanders, in his narration of the events of the day, declares that during that portion of the journey Wootton had left the buckboard, and was riding with Knausch and Graves, over a different road. He further explains that the four met again near the town of Reedley; that Wootton once more took his place in Sanders' buckboard, and the two vehicles and their occupants proceeded along the road together. Defendant sought to introduce the evidence of a witness, Wesley Traver, an acquaintance of defendant, to prove that there and at that time Traver saw Sanders, and was able to identify him and his conveyance; to prove further that he saw another vehicle in company with that of Sanders, and that each of these vehicles contained two men; to prove by general description, if not by exact identification, that the man riding with Sanders was William Wootton; to show the time when the meeting took place, the direction in which the men were traveling; and to afford

something of a description of the other two men. Under the circumstances, and under the nature of the evidence which had been brought to bear against Sanders, he should have been allowed the fullest latitude in the matter. The court, however, under objections from the prosecution, refused to admit the evidence of the witness Traver, and left such fragments of it as were admitted in an eviscerated and well-nigh unintelligible condition. Only by setting out in detail the record of the case, disclosing the futile efforts of the defense to present to the jury the evidence of this witness, could the hardship and injury which were worked to the defendant be adequately shown. The following, however, will serve as an example: The witness, having been allowed to testify that he did see Mr. Sanders, is asked: "Q. Who did you first see, Mr. Sanders or the others? Mr. Snow: We object to that as incompetent. Mr. Hinds: Irrelevant for any purpose whatsoever. Mr. Short: Q. What way were they going when you saw them? Mr. Hinds: We object on the ground it is incompetent and irrelevant for any purpose. The Court: Same ruling. Mr. Short: Q. What position were the men in when you saw them,—the three men you have described? Mr. Hinds: We object on the ground it is incompetent and irrelevant for any purpose. The Court: Let the objection be sustained." Considering the claim of the prosecution that in the mile and a half of road which lay between the place where Rohloff saw Wootton and Sanders driving together, and the place where Wiseman and Record, plowing in the field, saw Sanders driving alone, Wootton and all trace of him had disappeared as completely as though he had been whirled to another sphere, the importance to the defendant, Sanders, of evidence, even the slightest, showing or tending to show that after that time Wootton was seen in his company, and in the company presumably of the two men whom the prosecution claims to be myths, is manifest; and no discussion is needed to show the injury which the rulings worked. The language of this court in *People v. Myers*, 70 Cal. 582, 12 Pac. 719, in reviewing similar rulings of the trial court, may here be appropriately employed: "In other words, if needed in order to more clearly present the ruling: If the evidence offered would tend to show the guilt of the defendants, it was admissible; but, if to show their innocence, it was inadmissible."

Prior Nance and his wife lived in the valley up which Sanders testified that Knausch and Graves drove upon the 1st of February, and in which they tied their team when they crossed on foot over the hills to Wootton's home. Nance and his wife were allowed to testify that they saw no vehicle or men there upon that day. The evidence was admissible. The weight of it was for the jury.

In rebuttal and in disproof of the testimony of Sanders as to the existence and whereabouts of Knausch, the prosecution called as

a witness J. Scott, the sheriff of the county, and proved by him that he had made search and inquiry as to the existence and whereabouts of the said Knausch. He testified that he had written letters to people in different parts of the state where Sanders had at one time or another located Knausch; that he wrote to the hotels, livery stables, and prominent men in the southern part of the state; made a trip to Los Angeles and San Bernardino; made a thorough search; "wrote north and to every locality I have heard of his being"; that within the county of Fresno he had inquired of all the old citizens, and at every hotel, livery stable, and railroad ticket office; that he had carried on these investigations all over the state for something over a year; and that during the whole time he had never found a man that had ever heard or known of John Knausch. The prosecution, as part of its case, here undertook to prove a negative,—to prove the nonexistence of John Knausch. As the evidence of the defendant left Knausch a wanderer, without fixed habitation or abode, the only evidence in rebuttal which the people could introduce was evidence that, after diligent investigation and inquiry in every place where the testimony of Sanders located Knausch as having been, no trace of him could be discovered, and to this effect was the evidence of Scott. It may at once be said that the evidence was not conclusive; that, under the circumstances shown, Knausch might still have existed, and yet knowledge of his existence have escaped the inquiries of the officer; but this goes merely to the weight of the evidence, which was exclusively for the jury. Conceding, indeed, that the evidence was slight, it was in its nature the best evidence which the prosecution could bring forward, and how much or how little importance should be attached to it was for the jury alone to say.

The defense introduced in evidence a letter purporting to have accompanied the alleged forged draft, which letter made reference to the draft as an inclosure, and gave directions as to the disposition of the moneys to be obtained upon it. Four witnesses familiar with the handwriting of Wootton testified, for the defense, to their belief that the letter was written and signed by him. Against this no direct opposing evidence was offered by the people. The court refused certain instructions proposed by the defense (Nos. 51 and 52), to the general tenor and effect that the failure of the prosecution to introduce rebutting evidence made it the duty of the jury to treat and consider the letter as written and signed by Wootton. These instructions were properly refused. While there was no expert evidence upon the question of the letter in opposition to that introduced by the defense, other evidence in the case, and, indeed, all of the evidence in the case upon the part of the people, tended to show that it was impossible for the letter to have been written by Wootton. The mere fact that experts were not called in di-

rect rebuttal of the testimony of the defense upon the subject of the letter did not leave the case of the people without any evidence tending to show its fictitious character.

It will be remembered that the notarial certificates to many of the instruments introduced in evidence were executed by the defendant, Sanders, himself a notary public. The defendant offered, and the court refused, certain instructions (Nos. 53, 54, and 55) as to the presumption that public officers properly perform their duties; that a notary public is a public officer; and that the certificate of a notary of the acknowledgment of a deed is prima facie evidence of the facts stated in the certificate. These instructions are sound, as expositions of the law, but they were properly refused by the court in this case. In a civil action the notarial certificate of acknowledgment entitles a deed to be placed of record, and, when thus placed of record, the recordation carries constructive notice to the world. When offered in evidence, the effect of such a deed with its certificate is to shift the burden of proving that it is not a genuine and duly-executed instrument to the side opposing. For this reason it has come to be and is truly said in the law that the notarial certificate is prima facie evidence of the facts therein stated, and of the character of the officer taking the acknowledgment, which character is recited therein. But in this case the burden of proof was always upon the people to show the false and fraudulent character of the instrument, and the presumption of innocence always remained with the defendant until overcome by evidence. It was upon the prosecution to establish to the satisfaction of the jury that the instruments were not genuine. The defendant testified with positiveness that they were genuine. As against the proof required to be established by the people, and the declarations thus made by the defendant himself, the mere presumption of regularity or due execution amounted to nothing. The presumption could neither have added to nor detracted from the weight and effect of defendant's own statements.

Many of the instructions proposed by the defendant and refused by the court were sufficiently covered by those given of the court's own motion. Others, however, were not fully embraced in the instructions given. Defendant's proposed instruction No. 18, as to the reception by the jury of evidence of extrajudicial admissions or confessions, was unobjectionable in law, and should have been given. Instruction No. 40 might also well have been given. Instruction No. 43 declared to the jury that they were not to presume, as a circumstance in the case tending to show that the defendant was guilty of uttering the instrument with knowledge that it was forged, that the said William Wootton was dead at the time the draft was written, passed, or uttered, unless the prosecution had established by the evidence in this case, to their satisfaction, and

beyond a reasonable doubt, the fact that he was dead at that time, and that the defendant so knew. Some stress is laid upon the alleged error of the court in refusing this instruction. We think, however, it was properly refused. The jury were not to be debarred from considering this evidence, with all the evidence in the case, because the death of Wootton might not have been proved to their satisfaction beyond a reasonable doubt; for the death of Wootton might not have been, under the evidence and in the view of the jury, necessary to be conclusively established to warrant a verdict. If, however, the jury believed from the evidence that the defendant was not guilty, unless it were proved that Wootton was dead, and that Sanders knew of his death, then, under such a state of the evidence, it would unquestionably be incumbent upon the prosecution to establish the fact of his death, and of defendant's knowledge thereof, beyond and to the exclusion of any reasonable doubt.

We note no other points presented by appellant that seem to call for a special comment, saving the objection to the argument of the district attorney. A book of blank drafts introduced in evidence was claimed by the prosecution to be in a different condition from that in which it was upon a former trial. Defendant was not interrogated upon the subject of the book. The district attorney, in argument, commented upon this, saying that, if it was in the same condition now as it had previously been, the defendant, better than any one, could have explained and testified to that fact. Defendant's failure to testify upon any particular point should not be commented on in argument. *People v. McGungill*, 41 Cal. 429; *State v. Fairlamb* (Mo.) 25 S. W. 895.

For the foregoing reasons, the judgment and order are reversed, and the cause remanded for a new trial.

We concur: McFARLAND, J.; TEMPLE, J.

IN RE HOWELL. (Cr. 176.)

(Supreme Court of California. Sept. 16, 1896.)

PERJURY—STATEMENTS OF OPINION.

A prosecution for perjury cannot be predicated on the testimony of a witness in giving his estimate of the value of certain assets of a bank, where it does not appear that he made any misstatements of facts, or that he did not answer all questions in accordance with his best judgment.

Department 2. Application by John W. Howell for a writ of habeas corpus. Writ granted, and prisoner discharged.

Frank H. Farrar and James F. Peck, for petitioner. F. G. Ostrander, for respondent.

HENSHAW, J. The petitioner, John W. Howell, after examination before a justice of the peace in the county of Merced, upon a

charge of perjury, was held to answer before the superior court of said county upon said charge. He claims that his imprisonment is illegal, in that he was committed to the custody of the sheriff of the county upon the charge of perjury without reasonable, provable, or any cause, and in substantiation of this claim a transcript of all the evidence taken before the committing magistrate is brought before this court for consideration and review. It appears from this evidence that the petitioner was cashier of the Merced Bank. At the time of these occurrences the Merced Bank was in liquidation. The bank commissioners of the state sought to learn whether or not the bank was actually insolvent, or whether, by allowing it to continue in business, it would be able to realize upon its assets, and meet its obligations in the course of business as they fell due. For the purpose of acquiring this information, the said John W. Howell was put under oath by the commissioners, and interrogated as to the condition of the affairs of the bank. There had been prepared and presented to the commissioners a statement of the assets and liabilities of the bank, and as part of the assets there was an item of \$176,000 for loans and overdrafts. A statement had likewise been prepared showing in detail the items which composed the \$176,000 loans and overdrafts. These items were made up of the names of the bank's debtors, alphabetically arranged, and opposite each name was set down the face value of the indebtedness. The total amounted to the sum of \$176,000. The cashier was charged with having falsely sworn that the loans and discounts were of the value of \$176,000, "whereas in truth and in fact the value of such loans and discounts was not then and there of the value of \$176,000."

The principal witness in support of this charge was J. B. Fuller, one of the bank commissioners. His testimony in chief amounted substantially to this: that with the statement in his hand, showing in detail the debtors of the bank, he interrogated the cashier as to the value of each item on the list, and that the cashier told him that the claims were collectible and good. It is not pretended that the cashier ever swore that the value of the loans and overdrafts was \$176,000, but that he made representations, while under oath, to the bank commissioners, that the separate items aggregating \$176,000 were good and valid assets. There is nowhere in the record any evidence that the cashier did not answer fully and fairly and in accordance with his best judgment upon the matter of these items. There is no evidence that any of the items were false, or simulated, or manufactured, or that the statements of the cashier were willfully made, and in perversion of the truth, and not in the exercise of his best judgment, however faulty that judgment may have been.

When the evidence of the witness Fuller

comes to be analyzed, it abundantly appears that the sum of \$176,000 was not accepted as a direct and positive statement, made under oath, by the cashier, of the value of the assets, but that the same was reached in the exercise of a common judgment upon the part of the cashier and of the bank commissioners in estimating the value of these assets. It is quite true that in most cases the information as to the value was derived from the statements of the cashier, but, as has been said, it nowhere appears that the cashier either suppressed the truth or made declarations willfully false, or did anything but express his own opinion and judgment upon the value; and, even after he had so done, many of the items credited as valid assets were so credited in the independent exercise of the judgment of the commissioners. To illustrate: One item was "W. P. Applegate, \$3,550.30." Bank Commissioner Fuller is asked: "Q. What value did Mr. Howell place upon that? A. He said it was good after the court decided it was good. It was left with the court. He reported to me just that,—that the court said the bank would have to wait; that they would probably get it. Q. Is that what you call reporting a good asset? A. Yes, I think it is a good asset. Q. If there was a probability of getting it, you would call it a good asset? A. In a bank liquidation, yes. Q. Then, if it was doubtful, you would put it in as good? A. Yes, a doubtful one; yes." It was under these circumstances that this item was marked "Good" by the bank commissioner. Again, the witness is asked, as to a claim of \$119.60, what report Howell made as to that, and the answer was that he reported it "good in part; perhaps all. Q. What value did you set on that? A. The full value. Q. That was considered good for all? A. I should say so. It seemed that there was a probability of collecting it." Still again, the witness being interrogated as to certain notes which the cashier told him were in suit, says: "You could not know how the suit was going to be decided. Until it was decided, you could not tell how much you was going to get out of it. When he said a note was in suit, I would put it down good, because you could not say it was bad. Q. Notes that were in suit you would call good? A. Yes, sir. Q. In this statement all the notes reported to you as in suit you put down good? A. Yes, sir; couldn't write it off. You couldn't say it was bad until the court had so decided. Q. Whenever Mr. Howell told you one of these notes was in suit, and might be collected at the end of a lawsuit, you put that down as a good asset? A. For a bank in liquidation, yes." The witness further testified that as to many of the items, amounting in the aggregate to over \$10,000, the cashier told the commissioners that he "thought the claims were good." All of these items which the cashier declared that he thought were good were entered by the bank

commissioners as collectible assets of full face value.

Numberless other extracts might be made from the evidence showing the nature of the cashier's testimony, and the method by which the bank commissioners reached their conclusion. It would but unduly and unnecessarily extend this consideration to notice them all. One further example, however, should be given: At the close of this examination before the bank commissioners, when the discussion became general upon the question of the bank's solvency, the same witness, Fuller, bears testimony as follows: "The cashier was there, and we talked to him about the solvency of the bank. He said, in so many words, that, with a good season, there would be no doubt of the bank paying every dollar it owed. Q. It was a qualified statement? A. Yes, sir. Q. If they had a good season? A. Yes." The result of it all was, by Fuller's own testimony, that of the items composing the \$176,000 the cashier had reported \$12,000 to be of no account, and over \$14,000 he "thought to be good," while many others, without any concealment or evasion upon the part of the cashier, and under a plain statement of facts, were set down by the commissioners themselves as being good. The only evidence to prove the falsity of the cashier's statement was evidence of other witnesses conversant with the value of real estate, or of the financial standing of the debtors of the bank, who, testifying that they rejected all claims which they did not feel certain were collectible, made the cash value of the assets, as it naturally would be, very much less than the result reached by the bank commissioners, who allowed full value for every item which was not demonstrated to be totally bad. There was in this evidence no reasonable or probable cause for holding the defendant for trial. It appears throughout, as has been said before, that the defendant was giving to the commissioners his judgment upon matters of extreme uncertainty,—the value and collectibility of debts. We do not mean to say that, even in a matter calling for the exercise of judgment, a perjury might not be predicated if one willfully and wickedly and maliciously refrained from exercising and giving expression to the exercise of his best judgment, if in law he was bound so to do. But, in the absence of a showing that there was such a willful failure and refusal to exercise an honest judgment, a charge of perjury could not be successfully maintained. And, moreover, as appears from the quotations above made, the fixed sum of \$176,000 was reached quite as much in the exercise of the judgment of the commissioners in determining under the statements of the cashier what they believed to be good assets as from any declaration of the cashier himself. Let the prisoner be discharged.

We concur: McFARLAND, J.; TEMPLE, J.

v46p.no.3—11

FISK v. FRENCH. (No. 15,811.)

(Supreme Court of California. Sept. 28, 1896.)

ATTACHMENT—SUFFICIENCY OF AFFIDAVIT—DISSOLUTION.

1. Where the facts which the statute requires to be stated in an affidavit for attachment are not so stated, the attachment should be dissolved, even though such requisite facts are alleged in the complaint.

2. In an action on notes, in which an attachment was issued, where the petition shows that one of the notes was secured by an assignment of corporation stock as collateral security, and the affidavit for attachment falsely states that the notes have not been secured by any mortgage or lien on real or personal property, or any pledge on personal property, the attachment will be dissolved.

3. The defect in the affidavit is not cured by an amendment to the petition stating the fact that such note was secured by the assignment of stock as collateral, that the collateral was sold in accordance with the contract, and the proceeds credited on the note, and that a balance stated remains due and unpaid thereon.

Commissioners' decision. Department I. Appeal from superior court, city and county of San Francisco; Eugene R. Garber, Judge.

Action by Asa Fisk against J. B. French on four notes, in which an attachment issued and levied. From an order discharging the attachment, plaintiff appeals. Affirmed.

P. L. Benjamin and Daniel Titus, for appellant. Knight & Heggerty, for respondent.

VANOLIEF, C. Appeal from an order discharging an attachment in an action on four promissory notes,—the first for \$30, dated December 5, 1891; the second for \$40, dated March 25, 1892; the third for \$100, dated April 12, 1892; and the fourth for \$238.58, dated November 17, 1892,—the first and last two drawing compound interest at the rate of 3 per cent. per month, and the second like interest at the rate of 2½ per cent. per month. Neither the substance nor legal effect of any one of the notes was stated in the body of the complaint, but a copy of each note was attached to the complaint, and therein referred to as an exhibit. Immediately under the note of November 18, 1892; for \$238.58, was written an assignment by defendant to plaintiff of 100 shares of Belcher mining stock, "as collateral security for the payment" of the last-mentioned note, and an authorization of plaintiff to sell the stock at public or private sale, with or without notice, in case of default in payment of principal or interest of that note, and to apply the net proceeds of the sale to the payment of the last-mentioned note, and the surplus, if any, to the payment of any other obligations of defendant to plaintiff which might be held by the latter at the time of such sale.

The following is a copy of the affidavit for attachment: "State of California, City and County of San Francisco—ss.: Asa Fisk, being duly sworn, says: That he is the plaintiff in the above-entitled action; that the defendant, J. B. French, in the said action, is

indebted to the plaintiff in the sum of three hundred and seventy-six and $\frac{22}{100}$ dollars, gold coin of the United States, over and above all legal set-offs and counterclaims, upon an express contract, for the direct payment of money, to wit, four promissory notes, and that such contracts were made and are payable in this state, and that the payment of the same has not been secured by any mortgage or lien upon real or personal property, or any pledge upon personal property. That the said attachment is not sought, and the said action is not prosecuted, to hinder, delay, or defraud any creditor or creditors of the said defendant, Asa Fisk." After the writ of attachment had been issued and levied, defendant moved, on the complaint, affidavit for attachment, and other papers on file, to discharge the attachment, upon the ground that the affidavit upon which the attachment was issued is false in the statement therein that the payment of the notes had not been secured by any mortgage, lien, or pledge upon personal property; and is otherwise insufficient in that it does not state that the collateral security appearing on the face of the complaint had become valueless without any act of the plaintiff, nor even allude to that security. When the motion to discharge the attachment came on to be heard, the plaintiff, by leave of the court, amended the fourth count of his complaint (founded on the note dated November 17, 1892) by substituting for the second paragraph thereof the following: "(2) That plaintiff has ever since been, and now is, the owner and holder of the said note. That to secure the payment of the said sum of \$238.58, and the interest thereon, according to the terms of said promissory note, the said defendant did, on the 17th day of November, 1892, assign and transfer to said plaintiff one hundred shares of the capital stock of the Belcher Mining Company, with full power and authority in said plaintiff to sell the stock at any time after the note became due, without notice to said defendant, at public or private sale, at plaintiff's option, and to apply the net proceeds of the said sale of said stock to the payment of the said principal sum and the interest thereon, according to the terms of the note. That after the said principal sum and interest became due, and on, to wit, the 17th day of February, 1893, the said plaintiff, under the said authority and power, sold the said capital stock so pledged to him as aforesaid by said defendant, and realized from the said sale the sum of \$74 net; and the said plaintiff applied the sum of \$74 in payment of the interest then due, amounting to \$14.62, and the balance thereof, amounting to \$59.38, on said principal. That the interest has been paid on the said note to February 17, 1893, and the sum of \$59.38 has been paid on account of the principal of the said note, and that no other payments have been made on the said note, and the sum of \$179.20 of the principal of said note, together with the interest thereon from the 17th day

of February, 1893, is now due, owing, and unpaid by defendant to plaintiff." I think the court did not err in discharging the attachment. The amendment of the complaint did not supply or cure the defects in the affidavit for the attachment; but, on the contrary, incontestably proved that it was false in the material statement that the payment of the notes had not been secured by any mortgage, lien, or pledge upon personal property, and that it was fatally deficient, in that it failed to state that the security had become valueless. What the statute requires to be stated in the affidavit must be stated, and truly stated, in the affidavit; and, if not stated in the affidavit, the attachment should be dissolved, even though the requisite facts, omitted in the affidavit, are alleged in the complaint. Complaints on contracts for the direct payment of money generally and necessarily state nearly all the facts required to be stated in an affidavit for attachment in actions on such contracts; yet the statement of such facts in the complaint alone does not satisfy the requirement of the statute that they must be expressly and directly stated in the affidavit for an attachment. The case of Hathaway v. Davis, 33 Cal. 168, has no bearing on the question under consideration. In that case there was no pretense that the affidavit was defective in any respect.

If the views above expressed are correct, it is unnecessary to consider the other questions argued by counsel. I think the order should be affirmed.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order is affirmed.

BURRIS v. LANDERS et al. (S. F. 48.)¹
(Supreme Court of California. Sept. 18, 1896.)

TRIAL—FINDINGS BY COURT—RESPONSIVENESS TO ISSUE—PAROL GIFTS OF LAND—ENFORCEMENT IN EQUITY—PROMISE TO MAKE GIFT—WHEN ENFORCED.

1. A complaint which alleges that defendant's intestate, in his lifetime, made a parol gift "in relation and in respect to" certain land, whereby "he promised and agreed," if plaintiff would go into possession, to make a deed on demand; that plaintiff subsequently took possession, and made valuable improvements; and that intestate died without making a conveyance, etc.,—does not plead an attempted gift, defective in form, which equity will perfect, but alleges merely a promise to make a gift, the execution of which was never attempted by the donor; and a finding that intestate made a gift to plaintiff is without the issues.

2. A parol gift of real estate in presenti will be enforced in equity against the donor or his representatives, if the donee enters into possession, and makes valuable and permanent improvements.

3. One who enters into possession of land in reliance on the owner's verbal promise to give him a deed on demand, and makes permanent improvements, exceeding the rental value of the premises, may enforce such promise, in eq-

uity, against the promisor or his legal representatives.

Department 2. Appeal from superior court, city and county of San Francisco; J. M. Seawell, Judge.

Action by Butler Burris against Amy Landers and another, administrators of the estate of Michael Landers, to enforce a verbal promise by defendant's intestate to convey real estate. From a judgment for plaintiff, defendants appeal. Reversed.

J. W. Carter and Adams & Adams, for appellants. Andrew Thorne, for respondent.

HENSHAW, J. The appeal is from the judgment, taken within 60 days after its rendition. The evidence is brought up for review by a bill of exceptions. The action was brought by plaintiff against Amy Landers as administratrix, and William J. Landers as administrator, of the estate of Michael Landers, deceased. The complaint charged that Michael Landers was upon the 16th day of April, 1883, the owner of a certain piece of land,—a lot with 25 feet frontage by 90 feet in depth, situated upon Shotwell street, in the city and county of San Francisco, upon which had been erected a dwelling house. It then averred "that in consideration of long-continued, faithful services of plaintiff to said Michael Landers, on said 16th day of April, 1883, and in his lifetime, the said Michael Landers made a parol gift in relation and in respect to said lot of land and the improvements thereon, whereby the said Landers promised and agreed to and with this plaintiff that if he (this plaintiff) would go into the possession and occupancy of said land and premises, hereinafter described, he (the said Landers) would at any time thereafter, upon demand, when so requested, make a good and sufficient deed to this plaintiff of the legal title thereto; that on said day, and subsequent to said agreement, and previous to the death of said Landers, this plaintiff, with the knowledge, consent, and concurrence of said Landers, took possession of said lot and premises, and made lasting and valuable improvements thereon, paid the state, city, and county taxes thereon, and all charges for street improvements; that said Michael Landers died as aforesaid on the 20th day of October, 1886, seized of the legal title to said lot of land, without having made a conveyance thereof to this plaintiff." A decree was sought compelling the representatives of Landers, deceased, to execute a conveyance to plaintiff of the property in question.

It is claimed that the action is one in which the aid of a court of equity may be invoked to compel due execution of a parol gift of land, but the complaint does not sufficiently state a cause of action for this purpose. It does not aver a gift of the land, but "a gift in relation and in respect to said lot of land, whereby the said Landers promised and agreed to make a good and sufficient deed to

plaintiff upon demand." Under the complaint, which must govern plaintiff's right of recovery, a case is not pleaded of an attempted gift, defective in form, which, to prevent injustice upon the donee, equity will perfect. It is an effort simply to enforce a promise to make a gift, the execution of which was never attempted to be completed by deceased in his lifetime. The cases are numerous, and the rule may be considered well settled that where a parol gift of real estate is made in present, and the donee has entered under the gift, and has made permanent and valuable improvements upon the realty, and the circumstances are such that it would be an injustice upon the donee if he were thereafter to be deprived of the property by reason of imperfections in the gift, equity will treat the acts of the donor, together with the acts of the donee, as being such performance of the gift as will relieve the contract from the operation of the statute of frauds, and it will, under such circumstances, lend its assistance to the perfection of the donee's title. *Thornt. Gifts*, par. 372 et seq. That, however, is not the case here pleaded, and the finding of the trial court that upon the 16th day of April, 1883, Landers made a gift of the property to Burris, is without the issues.

Plaintiff's contention, under his pleadings, is that he entered with the knowledge and approval of Landers, and under Landers' promise that he would thereafter, upon demand, make him a deed, and that, relying upon that promise, he made lasting and valuable improvements upon the property. His claim, as deduced from his complaint, is that because of the change in his situation, brought about by the promise of Landers, it would be an injustice, amounting to a fraud upon him, if Landers or his representatives were not compelled to make good the promise. This, it will be noted, is a different action from one to compel the perfection of a gift presently but incompletely made. That equity will, however, even in such cases, and to prevent wrong, enforce the performance of such a promise, is recognized by the authorities. If a donor, by promises, induces the donee to change his position to his detriment, after the change is made the donor can be compelled to make his promise good. The relation between them then becomes one of contract. *Thornt. Gifts*, par. 337. In *Anderson v. Scott*, 94 Mo. 637, 8 S. W. 236, the court had under consideration a promise very like the one at bar, and stated the rule as follows: "Where the donee has accepted the promise, entered into possession of the land, made improvements on the faith of the promise, and thus changed his condition, the donor will be required to make good his gift. Such a state of facts will take the case out of the statute of frauds." But, to give the plaintiff the benefit of this rule, the expenditures must have been made upon the faith of the promise, and must be in the nature of lasting benefits and improvements to the

land, tending to enhance its value over and above the value of the use of the property to the plaintiff. *Wack v. Sorber*, 2 Whart. 392. Slight and temporary improvements, or trivial outlays, made to suit the taste or convenience of the occupant, do not raise an equity in favor of the donee (Pom. Spec. Perf. §§ 128-131; *Poorman v. Kilgore*, 26 Pa. St. 365); for, if the value of the expenditures made by the occupant does not exceed the benefit to him of the use of the land without charge or rental, then, generally, and in the absence of other circumstances of hardship shown, he not only will not have been injured, but will in fact have been advantaged, by the promises made. It is shown by the evidence that the rental value of this property is \$30 a month; that there was erected upon it, at the time that plaintiff entered into possession of it, a substantial dwelling house; that the plaintiff has had free use and occupation of the premises for the period of four years. The court found that lasting and permanent and valuable improvements had been made by the donee upon the property. It appears that the house was in process of construction at the time when Landers told the plaintiff that he might occupy it, and that in anticipation of his occupancy, and for his convenience, plaintiff made some changes in the arrangement of the house, costing about \$300. During his occupancy, plaintiff expended about \$100 for painting the house, \$45 for a mantel, and about \$150 for papering, decorating, and carpets. These latter improvements would amount to \$295, or less than a year's rent. In addition, the court finds that the plaintiff expended \$473 for taxes and street improvements; and, allowing interest upon that amount, the total expended for such purposes is \$584, or less than two years' rent. The evidence, then, in support of the findings, shows that the total expenditure of the plaintiff did not equal the rental value of the property during the time of his occupancy, and that the so-called permanent improvements were rather expenditures made to suit the convenience and taste of the occupant, and were not such as the law requires, or of a character to enhance the value of the realty. The judgment is reversed, and the cause remanded for a new trial.

We concur: McFARLAND, J.; TEMPLE, J.

KROHN v. LAMBETH. (S. F. 25.)
(Supreme Court of California. Sept. 18, 1896.)
VENDOR AND PURCHASER—WHO IS PURCHASER—
UNDISCLOSED PRINCIPAL.

Defendant agreed to furnish to a broker a certain amount of money, to be used in the purchase of a mine, which was to be conveyed to a corporation to be formed, in which defendant was to have a certain share of the stock; the money advanced to be repaid him from the profits. The broker purchased the mine in accordance with the agreement, making a cash payment thereon, which was furnished by defendant, and executing his own note for a de-

ferred payment, defendant not being known in the transaction with the seller. *Held*, that the broker, and not defendant, was the purchaser, and that defendant could not be held liable on the note, as an undisclosed principal.

Department 2. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by John Krohn against Milton Lambeth. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Reversed.

Naphtaly, Friedenrich & Ackerman, for appellant. Geo. A. Rankin, for respondent.

PER CURIAM. This action was brought by the plaintiff to recover from the defendant the sum of \$800, the balance of the purchase price of certain mines, said sum being the amount of a promissory note executed to the plaintiff by one J. Murray Bailey in his own name; it being alleged by plaintiff that, in making said purchase and executing said note, Bailey in fact acted as agent for the defendant, though plaintiff then, and for a long time thereafter, supposed and believed that he was acting in his own behalf. The jury returned a verdict for the plaintiff, upon which judgment was entered; and this appeal is from the judgment, and from an order denying defendant's motion for a new trial.

The only point made by appellant for reversal is that the verdict is not sustained by the evidence. Plaintiff was the owner of certain mines, and had given a bond to Holcombe & Beale to sell and convey said mines to them, at a price therein named, for the purpose of enabling them to sell the property. Bailey was a broker engaged in buying and selling mines, and Holcombe & Beale called his attention to the property, and exhibited to him specimens of the ore, which he had tested and found valuable. Lambeth, the defendant, was a mining man of considerable means; and Bailey, who was without means, and unable to purchase on his own account, called the attention of Lambeth to the property, and showed him the samples of the ore. Bailey testified that he proposed to Lambeth that when the property was secured he would form a corporation, and would give Lambeth the control "if he would put up the money and purchase the mine, provided he approved of it when he examined it"; that Lambeth said he would let him know, and the next day informed him that he was "ready to go in that mine." The understanding in relation to the interest each was to have in the stock of the corporation was that Lambeth should have 110,000 shares out of the 200,000 which was to represent the capital of the corporation, and Bailey was to have 90,000, out of which he was to provide for Holcombe & Beale, who held a bond on the mines. On June 11, 1891, Lambeth, Holcombe, and Bailey visited the mines, and spent two days

in examining them, and Lambeth said (as Bailey testified): "Bailey, I will put up \$12,000 for this property. That is all the money I have loose, and I will put up no more. I will give \$5,000 for the title, and the remaining \$7,000 shall go to repairing the mill, and for the development of the property." The price named in the bond held by Holcombe & Beale was \$22,500, and Bailey agreed to give them 40,000 shares out of his 50,000, they to permit the purchase to be made direct from the owner. Lambeth desired Bailey to put the proposition that he would give but \$5,000 for the title in writing, when Bailey suggested that that was "a big come-down from \$22,500, and that he might not be able to get it for that." Mr. Krohn, the owner, had not been seen at that time. Lambeth then said: "I will go as high as two thousand or three thousand dollars more than five thousand dollars cash, if you have to do it to get the property; but if you have to pay more than \$5,000 cash, and go as high as two thousand or three thousand dollars more, you take it on a long-time note, of two or three years." Bailey then wrote, and Lambeth signed, the following: "Waterloo Mine, June 13, 1891. To J. Murray Bailey—Dear Sir: I will advance \$12,000,—\$5,000 to pay for the property, and \$7,000 to be expended in repairing the mill and opening of mine. All money advanced by me to draw ten per cent. per annum until paid out of the profits of the mine, either by working or sale of mine. The property to be incorporated; capital stock, 200,000 shares; I to receive 110,000 shares. In regard to negotiating with Mr. Krohn, you can go as high as \$3,000 over the \$5,000 cash, if you have to do it as a last resort, but should get two or three years' time. [Signed] M. Lambeth." Lambeth then proposed to return to the city of San Francisco, where both he and Bailey resided. Bailey felt doubtful about getting the property for \$5,000, and suggested to Lambeth that he had better go and try it; but Lambeth replied that as he was known to be a man of wealth the parties would jump it upon him, or something to that effect, and at once returned to the city. Krohn lived some five miles from the mines, and had not been seen. Bailey then gave Holcombe a written agreement to give him, for himself and Beale, 40,000 shares of the stock, when issued, for their interest under the bond, and they gave written authority to Krohn to deal with Bailey regardless of the bond. Bailey then visited the plaintiff, who asked \$10,000, but finally agreed to take \$6,000,—\$5,000 in cash and a note for \$500, payable in 15 months and 15 days, without interest. Bailey executed the note, and plaintiff executed a deed for the property to Bailey, as grantee, and these instruments were placed in escrow. Bailey did not disclose Lambeth's connection with these transactions, nor did plaintiff know that

any one save Bailey himself was interested as purchaser. Upon Bailey's return to the city, Lambeth was fully informed of the transaction, and made no objection thereto. He deposited \$12,000 to the credit of Bailey, out of which Bailey paid \$5,200 to the bank, which held the deed and Bailey's note in escrow; and the bank delivered the cash and the note to the plaintiff, and the deed to Bailey. Bailey went to the mine, and took personal charge thereof. The corporation was formed, and the stock issued and distributed according to the arrangement hereinbefore stated. Bailey testified that he executed said note in his own name because he had no authority to sign Lambeth's name, and because of Lambeth's suggestion that if he were known in the transaction the price might be raised.

The verdict was returned and the judgment entered upon the theory that the evidence showed that Lambeth was an undisclosed principal in the purchase of the mine, acting through his agent, Bailey. We are of the opinion that no such interpretation can reasonably be put upon the evidence. Lambeth was not the purchaser of the property. Lambeth was not to receive from Bailey a deed to the property, or to any part thereof. Bailey was a "promoter," desirous of securing the ownership and control of the mine. He was without financial means to do so himself. He interested Lambeth in the proposition, and agreed with Lambeth that, if he (Lambeth) would advance to him (Bailey) money wherewith Bailey might purchase the mine, Bailey in turn would organize a corporation, convey certain shares of stock to others for their interest in the property, would retain a certain amount for himself, and would make over to Lambeth 110,000 shares. The money which Lambeth advanced, or in effect lent, to Bailey, was not even to be repaid in the form of stock. He was, under his agreement, still entitled to a return of every dollar of it out of a designated fund,—the profits of the mine. If Lambeth had said to Bailey that he would advance him \$12,000 for the indicated purposes, without taking any interest in the corporation, and that Bailey was to repay this money out of the profits of the mine, it would not be contended for an instant that Lambeth was any more an undisclosed principal than would have been any other person from whom Bailey might have secured the desired loan. But the circumstance that Lambeth is to receive shares of stock in the corporation to be formed does not alter his position under the agreement. Bailey is still the principal in the transaction with plaintiff. It devolved upon Bailey to purchase the property, not for Lambeth, but as a part of his agreement to secure the mine, organize the corporation, and convey to it the property. Lambeth's promises of money enabled him to do what otherwise he would have been

unable to accomplish. For Lambeth's failure to make good those promises Bailey might have had his cause of action against Lambeth, but as between plaintiff and Lambeth there was no privity. Bailey was not alone acting as principal, but in fact was the principal. The judgment and order are reversed, and the cause remanded.

KELLOGG v. KING et al. (Sac. 224.)

(Supreme Court of California. Sept. 26, 1896.)

TRESPASS—EQUITABLE RELIEF—TITLE OF PLAINTIFF—LEASE—PARTIES—RIGHTS IN WILD ANIMALS—JUDGMENT ON APPEAL.

1. That one may have relief for trespass, it is enough to show bona fide possession of the premises, under claim and color of title.

2. A lease of certain premises, the lessors reserving the right to pasture the same, and the right of way over every part thereof; the lessee covenanting not to disturb such reserved rights; and the lessors covenanting that the lessee, paying the rent and performing such covenants, shall peaceably hold and enjoy the premises for the sole purpose of hunting game thereon; the lessee covenanting that the number of persons who may be authorized by him to hunt on the premises shall not exceed 40,—gives exclusive rights in the premises as a hunting preserve.

3. Injunction will lie to prevent trespassing on a game preserve, whereby not only is game killed, but game is frightened away and deterred from returning, the remedy at law being inadequate.

4. The prevention of a multiplicity of suits is ground for injunction in case of repeated trespasses by a large number of persons.

5. A lessee, who, under the lease, is a trustee of an express trust, may maintain suit to enjoin trespass without joining with him the beneficiaries.

6. Under Civ. Code, § 656, declaring that "animals wild by nature are the subject of ownership while living only when on the land of the person claiming them," one has rights in wild birds within his game preserve, entitling him to protect them from trespassers.

7. The supreme court, on reversing a judgment on appeal, cannot order a judgment for the other party without a new trial, where the findings of fact will not support such a judgment, though such findings are not supported by the evidence.

Department 1. Appeal from superior court, Solano county; A. J. Buckles, Judge.

Action by Charles W. Kellogg, as trustee of the Cordella Shooting Club, against William King and others. Judgment for defendants. Plaintiff appeals. Reversed.

Young & Powers and Coghlan & Harvey, for appellant. L. G. Harrier and John M. Gregory, for respondents.

VAN FLEET, J. This is an action for an injunction to restrain the defendants (some 40 in number) from threatened acts of trespass upon plaintiff's premises, by entering thereon and destroying his game preserve, by shooting, killing, and driving away the wild game thereon. The evidence (which was quite full, and wholly without complaint) tends to show, substantially as alleged in the complaint: That plaintiff, as trustee of the Cordella Shoot-

ing Club, an association of sportsmen, of which plaintiff is the president and executive officer, rents, under a written lease, at a yearly rental of \$1,200, a large body of unreclaimed swamp and overflowed land in Solano county, for the purposes of a game preserve. That, under his lease, plaintiff has taken and now holds possession of said land, and has completely inclosed, by means of a substantial, barb-wire fence, and natural boundaries, consisting of wide and deep sloughs, the greater part of said land, some 3,000 acres in extent. That within such inclosure are numerous ponds, sloughs, and lagoons, and wide reaches of overflowed tule lands, which afford inviting and favorite feeding grounds for wild game fowl, such as ducks, geese, rail, and snipe, and where, more particularly during the months intervening the 1st of September and the 1st of March, those species of game birds are in the habit of returning annually, and congregating in great numbers, and thereby affording valuable and very desirable hunting privileges. That, within such inclosure, plaintiff has placed arks and other buildings and structures suitable and necessary to a complete and convenient shooting resort, for the use and enjoyment of the members of said club, and employs keepers to look after and protect the said premises, and for the further purpose of preserving said premises to the use and enjoyment of said club, and to warn all others than members thereof from invading and encroaching upon said preserves. Plaintiff, soon after taking possession of said premises, did, in September, 1894, have posted and set up, and has since maintained, throughout said inclosure, in and about the ponds, sloughs, and other bird resorts therein, between 400 and 500 notices stating that said premises were inclosed, and warning all persons from trespassing thereon, either for shooting or other purposes. That such notices are in large type, and so conspicuously and numerous distributed over said inclosure as to necessarily arrest the attention of any person intruding thereon. That these defendants, in pursuance of a concerted design and common purpose entered into by them to interfere with and defeat plaintiff's rights and those of said club in said premises, and to prevent their exclusive enjoyment thereof, did, during the months of September, October, and November, 1894, and during plaintiff's possession of said premises, on divers and numerous occasions, and in various numbers, invade and intrude upon said inclosure, both by day and by night, and shot, killed, and carried away large numbers of said game birds, and largely frightened away and dispersed such birds as they did not kill, shot into and broke down plaintiff's said notices, and threatened and intimidated his employes in charge of said preserve, and otherwise violated plaintiff's rights in various ways. That, while upon said premises, each of the defendants, in addition to the warning in said posted notices, was personally served with a notice in writing, sign-

ed by plaintiff as lessee, stating that said premises were leased and inclosed by him, and warning said defendants to trespass no further thereon, but to remove therefrom; but such notice and warning were entirely ignored by defendants and each of them, and a number of said defendants returned repeatedly to said premises after such warning. That the defendants threaten to continue and repeat their said acts of trespass, and to enter upon said premises and hunt and kill such game birds whenever they so desire, regardless of plaintiff's rights therein. That the effect of constant and indiscriminate shooting at said birds, such as is practiced and persisted in by the defendants, is and has been largely to frighten said birds, and permanently drive them from said resort, and deter and prevent their return thereto, and thereby to wholly destroy the value of plaintiff's said premises as a game resort and preserve, and work irreparable injury thereto, which cannot be compensated in money damages. That owing to the great number of defendants, and their constant, continuous, and repeated acts of trespass, the law furnishes plaintiff no adequate protection through its ordinary processes, and he is compelled to resort to equity for relief. Despite this showing, the learned judge of the superior court, in substantial effect, found all the material facts against the plaintiff, and denied him any relief. From the judgment, and an order denying him a new trial, plaintiff appeals, contending that the findings are wholly without support in the evidence.

The respondents, however, notwithstanding the uncontradicted character of the evidence, urge that the judgment is right, and assign various reasons why it should not be disturbed. It is claimed by them that the evidence is insufficient to show ownership or title in the leased premises in plaintiff's lessors, and the finding is in accord with this claim. Aside from the fact that we think there is sufficient evidence in the record to establish prima facie ownership in the lessors, the fact is not essential to plaintiff's recovery. Title in fee is not necessary to a recovery for trespass, and, although title may be alleged, it is not required to be shown, where, as here, the evidence shows bona fide possession of the invaded premises under claim and color of right. Possession is itself evidence of title. *Winans v. Christy*, 4 Cal. 70; *Castro v. Gill*, 5 Cal. 40. And a party may rely upon his possession, as against a mere trespasser. *Fitzgerald v. Urton*, Id. 308; *McCarron v. O'Connell*, 7 Cal. 152; *Mining Co. v. Fremont*, Id. 317; *Taylor v. Woodward*, 10 Cal. 91; *Welmer v. Lowery*, 11 Cal. 104.

It is also claimed by respondents that the evidence justifies the further finding that plaintiff acquired no exclusive right to the possession of the leased premises under his lease, that the only right granted thereunder was the privilege of hunting thereon, and this not an exclusive one. This claim, like

the finding which upholds it, is not only directly against the evidence, but is evidently based upon a total misconstruction of the lease in question. By that instrument the owners of the land "lease and demise unto said party of the second part, his heirs and assigns, all that certain tract of swamp and overflowed land situate," etc., "for the term of four years from the 22d day of July, 1893, at the yearly rent or sum of twelve hundred dollars." The lease provides that "the parties of the first part hereby reserve to themselves, their heirs and assigns, the right to pasture said lands, and the right of way over and upon said lands, and every part thereof, and the party of the second part covenants not to in any way disturb such rights reserved as aforesaid, and the said parties of the first part covenant that the said party of the second part, paying the said yearly rent and performing the covenants aforesaid, shall and may peaceably and quietly hold and enjoy the said demised premises for the term aforesaid, for the sole purpose of hunting game thereon; and the party of the second part hereby covenants, promises, and agrees that the total number of persons who may be directly or indirectly authorized by him to hunt over and upon said premises shall at no time during the term of such lease exceed forty." The party of the second part is described as "Charles W. Kellogg, of San Francisco, California, as trustee for the Cordelia Shooting Club, of that city." While admitting that, if plaintiff had the exclusive right of possession, he would be the "owner," for the purpose of prohibiting others from hunting on his land, respondents argue that no such right is given, because the lessors reserve to themselves the right of pasturage, and also restrict the number of persons plaintiff can admit to the hunting privileges; that by the reservation of the right of pasturage the lessors reserved to themselves "the right to open the grounds to the world," and, in restricting the number of hunters plaintiff can admit, "they reserved all hunting privileges, over what forty men can do," to themselves. Manifestly, the paper is open to no such construction. The reservation of the pasturage in no way affects or militates against the exclusiveness of plaintiff's rights in the premises as a hunting preserve, which the lease clearly contemplates; and the reservation of the number who shall be permitted to hunt obviously has in view the preservation of the premises as a resort for wild game, and that its value in that respect may not be entirely destroyed during the lease by the admission of an unlimited number of hunters. There is nothing in the language to indicate an intention to reserve to the lessors any part of the hunting privileges during the term. Even if such were the terms of the lease, however, none of the defendants attempt to show that they held any privilege or license from the owners to hunt thereon.

It is further contended that the evidence does not make a case entitling plaintiff to an injunction, for the reasons that it does not appear that any irreparable injury has been or will be worked by the acts or threatened acts of the defendants, and that it does not appear that plaintiff has not an adequate remedy at law, nor that defendants are unable to respond in damages. The mere fact that one has a right of action at law will not prevent his right to equitable relief by way of injunction against a threatened trespass, if, under the circumstances, the legal remedy would fail of affording adequate relief against the impending wrong. It is well settled that the remedy by injunction may be invoked to restrain acts or threatened acts of trespass in any instance where such acts are or may be an irreparable damage to the particular species of property involved. And in such case the question of the solvency or insolvency of the wrongdoer is an immaterial factor. It is the nature of the injury, and not the incapacity of the party to respond in damages, which determines the right. Where the effect of the act complained of is, or may be, to largely impair or destroy the substance of the estate, by taking from it something which cannot be replaced, it may be enjoined, irrespective of the ability of the defendant to respond in damages. These principles are upheld in the leading case of *Mining Co. v. Fremont*, 7 Cal. 317, following the modern English doctrine first announced by Lord Thurlow in *Flamang's Case*, cited in *Mitchell v. Dors*, 6 Ves. 147. Originally the right to restrain by injunction mere acts of trespass seems to have been confined to instances where the injury was to the freehold, in the nature of waste, such as the taking of wood or timber, extracting the precious metals or other valuable minerals, and the like. But this limitation of the right appears to have been departed from in the later cases, and as stated by Mr. High: "The jurisdiction may now, however, be regarded as well established, although it is still sparingly exercised, being confined to cases where, from the peculiar nature of the property affected by the trespass, or from its frequent repetition, the injury sustained cannot be remedied by an action for damages, and where it may therefore be properly termed irreparable. The foundation of the jurisdiction rests in the probability of irreparable injury, the inadequacy of pecuniary compensation, and the prevention of a multitude of suits; and, where facts are not shown to bring the case within these conditions, the relief will be refused. Equity will not, therefore, enjoin a mere trespass to realty, as such, in the absence of any element of irreparable injury. But where, owing to the peculiar character of the property in question, the trespass complained of cannot be adequately compensated in damages, and the remedy at law is plainly inadequate, equity may properly interfere by injunction." 1 High, Inj. § 697. And Mr. Story, after stating the same fact as to the original lines of the jurisdiction,

says: "It may be remarked, in conclusion, upon the subject of special injunctions, that courts of equity constantly decline to lay down any rule which shall limit their power and discretion as to the particular cases in which such injunctions shall be granted or withheld. And there is wisdom in this course, for it is impossible to foresee all the exigencies of society which may require their aid and assistance to protect rights and redress wrongs. The jurisdiction of these courts, thus operating by way of special injunction, is manifestly indispensable for the purpose of social justice in a great variety of cases, and therefore should be upheld by a steady confidence." Story, Eq. Jur. §§ 863, 929, 948, 856b. And see, also, *Poughkeepsie Gas Co. v. Citizens' Gas Co.*, 89 N. Y. 493. If these principles are applicable to this case,—and we perceive no good reason why they are not,—the objection under consideration is not tenable. The property right which is here the subject of injury is of a peculiar and exceptional character. The sole value of the invaded premises to the plaintiff is as a game preserve, by reason of its features as a resort for wild game. This feature of the property, the evidence shows, is being taken from it, and its value largely, if not wholly, destroyed by the acts of defendants. And it requires little if any argument to show that the injury thus committed is, and will be, irreparable, as being beyond any method of pecuniary estimation. As suggested by counsel, it is not so much the value of the birds killed which constitutes the injury to plaintiff. That could be estimated in dollars and cents. But it is the destruction of the hunting privilege, by driving away the birds and deterring their return,—a thing which, once accomplished, cannot be restored, and which constitutes an injury that cannot be estimated in money damages. It seems to us that this showing, if true, makes out a case of irreparable damage from the destruction of the very substance of the property right which plaintiff holds under his lease. But there is, moreover, another ground upon which, under the evidence, plaintiff should be entitled to the equitable remedy sought,—the avoidance of a multiplicity of actions. It is quite manifest that no adequate relief could be had at law by a plaintiff in such a case as is here disclosed, without the bringing of separate action against each individual defendant. "The necessity of preventing a multiplicity of suits," says Mr. High, "affords another exception to the rule, and will warrant the interposition of the strong arm of equity, even though there be a remedy at law." High, Inj. § 700. And again, says that author, "So a trespass of a continuing nature, whose constant recurrence renders the remedy at law inadequate, unless by a multiplicity of suits, affords sufficient ground for relief by injunction." Id. § 697.

The further objection that plaintiff had not capacity to bring the action is untenable. Under his lease, plaintiff is a trustee of an express trust, and, as such, entitled to sue

without joining with him those for whose benefit the action is prosecuted. Code Civ. Proc. § 369; *Tyler v. Houghton*, 25 Cal. 27.

The remaining points made in support of the judgment are without merit, and need not be specially noticed. The conclusions of the court below would seem to proceed upon the theory that there is no such thing as an exclusive private ownership or proprietorship in wild game, beyond such as may be acquired by reducing it to actual possession by killing or capture, and that for this purpose it may be pursued and taken wherever it may be found. This view of the law is incorrect. The wild game of the state, it is true, belongs to the people in their sovereign capacity, and is not subject to private dominion to any greater extent than the people, through the legislature, may see fit to make it. *Ex parte Maler*, 103 Cal. 476, 37 Pac. 402. But the legislature has seen fit to prescribe the limit where public proprietorship ends, and that of the individual commences; and, when within the provisions of such statute, an individual is as much to be protected in the enjoyment of his rights in this species of property as in any other under the law. Section 656 of the Civil Code provides that "animals wild by nature are the subject of ownership while living only when on the land of the person claiming them, or when tamed or taken and held in the possession, or disabled and immediately pursued." While these wild birds, therefore, are within the plaintiff's inclosure, he has, under this statute, such rights in them as entitle him to protect them from invasion by those not authorized to be there, and any person violating such rights is as much a trespasser as though entering unbidden the plaintiff's dwelling. We think, upon the evidence standing uncontradicted, the plaintiff made a case entitling him to the relief asked; and, as the findings are against such evidence, they cannot stand.

Plaintiff asks us, in the event the judgment is reversed, to order a judgment in his favor, without the necessity of a new trial. This we are not at liberty to do. This court has no power to make findings of fact, that being the exclusive province of the trial court. Since the findings here are against the plaintiff, a judgment we should order in his favor would be exactly in the position of the present judgment,—unsupported by the findings. It is only where the findings made by the lower court are such as to support a judgment for the appellant that this court, in reversing a judgment erroneously entered thereon, has jurisdiction to order a proper judgment to be entered. In the present case, therefore, there must be a new trial. Judgment and order reversed, and cause remanded for a new trial.

We concur: HARRISON, J.; GAROUTTE, J.

POTTKAMP v. BUSS et al. (S. F. 183.)¹
(Supreme Court of California. Sept. 28, 1896.)
AMENDING PLEADING—EFFECT OF PRIOR JUDGMENT ON APPEAL—DEMURRER—QUESTIONS TO WITNESS.

1. Where the supreme court held it error to refuse permission to plaintiff to file his amended complaint, and remanded the cause "for a new trial, with leave to the parties to amend the pleadings," plaintiff may, after the remittitur goes down, file, without leave of the trial court, an amended complaint other than the one offered on the first trial.

2. The point that it cannot be ascertained how the cause of action in an amended complaint is connected with the cause of action stated in the original complaint is not reached by demurrer to the amended complaint on the ground that it is "ambiguous, unintelligible, and uncertain"; it not appearing in the amended complaint what was alleged in the original.

3. The issue being whether an instrument, in terms an absolute conveyance, was accepted as such, as contended by plaintiff, or as security, as contended by defendant, a question asked plaintiff, "State what you believed that document to be at the time it was delivered to you," will not be held to ask an opinion as to its legal effect.

4. Where one has testified on cross-examination as to the time when, and the circumstances under which, he signed an instrument, a further question on cross-examination, "Do you swear that you signed that instrument as a witness?" calls for a conclusion of law based on the facts stated by him.

Department 1. Appeal from superior court, city and county of San Francisco; James M. Troutt, Judge.

Action by Adolph Pottkamp against John G. Buss and others. Judgment for plaintiff, and defendants appeal. Affirmed.

F. J. Castelhun and H. C. Firebaugh, for appellants. A. B. Hunt and A. D. Lemon, for respondent.

PER CURIAM. This action was commenced June 16, 1888, and defendants answered and filed a cross complaint, upon which issue was also taken. During the trial, plaintiff asked and obtained leave to file an amended complaint; but when it was prepared the court refused to permit it to be filed, upon the ground that it did not conform to the proofs. Judgment went against the plaintiff, and his motion for a new trial was denied. On December 8, 1892, this court reversed the judgment and order upon the ground that the court below erred in refusing to permit the plaintiff to file his amended complaint, and remanded the cause "for a new trial, with leave to the parties to amend their pleadings." 31 Pac. 1121. On February 21, 1893, the plaintiff, without motion therefor, or leave given by the court below, filed an amended complaint, and defendants moved to strike it from the files. That motion was denied, and defendants excepted.

Appellants contend that an application to amend is never general, but always specific, and, as plaintiff did not file the amended

¹ For opinion on rehearing, see 46 Pac. 673.

complaint which he had asked leave to file during the first trial, that he had no right to file a different amended complaint without leave of the court below. The leave given in this court was not special, to file a particular complaint, but the order was general, permitting both parties to amend. It is admitted that the remittitur had gone down. It thereupon became a record in the lower court, and had at least all the force of an order made by that court. Code Civ. Proc. §§ 53, 958. The motion was properly denied.

2. Defendants demurred to said amended complaint, and contended that the court erred in overruling their demurrer. Eleven grounds of demurrer were specified. Of these, the first was for want of sufficient facts; the second, third, fourth, and fifth presented grounds only available upon motion to strike from the files, or to require different causes of action to be separately stated; the sixth, that said amended complaint "is ambiguous, unintelligible, and uncertain"; and the remaining five specified sections of the Code under which the cause of action was alleged to be barred by the statute of limitations. The purposes of the action, as disclosed by said amended complaint, were to reform a deed executed by defendant Buss to the plaintiff; to quiet plaintiff's title under the same, as against the defendants; to require defendants to account for rents received by them from the premises after plaintiff's exclusion therefrom; and for general relief. The complaint covers 12 printed pages of the transcript, and is somewhat difficult of satisfactory condensation. It shows, in substance, that on March 31, 1887, the plaintiff was, and for a long time had been, in the employ of defendant Buss, as foreman of his bakery; that Buss was then in financial difficulties; that prior to that time the plaintiff had loaned him considerable sums of money, and, with a loan made at that date, he was indebted to the plaintiff in the sum of \$2,500; that Buss proposed to convey to plaintiff a lot at the southeast corner of Dolores and Seventeenth streets (subject to a prior mortgage thereon), together with certain personal property; that plaintiff, desiring to have said indebtedness fully paid and satisfied, agreed to accept said conveyance; that Buss then prepared and executed an instrument, of which the following is a copy: "John G. Buss to Adolph Pottkamp. Know all men by these presents, that I, John G. Buss, of the city and county of San Francisco, for and in consideration of \$2,500, the receipt whereof is hereby acknowledged, do hereby sell, convey, and transfer to Adolph Pottkamp that certain store, and all the stock therein, and the bakery attached thereto, and the tools and fixtures of said bakery, situate at the southeast corner of Seventeenth and Dolores streets, in the city and county of San Francisco, state

of California; also eight horses, three wagons, and one buggy, with the harness belonging to all and each of said wagons and buggy. In witness whereof, I have hereunto set my hand and seal this 31st day of March, 1887. [L. S.] John G. Buss. Witness: John Kelly." The complaint further alleged that said instrument was duly acknowledged on June 30, 1887, and recorded July 1, 1887; that said instrument was delivered to plaintiff on the day of its date, with the statement, "Here is the deed to this lot and premises, and to this storehouse and bakery," and, after pointing out said personal property, defendant Buss said: "All this property is yours. Now take possession of it." It was further alleged that, during all the time plaintiff had been in defendant's employ, the most friendly and confidential relations existed between them; that plaintiff, believing, trusting, and relying upon defendant's representations as true, accepted said instrument, without reading or examining the same, or having it read to him, as a good and sufficient deed to said premises, took possession of said premises and of the personal property, and held possession of the same until July 8, 1887, when the defendants Buss, Ludeman, and Pfeiffer, with intent to cheat and defraud him out of his money and out of his said premises, without right, and by force, put the plaintiff out, and by force entered, and unlawfully, and against his will, withheld said premises from his possession; that on July 2d Buss filed a declaration of homestead on said premises, and on July 8th filed a voluntary petition in insolvency and was adjudged an insolvent debtor; that on August 11, 1887, Buss executed a lease of said premises to defendant Pfeiffer for the term of five years, and on the same day assigned said lease to defendant Ludeman, and on August 31, 1888, conveyed said premises to Ludeman, and that Pfeiffer and Ludeman took with knowledge of the rights and interests of plaintiff, and that any claim made by them, or either of them, is subject and subordinate to the title of plaintiff; and that defendants have received in rents from said premises \$5,000.

Most, if not all, these acts of defendant Buss, and also of his confederates, are alleged to have been done with intent to defraud the plaintiff, and tend to some confusion and obscurity in the statement of plaintiff's cause of action, but that a cause of action is stated we have no doubt. It is true, defendants demur also upon the ground that the complaint is "ambiguous, unintelligible, and uncertain," and thereunder specify three particulars. The first is that it cannot be ascertained how the cause of action in the amended complaint is connected with the cause of action stated in the original complaint. It does not appear in the amended complaint what was alleged in the original, and this point was therefore not reached by

demurrer. The second specification is not well taken. It is argued that it is not charged, nor attempted to be charged, that Pfeiffer and Ludeman are "in any way responsible for the error, if there was any error, in the writing sought to be reformed," and that it is not attempted to be shown how the error therein ought to affect them. But it does clearly appear that their interests were acquired after the recording of the alleged conveyance to the plaintiff, and therefore with notice of whatever right or title he had thereunder; and this remark also answers appellants' third specification under this ground of demurrer. When the pleader alleges facts which in law constitute notice, it is equivalent to an allegation that the parties affected had notice. As to the demurrers alleging the bar of the statutes of limitation, the original complaint was to quiet title, and alleged that Pfeiffer and Ludeman claimed an interest, that it was without right, etc., but did not seek the recovery of rents and profits. The lease to Pfeiffer was made August 11, 1887, and Ludeman received the rents thereunder from that date. The last amended complaint was filed February 20, 1893, and therefore within five years from the date of the lease, and was not barred. See Code Civ. Proc. § 336, subd. 2.

3. Plaintiff, while testifying in his own behalf, was asked by his counsel: "State what you believed that document [referring to the instrument set out in the complaint] to be, at the time it was delivered to you." Defendants' objection was overruled. The defendants claimed that the instrument in question was a bill of sale given as security. The plaintiff claimed that it was a deed of conveyance, and the question was not, as counsel seem to think, what plaintiff "thought it was," or his opinion as to its legal effect, but what he believed it to be when he accepted it; in other words, whether he believed it to be what defendant Buss represented it to be. It was held upon the former appeal that the language of the instrument "clearly expresses the intention to convey the building in which the goods were stored, and the attachment thereto in which the business of baking was carried on"; and the question in issue upon the second trial was not whether its language expressed an intention to convey the real estate, but whether it was accepted as such, or whether it was accepted or believed to be merely a bill of sale of the personal property as security. We see no error in the ruling. Plaintiff's witness Leon was asked upon cross-examination, "Do you swear that you signed that instrument as a witness?" The objection that it was not cross-examination was properly sustained. He had not been interrogated in chief on that subject, and besides he had testified upon cross-examination as to the time when, and the circumstances under which, he had signed it, and

under these circumstances the question called for a conclusion of law based upon the facts stated by the witness.

It is insisted that the court erred in denying defendants' motion for a nonsuit. Twenty-nine grounds were specified as the basis of the motion. We cannot consider these in detail, and can only say that the ruling was right. Such motions are not determined by a consideration of the weight of the evidence, further than is necessary to ascertain whether it would justify a finding upon each material issue essential to the plaintiff's case if the defendants should fail or refuse to introduce any evidence.

Most of the findings of the court are excepted to on the ground that they are not justified by the evidence. To notice all of these specifications in detail would require more space than can be devoted to this opinion. The evidence upon most points is conflicting, but it may be said, generally, that there is evidence sufficient to justify all of the findings upon the material issues involved in the case, namely, the indebtedness of Buss to the plaintiff, the execution and delivery of the instrument under which the plaintiff claims, and the fact that it was intended and accepted as a conveyance of the real as well as the personal property, and not merely as a security, and that Pfeiffer and Ludeman took their interests with notice of the plaintiff's title. The conveyance from Buss to the plaintiff was recorded July 1, 1887, and on the next day Buss placed of record a declaration of homestead on the premises, and on the 8th of July filed his petition in insolvency, in which proceedings on the 20th of July the premises were set apart to him as a homestead. On August 11th he made a lease of the premises to Pfeiffer for five years, and on the same day assigned the lease to Ludeman, and on August 31, 1888, conveyed the premises to Ludeman. In view of all the evidence in the case, the court was authorized to find that these conveyances were made for the purpose of enabling Buss to defraud the plaintiff; and the finding that Pfeiffer and Ludeman took their conveyances with knowledge of the rights of the plaintiff, and that the conveyance to Ludeman was without any consideration, rendered the title of the plaintiff superior to their claim. There is no evidence in the record that there was any consideration for these conveyances, and the allegation in the complaint that the defendants have received the rents therefor is not denied, the denial being merely of the amount received during a portion of the time. The judgment is limited to the amount which was proved to have been received.

Portions of the sixth and other findings are criticised. They are inartificially drawn, and the portions objected to are findings of probative facts which do not overcome or affect the findings of ultimate facts upon which the judgment is correctly based,—as, for example, whether confidential relations existed between

the parties, whether plaintiff was in possession, whether certain things were done with intent to defraud and deceive, and whether Buss continued the business as before until he went into insolvency. These are probative facts, tending to establish ultimate facts, but do not control the findings upon such ultimate facts.

It is further contended by appellant Ludeman that he should have been allowed a further credit against the rents collected by him from the property in question, amounting to \$819.50. The parties stipulated as to the amount of the rents with which he should be charged, and the credits which should be allowed him, except as to said sum, which was claimed to have been interest paid by him on money which he borrowed for the benefit and use of Buss in 1883. The amount so borrowed was \$3,600, to enable Buss to build upon the lot in question, which Buss then held under a lease for five years, and which he assigned to Ludeman as security. About a year later Buss purchased the lot, and, at the time he was adjudged an insolvent, had reduced Ludeman's claim to \$2,869.95; and this sum was presented by Ludeman as an unsecured claim against said insolvent, which was due to him upon the loan which he had made from the Franklin Savings & Building Association. Said sum of \$819.50 was made up of monthly installments of interest paid by Ludeman to the bank after the insolvency of Buss had been adjudged. It was a portion of Buss' indebtedness to Ludeman under the transaction had in 1883, for which Ludeman had taken the lease from Bertz as security. But it does not appear to have had any other relation to the premises in question, and there is nothing in the record showing that it was a claim against this property. The affidavit of Ludeman, when he presented his claim therefor against the estate of Buss in insolvency, that he held no security for its payment, authorized the court to disallow it as a credit as the amount of rents received. The judgment and order appealed from are affirmed.

Ex parte ANEAR. (Cr. 218.)

(Supreme Court of California. Sept. 24, 1896.)

GAME LAWS—VIOLATION—JURISDICTION OF JUSTICE OF THE PEACE.

Criminal jurisdiction of a justice of the peace being limited to cases where the punishment by imprisonment cannot exceed six months, nor the fine \$500, he has not jurisdiction of a violation of the game laws, which Pen. Code, § 636, declares a misdemeanor, punishable by a fine of not less than \$100, or by imprisonment for not less than 100 days, or by both such fine and imprisonment.

Application by Edward Anear for discharge on habeas corpus. Granted.

O. R. Coghlan, for petitioner. F. R. Devlin, for respondent.

GAROUTTE, J. The prisoner asks to be discharged from custody upon habeas corpus. He was prosecuted and convicted before a justice of the peace of Montezuma township, Solano county, for violating certain provisions of the fish and game law of this state, found in section 636 of the Penal Code, as amended. St. 1895, p. 262. The statute declares a violation of any of the various provisions of that section to be a misdemeanor, and further declares that any person found guilty of a violation of any of its provisions shall be fined in a sum not less than \$100, or be imprisoned in a county jail in the county in which the conviction shall be had not less than 100 days, or be punished by both such fine and imprisonment. The minimum punishment only being prescribed by the section, the justice's court had no jurisdiction to try a defendant charged with a violation of its provisions. The jurisdiction of a justice's court is limited to those cases where the punishment by imprisonment cannot exceed six months, nor the fine exceed \$500. This case does not come within that class, for the punishment administered in cases prosecuted under this section may be much greater. The district attorney invokes the aid of section 19 of the Penal Code, but it is clear he gets no relief there. That section, by its terms, is only applicable to cases where no different punishment is prescribed, and here a different punishment is prescribed. For the foregoing reasons, the prisoner is discharged.

In re WHARTON. (Cr. 147.)

(Supreme Court of California. Sept. 23, 1896.)

ATTORNEYS—DISBARMENT.

It is no objection to a disbarment proceeding by the court under Code Civ. Proc. § 287, that the matter charged as violation of professional obligations constitutes a felony, and that he has not yet been tried by a criminal court.

In bank. Appeal from superior court, Sacramento county; A. P. Catlin, Judge.

Disbarment proceedings against Z. F. Wharton. His license was revoked, and he appeals. Affirmed.

J. H. Leggett, W. H. Layson, and E. C. Hart, for appellant. S. Solon Holl, W. P. Harlow, and Clinton L. White, for respondent.

GAROUTTE, J. This appellant, an attorney at law, was charged by accusation before the superior court of the county of Sacramento with violating his obligations as an attorney; and after issue joined, upon a hearing, he was found guilty of the charges filed against him, and his license as a practicing attorney revoked. An appeal to this court being accorded by section 287 of the Code of Civil Procedure, the matter is now here for consideration.

The main charges against Wharton, as indicated by the accusation, may be briefly and substantially stated as follows: "(1) As attorney for plaintiff in the divorce action of *Hoxie vs. Hoxie*, commenced in the superior court of the county of Sacramento, Wharton, in violation of his oath and duty as an attorney, and to mislead the court, exhibited to the court, and filed, as genuine, a false and fraudulent affidavit of service of summons, to which the name of one Peter Stortz was attached; that the defendant Hoxie had not been a resident of Sacramento county for more than two years, and was not in the county, and personal service of the summons could not be made on him in that county, and his whereabouts was unknown, all of which was well known to said Wharton. In fact, the summons was never served on Hoxie, either by personal service or by publication, nor did he ever appear in the action. Wharton obtained Stortz' signature by leading the latter to believe he was signing a receipt, and then, upon the false affidavit, procured the default of Hoxie to be entered, induced the court to accept the affidavit as genuine, had the case tried, and a decree rendered in favor of plaintiff, purporting to dissolve the marriage between plaintiff and defendant. (2) The accusation further shows that, in 1895, Wharton, acting as his own attorney, filed in court a complaint in which he, as plaintiff, sought a decree of divorce from his wife, Hattie Wharton. He returned the summons in this case with a false and fraudulent affidavit of service attached to it, also signed by Peter Stortz, the latter being led to believe by Wharton that he was signing his name as a witness to a will. Upon this fraudulent affidavit, Wharton caused the default of his wife to be entered in the action, the same as if she had been served with the summons and had failed to appear within the time allowed by law. He also induced the court to accept the fraudulent affidavit as genuine, and he called the case for trial the same as if the defendant in the case had been regularly served with summons and copy of the complaint, and had made default." The trial court found both of these charges made out by the evidence beyond a reasonable doubt; and that these acts of the accused are in law amply sufficient to demand his discontinuance of the practice of the law there is no doubt.

The accused has brought the evidence of the trial here in bulk, and, after a careful perusal of it, we are entirely satisfied that the findings of the court are fully supported therein. The general reputation of the accused, and also that of the principal witness against him, were largely involved in the investigation. Again, the evidence upon various branches of the case was contradictory; and for this reason, as to the facts, the case was pre-eminently one for the trial judge, whose conclusions we would not readily disturb.

It is further insisted that the accusation filed against the accused contains a charge

amounting to a felony, and that recourse should first be had to the criminal courts for a trial of that charge, before this proceeding could be inaugurated. There is nothing in this contention. For a full consideration of this identical question, we refer to *Ex parte Tyler*, 107 Cal. 78, 40 Pac. 33. Neither is the accused entitled to a trial by jury. The statute (Code Civ. Proc. § 297) provides for a trial by the court, and the constitutionality of that section is beyond question.

There are a few other matters urged by the appellant why this judgment should be reversed; but, after careful consideration, we consider them of minor importance, and wholly insufficient as grounds for a retrial of the cause. Judgment affirmed.

We concur: HARRISON, J.; HENSHAW, J.; McFARLAND, J.; TEMPLE, J.

ORANGE COUNTY v. LOS ANGELES COUNTY. (No. 19,492.)

(Supreme Court of California. Sept. 28, 1896.)

DIVISION OF COUNTIES—ADJUSTMENT OF ASSETS—AWARD OF COMMISSIONERS—EFFECT—AUTHORITY OF COURT TO CORRECT MISTAKE.

1. Act March 11, 1889, creating O. county out of a part of L. county, provides that certain commissioners shall ascertain and adjust the respective liabilities of the two counties. *Held*, that the commissioners are charged by such statute with the performance of quasi judicial duties, and an award by them is not a bar to a future action for a demand, not actually submitted to nor adjudicated by them, though it was in existence when the submission was made, and though the agreement was to submit all demands.

2. Act March 11, 1889, creating O. county out of a part of L. county, provides that the commissioners shall ascertain and adjudge the indebtedness between the two counties. *Held*, that where such commissioners by mistake, and because they did not know of the existence of a certain asset consisting of an indebtedness due L. county from the state, omitted to take it into consideration in adjusting the assets and indebtedness of such counties, the court had no authority to adjust the matter, but it must be done by the legislature.

Commissioners' decision. Department 1. Appeal from superior court, Ventura county; B. T. Williams, Judge.

Action by the county of Orange against the county of Los Angeles to recover from defendant a certain sum alleged to be due plaintiff as its proportion of a sum received from the state as repayment of money expended by Los Angeles county in providing for the support of aged persons in indigent circumstances between June 30, 1883, and March 11, 1889, prior to the formation of Orange county out of a part of Los Angeles county. From a judgment in favor of defendant after plaintiff's refusal to amend the complaint on a demurrer being sustained thereto, plaintiff appeals. Affirmed.

James G. Scarborough, for appellant. H. C. Dillon, for respondent.

BELCHER, C. This is an action to recover from the defendant the sum of \$1,903.70, alleged to be the plaintiff's proportion of \$19,032.43 received from the state of California as repayment of money expended by Los Angeles county in providing for the support of aged persons in indigent circumstances between the 30th day of June, 1883, and the 11th day of March, 1889. A general demurrer to the complaint was interposed and sustained, and, plaintiff declining to amend, judgment went for defendant, from which the plaintiff appeals.

The facts alleged in the complaint are, in substance, as follows: Orange county was created out of territory which had constituted a part of Los Angeles county, under the provisions of an act of the legislature approved March 11, 1889. After its organization was completed, commissioners were appointed, as required by the act, to ascertain and adjust the respective liabilities of the two counties. On June 9, 1890, the commissioners made a detailed report of the facts ascertained by them, showing, among other things, that the amount due from Orange county to Los Angeles county, on March 11, 1889, was \$15,581. This amount was, however, by a supplemental report reduced by deducting therefrom \$1,500, and the balance so found to be due was thereafter paid by plaintiff to defendant. In March, 1892, the defendant received from the state of California the sum of \$19,032.43 as aid granted by the state, and as repayment of money expended by defendant in providing for the support of aged persons in indigent circumstances for the period of time from the 30th day of June, 1883, to the 11th day of March, 1889. The money so received by defendant was not included in the division of the assets between the plaintiff and defendant by the said commissioners, and it is alleged, on information and belief, that the claim against the state for such money was not known to exist by either of the parties to the action or by the said commissioners at the time said division of assets was made. Under the provisions of said act, and under the proportion established by said commissioners, plaintiff is entitled to a little more than one-tenth of said money as its share and proportion thereof, amounting to \$1,903.70, for which sum defendant is indebted to plaintiff as for money had and received, with interest thereon. On the 25th of April, 1892, plaintiff presented to the board of supervisors of defendant and filed its claim, duly verified and itemized, for the sum of money last named, and the same was disallowed by said board in December following, and no part thereof has ever been paid to plaintiff, but the whole thereof with interest remains due and unpaid.

By section 7 of the act to create Orange county it is provided that: "They [the commissioners] shall ascertain the total amount

of indebtedness of Los Angeles county existing at the time this act takes effect, and also the total value of all assets of said county, including real estate, buildings and bridges erected or in progress of erection, money and solvent credits of whatever nature, and any other property belonging to the said county of Los Angeles. They shall also ascertain the assessed value of all property in Los Angeles county under the assessment made in 1888, and also the assessed value of the property under the same assessment assessed in the territory hereby set apart to form Orange county. They shall then find the balance of the total assets and indebtedness of Los Angeles county, and, if there is a balance of indebtedness against said county, the same shall be divided between the two counties according to the following proportion: * * * Said commissioners shall then certify forthwith to the respective boards of supervisors of said counties of Orange and Los Angeles such amounts of the said indebtedness due from Orange county, together with the ascertained value of all bridges and other property estimated and reckoned among the assets of Los Angeles county, as aforesaid, erected or purchased by county funds, and situate in Orange county, which property shall be charged to the new county, and the amount thereof shall be an indebtedness to Los Angeles county, and shall thereupon become the property of said Orange county. In case said commissioners shall find a balance of assets of Los Angeles county over and above its liabilities, they shall belong to Orange county by the proportion aforesaid, and shall certify the same to the said boards of supervisors, together with the value of the bridges and other property as aforesaid; and if the amount of said balance of assets belonging to Orange county is less than the value of said property, then the difference between the two amounts shall be assumed and paid by Orange county to Los Angeles county; but if said amount is greater than the value of said property, then Los Angeles county shall pay the difference between the two amounts to said Orange county." In this state the legislature has power to change the boundaries of counties, to consolidate two or more counties into one, and to create a new county out of the territory of one or more previously existing counties, subject only to the limitations expressed in article 11 of section 3 of the constitution. And, as said in *Los Angeles Co. v. Orange Co.*, 97 Cal. 331, 32 Pac. 316: "It has been established by an unvarying line of decisions that, upon the creation of a new county out of the territory of another, the legislature, in the absence of constitutional restrictions, may make such provision with reference to the public property and debts, or their division, as to it may seem just; and that, in the absence of any provision in reference there-

to, the old county will be entitled to retain all public property and assets, except such public buildings and structures as lie within the territory of the new, and will also be liable for all its prior obligations." Assuming, as we must, that the money, a portion of which is sought to be recovered in this action, was paid to the defendant as alleged in the complaint, the payment must have been made under and in pursuance of the provisions of an act of the legislature passed in 1883 (St. 1883, p. 380), and of section 22 of article 4 of the constitution. *San Francisco v. Dunn*, 69 Cal. 73, 10 Pac. 191; *Yolo Co. v. Dunn*, 77 Cal. 133, 19 Pac. 262. Clearly, then, the money collected in 1892 was due and collectible on March 11, 1889, and it constituted a part of the assets of defendant, which might have been taken into account and apportioned by the commissioners, thus reducing the indebtedness of defendant to the extent of its proportion thereof. It was not taken into account, it appears, because the existence of such a claim against the state was not known to the plaintiff or defendant, or to the commissioners at the time the division of assets was made.

The question, then, is, can the plaintiff resort to the courts, and maintain an action to recover its proportion of the overlooked claim, as money had and received to its use? It is contended for the respondent that the matters set up in the complaint are *res judicata*: that the commissioners, in making the division of assets between the counties, acted in a judicial capacity, and that their report had the force and effect of a judgment as to all matters which were or might have been considered and passed upon by them, and hence that the plaintiff is estopped from claiming the relief here sought. On the other hand, it is contended for the appellant that the commissioners were required to perform only ministerial duties, and that at most they acted only in a quasi judicial capacity, like arbitrators or referees, and their report was not conclusive or binding as to any matters not actually considered and passed upon by them. We think the commissioners were charged with the performance of quasi judicial duties which were substantially the same as those imposed upon arbitrators. Their report should, therefore, be treated as the award of arbitrators would be. What, then, was the effect of the report? In some of the states it has been held that, after a submission to arbitrators of all demands of the parties against each other, and an award thereon, the award is a conclusive bar to an action for any demand subsisting at the time of the submission and award, though the demand for which the action is brought was by mistake omitted to be laid before the arbitrators, or intentionally withheld, and was not considered or decided on by them. The preponderance of authority is, however, opposed to this view. "It is generally held that

an award will not operate as a bar to a future action for a demand which was not actually submitted to the arbitrators, nor adjudicated by them, notwithstanding it was in existence when the submission was made, and although the agreement was to submit all demands." 2 Black, *Judgm.* § 526, and cases cited.

But, conceding this to be so, still the question remains, can the courts interfere in a case like this? In *Commissioners v. Bunker*, 16 Kan. 498, it was said: "Where a county is divided, the rule for the division and apportionment of the debts and property between such county and detached territory belongs exclusively to the legislature, and not to the courts; and, when the legislature has determined how the debts and property shall be divided and apportioned, the courts cannot interfere." In creating the county of Orange, the legislature determined how the debts and property of Los Angeles county should be divided and apportioned, as it had full power to do. The act prescribed the limits of each county's rights and the methods by which they were to be ascertained. In performing their duties the commissioners doubtless intended to make the division as required; and, if they failed to do so, the failure arose through mistake. The mistake was one, however, which, in our opinion, can be corrected by legislative action only, and not by the courts. The courts are without authority to adjust matters of this character between counties. We conclude, therefore, that the demurrer to the complaint was properly sustained, and that the judgment should be affirmed.

I concur: SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

SACRAMENTO COUNTY v. COLGAN,
Controller. (Sac. 95.)

(Supreme Court of California. Sept. 16, 1896.)

REPEAL OF STATUTE—TAX COLLECTOR—COMPENSATION.

1. Act March 5, 1870 (St. 1869-70, p. 148), entitled "An act to regulate fees of officers and salaries of certain officers," etc., provided (section 13) that the tax collectors of the several counties should receive for the collection of state and county taxes, except taxes for school purposes, 6 per cent. on the first \$10,000 collected, 4 per cent. on all over that sum and less than \$20,000, and 2 per cent. on all over the latter amount. Act 1874 (St. 1873-74, p. 204), fixing the compensation of officers in Sacramento county, provided (section 9) that the tax collector of said county should have 1 per cent. on all state and county taxes collected by him, to be retained out of the moneys so collected; and section 18 declared that the act of 1870 (setting out its title), "so far as it relates to the county of Sacramento, and all acts and parts of acts in conflict with the provisions of this act, so far as they apply to the county of Sacramento, are hereby repealed." *Held*, that the act of

1874 repealed the earlier act, as to the commissions to be retained by the collector of Sacramento county.

2. Act 1874, § 9 (St. 1873-74, p. 204), provided that the tax collector of Sacramento county should retain out of all state and county taxes collected by him 1 per cent. of said amount. Act March 30, 1874 (St. 1873-74, p. 909), subsequently passed at the same legislative session, made the sheriff of Sacramento county ex officio tax collector, and fixed his salary as such at a stipulated sum per annum, "and five per cent. commissions upon all delinquent taxes by him collected, and the per cent. now allowed the tax collector for the collection of licenses, in full for all services rendered by him or his deputy as such collector." *Held*, that the effect of the last act was to entitle the county to receive, and retain to its own use, such commissions as the collector would otherwise have been entitled to take and use, had a salary not been substituted for fees, to wit, the 1 per cent. allowed by the first act.

3. Where a county officer, whose compensation is derived wholly or in part from fees collected by him, is placed upon a fixed salary, the fees formerly retained by such officer are still to be collected by him, but are to be paid over to the county treasury. *Smith v. Dunn*, 8 Pac. 625, 68 Cal. 54, applied.

Department 2. Appeal from superior court, Sacramento county; A. P. Catlin, Judge.

Petition by the county of Sacramento for a writ of mandate to E. P. Colgan, controller of the state of California. From a judgment denying the writ, petitioner appeals. Affirmed.

Albert M. Johnson and William M. Sims, for petitioner. Atty. Gen. Fitzgerald, for respondent.

HENSHAW, J. This is an action in mandate against the controller of the state, to compel him, in the next settlement to be made by him with the treasurer of the county of Sacramento, to allow the treasurer to retain, out of any moneys then in his hands and belonging to the state, the sum of \$32,660.10. This amount plaintiff claims to be due it as commissions for collecting state taxes for the years 1876 to 1892, inclusive. The claim was presented under a recent act of the legislature, entitled "An act authorizing the allowance, settlement and payment of claims of counties against the state," approved March 9, 1893 (St. 1893, p. 109). The trial court found against the claim of plaintiff, and from its judgment this appeal is taken.

In 1870 there was in force an act entitled "An act to regulate fees of office and salaries of certain officers, and to repeal certain other acts in relation thereto." St. 1869-70, p. 148. Section 1 of that act provided, "Fees and salaries are allowed to the officers hereinafter named, * * * and such officers may lawfully charge, demand and receive the same to their own use and benefit." Section 13 of the act provided that the tax collectors of the several counties shall receive for the collection of state and county taxes, except taxes for school purposes, 6 per cent. on the first \$10,000 collected, 4 per cent. on all over \$10,000 and under \$20,000, and 2 per cent. on all over \$20,000. In 1874 the legislature passed another act, en-

titled "An act to regulate the fees of offices and to fix the compensation of the county officers in the county of Sacramento." St. 1873-74, p. 204. Section 9 of this act provided that "the tax collector of said county is allowed one per cent. on all state and county taxes collected by him * * * which said percentage shall be retained by him out of the moneys so collected as aforesaid." Section 18 provided, "An act entitled 'An act to regulate fees of office and salaries of certain officers, and to repeal certain other acts in relation thereto,' approved March fifth, one thousand eight hundred and seventy, * * * so far as it relates to the county of Sacramento, and all acts and parts of acts in conflict with the provisions of this act, so far as they apply to the county of Sacramento, are hereby repealed." On March 30, 1874, the legislature passed still another act, entitled "An act in relation to the government of the county of Sacramento." St. 1873-74, p. 909. Under this act the sheriff was made ex officio tax collector, and by section 2 his salary as ex officio tax collector was fixed at "\$1,500 per annum and five per cent. commissions upon all delinquent taxes by him collected, and the per cent. now allowed the tax collector for the collection of licenses, in full for all services rendered by him or his deputies as such tax collector." In *Smith v. Dunn*, 68 Cal. 54, 8 Pac. 625, it was held that where a public officer, whose compensation had formerly been derived wholly or in part from fees by him collected, was placed upon a fixed salary, the fees formerly retained by the official are still to be collected by him, but are to be paid over into the treasury of the county. By the last legislative enactment above cited, the compensation of the tax collector was fixed, and that compensation was declared to be "in full for all services," whether rendered by him to the state or to the county. Nevertheless, that the state might bear its equitable portion of the expense of the collection of its own taxes, the county was still entitled to receive such commissions as had formerly been allowed by the state to the tax collector.

The sole question presented upon this appeal is whether, in the case of Sacramento county, and under the laws above set forth, that commission should be the 1 per cent. which the county has in the past demanded and collected from the state under the act of 1874; or should be the 6, 4, and 2 per cent. contemplated by the earlier act of 1870. The trial court held that the act of 1870 had been repealed by the later act of 1874. Of the soundness of its conclusion in this regard, we entertain no doubt. A reading of the two acts shows that, both in title and in contents, they deal with the same subject-matter. Under each act the tax collector was to be compensated for his services to the state by being allowed to retain a named percentage of the taxes by him collected. Both acts, then, deal with the compensation of the tax collector. The provisions fixing compensation under the later act are different from, and repugnant to, the provisions of the earlier one. The later

act, in express terms, is made applicable to the county of Sacramento; and, if this were not enough to show the legislative intent that the two acts should not and could not be construed together, there is an express provision in the act of 1874 calling direct attention to the act of 1870, by its title, and repealing it, so far as it applied to the county of Sacramento, or conflicted with the terms and provisions of the later act. Even if the act of March 30, 1874, be treated as an act in effect amendatory and supplemental to the earlier act passed at the same session of the legislature, the condition of affairs is not changed. The sheriff, as ex officio tax collector, is put upon a fixed salary. The county is entitled to receive and retain to its own use such commissions as the tax collector would otherwise have been entitled to take and use, had a salary not been substituted for fees. Those commissions or fees would still be the 1 per cent. allowed by the act of 1874. The judgment appealed from is affirmed.

We concur: McFARLAND, J.; TEMPLE, J.

ROSSI v. SUPERIOR COURT OF SAN JOAQUIN COUNTY. (Sac. 230.)

(Supreme Court of California. Sept. 26, 1896.)

APPEAL FROM JUSTICE'S COURT—ISSUES TRIABLE—EFFECT OF APPEAL—INTERVENTION.

1. In an action in justice's court to recover on a claim for labor assigned to plaintiff, defendant answered by a general denial, and a complaint in intervention was filed, in which the intervener, after denying the averments of the complaint, alleged that in another suit he had garnished the debt of defendant to plaintiff's assignor, and asked for judgment. Plaintiff's demurrer to this complaint was overruled, and the justice entered the default of the original parties for failure to answer in intervention, but denied intervener's motion for judgment on the default; and on the trial the issues were found for intervener, and judgment rendered in his favor against defendant, and in favor of defendant and against plaintiff for his costs, whereupon plaintiff appealed. *Held*, that plaintiff had a right to have the superior court pass on the sufficiency of his demurrer without any statement of the case, and also to have all the issues of fact presented below tried anew.

2. In taking such appeal, plaintiff properly served notice thereof on both defendant and intervener, who were "adverse parties," each of them having denied the allegations of the complaint.

3. The fact that intervener had garnished the claim in his suit against plaintiff's assignor would not of itself authorize him to defeat plaintiff's right of recovery against defendant, there being nothing to show that intervener had established his right against plaintiff's assignor, or recovered judgment in his action against him.

4. The effect of an appeal from a judgment of a justice's court is to vacate the judgment.

Department 1. Application by one Rossi, for a writ of prohibition to the superior court of San Joaquin county to restrain further proceedings in an action pending in said court. Writ denied.

J. B. Webster and Chas. Light, for petitioner. Woods & Levinsky, for respondent.

v.461.no.3—12

HARRISON, J. One G. Gianelli commenced an action in the justice's court against D. J. Hoult, to recover the sum of \$125 upon a claim for labor performed for the defendant by one Kass, and by him assigned to the plaintiff. Hoult answered the complaint, denying all its allegations. Before the trial of the action, the petitioner herein filed a complaint in intervention in the justice's court, in which he denied all the allegations in the complaint, and alleged that in another action, brought by him in the justice's court against Kass, he had attached the indebtedness of Hoult to Kass, and asked judgment that plaintiff take nothing by the action, but that judgment be rendered in his favor for such sum as might be found due from Hoult to Kass. A demurrer by the plaintiff to this complaint was overruled by the justice, and, before the day fixed for the trial, the justice entered the default of the plaintiff and defendant for failure to answer in intervention. The court denied a motion by the intervener for judgment upon this default, and, upon the trial of the issues, witnesses were examined and briefs filed on behalf of the intervener and the plaintiff, upon which the court found that the sum of \$105 was owing from Hoult to Kass at the time of the garnishment, and rendered judgment in favor of the petitioner herein against Hoult for this amount, and in favor of Hoult and against the plaintiff for his costs. The plaintiff thereupon appealed to the superior court from this judgment, and from the whole thereof, on questions of both law and fact, serving his notice of appeal upon both the defendant and the intervener. The superior court overruled the plaintiff's demurrer to the complaint in intervention, and plaintiff thereupon, under leave of the court, filed an answer thereto, in which he denied its several allegations. The court having set the case for trial, the present application has been made for a writ of prohibition, restraining it from all further proceedings in the action so far as it relates to the proceedings had by reason of the intervention of the petitioner.

Counsel on both sides have assumed the right of a justice's court to permit a complaint in intervention to be filed therein, and our conclusion herein has been reached without determining whether such right exists. See, however, Code Civ. Proc. § 925. "An intervention takes place when a third person is permitted to become a party to an action or proceeding between other persons, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendant in resisting the claims of the plaintiff, or by demanding anything adversely to both the plaintiff and the defendant." *Id.* § 387. In the present case the intervener denied all the allegations in the complaint, and thus "united with the defendant in resisting the claim of the plaintiff," and created issues between him and the plaintiff in addition to those between the defendant and the plain-

tiff which were tried in the justice's court. Although, after overruling the plaintiff's demurrer to the complaint in intervention, the justice entered his default for failing to answer the complaint, yet the demurrer itself shows that the plaintiff was not actually "in default"; and the intervenor himself, by his denial of all the allegations in the plaintiff's complaint, raised issues of fact between them which the justice was required to try; and that a trial of these issues was had appears from the recital in the justice's docket that the witnesses who were produced at the trial were examined by the counsel for the intervenor.

The plaintiff had the right to appeal from the judgment rendered by the justice, and, in taking the appeal, was required to serve his notice of appeal upon the "adverse party," which in the present case included the defendant and the intervenor, each of them having denied the allegations in his complaint. If it should be conceded that the filing by the plaintiff of an answer in the superior court to the complaint in intervention was unauthorized, yet upon his appeal plaintiff had the right not only to have the superior court pass upon the sufficiency of his demurrer to the complaint in intervention, without any statement of the case (*Southern Pac. R. Co. v. Superior Court*, 59 Cal. 471), but also to have all the issues of fact that had been presented in the justice's court tried anew in the superior court. The effect of the appeal was to vacate the judgment of the justice's court against the plaintiff (*Bullard v. McArdle*, 98 Cal. 355, 83 Pac. 193), and to require that all the issues of fact between him and the intervenor, as well as those between him and the defendant, be tried anew in the superior court; and, if, upon a trial of these issues, the superior court shall determine in favor of the plaintiff, it will be authorized to render a judgment in his favor against the defendant, notwithstanding the intervention of the plaintiff.

The complaint of the intervenor does not show that he has ever established his claim against Kass, or recovered judgment in his action against him; and, while Hoult might desire to protect himself against the effect of the garnishment in that action, such garnishment would not of itself authorize the intervenor to defeat the plaintiff's right of recovery against Hoult. The application for the writ is denied.

We concur: GAROUTTE, J.; VAN FLEET, J.

DUDLEY et al. v. BARNEY.

(Court of Appeals of Kansas, Northern Department, E. D. Sept. 16, 1896.)

NEW TRIAL—TIME FOR APPLICATION—APPEAL—PRESUMPTION—JUDICIAL NOTICE—TERMS OF COURT.

1. The application for a new trial must be made during the term at which the verdict was

rendered, and except for the one cause, "newly-discovered evidence," must be made within three days. In a case of newly-discovered evidence, if "unavoidably prevented" (Code Proc. § 308), it can be made after the expiration of the three days, but not beyond the term.

2. Where the record fails to show that the motion for new trial was filed during the term at which the verdict was rendered, it will be presumed, for the purpose of upholding the judgment of the court below and the ruling upon the motion, that it was not made in time, and was for that reason overruled.

3. This court cannot take notice of the length of terms of district courts.

(Syllabus by the Court.)

Error from district court, Shawnee county; John Guthrie, Judge.

Action between Gulford Dudley and another and Anne C. Barney. From a judgment for the latter, the former bring error. Affirmed.

W. P. Douthitt, for plaintiffs in error. G. C. Clemens, for defendant in error.

GILKESON, P. J. At the threshold of our examination we are met with an objection to a review of the errors alleged in this action, for the reason that "the record does not affirmatively show that the motion for a new trial was filed at the term the verdict was rendered, and for this reason it must be presumed that the motion was overruled because not filed in time." Paragraph 4403, Gen. St. 1889 (section 308, Code Proc.), provides: "The application for a new trial must be made at the term the verdict, report or decision is rendered, and except for the cause of newly-discovered evidence, material for the party applying, which he could not with reasonable diligence have discovered and produced at the trial, shall be within three days after the verdict or decision was rendered, unless unavoidably prevented." As we understand this section, the application for a new trial must be made during the term at which the verdict was rendered, and must, except for the one cause of "newly-discovered evidence," be made within three days. In case of newly-discovered evidence, if "unavoidably prevented," it can be made after the expiration of the three days, but not beyond the term. This seems to be in harmony with the decisions of the supreme court of this state construing this section (*Earls v. Earls*, 27 Kan. 538; *Mercer v. Ringier*, 40 Kan. 189, 19 Pac. 670; *Powers v. McCue*, 48 Kan. 477, 29 Pac. 686; *Glass Co. v. Bailey*, 51 Kan. 193, 32 Pac. 894); and it seems to be the construction the plaintiffs in error give to it. The record shows a verdict rendered November 8, 1890; motion for new trial filed November 11, 1890; and nothing further done until July 17, 1891. So, unless this court can take judicial notice of the duration of the September term, A. D. 1890, of the district court of Shawnee county, the record not showing that the motion was filed "during the term at which the verdict was rendered," it will be presumed, for the purpose of upholding the judgment of the court below and the ruling upon the motion for a new trial, that the mo-

tion was not made in time, and that, therefore, the court did not err in overruling it, and that all errors occurring during the trial were waived. *Hover v. Tenney*, 27 Kan. 133; *Lucas v. Sturr*, 21 Kan. 480. The plaintiffs in error conceded this, but invoke judicial knowledge and appellate presumption to aid the record. We think the rule is the other way: Judicial knowledge and appellate presumption are indulged only in aid of the ruling of the court below, not to overthrow it.

We agree with plaintiffs in error that this court will take judicial notice of the commencement of the terms of court, but we have been unable to find any authority to the effect that an appellate court will take judicial notice of the duration of the term of the court below; but, on the contrary, the authorities are the other way. The supreme court cannot take judicial notice of the length of a term of the court of common pleas (*Kent v. Bierce*, 6 Ohio, 336); and it is certainly well settled in this state that error is never presumed; it must always be shown, and, if not affirmatively shown, it will be presumed that none was committed. Aside from the objection made by the defendant in error, we have carefully examined the record in this case, under the assignments of error presented and urged, and fail to discover any reversible error therein. The judgment of the court below will therefore be affirmed. All the judges concurring.

HOME INS. CO. v. ATCHISON, T. & S. F. R. CO.

(Court of Appeals of Kansas, Northern Department, E. D. Sept. 9, 1896.)

RAILROADS—FIRE SET BY LOCOMOTIVE—ACCIDENT.

There is no liability on the part of a railroad company to pay to an insurance company the value of property which was destroyed by a fire set out by said railroad company, and which the insurance company was required to pay to the owner by virtue of a certain contract of insurance, when the fire is shown to have been accidental.

(Syllabus by the Court.)

Error from circuit court, Shawnee county; J. B. Johnson, Judge.

Action by the Home Insurance Company against the Atchison, Topeka & Santa Fé Railroad Company to recover damages for the destruction of property by a fire set by a locomotive. From a judgment for defendant, plaintiff brings error. Affirmed.

J. B. Larimer and E. F. Ware, for plaintiff in error. W. Littlefield and A. A. Hurd, for defendant in error.

CLARK, J. One David R. Clements was the owner of a dwelling house and other property located about 150 feet from the center of the railroad track of the Atchison, Topeka & Santa Fé Railroad, near the city of Burlingame, Osage county. On March 24, 1890, this property was destroyed by a

fire caused by the defendant in error in operating its railroad. The dwelling house and its contents were, at the time of the fire, insured in the Home Insurance Company of New York, in the sum of \$1,370. On April 4, 1890, a duly-authorized agent of the insurance company adjusted the loss, and in pursuance of a promise at that time made by the agent, that a draft for the amount of the policy would be sent him, Clements signed a receipt on the back of the policy, and therein acknowledged the payment to him of \$1,370 in full satisfaction of all claims against the company, and at the same time surrendered the policy to the agent. A draft for the stipulated amount was soon thereafter sent to Clements by the company, from its office in Chicago. On April 8, 1890, and prior to the actual payment of the loss by the insurance company, and without its knowledge or consent, Clements compromised and settled with the railroad company for the damages resulting from the fire, and received from it \$1,030 in full satisfaction of all demands against it. The insurance company, claiming that the fire was caused by the negligence of the railroad company, and that the latter was therefore primarily liable for payment of the damages sustained by Clements, brought this action against the defendant in error to recover the \$1,370 so paid by it. The jury returned special findings of fact, and a general verdict in favor of the defendant, and judgment was thereafter rendered in favor of the railroad company. The insurance company seeks a reversal of that judgment.

The record shows that the plaintiff challenged for cause two talesmen who had been summoned as jurors, upon the ground that they had been in the employ of the railroad company for several years. These challenges were overruled by the trial court, and this ruling, with others, is assigned for error. Neither of these parties was in the employ of the railroad company at the time the challenges were interposed, having been discharged from the service several months prior thereto, nor had either of them made application to the defendant for reinstatement, and the record fails to show that they were disqualified to sit as jurors at the trial of this action. Counsel for plaintiff in error complain that quite a number of the talesmen who were summoned as jurors had formerly been employed by the railroad company, or had relatives employed in it, and contend that, while the existence of such facts would not be sufficient ground upon which to base a challenge for cause, yet that, in the proper exercise of its discretion, the trial court should have excused such persons from sitting as jurors in an action in which the railroad company was a party. While this suggestion might have much force if presented to a trial court under ordinary circumstances, yet it should be borne in mind that the general offices of the de-

defendant in error, as well as its principal shops, were, and for many years prior thereto had been, located in the city of Topeka, Shawnee county, and that during all that period a very large number of persons had been employed by the defendant in said city, and that it would be an exceedingly difficult matter for an officer, without the exercise on his part of more than ordinary diligence, to summon 12 men in the city of Topeka, none of whom had ever been in the service of the railroad company, or had relatives, either by affinity or consanguinity, who had not been, or who were not then, employed by the defendant in error. The alleged negligence of the railroad company which resulted in the loss under the policy occurred in Osage county, yet the plaintiff in error, while evidently cognizant of the existing conditions, elected to commence this action in Shawnee county, and for this reason ought not to be heard to complain of the action of the trial court in permitting former employes of the railroad company to be called as witnesses. From an examination of the record, we are unable to discover anything upon which a question could reasonably be based that any attempt was made, either by the officers of the court, or by the defendant in error, to secure other than a fair and impartial jury to try this cause. It further appears from the record that one of the jurors had two sons working for the defendant at the time of the trial. The plaintiff challenged this juror for cause, but the court overruled the challenge, and this ruling is also assigned for error. But no exception appears to have been saved to this ruling of the court.

The particular allegation of negligence charged against the defendant, as set up in the petition, is that: "Upon the said day (March 24, 1890), between the hours of two and three o'clock in the afternoon, an engine belonging to the defendant, and engaged in pulling a passenger train going east, passed along the defendant's track, near the house of said Clements; and the said engine being improperly constructed, and its spark arrester being out of order, large quantities of sparks from the said engine were emitted, and they set fire to the said house of the said Clements, and the house was burned to the ground. The said engine is believed by plaintiff to have been No. 642, and the plaintiff alleges that if the said engine had been properly constructed, and in good and sufficient repair, the said sparks would not have been emitted, nor the said property burned. And the plaintiff alleges that it was by reason of the gross negligence of the defendant in the operation of its line of railroad that the engine was in said condition, and was in such condition as to emit sparks as aforesaid, and caused the damage alleged." Evidence was introduced by the defendant tending to disprove the allegation of the petition that the engine was faultily constructed, or that its spark

arrester was out of order; and the jury made, among others, the following special findings of fact:

"(10) Was the said property destroyed by fire originating from the operation of the defendant's railroad? Yes. (11) Was the burning caused by fire originating from the defendant's locomotive? Yes. (12) Was the said locomotive properly constructed, and in good and sufficient repair, so far as it relates to the emission of sparks or fire? Yes. (13) Did the locomotive emit burning sparks, in unusual and dangerous quantities, at the time and place of the fire? No." "(15) Was the railroad negligent as to the condition of its engine immediately preceding the said fire, and at the time thereof? No. (16) Did the fire originate from the improper construction of its engine, or from the faulty condition or want of repair of its engine? No." Complaint is made of the action of the court in eliminating from interrogatory No. 16 the inquiry as to whether the fire originated from the negligent operation of the railroad, but we see no error in limiting the inquiry to the particular negligence charged in the petition, which is that the engine was faultily constructed, and was not in good and sufficient repair. The plaintiff in error contends that there is no evidence to support the finding that the locomotive did not emit burning sparks in unusual or dangerous quantities at the time and place of the fire. The evidence is uncontradicted that property adjoining the defendant's right of way, near Burlingame, was frequently set on fire by sparks escaping from passing locomotive engines. The evidence was clear that the wind was blowing very hard at the time of the fire, one witness testifying that it was "a great gale." We cannot say that this particular finding of the jury is unsupported by the evidence. As the engine was found by the jury to be in good condition and in proper repair, it necessarily follows that under the allegations of the petition no recovery could be had for any loss resulting from the escape of fire from the engine, it being purely accidental. The testimony of the agent of the railroad company was that he was not satisfied that the fire originated from the engine, or that the company was liable; but, to avoid trouble, he compromised the claim, and paid Clements \$1,050 on account of his loss, that being but little more than one-third of the amount which the agent testified Clements demanded from the company. We do not think the fact that the railroad company compromised and settled what it believed to be a doubtful claim should be held conclusive as to its liability. It was not liable unless the fire resulted from its negligence. The special findings of the jury exonerated the railroad company from any liability. As, under the findings of fact and under the general verdict, no recovery could be had from the railroad company, many

of the questions argued by counsel for plaintiff in error need not be considered. The judgment will be affirmed. All the judges concurring.

WILMER v. BORER et al.

(Court of Appeals of Kansas, Northern Department, E. D. Sept. 9, 1896.)

PLEADING AND PROOF.

Where the testimony fails to establish the allegations of the petition, not only on some particular or particulars, but in its general scope and meaning, there is a failure of proof, and the plaintiff cannot recover.

(Syllabus by the Court.)

Error from district court, Douglas county; A. W. Benson, Judge.

Action by Theodore Wilmer against Joseph Borer, executor of Anton Feldhofe, deceased, and others, to set aside a will. From a judgment for defendants, plaintiff brings error. Affirmed.

A. G. Richards and D. S. Alford, for plaintiff in error. J. Q. A. Norton, for defendants in error.

GILKESON, P. J. The petition alleges in substance as follows: (1) That on August 10, 1890, one Anton Feldhofe departed this life in Douglas county, Kan., being at the date of his death the owner of certain real estate and personal property. That after his death there was presented to the probate court an instrument of writing, purporting to be the last will and testament of said Anton Feldhofe. That on the 12th day of August, 1890, said will was admitted to probate. That by said will the defendants Henry Gerlach, Eberhardt Feldhofe, Bernard Brinkman, Catherine Roper, and the Church of the Holy Family of Eudora, Douglas county, Kan., were named as legatees. That said Anton Feldhofe died an unmarried man, without issue, neither father nor mother surviving him, but that certain persons therein named, and made defendants, were his only relatives and sole heirs. That the deceased, at the date of the execution of said pretended will, was of unsound mind, was not of sound and disposing mind, was wholly unable to sign said will, or to know or comprehend the contents thereof. (2) That he never signed and executed said will, and did not, on the 4th day of August, 1890, or at any time, have the mental capacity to comprehend the contents of said instrument if read to him, he being unconscious most of the time. (3) That on said 4th day of August, 1890, he was wholly unable to remember the names of his brother's and sister's children, had forgotten and did not know that he had any blood relation or kin in the United States. (4) That the pretended will is not intelligible, is uncertain, and the devices and bequests therein are void. That said will is void for uncertainty. (5) That the plaintiff, on or about the 16th day of

October, 1882, was an unmarried man, living and residing in the province of Westphalia, in Germany, and that he is a son of a sister of said Anton Feldhofe, deceased. That his prospects in life at that time, if he had remained in Germany, were of the value of \$4,000, but would be wholly lost to him if he removed from Germany to the United States. That he, on or about the said last-mentioned date, received a letter from the deceased, asking him about his (deceased's) sister's children, and informing him that he (deceased) was then quite wealthy, alone in the world, and wanted some one of his sister's children to come to this country to reside with him, or near him. That several letters were exchanged between them, and that the said deceased agreed with the plaintiff that if the plaintiff would marry, and emigrate to the United States, and settle with, or near him, and help him as he should desire, and treat him as a person should under the circumstances, the deceased would make the plaintiff the sole heir to his property, both real and personal. That, relying on these promises and agreements, and pursuant thereto, he married in Germany, and emigrated to the United States and to Eudora, Kan., and commenced to labor for and improve the property of the said deceased, and to work for and turn over the proceeds thereof to the deceased, for nearly one year and a half. That during that time he cared for the deceased, administering to his wants and comforts, and performed all things requested of him by the deceased. That afterwards, and at the request of the deceased, plaintiff removed from the residence of the defendant, but continued to act and do as requested by deceased in and about the management of his property, home, and interest, and continued to do and perform all the duties and obligations of a son and child to the deceased up to the time of his death, and discharged all duties and requirements of deceased to the best of his knowledge and ability; and prays for judgment as follows: "Setting aside said pretended will, and that the plaintiff be decreed to be the sole owner of the property, real and personal, owned by the deceased at the time of his death, and for such other and further relief as may be deemed equitable and proper in the premises." Joseph Borer, the executor of said will, filed his answer, admitting the death of Anton Feldhofe at the time stated in the petition, his ownership of certain real and personal property, the presentation to and the admission to probate of an instrument purporting to be the last will and testament of Anton Feldhofe by said probate court on or about the time alleged in the petition, and that the parties mentioned in the petition were named in said will as legatees; denying each and every other allegation and averment in said petition contained, and further alleging that on the 12th day of August, 1890, he duly qualified as executor of the will and of the estate of Anton Feldhofe, deceased; that he has been and is now acting as the legally constituted execu-

tor of the will and estate of said deceased. No other pleadings were filed in this action. Upon the issues thus joined the case was tried to the court without a jury.

The will referred to is as follows:

"In the name of God, I, Anton Feldhofe, of the town of Eudora, in Douglas county, and state of Kansas, of the age of seventy-three years, and being of sound mind and memory, do make and publish and declare this my last will and testament in the manner following, that is to say: First. I give and bequeath to Catherine Roper, of Eudora, the sum of \$50.00. Second. I give and bequeath to the Church of the Holy Family of Eudora, Douglas county, Kansas, to be in the care of Rev. Henry Gerlach, the sum of \$100.00. Third. I give and bequeath to Henry Gerlach, for his own individual use, the sum of \$10.00. Fourth. I give and bequeath to Bernard Brinkman and Eberhardt Feldhofe, both of whom reside in Meelenbeck, near Münster, of the province of Westphalia, in Germany, the balance of my property, both real and personal, to be divided as follows: One half to Bernard Brinkman, to be divided equally with his cousins; and the other half to go to Eberhardt Feldhofe, and by him divided equally with his cousins. Fifth. I desire my debts, including the expenses of my last sickness, shall be paid before any division of the property be made. In witness whereof, I have hereunto caused my name to be attached this 4th day of August, 1890. Signature:

his
Anton X Feldhofe. Attest: H. H. Karr.
mark.

"The above instrument was, at the date thereof, signed, sealed, published and declared by said Anton Feldhofe as his last will and testament in the presence of, and in his presence, and subscribed by himself and the witnesses in the presence of each other. H. H. Karr. Peter A. Hartig."

On the margin is written the following: "Sixth. I hereby appoint Joseph Borer my executor."

After the introduction of the testimony on the part of the plaintiff the case was submitted to the court upon said testimony and pleadings. The court rendered judgment in favor of the defendant Borer, the executor, and against the plaintiff.

Like the defendants in error, from an examination of the petition in error, the pleadings in the case, and the brief of counsel for plaintiff in error, we are at a loss to know what the plaintiff relies on. We were led to believe, upon examination of the original petition, that this was an action to set aside the will of Anton Feldhofe on the ground of his unsoundness of mind at the time he executed the same, and to declare the same as void for uncertainty. Towards the close of said petition the plaintiff seems to ask for a specific performance of a contract, and that he be declared the sole heir of the deceased; but in

his brief he abandons all the grounds alleged in the petition, and claims that the principal error committed by the trial court was in refusing to allow his claim against the estate, but we have failed to see where, by the original petition, any claim is set up against the estate of Anton Feldhofe.

After a careful examination of this record, we have failed to find any reversible error. If any was committed it was in favor of the plaintiff below, and of this he cannot complain. We think there is a total failure of proof on the part of the plaintiff below to establish any material allegation contained in his petition. There is not a word or syllable of testimony as to the mental, or even physical, condition of the deceased at the time the will was made, and certainly none establishing any contract or agreement between the deceased and the plaintiff. If we consider the letters introduced in testimony as competent evidence, they do not establish a contract, but leave it entirely at the option of the plaintiff whether he comes or not, and his heirship clearly depended upon the treatment the deceased received at his hands. Take the strongest language that can be found in these letters, viz.: "If you want to come, you have to do your rights of the kid, and I am going to do the rights of a father. If you treat like my kid, you shall be my heir, but not before I am dead. I am not going to put off my clothes before I am going to bed." Again, "If you treat me, which you will have to do well, then I am going to treat right." These show what Feldhofe agreed to do provided plaintiff treated him well, and this could only be determined by association and acquaintance. Now, was this contract carried out? The testimony of Catherine Summers shows that Wilmer and his wife were not with Feldhofe during his last sickness, nor had they been at his house for six or seven years before he died, and that plaintiff went to Kansas City, and that before he went there he had moved away from Feldhofe's. That the defendant told her, just before his death, that "he did not like the plaintiff, Wilmer, and did not want to give him anything; said he did not do as he ought to, and went away. He promised to give him everything when he comes and stays with him, but after he come he did talk to him hardly,—he did not talk enough; and I told him to go; I did not want to have my old days like this; and he told him that at that time he would not give him anything, because he did not stay with him." But, should we adopt the theory of the plaintiff in error, that this is not an action to set aside the will, but a claim to the whole estate,—that is, to declare him the sole heir,—then he must fail in this action, for, to recover, he must establish the alleged contract. We think the judgment of the court is sustained by the evidence, and no error was committed by the trial court. The judgment will therefore be affirmed. All the judges concurring.

ATCHISON, T. & S. F. R. CO. v. PHELPS.

(Court of Appeals of Kansas, Northern Department, El. D. Sept. 9, 1896.)

TORTS—ELECTION OF REMEDIES—IMPLIED CONTRACT—SET-OFF—WHEN ALLOWED.

1. Where the plaintiff has a cause of action on a contract, he must state the contract, and cannot properly state his cause of action without stating the contract.

2. Whenever one person commits a wrong or tort against the estate of another, with the intention of benefiting his own estate, the law will, at the election of the party injured, imply or presume a contract on the part of the wrongdoer to pay to the party injured the full value of all benefits resulting to such wrongdoer; and, when the injured party elects to waive the tort, his cause of action may be used as a set-off. *Fanson v. Linsley*, 20 Kan. 235.

3. Where one person commits a wrong or tort against another, without any intention of benefiting his own estate, and his own estate is not thereby benefited, the law will not imply or presume a contract on the part of the wrongdoer to pay for resulting damages; and such cause of action cannot be used as a set-off. *Fanson v. Linsley*, supra.

(Syllabus by the Court.)

Error from district court, Johnson county; John T. Burris, Judge.

Action by John C. Phelps against the Atchison, Topeka & Santa Fé Railroad Company to recover damages for failure to transport cattle. From a judgment for plaintiff, defendant brings error. On motion to dismiss. Granted.

O. J. Wood and A. A. Hurd, for plaintiff in error. Parker & Hamilton, for defendant in error.

GILKESON, P. J. The plaintiff, as his cause of action, alleges that "on December 20, 1890, the defendant, by and through its duly-authorized agent, H. L. Phillips, of Olathe, Kansas, agreed to furnish a car and carry over its line of railroad, from Elizabeth station, Kan., to Kansas City, Mo., one car of twenty-two (22) head, for plaintiff, on the night of January 21, 1891, in consideration of which the plaintiff agreed to pay defendant the sum of \$10; that, pursuant to such contract, he drove the said cattle to the stock yards at Elizabeth, on defendant's railroad, but that the defendant, well knowing that plaintiff intended to take said cattle to market at Kansas City, Mo., and market them on the morning of January 2, 1891, in disregard of its agreement so to do, failed, neglected, and refused to provide the car for carrying said cattle, and failed, neglected, and refused to carry said cattle to market to Kansas City, Mo., until the afternoon of January 2, 1891, too late for that day's market; that, by reason of said failure by defendant to transport said cattle, he was compelled to leave said cattle in the stock yards at Elizabeth for a long time, viz. eighteen (18) hours, whereby said cattle became bruised and injured, and shrunken in weight, and greatly lessened in their market value; that, by reason of said

failure, he was put to great loss of time, and caused great inconvenience and trouble, in looking after said stock, and marketing them, on January 3, 1891, and expense in feeding them; that, by reason of the delay aforesaid, defendant's failure to transport said cattle to market on the night of January 1, 1891, he was unable to market them until January 3, 1891, when the market price had greatly declined, and he was unable to get as much for his cattle on January 3, as he could have gotten on January 2, 1891, whereby he suffered great loss; that he has been damaged in the sum of \$90, for which he asks judgment." The defendant railroad company filed answer of—First, general denial. And, "for a second and further defense and counterclaim against said plaintiff, this defendant says that said plaintiff, at divers times during the month of February, 1891, ordered, from the agent of said defendant, cars to be delivered to him for the purpose of loading and shipment over the line of defendant's railroad, which said cars were duly delivered at the station requested for said purposes, but that plaintiff failed to use said cars; and this defendant says that the cars so ordered by said plaintiff for his use, which he failed to make use of, were maliciously ordered, for the purpose of damaging and injuring defendant's business, and without any intention to make use of the same for the shipment of property over the defendant's line of railroad; that, by reason of said willful and malicious action, this defendant has been damaged in the sum of \$125. For a third and further defense and counterclaim against said plaintiff, this defendant says that on or about the — day of March, 1891, plaintiff ordered a car to be loaded with live stock to be shipped over said defendant's line of railroad upon one of defendant's regular freight trains; that said plaintiff, well knowing the time when said freight train would be ready to receive and forward said car, negligently and willfully delayed the loading of the same, for the purpose of causing injury and damage to said defendant, for the period of two hours after the time when said freight train should have been permitted to continue its journey, thereby delaying the entire train for over two hours, to the damage of said defendant in the sum of \$200,"—praying judgment in the sum of \$325 and costs. To the second and third counts of this answer, the plaintiff filed a demurrer upon the following grounds: First, because there is a misjoinder of causes of action in said answer; second, because the alleged causes of action therein have not arisen on contract, nor have been ascertained by the decision of the court; third, because said causes of action sound in tort. And also a motion to strike from said answer the second and third counts, for the reasons: First, because the alleged causes of action therein set out are improper to be set off in this action; second, because the alleged causes of action therein have not arisen on said con-

tract, nor have they been ascertained by the decision of any court. The demurrer and motion were sustained by the court below. No further answer was filed. Trial had before court and jury, resulting in a general verdict for plaintiff in the sum of \$39.45, upon which judgment was rendered. Defendant railroad company brings the case here for review.

Gen. St. par. 4177 (Civ. Code, § 94), provides, among other things: "The defendant may set forth in his answer as many grounds of defense, counterclaims, set-off and for relief as he may have, whether they be such as have been heretofore denominated 'legal' or 'equitable,' or both. * * *". Gen. St. par. 4178 (Civ. Code, § 95), defines a counterclaim, viz.: "The counterclaim mentioned in the last section must be one existing in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action, and arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claims, or connected with the subject of the action." Gen. St. par. 4181 (Civ. Code, § 98), provides: "A set off can only be pleaded in an action founded on contract, and must be a cause of action arising upon contract, or ascertained by the decision of the court."

Do these defenses fall within the provisions of either of the sections we have quoted? We think not. The plaintiff sued on contract. The defenses attempted to be brought in are other distinct separate transactions. Nor is it claimed that they arose out of the same transaction as the plaintiff's cause of action, and how they can be connected with the subject of the action we are at a loss to understand. These defenses are pleaded as torts. The gist of the second defense is undoubtedly the "willful and malicious" action of plaintiff in ordering cars. The third is the willful negligence in delaying the road; that, by reason of such action, the damages claimed occurred. There is no allegation of the terms of any contract, nor of any price or consideration; and we cannot believe that the learned counsel who framed these pleadings had at the time any idea or intention of declaring upon a contract, or they certainly would have set forth its terms. "Where a plaintiff has a cause of action on contract, he must state the contract, and cannot properly state his cause of action without stating the contract." Neither of these defenses had any connection with the foundation or subject of the plaintiff's action; nor are they causes of action arising upon contract, or ascertained by the decision of a court, but are *ex delicto*.

But it is contended by plaintiff in error "that the defendant could waive the tort and recover for the breach of the contract." While that is true in some cases, we do not think it applies to the case at bar. It is a familiar

rule of law that a promise may be express or implied. Whenever a promise is implied, and the consideration is sufficient, an action on contract may be maintained. This brings us to the question, when is a promise implied by law? "It is a principle well settled that a promise is not implied against, or without the consent of, the person attempted to be charged by it; and, where one is implied, it is because the party intended it should be, or because natural justice plainly requires it, in consideration of some benefit received." Webster v. Drinkwater, 5 Greenl. 322; Tightmeyer v. Mongold, 20 Kan. 90. And we think the test to be applied in order to determine whether the law will imply or presume a contract from the commission of a tort is: "Was the tort or wrong committed against the estate of another with the intention on the part of the wrongdoer of benefiting his own estate, or was his estate benefited thereby?" By what process of reason can it be held that in this action the plaintiff intended to, or did, benefit his estate by "willfully and maliciously" ordering cars, "without any intention of making use of them," or by "negligently and willfully delaying loading the same." The supreme court of this state have passed upon the question of waiver of tort in Fanson v. Linsley, 20 Kan. 235, and have thus laid down the rule as to when it can be waived: "Wherever one person commits a wrong or tort against the estate of another, with the intention of benefiting his own estate, the law will, at the election of the party injured, imply or presume a contract on the part of the wrongdoer to pay to the party injured the full value of all benefits resulting to such wrongdoer, and, when the injured party elects to waive the tort, his cause of action may be used as a set-off;" and also the rule when it cannot be waived: "Where one person commits a wrong or tort against another without any intention of benefiting his own estate, and his own estate is not thereby benefited, the law will not imply or presume a contract on the part of such wrongdoer to pay for the resulting damages; and such cause of action cannot be used as a set-off." We perceive no error in the action of the court in sustaining the demurrer and motion to strike out the second and third counts of the answer.

This brings us to the question presented by defendant in error: With these defenses stricken out, has this court jurisdiction to inquire as to error alleged to have been committed upon the trial? This we are compelled to answer in the negative. The amount in controversy would be the amount of the judgment rendered against defendant, \$39.45, which is less than the jurisdictional amount; and it is not shown by the certificate of the trial judge that this is one of the excepted cases. All the judges concurring.

BLUSH v. STATE.

(Court of Appeals of Kansas, Northern Department, E. D. Sept. 16, 1896.)

ILLEGITIMATE CHILDREN—SUPPORT—DIVORCE—EFFECT OF DECREE.

1. A prosecution for the maintenance and support of an illegitimate child can only be maintained when the complainant, at the time of the commencement of the action, is an unmarried woman. Gen. St. 1889, par. 3252.

2. Under paragraphs 4757, 4759, Gen. St. 1889, a decree of divorce does not become final, or operate as a dissolution of the marriage contract, until the expiration of six months from the date of the rendition thereof, and the parties thereto are not single or unmarried persons until such decree becomes final and absolute; and it is incumbent, in an action of this kind, where the prosecuting witness claims to be unmarried by reason of a decree of divorce, for her to show by legal testimony that such decree had become final.

(Syllabus by the Court.)

Error from district court, Shawnee county; Z. T. Hazen, Judge.

Action by the state against Van R. Blush. From a judgment for plaintiff, defendant brings error. Reversed.

David Overmyer, for plaintiff in error. H. C. Safford, Co. Atty., and A. H. Case, for the State.

GILKESON, P. J. This was an action brought in the name of the state of Kansas, as plaintiff, against Van R. Blush, as defendant, to compel him to make certain provisions for the support of an alleged illegitimate child, the paternity of which was imputed to him by the mother of said child, one Laura A. Hunt. The prosecution was instituted before A. F. Chessney, a justice of the peace of the city of Topeka, on the 16th day of February, 1893. There are several errors assigned. We shall, however, consider one, as upon it this case must be reversed.

Was Laura Hunt a single woman at the time she made this complaint? Paragraph 3252, Gen. St. 1889, provides: "When any unmarried woman who has been delivered of, or is pregnant with a bastard child, make complaint. * * *" This section has been construed by the supreme court of this state to mean that if the prosecuting witness is a single woman when she commences the prosecution, although she may have been married when the child was born, the proceeding may be prosecuted by the mother of such child. *Willets v. Jeffries*, 5 Kan. 470. The evidence in this case shows that at the time the child was born she was a married woman. Does not, then, the law presume, where it is once shown that a marriage relation exists, that it continues, until it is proven to the contrary? We think so, and it is incumbent upon the state to prove every material fact and element necessary to constitute the offense, before a conviction can be had. One of the material facts of this case to be proven by the state was that Laura Hunt, at the time she made this complaint, on the 16th day of October,

1893, was a single woman. The only testimony upon this proposition is that of the prosecutrix herself, in which she says that at the time of the birth she was a married woman, and then testifies as follows: "Who had you married? A. W. A. Hunt. Q. At the time of the birth of the child, how long had you been married to him? A. From the 1st of October to the 9th of May of the same year. Q. 19th of October? Is that correct? A. 1892. Q. The child was born March 9, 1892? A. Yes, sir; I was married in 1891. Q. You were married in October before that? A. The 19th of October, 1891. Q. Prior to that date, had you been married? A. No, sir. Q. Had you ever been married prior to the time you married Hunt? A. Yes, sir; my first husband was dead. Q. What had become of your first husband? A. He was dead. Q. When did he die? A. He died in October. Q. What year? A. Two years before that. I cannot call the year. Q. Two years before you married Hunt? A. Yes, sir. Q. On the 16th day of October last. And now state whether you were a married woman, or single. A. Single." Upon cross-examination she stated: "Q. You say the child was born on what day of the month? A. 9th of March, 1892. Q. You say at that time you were married to Hunt? A. Yes, sir. Q. Got married October before? A. Yes, sir; but I did not live with him. Q. But you had been married to him the October before? A. I did not live with him at all. Q. You was married to him? A. Yes, sir. Q. You have so stated, I believe. A. Yes, sir. Q. Then you stated that in last October, when you brought this action, you was a single woman? A. Yes, sir. Q. How did that come? A. I obtained a divorce from Mr. Hunt. Q. Where? A. In this court. Q. You obtained a divorce in October last? A. Yes, sir. Q. Do you remember the day in October it was granted? A. No, sir; I do not, exactly. Q. The 15th? A. I do not remember the date. Q. What is your best impression as to the date? I see this is filed October 16th. A. I think it was near that. Q. It was about there, was it, before you filed this, that you got your divorce here? A. Yes, sir; a few days, I suppose. I cannot state just exactly. Q. What is your best recollection? A. I will tell you as near as I know. I cannot tell you. I know I got the divorce somewhere near the middle of October. Q. That is, you got your divorce? A. Yes, sir. Q. You know it was in the month of October? A. Yes, sir."

Paragraph 4757 (being section 647 of the Civil Code) reads as follows: "A divorce granted at the instance of one party shall operate as a dissolution of the marriage contract as to both, and shall be a bar to any claim of the party for whose fault it was granted, in or to the property of the other, except in case where actual fraud shall have been committed by or on behalf of the successful party. Every judgment of divorce granted by a district court shall be final and conclusive, unless appealed from within

the time and in the manner herein provided. A party desiring to appeal from a judgment of divorce granted must within ten days after such judgment is rendered, file a written notice in the office of the clerk of such court, duly entitled in such action, stating that it is the intention of such party to appeal from such judgment; and unless such notice be filed, no appeal shall be had or taken in such cause; if notice be filed as aforesaid, the party filing the same may commence a proceeding in error for the reversal or modification of such judgment at any time within four months from the date of the decree appealed from, and not thereafter. But whether a notice be filed as herein provided or not, or whether proceedings in error be commenced as herein provided, or not, it shall be unlawful for either party to such divorce suit, to marry any other person within six months from the date of the decree of divorce, and if notice be filed and proceeding in error be commenced as hereinbefore provided, then it shall be unlawful for either party to such cause to marry any other person until the expiration of thirty days from the date on which final judgment shall be rendered by an appellate court in such appeal. And every person marrying contrary to the provisions of this section shall be deemed guilty of bigamy and such marriage shall be absolutely void." Paragraph 4759 (section 647b, Civ. Code) provides: "Every decree of divorce shall recite the day and date when the judgment was rendered in the cause and that the decree does not become absolute and take effect until the expiration of six months from said time." Conceding that her testimony was sufficient to establish the fact that she had obtained a decree of divorce, it is clearly shown by the testimony that within two or three days after it was granted she commenced this action. She says that she was divorced in the middle of October. Now, giving all the latitude that is possible to be given to what is meant by the term "about the middle of October," it would only include a range from the 10th to the 20th of the month. Either of these dates would constitute the middle of the month. But it must, from her testimony, have been prior to the 16th, and, at the utmost limit, not over six days before she instituted this action. But did the mere decree of divorce make her a single woman? We think not. Our statute expressly declares that the decree does not become absolute, or take effect, until the expiration of six months from the date of its rendition. It not only makes it unlawful for the parties to marry during that time, but declares that a marriage so contracted shall be absolutely void. During that six months, therefore, neither of the parties to the decree of divorce are unmarried persons. As we have said, neither of them could contract marriage within that time, and if they did the marriage would be void, and in the eye of the law they are still married. The decree is not absolute at the time of its rendition. It is merely a

decree nisi, subject to the future order of the court, and to be affected by contingencies that might arise within the six months. And it has been held by courts of high reputation that until the decree is absolute the marriage is in full force. 5 Am. & Eng. Enc. Law, p. 838; *Wales v. Wales*, 119 Mass. 89. And the supreme court of this state (*Wilhite v. Wilhite*, 41 Kan. 154, 21 Pac. 174) has adopted this doctrine, and held in that case, in construing the Oregon statute (*Hill's Ann. Laws*, § 503), which provides: "A decree declaring a marriage void shall have the effect to terminate such marriage as to both parties, except that neither party shall be capable of contracting marriage with a third person, and if he, or she, does so contract, shall be liable therefor as if such decree had not been given, until the suit has been heard and determined on appeal, and if no appeal be taken, the expiration of the period allowed by this Code to take such appeal,"—that under that law a decree of divorce does not absolutely terminate the marriage relation, nor entirely free the parties from its obligation and liability, until the expiration of the time allowed in which to take appeal. The same construction had been given to a similar statute in the then territory of Washington, in the case of *Smith v. Fife*, 30 Pac. 1059. This court, in passing upon a similar question (*Conn v. Conn*, 2 Kan. App. 419, 42 Pac. 1009), held that a marriage contracted within six months under the law of marriage and divorce, as it stood in 1881, was valid, but placed it upon the ground that the Code of 1881, unlike the statutes of Oregon and Washington, simply declared that it should be unlawful for either party to marry within six months after the decree, and did not make the parties incapable of contracting, nor declare a marriage so solemnized void; and Judge Clark, in rendering the decision of the court in that case, makes this distinction very clear, and very plainly intimates that if the law governing that case had contained the provisions which it now contains the decision would have been different. In speaking of the construction given to the statute in 1881, he says: "This construction seems to be in accord with the views of the legislature when, in 1889, the law was amended so as to make absolutely void a marriage by either party to a divorce suit before the expiration of six months from the rendition of the decree, and during the pendency of proceeding in error." We think that the prosecuting witness at the time of the commencement of this prosecution was undoubtedly a married woman. This being the case, she cannot maintain the prosecution, and, upon her own showing, she had simply obtained a decree which had not become absolute,—had not yet taken effect.

It is contended by the defendant in error that this decree of divorce, and in fact every decree of divorce, becomes final within 10 days after its rendition, under that portion of the section which reads: "Every judgment

of divorce granted by a district court shall be final and conclusive unless appealed from within the time and in the manner herein provided." The time and manner provided is filing a notice within 10 days after such judgment. We cannot agree with them upon this construction of the statute, and, even if we did, the state failed to prove in this case that the 10 days had expired. And, as we have said, giving the greatest latitude that could possibly be given, the decree had not been entered over 6 days prior to the filing of this complaint, so that under their contention the decree was not final. We think, for the reasons given, the judgment in this case should be reversed, and the cause remanded, with instructions to dismiss the prosecution and discharge the defendant. All the judges concurring.

UNION PAC. RY. CO. v. MAHAFFY.

(Court of Appeals of Kansas, Northern Department, E. D. Sept. 9, 1896.)

RAILROADS—ACTION BY EMPLOYEES FOR INJURIES— NEGLECT—EVIDENCE.

1. Negligence is not to be presumed, but must be proven; and when the evidence in an action for damages against a railroad company, under paragraph 1251, Gen. St. 1889, shows that the employé charged with being negligent exercised towards the injured employé the care and diligence which a prudent person would ordinarily exercise under like circumstances, no liability is established against the company.

2. Under the facts in this case, *held*, that the railroad company is not liable for damages on account of the accident.

(Syllabus by the Court.)

Error from district court, Wyandotte county; H. L. Alden, Judge.

Action by William Mahaffy against the Union Pacific Railway Company. From a judgment for plaintiff, defendant brings error. Reversed.

A. L. Williams and N. H. Loomis, for plaintiff in error. J. W. Jenkins, for defendant in error.

GILKESON, P. J. On July 15, 1890, William Mahaffy, a boiler maker, and Charles E. Prince, his helper, were in the employ of the plaintiff in error, and on said date were attempting to remove the bottom out of the fire box of a locomotive, which was standing in a roundhouse of said company. To do so, it was necessary for them to go into the pit over which the locomotive was standing. Having entered the pit, they each took hold of opposite ends of the grate, to remove it. Prince at this time was looking up, and, as they were getting it out of the socket, some ashes from above fell into his eyes, causing him to let go of his end of the grate. He gave no warning of his intention to drop the grate, which weighs from 75 to 100 pounds. Mahaffy, not knowing what had happened to Prince, held fast to his end, and thereby re-

ceived a sprain of the right wrist. To recover for the injury so sustained, this action was brought, under paragraph 1251, Gen. St. 1889. The petition alleges that plaintiff and Charles E. Prince were employes of and working for and under the direction of defendant in its shops, and while so engaged, and as part of their duties therein, they were removing a grate from an engine; and that Prince negligently jerked and twisted said grate, and let it fall, without giving any notice to plaintiff, and thereby twisted, wrenched, sprained, and severely hurt plaintiff's wrist, rendering him unable to work, and permanently disabling him.

Upon the trial of this cause, the jury returned 17 special findings, very few of which have any bearing upon the question raised by the plaintiff in error, viz. that the testimony did not show any negligence on the part of Prince; in other words, that it did show conclusively that the injury was the result of an unavoidable accident. We think the contention of the plaintiff in error is well founded. There is but little testimony upon the facts as to this injury. But two witnesses knew, or could know, anything about it,—the plaintiff and his co-employé, Prince; and their testimony, when carefully examined, does not conflict. While they have not expressed themselves in precisely the same terms, nor used similar language to convey their ideas, yet their explanation of this transaction is strikingly similar. The testimony of the plaintiff is: "I had hold of the grate, and, in order to get it out, one end has to be lifted up first, and the other end lowered down below the bar. Prince had hold of the other end. We were in a stooping position. We could not stand up straight and take the grate out, but was bent over. We had just lowered it below the bar when, as he claimed, and so told me at the time, that some ashes fell into his eyes. He gave it a throw, that way, and let it fall out of his hands. I had my end out of the slot on which it runs. We had lowered both ends out. Prince's end came out first, and mine almost the same time. He gave it a twist, and threw it that way, and it fell out of his hands. Just before it was taken down, before he let it drop, he was looking up. He got some ashes in his eyes. That is what he said at the time. That is what he told me. He gave a kind of a jerk at the time, and let it fall. That is the way I understood at the time as to how it happened. He gave a wrench over, and the grate fell out of his hands." Prince testifies as follows: "I am the man that was helping Mahaffy take this grate out of the locomotive. Mr. Mahaffy had one end of the grate, and I had the other. We were under the engine, and had to work sitting down,—sitting on the side of the pan. When we were getting it out of the socket that fits in the bars, I was looking up, and dirt fell in my eyes. I gave the bar a kind of let-go, and it fell from my hands. I think there was a handful of

ashes, and fell in my eyes. I do not know. It fell right into my eyes. The eye got full. It caused me pain in the eye. It felt to me as if needles were put in my eyes. The dirt falling in there was sharp, and cut and ached. It caused me to let go my hold on the grate. That is the only reason for me letting go. When I let go, the grate turned from me. I lost my hold of it. I let go immediately as soon as the ashes fell in my eyes. I cannot say that I threw it. I suppose you might call it 'shoving away.' I did not give Mahaffy any warning. I had no time to give warning myself. I could not help it. The dirt came into my eyes, and made me loose my hold on the grate. I did not know I was going to do it. It occurred so suddenly, I did not have time to give any notice or warning." This is all the testimony bearing upon this subject.

"An act which involves none of the elements of negligence or intentional wrong is always considered an accident. No person can be held responsible for an unseen accident which incidentally occurs while he is 'in the rightful and proper exercise of his lawful business.' The act of Prince in letting go of this bar would not have occurred had it not been for the ashes falling in his eyes, and the jury so found; and, under the circumstances, his actions were but the natural and usual acts of any person acting under similar circumstances; and, in judging of the care that he was required to use, allowance should be made for the circumstances of the case, and, if they were committed suddenly, he would be excusable for omitting some precaution, or even in making an unwise choice under these influences. Of course, he was under obligations not to injure Mahaffy if he could avoid it. We are all under such an obligation one to another, but being under such an obligation does not render us liable for accidents which we did not contemplate, and which we could not avoid. What duty did Prince fail to perform? What obligation was he under which he disregarded? We have failed to discover any. We think he exercised towards the injured employé that degree of care and diligence which a prudent person would ordinarily exercise under like circumstances, and we think the testimony in this case shows conclusively that the falling of the ashes in Prince's eyes caused him to give an involuntary start, and relax his hold on the grate. That what constitutes negligence in a particular case is generally a question for the jury, and not for the court, is undoubtedly true; but, when there is no conflict in the testimony offered, the question of negligence becomes a question of law, and this is especially true when there can be but one deduction drawn from the testimony. Negligence is not to be found without evidence. There is always a presumption against it, and therefore the plaintiff who asserts it must adduce proof that the party charged therewith did not use ordinary care.

At least, taking the testimony as a whole, some want of ordinary care must appear to sustain a recovery. The testimony in this case fails to show any negligence upon the part of the co-employé, and, on the other hand, conclusively shows that the injury is the result of an accident, and that the defendant below is responsible therefor. The verdict is not sustained by sufficient evidence, and is contrary to law. The judgment, therefore, will be reversed, and the cause remanded for further proceedings in accordance with this opinion. All the judges concurring.

KANSAS CITY INV. CO. v. FULTON.

(Court of Appeals of Kansas, Northern Department, E. D. Sept. 9, 1896.)

LIMITATIONS—RUNNING IN FAVOR OF TRUSTEE—ADVERSE POSSESSION—BONA FIDE MORTGAGEE.

1. When one person holds the legal title to real estate as trustee for one who is the equitable owner, the statute of limitations will not run, as between them, until there is a renunciation of the trust, or until the party holding the legal title by some act or declaration asserts a claim adverse to the real owner.

2. Open, notorious, exclusive possession of real estate is notice to the world of whatever title or interest the person so in possession may have therein.

3. The defendant in this action being in the actual, open, notorious, and exclusive possession of the real estate in controversy at the time the plaintiff's mortgage was executed, and when the plaintiff acquired the same, the mortgage was taken and is held subject and inferior to the title of the defendant.

(Syllabus by the Court.)

Error from district court, Wyandotte county; N. H. Loomis, Judge pro tem.

Action by the Kansas City Investment Company against Mary J. Fulton and others. From a judgment in favor of defendant Fulton, plaintiff brings error. Affirmed.

Cook & Gassett, for plaintiff in error. McGrew, Watson & Watson, Hale & Fife, and J. S. Gibson, for defendant in error.

GILKESON, P. J. On the 6th day of December, 1853, the defendant in error, Mary J. Fulton, was married to one William J. Fulton; and at the time of the marriage she was the owner of some property, William J. Fulton being insolvent. From time to time the defendant in error received money from her relatives, amounting to quite a sum; and in December, 1866, the said William J. Fulton, husband of the defendant in error, having this money in his possession, purchased certain real estate (it being the property in controversy in this action) of Isabelle S. Clements, it being understood and agreed that the title should be taken in the name of Mary J. Fulton. This was not done, and the deed was taken in the name of W. J. Fulton. In 1881 W. J. Fulton procured a divorce from his wife Mary J. In 1885 Mary J. Fulton took possession of this property, and has held the same ever since. In 1886 William

J. Fulton and his then wife, Eliza, sold and conveyed this property to Caroline Milotte; and on the day of said sale Milotte and her husband executed a mortgage on this property to Garrard Chestnut and R. T. Darnell & Co., both of the state of Missouri. These notes were, by Chestnut and Darnell, indorsed to one Mrs. Clara P. Buckner or order, and by her indorsed to A. C. Buckner or order, without recourse. In July, 1888, A. C. Buckner indorsed them to the Kansas City Investment Company, the plaintiff in this action, or order, without recourse. In April, 1889, the co-defendants of Mary J. Fulton in this action brought suit against her for the recovery of this property; and judgment was rendered therein on October 7, 1889, against them, in favor of said Mary J. Fulton. It also appears from the record that William J. Fulton, Garrard Chestnut, and R. T. Darnell & Co. were and are nonresidents of the state of Kansas, and that the plaintiff in this action is a Missouri corporation. On the 25th of January, 1889, the plaintiff in error brought an action to foreclose this mortgage against Alphonso Milotte, the husband, and others, the heirs of Caroline Milotte, deceased, making Mary J. Fulton a defendant therein. There was no contest between the plaintiff in error and any of the defendants, except Mary J. Fulton, who alleged, as her defense, that she was at the time of the commencement of this action, and for a long time prior to the 30th of March, 1885, had been, the equitable owner of, and in the open and notorious possession of, all the real estate in said petition described, and that if ever said notes and mortgage were given, made, and executed, they were given, made, and executed subject to her rights in said property, and that at the time of taking the same the payees and grantees thereto had notice of her occupancy and title, and took the same subject thereto; and also set out the proceedings had between her and her co-defendants in the supplemental answer filed herein. To this plaintiff in error filed a reply admitting that the judgment referred to was rendered, and further alleging that the defendant Mary Fulton during the month of August, 1890, had notice and knowledge that the title to the land was taken in the name of William J. Fulton, her former husband, when he purchased it, and that she took no action to enforce her equitable title or estate until the fall of 1885, when she took possession of the land without his knowledge or consent, and has since remained in possession without his or his grantor's consent, and, further, that her cause of action accrued more than five years prior to the time she so took possession of said land. The case was tried to the court, and special findings of fact and conclusions of law were made by the court, as follows:

"Findings of Fact. (1) I find that the property in question was purchased by William J. Fulton on or about the 31st day of December,

1866, with funds belonging to the defendant Mary J. Fulton, then wife of William J. Fulton, and that said William J. Fulton promised said Mary J. Fulton to take the title of said property in her name, at the time it was purchased. (2) I further find that, without the knowledge or consent of his wife, said William J. Fulton took the title of said property in his own name, and that said Mary J. Fulton supposed the title of the property to be in her name until some time in August, 1880. (3) I further find that said William J. Fulton was divorced from said Mary J. Fulton upon or about the 31st day of March, 1881. (4) I find that said Mary J. Fulton took no steps to assert her rights to said property until some time in the fall of 1885, when she took possession of said property, and has been in the open and visible possession of the same ever since. (5) I further find that said William J. Fulton and wife conveyed said property to said Caroline Milotte upon the 30th day of March, 1886, and that said Caroline Milotte and husband thereafter gave the mortgage sued upon herein. (6) I further find that there is due to the plaintiff from defendant Alphonse Milotte, personally, and John Gibson as administrator of Caroline Milotte, deceased, the sum of \$588.92, bearing interest at the rate of eight per centum per annum, and its costs herein expended, and that the conditions of its mortgage have been broken. (7) I further find that the defendant Mary J. Fulton was informed in the month of August, A. D. 1890, that the title to the property was in the name of Wm. J. Fulton, and that she took no steps, as above found, to assert her right in said property until some time in the fall of A. D. 1885, when she took actual possession of the same, and that during said period she was under no legal disability from asserting her said rights. (8) I further find that the plaintiff did not appear in, and was not a party to, the suit of Alphonse Milotte et al. v. Mary J. Fulton, as alleged in the answer of said Fulton filed in this cause, and is not estopped by the proceedings in said cause.

"Conclusions of Law. (1) That, at the date of said conveyance from William J. Fulton to Caroline Milotte, said Mary J. Fulton had the equitable title to said property, and that said equitable title was paramount to the legal title of said William J. Fulton. (2) That the plaintiff was charged with notice of the possession of said premises by said Mary J. Fulton at the time it obtained the mortgage upon the same. (3) That the plaintiff take, so far as the defendant Mary J. Fulton is concerned, naught by this suit, and that she have and recover her costs herein. (4) That the plaintiff is entitled to recover of and from the defendant Alphonse Milotte personally, and John Gibson as administrator of Caroline Milotte, deceased, the sum of \$588.92, bearing interest at the rate of eight per centum per annum, and that, as against all of the defendants excepting Mary J. Ful-

tion, it is entitled to foreclosure of its mortgage, but that as the land herein described is the property of Mary J. Fulton, as aforesaid, no decree of foreclosure will be given, the said mortgage for such reason not being a lien upon said land.

"N. H. Loomis, Judge pro tem.

"No. 5,470. K. C. I. Co. vs. Milotte et al. Special Findings. Filed June 29, '91.

"E. W. Towner, Clerk."

We cannot agree with plaintiff in error that the court overturned a legal title without substantial testimony. On the contrary, we think the testimony in this case supports the conclusions of law as found by the trial court, by an overwhelming preponderance thereof, and is of the strongest kind possible to be presented in a case of this nature. The findings of fact are not questioned, nor could they be, for they are supported by all of the testimony in this case; and it is clearly shown that the funds with which this property was purchased was received from, and belonged to, the defendant Mary J. Fulton, and that the property was purchased with the express understanding that the title should vest in her. "When the legal title to real estate is in one person, and the real interest is in another, the statute of limitations will not run, as between them, until there is a renunciation of the trust, or until the party holding the legal title by some act or declaration asserts a claim adverse to the real owner." There is no proof, or attempt to prove, that W. J. Fulton ever denied the trust; nor was there any act of hostility done or adverse claim made by him until the very transaction upon which the claim of the plaintiff is founded occurred viz. the sale of this property to Caroline Milotte. And at the time Mrs. Fulton was in open, notorious, and exclusive possession; and Mrs. Milotte therefore took the title subject to the trust,—purchased with notice of this possession. The plaintiff purchased the notes and mortgages with the same notice—all the parties were bound thereby—of whatever title Mrs. Fulton had, and neither obtained any title which can be asserted against the defendant. Greer v. Higgins, 20 Kan. 420. It is well established that open, notorious, and exclusive possession of real estate under an apparent claim of ownership is notice to the world of whatever claim the possessor asserts, whether such claim is legal or equitable. Moore v. Reeves, 15 Kan. 150; Johnson v. Clark, 18 Kan. 157; School Dist. v. Taylor, 19 Kan. 287; Tucker v. Vandermark, 21 Kan. 263; Bruce v. McBee, 23 Kan. 382; McNeil v. Jordan, 28 Kan. 16; Deetjen v. Richter, 33 Kan. 414, 6 Pac. 596. Under these circumstances, it was incumbent upon the plaintiff to inquire, and to pursue his inquiry until he ascertained the nature of the possessor's claim; and, failing to do so, the law treats him precisely as though he had so acted, and learned all that might have been ascertained thereof. Milotte purchased, therefore, sub-

ject to all the equities of Mrs. Fulton, and the plaintiff took its mortgage subject to the same. As said in School Dist. v. Taylor, supra: "When it comes to comparing equities between the parties, those of the defendant would enhance by her possession of the property. Her equities are prior in time, and therefore prior in right. The defendant was in possession of the property when the plaintiff's equities were created, and this constituted such a strong and paramount equitable title to the property that no mere legal title could overthrow it. And, where a grantee purchases with knowledge of the trust, he takes no greater interest than his grantor had."

With reference to the admission of certain testimony of the defendant, because of the marriage relation existing between her and William J. Fulton at the time: This testimony consisted of (1) transactions had between Mrs. Fulton and her then husband as to the furnishing of the funds to purchase this property; and (2) communications made by him to other persons as to the title of this property, in her presence and hearing. We think the testimony was competent, as to the first, for the reason that they were all transactions in which he was acting as her agent, and fall within the statutory exception. As to the second, such testimony is clearly admissible. Higbee v. McMillan, 18 Kan. 138. But if this testimony had all been excluded there would still be ample testimony to support the finding of the court that the property was purchased by William J. Fulton with funds belonging to the defendant Mary J. Fulton. We perceive no error in the rulings or judgment of the court below. The judgment in this case will therefore be affirmed. All the judges concurring.

GREER et al. v. PAYNE et al. 1

(Court of Appeals of Kansas, Northern Department, E. D. Sept. 9, 1896.)

TRUSTS AND MONOPOLIES—RIGHTS OF MEMBERS—EQUITY JURISDICTION.

1. All combinations and associations of persons formed in this state for the purpose of imposing an unreasonable restraint upon the exercise of a trade or business are unlawful and void, as against public policy, and contrary to the statutes of the state.

2. A court of equity will not lend its aid to a member of such unlawful association, to enable him to retain his membership therein, and to restrain the association from suspending or expelling him therefrom for a violation of its illegal rules and by-laws.

(Syllabus by the Court.)

Error from district court, Wyandotte county; H. L. Alden, Judge.

Action by J. E. Greer and others, partners, as Greer, Mills & Co., against John M. Payne and others, for an injunction. From a judgment for defendants, plaintiffs bring error. Affirmed.

¹ Rehearing denied.

Waggener, Horton & Orr and Mills, Smith & Hobbs, for plaintiffs in error. McGrew, Watson & Watson and Hutchings & Kepfinger, for defendants in error.

GARVER, J. The plaintiffs in error, Greer, Mills & Co., who were plaintiffs below, together with the defendants in error, compose a voluntary association, formed at Kansas City, Kan., and designated as the Kansas City Live-Stock Exchange. The plaintiffs were charged, tried by the board of directors, and found guilty of violating the rules of the exchange with reference to the commission charges to be made for the purchase of cattle. As penalties therefor, fines were assessed against them aggregating the sum of \$1,000. By the rules of the association, a member failing to pay a fine assessed against him within three days may be suspended from membership until the same is paid. This action was brought by the plaintiffs for an injunction to restrain the defendants from enforcing the payment of said fines by suspending them from membership in said association. Upon the trial in the district court of Wyandotte county, an injunction was refused, and the case is now here for review upon the pleadings, the findings of fact, and conclusions of law, and the judgment. The evidence is not included in the record.

Among the findings of the court are the following: "(2) The Kansas City Live-Stock Exchange is an unincorporated voluntary association, composed of individuals, partnerships, and corporations doing business as live-stock commission merchants at the Kansas City Stock Yards, and was organized for the purpose, as expressed in its articles of association, of 'maintaining a business exchange, not for pecuniary profit or gain, nor for the transaction of business, but to promote and protect all interests connected with the buying and selling of live stock at the Kansas City Stock Yards, and to promulgate and enforce amongst the members correct and high moral principles in the transaction of business.' (3) Said exchange issues certificates of membership, has adopted a seal, and permits its certificates of membership to be assigned and transferred. Its membership numbers at this time about three hundred, and includes nearly all the persons, firms, and corporations doing business as live-stock commission merchants at the Kansas City Stock Yards. It has no part in the profit of the business of buying and selling live stock, and the sale or purchase of such live stock is not the transaction of the exchange, but is the individual transaction of each member, firm, or corporation making the particular purchase or sale. It is maintained by membership fees, dockage fees, and assessments on its members when needed. (4) The membership fee in said exchange at this time, as fixed by the exchange, is one thousand dollars, and

each member of a partnership or stockholder in a corporation is required to take out a certificate of membership to entitle such partnership or corporation to the privileges of such exchange, provided that the total number of such members of a commission firm or stockholders in a corporation holding membership need not exceed five. Such certificate of membership entitles the holder to all the privileges of the exchange, and to do business with each and all the other members of the exchange, and to the use and service of the dockage system and dockers provided by said exchange in said yards; and such membership, rights, and privileges are valuable in and about the business of live-stock commission merchants at said yards, and, if the plaintiffs are suspended or expelled from membership in said exchange, the same would result in a pecuniary loss to them of more than \$2,000. (5) To carry out the objects and purposes of its organization, said exchange has adopted rules, by-laws, and regulations for the government of the exchange and discipline of its members, and for the conduct of business by its members at said yards, which, together with its articles of association, are printed in book or pamphlet form, and distributed among all the members of said exchange; and upon becoming a member of said exchange, and as a condition to receiving a certificate of membership therein, each member is required to subscribe to said articles of association, by-laws, rules, and regulations, for which purpose a book is kept in the office of the secretary, in which is copied the articles of association, rules, and by-laws, in the order named, to which is signed the name of each member, either by himself or some authorized agent; and each of said plaintiffs, J. E. Greer and Frank O. Greer, subscribed to said articles of association, rules, and by-laws, the same as other members, at the time of joining said exchange." "(7) Rules were adopted by said exchange, and were in force at the time plaintiffs became members thereof, including those above set out, except an amendment to section 5, rule 9, as hereinafter stated; and plaintiffs signed and agreed to faithfully observe and be bound by said rules. After the plaintiffs became members thereof, to wit, March, 1892, an amendment to section 5, rule 9, increasing the minimum charge for commissions, was made, and the manager for the plaintiffs was present and voted for said change." "(9) When a member of the exchange is suspended or expelled, or when one who is not a member attempts to do business as a live-stock commission merchant at said stock yards, the board of directors of said exchange gives notice by posting on a bulletin board, in a conspicuous place in the exchange building, requesting that no members of the exchange do business with such nonmember; and the services of inspectors or dockers in the yards, being employes of

the exchange, are also refused to such non-member or suspended or expelled members."

Rule 9, adopted and enforced by the association, contains the following provisions:

"Section 1. The commissions charged by members of this association for selling live stock shall not be less than the following named rates:

"Sec. 2. Six dollars per car load for single-deck car loads of hogs or sheep, and ten dollars per car load for double-deck car loads of the same; provided members of this exchange may, after charging commissions as above provided, pay a regular sheep salesman on these yards a sum of money contingent on number of sheep sold; and said sheep salesman may be in the employ of other members of the exchange.

"Sec. 3. Fifty cents per head for cattle of all ages; in car loads of twenty-four or more, not more than twelve dollars per car load; ten dollars per single-deck car load, and eighteen dollars per double-deck car load, of veal calves.

"Sec. 4. Fifty cents per head for cattle, and twenty-five cents per head for calves, and ten cents per head for hogs and sheep in mixed car loads, but not to exceed twelve dollars per car load; fifty cents per head for cattle, and twenty-five cents per head for calves, driven into the yards, and ten cents per head for hogs and sheep for sixty head or less; more than that numbers shall be charged for at car-load rates.

"Sec. 5. Fifty cents per head for buying cattle for stockers or feeders, provided such charges shall not exceed twelve dollars per car load; six dollars per single-deck car load for buying sheep; and ten dollars per double-deck car load. All purchases paid for by a commission house or shipping clearance made by same shall be deemed a purchase, and charged for as above provided.

"Sec. 6. Not less than four dollars per single-deck and five dollars per double-deck car load for buying live hogs, and not less than three cents per head for hogs bought by the head."

"Sec. 11. Any member of this association or firm or corporation represented herein sending, or causing to be sent, a prepaid telegram or telephone message quoting the markets, giving information as to the condition of the same, shall be fined not less than \$100, nor more than \$500. If said fine is not paid within three days, said firm or member shall be suspended until said fine is paid; provided, however, that prepaid message may be sent to shippers quoting actual sales of their stock on the day made, also to parties desiring to make purchases on this market.

"Sec. 12. Any member of this exchange or firm or corporation in which he may be a partner violating any of the provisions of this rule shall be fined not less than \$500, nor more than \$1,000, for the first offense. Said member or firm may be suspended from member-

ship until same is paid. For a second offense said member or firm may be expelled from membership in the exchange."

The particular rule which plaintiffs were charged with violating is that contained in above section 5, the complaint stating that, through their agent, they bought certain cattle for feeders, for which service a commission was charged that was less than the minimum charges established by said rule. Various matters are urged by counsel for plaintiffs as reasons why they should have been granted the injunction prayed for, the principal ones being that the facts found by the court show that the charges made against them, and the trial thereof by the board of directors, were not made and had in good faith; that the rules of the exchange relating to the trial, which were enforced against the plaintiffs, are unreasonable and unjust; that the rule fixing the minimum commission charges is unreasonable, was enacted in aid of an unlawful combination in restraint of trade, is illegal and void; and, therefore, that the defendants should not be permitted to deprive the plaintiffs of their membership because of their failure to observe an illegal and void rule. On the part of the defendants it is contended that, the plaintiffs having had a fair and regular trial in accordance with the rules and regulations of the exchange, the result thereof is not subject to review by the courts; that such membership is not a property right that a court of equity will protect by injunction; that the action, even if maintainable, is prematurely brought, for the reason that no attempt has been made to enforce the payment of the fine by making an order of suspension; and that if the rules and regulations which the plaintiffs are charged with violating are illegal and void, because against public policy, and in violation of the laws of the state, a court of equity will not exercise its jurisdiction to aid them in retaining membership in such illegal organization. Able and elaborate briefs have been filed by counsel for plaintiffs and defendants, respectively, upon the several questions raised in this case. In the view, however, which we take, we do not deem it necessary to consider all of them, and shall content ourselves with a brief statement of the grounds upon which we think the judgment of the court below must be affirmed.

It may be conceded that a membership in the Kansas City Live-Stock Exchange is such a property right as will, in a proper case, be protected by a court of equity; and that, if equity would aid the plaintiffs in maintaining their right of membership, there has been such a threat and attempt to interfere therewith by the defendants as justifies the commencement of an action to restrain the threatened suspension. It may also be conceded that no society or association has a right to enforce against its members any rule or regulation which is unreasonable, or which is contrary to public policy, or in violation of the law. But such considerations, in our opinion, fall short

of the real questions involved in this case. It is admitted by the plaintiffs, and so alleged in their petition, that rule 9 was adopted for the purpose of effecting an illegal combination of the persons who were engaged in the live-stock commission business at Kansas City, and is in restraint of trade. The petition states "that said rules above set out, to wit, rule 16, and sections 5, 12, and 15 of rule 9, are unreasonable, in aid of an unlawful combination, in restraint of trade, against public policy, and repugnant to and in violation of law." By the seventh finding of facts, it appears that "the plaintiffs signed and agreed to faithfully observe and be bound by said rules"; and after they had become members, and on March 31, 1892, they voted to amend said section 5, by increasing the minimum commission charges. The articles of association and the rules and by-laws must be taken as a whole, in order to determine the character of this exchange. It matters not how meritorious and praiseworthy its declared objects may be. The law cannot be evaded by colorable pretenses. It looks at the substance of things, whatever disguise may be assumed to conceal it. It is impossible to read the articles of association and by-laws of this exchange without being convinced of the fact that the principal inducement is, not "to promulgate and enforce among the members correct and high moral principles in the transaction of business," as stated in the articles, but that it is, rather, to prevent competition, along certain lines, among those engaged in the live-stock commission business, and to maintain uniform minimum prices for their services. Thus, by section 11 of rule 9, a commission man or firm is prohibited, under penalty of a fine of not less than \$500 nor more than \$1,000, from sending a prepaid telegram giving information as to the condition of the markets to a farmer or stockman contemplating the sale or shipment of stock. Another rule prohibits members from doing business with one not a member, who attempts to transact the live-stock commission business at the Kansas City Yards. These and other rules of a like character are, apparently, the main features of this organization, which make a membership therein so valuable. The exchange makes no pretense of giving direct aid to its members in securing business, but leaves that to their own individual efforts. Its profitability, however, is, no doubt, greatly augmented by reason of the fixing of charges by a combination which is powerful enough to monopolize such services. An organization having such objects is an unlawful combination, which is expressly prohibited by law. Laws 1889, c. 257. Combinations and associations which are entered into for an illegal restraint of trade are usually organized with great skill, and with a special view to covering up the unlawful purposes by professed designs and objects which are lawful; hence the recognized difficulties which obstruct the enforcement of all general laws against un-

lawful trusts and combines. This fact, doubtless, induced the legislature of this state to enact a law which was specially designed to prevent and suppress unlawful combinations of persons engaged in buying or selling live stock for others on commission. Laws 1891, c. 158. That act not only makes it unlawful for two or more persons or corporations engaged in such business to enter into any combination for the purpose of regulating the charges to be demanded, but it specially provides: "It shall be unlawful for any person or persons, corporation or corporations, doing business in this state, to be or become a member of any society, association, or corporation whose by-laws provide for and fix the minimum commission for the selling of live stock for others, or whose by-laws prohibit its members from purchasing live stock from persons who are not members of such society, association or corporation." And any one violating its provisions is deemed guilty of a misdemeanor, and subject to severe penalties. The plaintiffs invoke the act to invalidate and nullify the by-laws which they are charged with violating; while the defendants contend that its legal effect is to put the plaintiffs in the position of asking the courts to maintain them in a membership which is a direct violation of the law.

The association of the persons composing the exchange is a voluntary one. Their mutual rights, of whatever nature, are contractual. Any right which the plaintiffs may have to membership is based upon, and grows out of, the contract entered into between them and the exchange, at the time they became members and signed the articles of association. The right to the relief which they ask against the threatened action of their associates is based upon the recognition of this contract, and granting the relief would be the solemn declaration of the law that they must not be deprived of its privileges and benefits. Not only is the entering into such contract relations expressly prohibited by the statute, but the simple act of continuing the relationship is made a misdemeanor, subject to severe penalties. The contract of membership is therefore illegal and void, and no rights can grow out of it. Hence it comes to this: A court of equity is asked to assist the plaintiffs in carrying out an illegal contract, so that they may enjoy its fruits, and to aid them in maintaining a position, as members of an organization, which can be done only by a continual violation of the law. This will not be done. The law will not allow any effect to an illegal contract, either by enforcing it, or by aiding one to secure benefits accruing from it. Whenever it is necessary for a plaintiff to establish or rely upon an illegal contract, as a basis of his right to relief, the courts will not stop to inquire into the merits of the controversy, but will at once refuse to exercise their jurisdiction in his behalf. The general rule is thus stated by Mr. Pomeroy: "Whenever a contract or other transaction is illegal, and the parties

thereto are, in contemplation of law, in pari delicto, it is a well-settled rule, subject only to a few special exceptions, depending upon other considerations of policy, that a court of equity will not aid a particeps criminis, either by enforcing the contract or obligation while it is yet executory, or by relieving him against it, by setting it aside, or by enabling him to recover the title to property which he has parted with by its means. The principle is thus applied in the same manner when the illegality is merely a *malum prohibitum*, being in contravention to some positive statute, and when it is a *malum in se*, as being contrary to public policy or to good morals." Pom. Eq. Jur. § 402. See, also, *Mellison v. Allen*, 30 Kan. 382, 2 Pac. 97; *Water-Supply Co. v. City of Potwin*, 43 Kan. 404, 23 Pac. 578; *Sheldon v. Pruessner*, 52 Kan. 579, 35 Pac. 201; *Yount v. Denning*, 52 Kan. 629, 35 Pac. 207; *Buchtella v. Stepanek*, 53 Kan. 373, 36 Pac. 749; *Woodworth v. Bennett*, 43 N. Y. 273; *Watson v. Fletcher*, 7 Grat. 1; *Griffin v. Piper*, 55 Ill. App. 213; *Watson v. Murray*, 23 N. J. Eq. 257; *Spalding v. Preston*, 21 Vt. 9; *Abbe v. Marr*, 14 Cal. 210; *Nester v. Brewing Co.*, 161 Pa. St. 474, 29 Atl. 102; *Rigby v. Connol*, 14 Ch. Div. 482; *Swaine v. Wilson*, 24 Q. B. Div. 252; *More v. Bennett*, 140 Ill. 69, 29 N. E. 888; *Salt Co. v. Guthrie*, 35 Ohio St. 666; *Coppell v. Hall*, 7 Wall. 542; *Armstrong v. Toxler*, 11 Wheat. 258; *Roby v. West*, 4 N. H. 285; *Dillon v. Allen*, 46 Iowa, 299.

While the above are for the most part cases in which the plaintiff sought to recover the fruits and benefits derived from an illegal contract, yet they all involve an application of the same principle. The mere fact that the courts in very few instances have been appealed to, to aid a party in carrying out an illegal contract, or to enable him to enjoy future benefits to be derived therefrom, and that parties to such contracts, with few exceptions, have ventured into court only for the purpose of recovering something already earned, or damages previously sustained, is strong evidence of what the opinion of the legal profession has been upon this question. Our attention has been called to no case, and we know of none, in which a court of equity directed the specific performance of an executory contract which was tainted with illegality, or in which the parties to it were granted any assistance in carrying it out. *Rigby v. Connol*, supra, was an action similar to the one at bar, in which the plaintiff sought to restrain the trustees of a trades union from excluding him from membership therein, because of his violation of a rule which, he alleged, was illegal and void. It was held that as the trades union was an unlawful association, for the reason that some of its principal objects were in restraint of trade, the court would not aid the plaintiff in maintaining his membership therein. In the opinion it is said: "It appears to me that it is clearly an unlawful association. It is an associa-

tion by which men are not only restrained in trade, but they are bound to do certain acts under a penalty. Take the very act for which this man was expelled. He was expelled because he bound his son apprentice in a shop where the workmen did not belong to this union, but to another union. That is the allegation. And the rule is that any man binding his son in a 'foul shop,' which, as it has been explained to me, includes a shop of this description, where the members employed belong to another union, and not to this union, shall be fined £5, and so on, according to the rules. I see a great number of other stipulations of a character which are not only a restraint in trade, but so much in restraint of trade, limiting the subject of it, that I have no doubt, before this act [legalizing certain trades unions] was passed, these rules would have been altogether illegal; and if nothing in the act, therefore, will assist the plaintiff, he must still be in the position of a member of an illegal association, coming to a court of justice to assist him to enforce his rights under that illegal association." In *Spalding v. Preston*, supra, *Redfield, J.*, said: "One who sets himself deliberately at work to contravene the fundamental laws of civil governments—that is, the security of life, liberty, or property—forfeits his own right to protection in those respects wherein he was studying to infringe the rights of others. * * * If any member of the body politic, instead of putting his property to honest uses, convert it into an engine to injure the life, liberty, health, morals, peace, or property of others, he thereby forfeits all right to the protection of his bona fide interest in such property before it was put to that use." In *Coppell v. Hall*, supra, considering the principle involved in such cases, it is said: "In such cases there can be no waiver. The defense is allowed, not for the sake of the defendant, but of the law itself. The principle is indispensable to the purity of its administration. It will not enforce what it had forbidden and denounced. The maxim, 'Ex dolo malo non oritur actio,' is limited by no such qualification. The proposition to the contrary strikes us as hardly worthy of serious refutation. Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. * * * Wherever the contamination reaches, it destroys. The principle to be extracted from all the cases is that the law will not lend support to a claim founded upon its violation." In *Roby v. West*, supra, the following forcible language is used: "The principle that no court shall aid men who found their cause of action upon illegal acts is not only well settled, but a most salutary principle. It is fit and proper that those who make claims which rest upon violations of the law should have no right to be assisted by a court of justice. It is fit and proper that courts should refuse their aid to those who seek to obtain the fruits of an unlawful bargain. It is fit

and proper, when parties come into court to litigate claims founded upon illegal contracts, in relation to which they stand in pari delicto, that they should be reviewed and treated in those transactions as outlaws, who have forfeited the protection of the law; and it is fit and proper that they should be left to adjust their unlawful concerns as they can, and enjoy the fruits of their transgressions of the law as they may." The general rule is thus summarized by the court in the syllabus in *Buchtella v. Stepanek*, 53 Kan. 373, 36 Pac. 749: "Where parties purposely engage with equal guilt in illegal, immoral, or fraudulent dealings, the court leaves them where it finds them, and will not lend its aid to either party."

A very plausible and ingenious argument is made by the able counsel for plaintiffs, to the effect that a denial of the relief prayed for will keep the defendants in a position where they can enforce their illegal by-laws against members, and thus perpetuate their existence as an unlawful organization; whereas the granting of the relief would be a virtual wiping out of such illegal by-laws, and the exchange, with its members, would be left to conduct its business under valid and lawful rules and regulations. It is contended that the plaintiffs should be aided in resisting the enforcement of the illegal rules, and the defendants given to understand that such regulations and agreements will not be recognized or upheld by the courts. The argument is presented with much force and ability; but, in our opinion, it ignores the vital facts in this case, and calls for an abandonment of well-settled rules of law. We must not lose sight of the nature and object of this action. The plaintiffs' purpose is not to wipe out illegal by-laws; it is to prevent the wiping out of an unlawful membership. They seek to avoid the enforcement, as against them, of rules which, as alleged in their petition, they have been zealous and faithful in living up to and in enforcing against others. If retained as members, they would, no doubt, in the future, as in the past, not deny themselves the opportunity thus afforded to acquire illegal gains. When an association of this character comes before a court of equity, it will not stop to weed out the illegal growths which have fastened themselves upon it, and endeavor to fashion out of it something that is entitled to judicial recognition. It is clear that any order or judgment, whether for the plaintiffs or for the defendants, which the court could render in this case, would not eliminate from the exchange the obnoxious by-laws. So far as this action is concerned, they will remain without change. The organization itself will continue with unimpaired ability to violate the law, and with impunity to trample upon the public interests. A membership therein, after the judgment of this court is rendered, will be as much within the prohibition of the statute as it was before this action was com-

menced. These parties have, by their voluntary acts, created an organization which the law condemns, and one with which no man can be connected without being answerable to the laws of the state as a criminal. Clearly, the law will not aid them under the circumstances. A court of equity takes them as it finds them, and as it finds them it leaves them, undeserving of aid and assistance in a matter which inheres in, or grows out of, their illegal contracts. These principles, which, in our opinion, are of vital and controlling importance in this case, require an affirmance of the judgment. All the judges concurring.

DOORLEY et al. v. FARMERS' & MECHANICS' LUMBER CO.

(Court of Appeals of Kansas, Northern Department, E. D. Sept. 16, 1896.)

EATOFFEL TO DENY SURETSHIP.

1. Where a surety signs a bond, and leaves it in the hands of the principal, to be delivered only upon the performance of certain conditions, and the principal delivers the bond to the obligee without such condition being complied with, and the obligee takes it without notice of the conditional agreement, the surety will be bound.

2. Courts of justice, if in their power to do so, should not allow a party who, by act or admission, has induced another with whom he is contracting to pursue a line of conduct injurious to his interests, to deny the act or retract the admission in case of apprehended loss.

(Syllabus by the Court.)

Error from district court, Wyandotte county; H. L. Alden, Judge.

Action by the Farmers' & Mechanics' Lumber Company against Andrew N. Pettit and others on a bond. From a judgment for plaintiff, defendants Doorley and Gruble bring error. Affirmed.

Nathan Cree, for plaintiffs in error. Moore & Berger, for defendant in error.

GILKESON, P. J. In 1889, Andrew N. Pettit was the owner of certain real estate in the city of Wyandotte, and entered into a contract with the Farmers' & Mechanics' Lumber Company for lumber and other building material, to be used in the erection of two buildings thereon. To prevent the filing of mechanics' liens, he made, executed, and filed with the clerk of the district court of Wyandotte county his bond, as provided by paragraph 4745, Gen. St. 1889, in the sum of \$3,000, on the 3d day of July, 1889. The Farmers' & Mechanics' Lumber Company performed their part of the contract, but Pettit failed to pay for the material so furnished, amounting to the sum of \$400, and to recover this amount they brought an action upon the bond, making Pettit, Doorley, and Gruble (as principal and sureties thereon) parties defendant. Andrew N. Pettit made no appearance. Defendant James Doorley filed answer of (1) general denial, and further alleges, in substance, that on or about the 24th

day of June, 1889, he signed said bond as surety, with the said Andrew N. Pettit as principal, and one R. H. Corwin as a co-surety thereon, and with said Corwin and the defendant Pettit went to the clerk of the said district court, and presented said bond so signed for approval and acceptance, and said clerk refused to approve the same, or to approve either said defendant or the said Corwin as sureties thereon, and then and there, without the knowledge and consent of said defendant, erased the name of said Corwin from the body of the said bond, and the signature of said Corwin therefrom, and then returned said bond to said Corwin, and that thereupon said defendant understood and believed that all proceedings to execute the same as his bond were ended and terminated; that afterwards one Cox came into possession of said bond, and without the knowledge or consent of said defendant procured the signature of the said George Gruble thereon, and presented the same to the clerk of said court, who then approved the same, but without having said defendant Doorley justify as surety or approving said Doorley as surety thereon; that all use of said bond, after the same was rejected by said clerk when presented with said defendant and said Corwin thereon, was unauthorized by said defendant, without his knowledge and consent; wherefore said defendant claims to be released from surety thereon. The defendant George Gruble answers said petition substantially as in the answer of said defendant Doorley as above set out, and further states and alleges, in substance, that when he, Gruble, signed said bond, he justified as a surety thereon, and delivered it to one J. F. Cox, with directions to secure the justification of said defendant Doorley as surety thereon,—he at that time having no knowledge of the prior rejection of said bond, or the refusal of the clerk of said court to approve said Doorley as surety thereon, but supposing that said bond was not to be approved without two approved sureties thereto; that afterwards, said Cox, without complying with his said directions, presented said bond to said clerk with said defendant Gruble's name thereon, who thereupon approved the same, and filed it in his office; that he never authorized the delivery of said bond to said clerk by said Cox in violation of the instructions of said defendant, without the justification and approval of said Doorley as a surety thereon; wherefore said defendant claims to be released from the liability as said surety. The jury found as follows: "Did Towner ever approve and accept Doorley as a surety, or did he reject him?" "Yes, he approved him." "After the rejection of Doorley as a surety, did he think and understand that the proceedings to deliver the bond as his bond were ended?" "No, sir." "After that time, did he ever intend that it should be delivered as his bond?" "Yes." "After that time did he ever give any one any authority to use the bond as

his and deliver it?" "Yes." "Did Gruble ever agree or expect to be alone bound?" "No." "Was Doorley insolvent when the bond was filed?" "We do not know." "At the time Gruble signed the bond, and when it was delivered, did he know of the rejection of Doorley as a surety?" "No." "When Towner accepted and approved the bond, did he have any authority from Doorley to do so?" "Yes." "When Gruble signed the bond, did he know Doorley, or have knowledge of his insolvency?" "No." "Did Doorley, after the rejection of the bond, leave the bond with Corwin, intending it to be used to get further sureties, and then delivered as his bond?" "Yes." "Was the bond left in the possession of Pettit, after its rejection by Towner?" "Yes, with agent."

The defendants claim that for the reason set forth in their answers they should be released. This contention cannot be maintained. The findings of the jury do not support their contention, and these findings are supported by a great preponderance of the testimony, and we do not think the law sanctions their release. The object of the bond sued upon in this action is twofold: (1) The protection of those who contribute labor and material to the building or improvement contracted for, and (2) the benefit of the owner or contractor. When it is given, no lien can attach, and, if any has so attached prior to its being given, it is discharged. It takes the place of the lien. Should a bond given for such purpose be lightly set aside for any act or omission of the principal, or upon some secret, unperformed understanding between the sureties? We think not. *Risse v. Mill Co.*, 55 Kan. 518, 40 Pac. 904; *Carter v. Moulton*, 51 Kan. 9, 32 Pac. 633. It is well established in this and in other jurisdictions that where a surety signs a bond and leaves it in the hands of the principal to be delivered only upon the condition that it is to be signed by another person, and the principal delivers the bond to the obligee without complying with the condition, and the obligee takes it without notice of the conditional agreement, the surety will be bound. *Doir v. U. S.*, 16 Wall. 1; *Shah v. Peck*, 51 Me. 284; *Taylor Co. v. King*, 73 Iowa, 153, 34 N. W. 774; *State v. Pepper*, 31 Ind. 76. In such case it is the surety who puts the trust and confidence in the principal, and not the obligee; and, if any one is to be the loser, it should be the surety, for he puts it in the power of the principal to do the mischief complained of. The bond having been accepted and acted upon, the sureties are estopped from setting up a nonperformance and undisclosed condition.

The ancient rules of the common law in relation to estoppels in pais have been relaxed, and the tendency of modern decisions is to take broader views of the purposes to be accomplished by them, and they now apply so as to reach the case of a party whose conduct is purposely fraudulent, or will effect an unjust result. It must be conceded that courts

of justice, if in their power to do so, should not allow a party who by act or admission has induced another with whom he was contracting to pursue a line of conduct injurious to his interests, to deny the act or retract the admission in cases of apprehended loss. Sound policy requires that the person who proceeds on the faith of an act or admission of this character should be protected by estopping the party who has brought about this state of things from alleging anything in opposition to the natural consequences of his own course of action. And we think it is well-established doctrine that "whenever an act is done or statement made by a party which cannot be contradicted without fraud on his part, or injury to others, whose conduct has been influenced by the act or admission, the character of an estoppel will attach to what otherwise would be mere matter of evidence." The trial judge has very ably and fully presented the law governing this case in his instructions, and the jury have found fully upon the facts in the case. It is clear upon these facts, both upon principle and authority, that the bond is a valid obligation upon those who executed it, upon the principle and for the reason that the sureties knew the purpose of making the bond was for the protection of the material men and laborers from loss by the acts of the principal. They left the bond in the principal's hands for delivery for that purpose; true, "upon condition." But the obligees knew nothing of the condition. They relied upon the bond, and furnished material upon the strength thereof. The sureties, by executing the bond, and leaving it with the principal, placed it in his power to deliver it as a valid, complete instrument. He did so deliver it. It is a case for the application of the maxim, "That when one of two innocent parties must sustain a loss from the wrongful act of a third, the loss must be borne by the one who has enabled the wrongdoer to commit the act." The judgment of the court below will be affirmed.

DOUGLAS v. CRAIG.

(Court of Appeals of Kansas, Northern Department, E. D. Sept. 16, 1896.)

DELINQUENT TAX LIST—AFFIDAVIT OF PUBLICATION—TRANSMISSION TO TREASURER—MUNICIPAL CORPORATIONS—LOCAL IMPROVEMENTS—ASSESSMENT OF BENEFITS.

1. Where the affidavit made by the printer of the delinquent tax list is transmitted to the county clerk, instead of the treasurer, within the 14 days as required by law, and it is not shown that the same did not come into the hands of the treasurer within the time so limited, and it appears that the treasurer acted upon the same as if transmitted to him direct, it will be presumed that the treasurer did duly receive it; and the mode of transmission will be considered a mere irregularity, and would not vitiate a deed founded upon such sale.

2. Where a statute authorizes a city to provide for the construction of sewers and drains, and to tax the cost thereof upon the adjacent property owners, but does not prescribe any

mode for the apportionment of the taxes, the city in such case would have a right to adopt any mode for the apportionment of the taxes that would be fair and legal; and, as a general rule of apportionment, the levying of taxes in proportion to the value of the lots taxed, without the improvements thereon, would be fair and legal. *Gilmore v. Hentig*, 5 Pac. 781, 83 Kan. 156.

(Syllabus by the Court.)

Error from district court, Leavenworth county; Robert Crozier, Judge.

Action by John C. Douglas against R. B. Craig. On defendant's death, Imogene Craig was substituted, and from a judgment in her favor plaintiff brings error. Affirmed.

John C. Douglas, for plaintiff in error. Baker, Hook & Atwood, for defendant in error.

GILKESON, P. J. On the 7th day of May, 1887, John C. Douglas commenced this action in the district court of Leavenworth county against R. B. Craig for the recovery of certain real estate in the city of Leavenworth, and for the rents, issues, and profits thereof from the 15th day of November, 1884, up to the time of the commencement of this action, and for damages for withholding the possession of said property. Before trial was had, R. B. Craig died, leaving the now defendant in error, Imogene Craig, his sole heir and devisee under his will. Thereupon a supplemental petition was filed against her, to which she answered by general denial, and plea of possession for more than 15 years; and afterwards a supplemental answer, setting up title to the land in controversy in her own right, under and by virtue of a tax deed, to which plaintiff filed reply of general denial. At the April term, 1891, the cause came on for trial before the court, a jury being waived. The court made special findings of fact and conclusions of law, as follows:

"Findings of Fact. First. On the 18th day of April, 1887, the plaintiff, through a quitclaim deed from one of the heirs of Daniel L. Henry, became the owner of one undivided one-fourth (¼) of the lots in controversy, and immediately caused said deed to be recorded in the proper office. Prior to the execution of the said quitclaim deed, plaintiff claimed to be the owner of said lots by virtue of certain tax deeds from the county and city of Leavenworth, which were, however, void upon their face, and conveyed no title to the plaintiff. Second. On November 14, 1884, R. B. Craig, the then husband of the defendant, obtained from the county of Leavenworth a tax deed for the taxes of 1878 upon said lots, regular and valid upon its face, but invalid by reason of defects upon which it was founded, which deed was recorded in the proper office November 19, 1894. Third. Said R. B. Craig, on the 7th day of July, 1887, died, and the defendant, Imogene Craig, then became the owner of whatever interest the said R. B. Craig had in the lots as the sole legatee under his will, which was duly probated soon after his death. Fourth. The lots in controversy,

from time immemorial, and until a few days after November 15, 1884, remained and were vacant and unoccupied, when the plaintiff took possession thereof, and was proceeding to inclose the same, until he was forbidden by said R. B. and Imogene Craig. In a day or two after he commenced to inclose the same, and to further proceed with the work of inclosing the same, the said R. B. Craig claimed to be the owner of the lots by virtue of a tax deed of November 14, 1884. The plaintiff thereupon, by reason of being so forbidden, stopped the work of inclosing said lots, and made no further efforts to complete the same. Very soon thereafter, without the consent of the plaintiff, the said R. B. Craig took possession of said lots, and inclosed the same with a substantial fence, and remained in possession thereof until his death, when he was succeeded in such possession by Imogene Craig, who has since had the possession until now. Fifth. The lots in controversy, for the year 1885, were entered upon the assessment and tax rolls in the name of R. B. Craig. Sixth. This action, which is in the nature of an ejectment and for rents and profits, was commenced by the plaintiff against R. B. Craig May 7, 1887, and said Craig filed his answer denying title to the plaintiff and admitting possession in himself. Seventh. The taxes levied upon said lots for the year 1885 remained due and unpaid and delinquent, and said lots were sold for such taxes in September, 1886, to the county of Leavenworth. In November, 1887, the said certificate was duly sold and assigned to one William Booth, on the 14th day of the month. On the 15th day of the same month said sale certificate was duly sold and assigned by Booth to Imogene Craig, by the name of Mrs. R. B. Craig; and on February 13th she obtained a tax deed thereon from the county of Leavenworth, which was regular upon its face, and valid, and was recorded in the proper office on May 1, 1890. Eighth. After the death of R. B. Craig, in July, 1887, this action was revived against Imogene Craig. On July 13, 1889, the plaintiff filed a supplemental petition making her a party defendant; caused a summons to be issued to her, which was duly served; and on October 9, 1890, she filed a supplemental answer, setting up her deed of February 13, 1890, mentioned in finding No. 7; and on the same day the plaintiff filed his reply thereto, denying her title to said lot under said tax deed. Ninth. The valuation of the rents and profits of said lots from November, 1884, was \$4 per year.

"Conclusions of Law. First. The defendant is entitled to a judgment that she is the owner of said lots, and entitled to the possession of the same, and the costs accruing subsequently to the filing of her supplemental answer, October 9, 1890. Second. The plaintiff is entitled to a judgment for costs accruing down to October 9, 1890, and for rents and profits of the lots from November, 1884, to October 9, 1890."

And judgment was rendered thereon.

The case-made contains a statement that the plaintiff excepted to the said several conclusions of law at the time, and filed his motion for a new trial on the grounds—First, that said findings of fact and conclusions of law were not sustained by sufficient evidence, and were contrary to law; second, for error of law occurring at the trial, and excepted to by the plaintiff. The motion is not preserved in the record, nor is the testimony, or all of it; but in said case-made, we find the following statement: "On the trial of said cause, plaintiff, to maintain the issues on his behalf, and to prove, aliunde the face of defendant's said tax deed for taxes of 1885, that said deed was void, offered competent evidence tending to show that there was included in said tax deed of 1885, and for which said lots were sold, a printer's fee of ten cents for each lot, and that the printer who published the delinquent tax list and notice of sale did not, immediately after the last publication thereof, nor within fourteen (14) days thereafter, nor at any time, transmit to the treasurer of said Leavenworth county an affidavit of such publication made by himself, or by any one. Defendant objected to said evidence because it was immaterial, inasmuch as it appeared that such list and notice, with such affidavit attached, was transmitted to the county clerk of said county direct from said printer, and within said fourteen (14) days. It being true that the list, notice, and affidavit referred to in the publication were transmitted from the printer direct to the county clerk, and were recorded by him within fourteen (14) days, as provided by law, the court sustained said objection for these reasons, and plaintiff at the time excepted. Plaintiff, further, for the same purpose, offered like evidence tending to prove that there was included in said taxes of 1885, as part thereof, a levy by said city of Leavenworth, a city of the first class, for constructing and maintaining the main trunk sewers of said city, a tax of $\frac{3}{4}$ mills on the dollar valuation on all lots and pieces of ground in said city subject to taxation, exclusive of personal property, and the value of the real estate to be taken from the general assessment roll of said county said year. Defendant objected for same reasons as last above, and the court sustained the objection, and plaintiff excepted." The above and foregoing was all the evidence offered to prove the invalidity of said tax deed for the taxes of 1885, and this is the only attempt to set out any of the testimony offered on the trial of this cause. The petition in error contains 13 assignments of error, but, from the condition of this record, it is impossible for us to pass upon any of them, except such as come strictly within the admissions in the case-made as to the testimony offered and refused on certain points; and as to what the others are founded upon would require an examination of the evidence adduced in the

case, which, as we have said, has not been preserved.

The first assignment of error in plaintiff's brief is the rejection of competent evidence tending to show that there was included in said taxes of 1885, for which said lots were sold, a printer's fee of 10 cents for each lot, but that the printer who published the delinquent tax list and notice of sale did not immediately after the last publication thereof, nor within 14 days thereafter, nor at any time, transmit to the treasurer of said Leavenworth county an affidavit of such publication, made by himself or by any one. Paragraph 6957, Gen. St. 1889 (Laws 1876, c. 34, § 108, "Tax List"), provides: "Every printer who shall publish such list and notice shall, immediately after the last publication thereof, transmit to the treasurer of the proper county an affidavit of such publication, made by such person to whom the fact of the publication shall be known; and no printer shall be paid for such publication who shall fail to transmit such affidavit within fourteen (14) days after the last publication," etc. To determine whether or not the printer's fee is properly taxable as a charge or penalty against property, we must first ascertain whether or not the county is liable to the printer therefor. If it is not, then there is no authority or right for the collection of it; and the statutory requirement compelling the affidavit to be made within a certain time is merely for the purpose of placing in the hands of the county authorities, whose duty it is to charge these up against the land, proof that such publication has been made. In other words, the official whose duty it is to enter these charges against the property cannot do so until he has learned, through legal proof, that they have been earned; and, if he does not so learn within the time limited by statute, no charge therefor can be entered on the tax roll. But under this section there must be an absolute-total-failure to make and transmit this affidavit, not a mere irregularity in the manner in which the proof is forwarded to the officer. The mere fact that it is not handed or transmitted to the county treasurer in the first instance would not invalidate the deed. If it comes into his hands by any means (through the medium of the county clerk, or anybody else) within the 14 days limited, it would be sufficient. The object of it has been accomplished, and the requirement of the law fulfilled. This same section provides that: "The county treasurer shall also make, or cause to be made, an affidavit or affidavits of the printing of such list and notice as above required, all of which shall be carefully preserved by him, and deposited as hereinafter specified." Yet his failure to do so would not invalidate the deed. It is a mere irregularity. *Stout v. Coates*, 35 Kan. 362, 11 Pac. 151. If it were shown that this affidavit had never been received by the county treasurer until

after the expiration of the 14 days, then we think the contention of the plaintiff in error would have some force. But it is admitted in this case that the affidavit was made within the time, and, instead of being transmitted to the county treasurer, was sent to the county clerk, and, for aught that is shown in this record, the clerk may have handed it to the county treasurer, and the presumption is that he did, for it will always be presumed that, where an officer has performed an act required to be done by him, it was properly done; and, as the fee in this case was charged against the land by the county treasurer, it will be presumed that it was made upon legal notice, as required by statute. To hold that so trifling an irregularity as this should overturn a tax deed is sacrificing substance to form, and would be totally ignoring paragraph 6953, Gen. St., which was undoubtedly enacted to cover just such cases; and it reads: "No irregularity in the assessment roll, or omission from the same, nor mere irregularities of any kind in any of the proceedings, shall invalidate any such proceeding, or the title conveyed by tax deed," etc.

Second assignment of error: The rejection of competent evidence tending to prove that there was included in said taxes of 1885, as a part thereof, a levy by the city of Leavenworth, a city of the first class, for constructing and maintaining the main trunk sewers in said city, a tax of three-fourths mills on the dollar of valuation on all the lots and pieces of ground in said city subject to taxation, exclusive of personal property, and the value of the real estate to be taken from the general assessment roll of said county for said year. Just what point is intended to be raised under this second assignment of error, we are at a loss to understand. From what we quoted, it would seem to be his contention that the levy was illegal because it was made exclusive of personal property; but in his argument he says that this second specification of error is based upon the principle of fairness, equality, and uniformity which characterizes every exercise of taxation and assessment; that it is not just or equal or uniform to assess for the purpose of the main trunk sewer the lot of a poor man, whose little house is thereon, as much as that of a wealthy merchant or hotel keeper whose immense building occupies the next lot. This would indicate his contention to be that the levy was illegal because it was made upon land without regard to improvements thereon. We can only answer this in the language of the defendant, in error: "If such is the contention, it contains within itself that which shows the impossibility of considering it, because the first quotation discloses the fact that the valuation of the real estate was to be taken from the general assessment roll of said county for said year. The general assessment roll indicates the value of realty, including the

improvements thereon." The statute under which the city acted in levying this tax is section 19, c. 37, Laws 1881, "Cities of the First Class" (paragraph 563, Gen. St.): "The mayor and council shall have power to provide for a system of sewerage and drainage for the city, or any part thereof, and to build and construct sewers and drains by districts or otherwise, as the mayor and council may designate. The cost and expense of constructing the same shall be assessed against the lots or pieces of grounds contained in the district in which the same is situated, and the cost of same shall be levied and collected as one tax in addition to other taxes and assessments, and shall be certified by the city clerk to the county clerk, to be placed on the tax roll for collection, subject to the same penalties and collected in like manner as other taxes; as provided by law." In *Gilmore v. Hentig*, 33 Kan. 156, 5 Pac. 781, the supreme court, in passing upon this section, says: "Where a statute authorizes a city to provide for the construction of sewers and drains, and to tax the cost thereof upon the adjacent owners, but does not prescribe any mode for the apportionment of the taxes, the city, in such case, would have a right to adopt any mode for the apportionment of the taxes that would be fair and legal; and, as a general rule of apportionment, the levying of the taxes in proportion to the value of the lots taxed, without the improvements thereon, would be fair and legal." As to the assessment being made without including personal property, the act under which it was made specifically provides that "the cost and expense of the sewers shall be assessed against the lots or pieces of ground." This certainly excludes personal property, and, as we have said, from the condition of this record we cannot intelligently pass upon the other assignments of error, as their correctness or incorrectness depends entirely upon the testimony introduced at this trial, which has not been preserved. We fail to see any error in the record. The judgment of the lower court will therefore be affirmed. All the judges concurring.

CHICAGO, R. I. & P. RY. CO. v. GREEN.
(Court of Appeals of Kansas, Northern Department, E. D. Sept. 9, 1896.)

RAILROADS—DUTY TO FENCE.

1. Railroad companies are not absolved from complying with the express terms of the statute requiring them to inclose their roads with a good fence, except where some paramount interest of the public intervenes, or some paramount obligation or duty to the public rests upon them, rendering it improper for them to fence. *Railway Co. v. Shaft*, 6 Pac. 808, 33 Kan. 521.

2. And if, for any reason, they are relieved from fencing their roads at some particular place or places, they must construct fences or other barriers as near thereto as is reasonably practicable.

(Syllabus by the Court.)

Error from district court, Wabaunsee county; William Thompson, Judge.

Action by Amava Green against the Chicago, Rock Island & Pacific Railway Company. From a judgment for plaintiff, defendant brings error. Affirmed.

M. A. Low and J. E. Dolman, for plaintiff in error. Sprague & Tracy, for defendant in error.

GILKESON, P. J. This action was brought by Amava Green against the Chicago, Rock Island & Pacific Railway Company, in the district court of Wabaunsee county, to recover damages for the killing of a horse belonging to the plaintiff. The allegations of the petition are that "the killing was the result of and caused by negligence of the defendant in the operation of its railroad, in that the agents and employes of the defendant at the time of the killing did not exercise due care and diligence in the operation of its engine and cars, and that the defendant did not exercise due care and diligence in having its track inclosed with a good and lawful fence, as required by statute." The first allegation of negligence seems to have been abandoned, and the right to recover was based entirely on the alleged failure of the defendant to fence its track.

The evidence establishes the following facts: That the horse in question was killed by the agent and employes of the defendant below, at the time stated in the petition, at a point about 800 feet west of the west switch limits of said railroad, at Wabaunsee, Wabaunsee county; that the plaintiff was the owner of the horse; that a fair market value of the horse was \$75, and that the reasonable attorney's fees was \$40; that a proper demand was made upon the defendant railroad company for the value of the horse before this action was commenced, and that at the place where the horse was upon the right of way of the railroad company, and for a quarter of a mile east and west of that point, there were no fences, cattle guards; or other barriers to prevent stock from going onto said railroad, inclosing the right of way; that, just before the horse was killed, it came down the bank, and onto the right of way, from a point about 15 rods from the railway track, west of a certain toolhouse of the company, which is located on the right of way, about a quarter of a mile northwest of the depot; and that the horse was struck and killed at a point west of the public crossing.

There are but two alleged errors assigned upon which the plaintiff in error relies for a reversal of the judgment: First, "that the court erred in refusing to instruct the jury at the close of the testimony to return a verdict for the plaintiff in error"; and, second, "in overruling a motion for a new trial."

Paragraph 1252, Gen. St. 1889 (being section 1, c. 94, Laws 1874), provides: "Every railway company or corporation in this state, and every assignee or lessee of such company or corporation, shall be liable to pay to the owner the

full value of each [any] and every animal killed, and all damages to each and every animal injured by the engine or cars of such railway, or any other manner whatever in operating such railway, irrespective of the fact as to whether such killing or wounding was caused by the negligence of such railway company or corporation, or assignee or lessee thereof, or not." Section 5 of the same act provides: "That this act shall not apply to any railway company or corporation, or the assignee or lessee thereof, whose railroad is inclosed with a good and lawful fence, to prevent such animals from being on said railroad." Our supreme court, passing upon this statute, has said: "There is no express exception to, or limitation upon, or modification of, any of the provisions of the foregoing sections by any other statute, none except such as is found in said section 5; and if there is any exception, limitation, or modification of any of the foregoing sections, other than that contained in section 5, it must be such only as arises by implication or by judicial construction or interpretation. In other words, under chapter 94 of the Laws of 1874, and upon its face, a railway company is liable in all cases for injuries done to animals by the operation of its road, except where the railroad is inclosed with a good and lawful fence. 'Expressio unius est exclusio alterius.' * * * In the nature of things, however, there must be some limitation upon the terms of the language used in said chapter 94 of the Laws of 1874. It would be improper for the railroad to inclose its road where the same crosses a public street or highway, for such a thing would do violence to other provisions of the statutes of the state. It is also held by some courts that even a railroad depot or station is of such a public character that it would be improper to fence its road at such place, and there are cases which go even beyond this. The great weight of authority, however, is that railroad companies are not absolved from complying with the express terms of the statute requiring them to inclose their roads with a good and lawful fence, except where some paramount interest of the public interferes, or some paramount obligation or duty to the public rests upon the railroad companies, rendering it improper for them not to fence their roads. No private interest or convenience or inconvenience on the part of a railroad company will alone be sufficient to absolve it from fencing its road where the statute, in express terms, requires that the road shall be fenced. The language of the statute is very plain, 'must be inclosed with a good and lawful fence, to prevent such animals from being on said railroad.' Building fences along the side of the track is not alone sufficient, nor would the construction of cattle guards at each end of the switch limits comply with the plain statutory requirements. The railroad must be inclosed; and it is not the province of the

courts to create exceptions to the rule, or interfere with the legislative policy. Courts may and have said that, where some other statute or some paramount duty or obligation absolves railroad companies from fencing their road, they need not do so; but where the statute expressly requires them to fence in order to exempt the company from liability, and no other statutes or obligations or duty or any good reason exists to relieve them from so fencing, the courts cannot say they need not fence. And if, from any reason, they are relieved from fencing at any particular place or places, then they must construct fences, cattle guards, and other barriers as near thereto as is reasonable and practicable to inclose their tracks." *Railway Co. v. Shaft*, 33 Kan. 521, 6 Pac. 916. We think the exceptions to the general rule requiring railroad companies to fence their roads have been clearly and fully pointed out by the supreme court of this state in the cases of *Railway Co. v. Shaft*, supra, and *Prickett v. Railway Co.*, 33 Kan. 748, 7 Pac. 611. And if, from any reason, in this case the company was relieved from fencing its road at any particular place, it devolved upon the company to show it. The burden of proof in all such cases rests upon the company.

There was no attempt on the part of the company to show that its road was fenced at the place of the accident, or at any place. There was some testimony offered to show that to maintain cattle guards within 1,000 feet of the switch limits would endanger the lives and limbs of its employees. But the verdict and findings of the jury are against the company upon this proposition, and conclude this court. And conceding, for the purpose of this case, this to be true, would the company be relieved from fencing their road at the place of the accident? We think not. It is not shown that the land or place of the accident was necessary for the use of the company, as a part of its station grounds; yet it might be said from the testimony that it was so used. But would that relieve the company from the statutory duty of fencing? Our supreme court has answered this question in the negative, and in *Railway Co. v. Shaft*, supra, it is said: "Assuming for the purposes of this case that land necessarily used for station grounds need not be fenced, then the question arises: Is it necessary for a railroad company to inclose a tract not necessary for the use of the railroad company as a part of its station grounds, but in fact so used? Under the circumstances of this case, we think we must answer this question in the affirmative. To say that railroad companies are not required to fence their roads in such cases would be to create an exception, without any good reason therefor." We have failed to discover any reversible error in the record. The judgment of the district court will be affirmed. All the judges concurring.

BEACH v. MOSER et al.

(Court of Appeals of Kansas, Northern Department, E. D. Sept. 16, 1896.)

**GUARDIAN—LIABILITY FOR DEFAULT OF AGENT—
BANKS AND BANKING—COLLECTIONS—
SUBAGENTS.**

1. A guardian who in good faith, and using reasonable care to select a proper agent, does select one of good repute to make collection of a claim of his ward, and such agent collected the money due thereon, and kept it, is not liable to his ward for the loss.

2. Where a collection is placed in the hands of a bank with authority to employ another bank to collect it, the second bank becomes the subagent of the customer of the first, for the reason that the customer authorizes the employment of such agent to make the collection.

(Syllabus by the Court.)

Error from district court, Morris county; M. B. Nicholson, Judge.

Action by Asahel Henry Beach against A. Moser, Jr., and others, on a guardian's bond. From a judgment for defendants, plaintiff brings error. Affirmed.

In April, 1884, A. Moser, Jr., one of the defendants in error, was appointed guardian of the estate of Asahel Henry Beach, the plaintiff in error, by the probate judge of Morris county, Kan., who filed his bond as such guardian, with his co-defendants as his sureties thereon. The estate of the plaintiff in error consisted of a legacy of \$1,000, bequeathed to him by his uncle Abijah I. Beach, late of the county of Richland, in the state of Ohio; and one Benjamin Woodruff was the executor of the last will and testament of said Abijah I. Beach, and one A. H. Redding was the attorney of said Woodruff, residing in Richland county, Ohio, and with whom most of the business connected with this legacy was transacted. Mr. Moser, the guardian, was also the cashier of the Farmers' & Drovers' Bank of Council Grove, Kan. After Moser's appointment, he had some correspondence with Redding, the attorney of the executor, Woodruff, in reference to the legacy, who wished Moser to take some notes due the estate of Abijah I. Beach from a Mr. Welch, who resided in Morris county, Kan., in payment of the legacy. Mr. Moser investigated the matter, and declined to do so, because Welch was not ready to pay, and informed the executor, through his attorney, to that effect. In July, 1884, the executor acknowledged the receipt of this information with reference to Welch, and sent a receipt for Moser to sign, asking him to send it to the Exchange Bank of Belleville, Ohio, and that the legacy would be paid soon. Moser did as requested, and attached a draft to the receipt, and sent it to the Ohio bank, using for this purpose the stationery and blank of the Farmers' & Drovers' Bank, but the bank was in no way connected with this collection. It was not charged to the bank, nor did he take any credit therefor. He repeatedly inquired by letter to the Ohio bank, and was informed each time that the money

had not been paid; but in fact the Ohio bank had received the money, and its statements to the guardian were false. In February, 1885, the Ohio bank failed, and the guardian has been unable to collect any of said legacy. In April, 1889, the plaintiff in error brought suit to recover the amount of this legacy, with interest thereon, from Mr. Moser and his sureties upon his bond as guardian. Trial was had before court and jury, which resulted in a verdict and judgment in favor of the defendant, and the plaintiff brings the case here for review.

J. H. Mahan and D. H. Browne, for plaintiff in error. Malloy & Kelley and Morris L. Ritchie, for defendants in error.

GILKESON, P. J. (after stating the facts). We think the theory adopted by the court below of this action is correct,—that it is an action between the guardian and his ward, and not between the guardian and the Farmers' & Drovers' Bank; and the only issue presented by the pleadings and proof offered in support thereof was whether or not the defendant Moser had, or had not, been negligent in the discharge of duties. The petition charges a breach of the condition of his bond, viz. "that he did not faithfully discharge his duties as guardian." The answer alleges that "he had used due care and diligence in his attempt to collect the legacy sought to be recovered in this action, and, without any fault or negligence on his part, had failed to do so." The reply denies this, and the testimony offered by the plaintiff upon the trial was unquestionably for the purpose of showing the negligence on the part of the defendant in not collecting this money from the parties the plaintiff claims were liable therefor, as well as want of diligence upon his part. But the plaintiff now contends that no question of negligence or diligence is in issue; yet he insists that the law of this case is that "it is incumbent on a trustee to manage the trust estate in the same manner that a discreet man would manage his concerns, and he is accountable if he neglects to perform his duty"; that "a trustee is bound to manage and employ the trust property for the benefit of a cestui que trust with the care and diligence of a provident owner,"—and cites authorities in support thereof; and we agree with him that such is the law, and that it governs this case. And it is also true that a guardian who in good faith, and using reasonable care to select a proper agent, does select one of good repute to make a collection of a claim of his ward, and such agent collected the money due thereon, and kept it, is not liable to his ward for the loss. *Holeman v. Blue*, 10 Ill. App. 130. A rule which would subject a guardian to a sort of a fine for mere error in judgment is inapplicable to the character of the office. *McElheny v. Musick*, 63 Ill. 328; *Landmesser's Appeal*, 126 Pa. St. 115, 17 Atl. 543. The jury passed upon this ques-

tion of negligence, and found in favor of the defendant, and these findings are supported by ample testimony: "Q. 1. Did the defendant Moser use ordinary care and prudence in attempting to secure the legacy belonging to the plaintiff? Ans. Yes. Q. 2. Did the defendant Moser ever receive the amount of the legacy due to the plaintiff from the estate of A. H. Beach? Ans. No. Q. 3. Was the defendant Moser guilty of any negligence in attempting to secure the amount of the legacy due to the plaintiff? Ans. No." Under the rule so well established in this state, the verdict will not be disturbed so far as this question is concerned.

Again, it is urged that this guardian was also cashier of the Farmers' & Drovers' Bank, and, as such, forwarded this draft through the bank to the Ohio bank. We cannot agree with this contention. The testimony very clearly shows that the bank was not connected with it in any way. The guardian did not act as cashier, but as guardian, in this transaction; nor was it in any sense a commercial transaction. The fact that a draft was attached to the receipt would not make it one if it was substantially something else. The substance, not the form, determines the character of a transaction, contract, or document. The receipt was the essential document, and upon it the money was to be, and was, paid. The draft was merely ancillary. The draft was not intended as such, nor sent in the usual course of banking business, but direct to a bank convenient to the executor, and at his request. All these circumstances tend to uphold the defendant's theory of this case,—that he acted as guardian, and not as cashier; never supposed or treated the transaction as a contract with his bank. We think the contention of the plaintiff in error is founded upon a misapplication of a rule of commercial law, prevailing in some, repudiated in many other, states, and not adopted in Kansas to the facts of the case at bar.

If we were to concede that the defendant acted as cashier in this transaction, under the circumstances of this case, would his bank be liable to him as guardian? We think not. The Farmers' & Drovers' Bank would simply be the agent of the guardian to transmit the note to the Exchange Bank of Belleville, Ohio; and the latter bank would be the agent of the guardian for the collection thereof. *Bank of Lindsborg v. Ober*, 81 Kan. 599, 3 Pac. 324. The Farmers' & Drovers' Bank was not only authorized to employ another agency, but was directed and instructed as to the particular one to be employed. We think the law is well settled that the bank receiving the paper became an agent of the depositor, with authority to employ another bank to collect it. The second bank becomes the subagent of the customer of the first, for the reason that the customer authorizes the employment of such an agent to make the collection. The paper remains the property

of the customer, and is collected for him. The party employed with his assent to make the collection must therefore be regarded as his agent. A subagent is accountable, ordinarily, only to his superior agent, when employed without the assent or direction of the principal. But, if he be employed with the express or implied assent of the principal, the superior agent will not be responsible for his acts. There is in such a case a privity between the subagent and the principal, who must therefore seek a remedy directly against the subagent for his negligence or misconduct. *Story, Ag. §§ 217-318*. These familiar rules of law, applied to the case at bar, relieve it of all doubt, even under the theory of the plaintiff in error.

While it must be admitted that there seems to be a variety of opinion among the very able courts that have had this question before them, yet we doubt, if the cases were all carefully studied, and the facts upon which each case was decided were carefully considered, there would be as much conflict as at first seems; and, undoubtedly, the preponderance of the authorities supports the conclusions we have reached. The following, among others, are to this effect: *President, etc., of Dorchester & Milton Bank v. President, etc., of New England Bank*, 1 Cush. 177; *Fabens v. Bank*, 23 Pick. (Mass.) 830; *Lawrence v. Bank*, 6 Conn. 521; *Bank v. Scovill*, 12 Conn. 303; *Hyde v. Bank*, 17 La. 560; *Aetna Ins. Co. v. Alton City Bank*, 25 Ill. 243; *Stacy v. Bank*, 12 Wis. 629; *Tiernan v. Bank*, 7 How. (Miss.) 648; *President, etc., of Agricultural Bank of Mississippi v. Commerce Bank of Manchester*, 7 Smedes & M. 502; *Bowling v. Arthur*, 34 Miss. 41; *Jackson v. Bank*, 6 Har. & J. 146; *Bank v. Howell*, 8 Md. 530; *Bank v. Triplett*, 1 Pet. 25; *Bank v. Earp*, 4 Rawle, 384; *Bellefleur v. Bank*, 4 Whart. 105; *Daly v. Bank*, 56 Mo. 94; *Smedes v. Bank*, 20 Johns. 373; *Guelich v. Bank*, 56 Iowa, 484. 9 N. W. 328.

It is contended that the court erred in giving certain instructions, to which the plaintiff excepted in the following manner: "To the giving of which said instructions the plaintiff then and there duly excepted and excepts." This is insufficient. A general exception to a whole charge is not available, unless the whole charge is erroneous, or unless the charge in its general scope or meaning is erroneous. *Sumner v. Blair*, 9 Kan. 521; *Atchison City v. King*, Id. 550; *Ferguson v. Graves*, 12 Kan. 39; *Wheeler v. Joy*, 15 Kan. 390; *Hunt v. Haines*, 25 Kan. 211; *Yeaman v. James*, 27 Kan. 213; *Bard v. Elston*, 31 Kan. 276, 1 Pac. 565; *Fullenwider v. Ewing*, 25 Kan. 69. The charge in this case is not subject to any such objection.

There are numerous assignments of error upon the admission of testimony. We have carefully examined and considered them, but fail to find any reversible error therein.

The judgment of the court below will be affirmed. All the judges concurring.

**MERRIMACK RIVER SAV. BANK v.
CURRY et al.**

(Court of Appeals of Kansas, Northern Department, E. D. Sept. 16, 1896.)

CONTRACT OF SURETYSHIP—CONSTRUCTION.

A surety is a favorite of the law, and has a right to stand upon the precise terms of his obligation; and when the terms used therein are not explicit the courts will place such a construction thereon as will uphold the evident understanding of the parties as to its force and effect at the time it was entered into. Garver, J., dissenting.

(Syllabus by the Court.)

Error from circuit court, Shawnee county; J. B. Johnson, Judge.

Action by the Merrimack River Savings Bank against W. S. Curry and others on a bond. On defendant Curry's death, Cornelia H. Curry and others, executrix and executors, were substituted, and from a judgment in their favor plaintiff brings error. Affirmed.

D. N. McFarland and Wheeler & Switzer, for plaintiff in error. Douthitt, Jones & Mason, for defendants in error.

GILKESON, P. J. In April, 1885, the plaintiff commenced a suit in the district court of Shawnee county, which was afterwards removed to the circuit court of the United States for the district of Kansas, against Rufus Bean and Susan A. Bean (husband and wife) and Christopher E. Schmidt, to recover of the Beans the amount due on a promissory note secured by mortgage, and to foreclose said mortgage. Christopher Schmidt also held a mortgage on the same property, and was for that reason a party defendant. At the time of the commencement of this suit an application was made for a receiver. The defendants Bean and his wife tendered a bond in the sum of \$1,200, upon which W. S. Curry was surety. The court accepted this bond, and overruled the application for a receiver. The bond is as follows: "Know all men by these presents, that we, Rufus Bean and Susan A. Bean, as principals, and W. S. Curry and ———, as sureties, all of Shawnee county, in the state of Kansas, are held and firmly bound unto the Merrimack River Savings Bank, a corporation duly organized and existing under and by virtue of the laws of the state of New Hampshire, in the penal sum of twelve hundred dollars (\$1,200), lawful money of the United States, to the payment of which, well and truly to be made, we do hereby, jointly and severally, bind ourselves, our heirs, executors, administrators, and assigns, firmly by these presents. The conditions of this obligation are such that, whereas the said Rufus Bean and Susan A. Bean on the 15th day of December, 1881, executed and delivered to said Merrimack River Savings Bank their certain promissory note for the sum of six thousand dollars (\$6,000), due five (5) years after date, with interest thereon at the rate of eight (8) per cent. per annum, payable semi-

annually according to the coupons attached to said note, and, to secure the same, executed and delivered unto the Merrimack River Savings Bank a certain real-estate mortgage, which said mortgage was, however, junior and subsequent to certain other mortgages held by Christopher E. Schmidt, to secure the sum of thirty-five hundred dollars (\$3,500) and interest; and whereas, said Merrimack River Savings Bank, as plaintiff, has commenced a suit in the district court within and for the county of Shawnee, in the state of Kansas, against said Rufus Bean and Susan A. Bean and Christopher E. Schmidt, as defendants, praying a personal judgment against said Rufus Bean and Susan A. Bean for the amount due on said note and mortgage, and also for a foreclosure of said mortgage, and the sale of said mortgaged premises to pay said indebtedness; and whereas, said plaintiff has made an application to said court in said action for the appointment of a receiver therein to take charge of said mortgaged premises, and collect the rents and profits thereof, which said order said court refused to make, but ordered this bond, conditioned as herein set forth, to be executed in lieu thereof: The condition of this obligation is such that if the above-bounden Rufus Bean and Susan A. Bean shall, within ten days after the sale of said mortgaged premises under a decree of foreclosure rendered in said action, pay to the Merrimack River Savings Bank the balance, if any, to the amount of this bond, due upon the judgment rendered in favor of said Merrimack River Savings Bank in said action after applying the proceeds arising from the sale of said mortgaged premises to the payment of the mortgage indebtedness thereon, under the order of said court, in accordance with the priorities established by said court, then this obligation shall be void, otherwise shall remain in full force and effect. Dated this 6th day of May, 1885. Rufus Bean, Susan A. Bean, and W. S. Curry." On the 3d day of May, 1886, the circuit court of the United States ordered and decreed that there was due the said Merrimack River Savings Bank, plaintiff herein, from Rufus Bean and Susan A. Bean, the sum of \$7,275.84, and that said indebtedness should bear interest at the rate of 12 per cent. per annum; that there was due defendant Christopher E. Schmidt from said defendants Rufus Bean and Susan A. Bean the sum of \$4,404.67, and that debt should bear interest at the rate of 10 per cent. per annum; and that said Christopher E. Schmidt had a first lien, and said Merrimack River Savings Bank had a second lien, upon the premises therein described, by virtue of the mortgages sued on. And it was then and there by the court further ordered and decreed that should said defendants Rufus Bean and Susan A. Bean fail for six months from the rendition of said judgment to pay to said Merrimack River Savings Bank and said Christopher E. Schmidt said sum so as aforesaid found due them, together with the interest

thereon, and the costs of action, the said described premises should be sold without appraisalment, etc. Said premises were on the 20th day of December, 1886, by W. A. Scott, special master in chancery, sold in accordance with said decree; and he filed his report, showing that the premises sold for the aggregate sum of \$12,175, that the costs of suit amounted to \$261.27, that the amount due Christopher Schmidt was \$4,082.40, and that the amount due the Merrimack River Savings Bank was \$7,826.37. After this report was filed, in January, 1887, the plaintiff applied to the court, asking that the taxes levied and assessed against the real estate, amounting to \$282.68, be paid. The court ordered the master in chancery to pay these taxes out of the proceeds of said sale. On the 16th day of February, 1887, W. S. Curry, the surety on said bond, paid in to the clerk of said circuit court the sum of \$606.14. The plaintiff contends that, under the terms of this bond, the taxes so as aforesaid paid should be deducted from the amount received for the property, as well as the costs of said suit, and that then the balance due would be \$877.72, with interest at the rate of 12 per cent. per annum, and, to recover this amount, on the 13th day of April, 1890, brought suit upon this bond. W. S. Curry filed a demurrer to the petition. Rufus Bean and Susan A. Bean made default. Upon the hearing had upon the demurrer, the court held that the petition did not state facts sufficient to constitute a cause of action in favor of the plaintiff and against the defendant Curry, and sustained the demurrer. The cause was proceeded with as against the other defendants, and judgment rendered against Bean and Bean for the sum of \$441.61. Plaintiff brings case here for review on the action of the court sustaining the demurrer.

Why was this bond given? There was an action pending to foreclose two mortgages against the property of the principals on this bond,—one belonging to the plaintiff in error, and the other to one Christopher E. Schmidt. These were the only things under consideration at the time, and to provide for the payment thereof this bond was entered into. One of these must be a first, and the other a second, lien on the land. The court must and would decide between them. This would constitute the priorities to be established. If the plaintiff's was decreed to be a prior lien, then the liability of the bond would only be the difference between the purchase price, or proceeds, and the amount due on the judgment rendered. If the purchase price was more than the judgment, then there would be no liability. If it was declared to be a second lien, then the liability would be determined in another manner, viz.: If the purchase price was not sufficient to pay the first, the liability would be for the amount of the judgment rendered. If more than sufficient to pay the first, then it would be the difference between the purchase price, less the amount of the other mort-

gage, and the amount of the judgment rendered, subject to the order of the court made at the time the decree of foreclosure was entered. The order entered at that time was "to pay to said Merrimack Savings Bank the sum as aforesaid found due, together with the interest thereon, and costs of this action." The court found, with reference to the amounts due, that there was due the plaintiff \$7,275.84, with interest at 12 per cent.; that there was due to Christopher E. Schmidt the sum of \$4,404.67, with interest at 10 per cent. The amount therefore found due on the mortgage indebtedness was the difference between these two sums, and the interest thereon; and, under the order of the court, the bondsmen had six months from the date of the rendition of the judgment in which to pay this amount. We cannot believe that it was contemplated by the parties at the time the bond was given that the term "proceeds" meant the amount due after all expenses were deducted, or that they intended to be bound for the payment of any and all liens that might be established against this property. They used the term "proceeds" in its usual, well-known, general signification: "The sum, amount; money arising from the sale; the purchase price; the bid." We think the language of the bond admits of but one construction, viz.: That the proceeds (that is, the purchase price; the amount bid) shall be applied to the mortgage indebtedness, according to the priorities, and then, if any balance was due, it should be paid under the bond, according to the order of the court. We fail to see where there is any room, under the conditions of this bond, to hold the surety for a deficiency created by any other liens than those contemplated at the time he became a surety. Suppose it developed, in the progress of this action, that a mechanic's lien had attached to either of the tracts of land, and it was prior to either or both of these mortgages, so that the plaintiff's mortgage, instead of being a second, would have been a third, lien; would it for a moment be contended that this bond would indemnify against it? We think not; and the taxes were simply a lien. These parties, as we have said, were contracting for and about two certain mortgages,—nothing more, and nothing less. The taxes were surely not contemplated. The record shows that the plaintiff did not think of them until long after the sale was made. The plaintiff had it in his power to make these taxes a part of the mortgage indebtedness. He failed to do so. We cannot make a contract for him. The court, under the statutes, ordered these paid, not as a part of the mortgage indebtedness, but out of the proceeds. We cannot understand how it can be claimed that the parties to be bound intended that the taxes should be first paid, any more than any other lien that had attached to this property. This bond was given in a legal proceeding.

The parties could very easily have made it express what they now claim it means. They did not, but have acted under it. The record shows that the surety paid (under the order of the court, adding interest and deducting costs) the sum of \$3006.14, and there is no showing made that any objection was ever entered by the plaintiff until more than three years afterwards, by bringing this action. We do not think equity demands, or would uphold, any such strained construction being placed upon the plain terms of this bond. The contention of the plaintiff in error calls to mind the noted litigant in the court of last resort at Venice, reported unofficially some centuries ago. He, being in about the same frame of mind and occupying the position they do here, stated his claim:

"Till thou canst rail the seal from off my bond,
Thou but offend'st thy lungs to speak so loud.
* * * I stand here for law."
—Shylock v. Antonio, Merchant of Venice, act 4, scene 1.

We can best meet this position by using the plea the plaintiff in that case urged as he saw his right of recovery melting away before the argument of Portia:

"Is it so nominated in the bond?
I cannot find it: 'tis not in the bond."
—Shylock v. Antonio, *supra*.

And the courts of the present day have sustained this doctrine: "That a surety is a favorite of the law, and has a right to stand upon the precise terms of his obligation." "That his liability cannot be extended by implication." *Burton v. Decker*, 54 Kan. 609, 38 Pac. 783. The judgment of the court will therefore be affirmed.

CLARK, J., concurring.

GARVER, J. (dissenting). I am unable to concur with the views expressed by the majority of the court in this case. In my opinion, a proper consideration of the circumstances under which the bond was made, and of the object of its execution, requires that such a construction be put upon it as will give effect to the evident intention of the parties to provide for the payment of any deficiency that might remain on the plaintiff's judgment in case it did not receive full payment and satisfaction thereof out of the proceeds of the sale of the mortgaged premises. The taxes due and unpaid on the land were a legal charge thereon, which the purchaser at the sale had a right to have paid out of the purchase money. *Gen. St. 1880, par. 6902*. And the plaintiff could not look to the proceeds of the sale for payment of its judgment until all prior liens, including the taxes, were paid. I think the words, "after applying the proceeds arising from the sale of said mortgaged premises to the payment of the mortgage indebtedness thereon," should be held to refer, as concerns plaintiff's judgment, only to such proceeds as

could be applied to the payment of such judgment, after the payment of all prior legal charges and liens which the court ordered paid.

EDGERTON v. O'NEILL.

(Court of Appeals of Kansas, Northern Department, E. D. Sept. 9, 1896.)

DEMURRER TO EVIDENCE—STREET RAILROADS—RIGHTS—CONTRIBUTORY NEGLIGENCE—PERSONAL INJURIES—DAMAGES—PLEADING.

1. A demurrer to the evidence should be overruled when the evidence fairly tends to establish every material allegation of the petition.

2. A street railway has not exclusive rights to the use of its tracks and ground covered by it, and is constructed and operated on the theory that it is not an additional burden on the highway, but is merely an additional use contemplated when the street was laid out. This necessitates a liberal construction in favor of the rights of the public, and the law is averse to concede any exclusive rights to the portion of the street to railway companies, except where the necessities of the case demand.

3. Where one acts erroneously through fright or excitement, induced by another's negligence, or adopts a perilous alternative in the endeavor to avoid an injury, threatened by such negligence, or when he acts mistakenly in endeavoring to avoid an unexpected danger, negligently caused by the defendant, he is not guilty of contributory negligence, as a matter of law.

4. A personal injury from a single wrongful act of negligence is an entirety, and affords ground for only one action. In that action recovery may be had for all damages suffered up to the time of trial, and for all which are shown to be reasonably certain or probable to be suffered in the future; and, when these are the necessary and proximate result of the act complained of, they need not be specially averred, but are recoverable under the general allegation of damages.

(Syllabus by the Court.)

Error from court of common pleas, Wyandotte county; T. P. Anderson, Judge.

Action by Michael O'Neill against D. M. Edgerton, receiver of the Interstate Rapid-Transit Railway Company. From a judgment for plaintiff, defendant brings error. Affirmed.

Wallace Pratt, for plaintiff in error. Dall & Bird, for defendant in error.

GILKESON, P. J. This was an action by Michael O'Neill, as plaintiff, against D. M. Edgerton, as receiver of the Interstate Rapid-Transit Railway Company, for an injury to said O'Neill, caused by a collision of one of the trains of the said railroad company with a wagon in which O'Neill was seated, and which at the time was attempting to cross the tracks of the street railway. The accident complained of occurred at the street crossing at Ninth and Central avenue, in Kansas City, Kan., upon what is known as the "River View Line," a branch of the main line, and connects therewith at River View Station, in Kansas City, Kan., and runs through said city to Grand View Station, its terminus, a distance of about two miles. This is a double-track road, operated through said city, the trains of which

are drawn by small dummy engines, the round trip being made in about 20 minutes. On the return trip—that is, from Grand View east to River View—the trains are run backward, not being turned at the western terminus, although switches are provided at that point for that purpose. About 100 yards west of the Ninth street crossing is a power house or car barn, between it and the place of collision; and about 200 feet distant therefrom is a curve in the track. The avenue slopes with considerable grade from Tenth street to Ninth street. The train which caused the injury was at the time going east, and was running backward. On the day of the accident, the plaintiff, O'Neill, had been at work grading on Tenth street and Central avenue, and between 6 and 7 o'clock was returning from his work to his boarding house, seated in the rear end of a two-horse wagon, which was driven by one Frank Buchanan. They had proceeded down Central avenue, on the north side thereof, from Tenth street to Ninth street, and at Ninth street the driver attempted to cross the avenue. To do so, he was compelled to cross both tracks, and had crossed the north track, and was in the act of crossing the south, when the train was discovered close upon them. The team and wagon escaped, but O'Neill, jumping therefrom, was struck by the train, and injured.

The jury made special findings of fact, as follows: "(1) What was the speed of the train in question? Ans. About twenty miles per hour. (2) At what distance could the approaching train have been seen by plaintiff at and before the actual crossing of the track? Ans. About six hundred feet. (3) Did or not the plaintiff look to see if a train was approaching at the time before crossing the track or right of way of the defendant, after leaving the road the plaintiff was on? Ans. Yes. (4) If plaintiff did look, at what distance from and before attempting to make the crossing? Ans. About twenty feet. (5) At what distance was train from plaintiff when he first saw it, and could he then have escaped in time to have avoided the accident? Ans. About 45 or 50 feet; to the best of our knowledge, no. (6) Did the plaintiff, at any time before crossing the track of the defendant, stop, and either look or listen for an approaching train? Ans. Stopped, no; looked, yes. (7) What time of day did the accident occur? Ans. Between 6 and 7 p. m." "(11) Was plaintiff guilty of any negligence? If so, in what respect? Ans. No. (12) Was or not Key, the conductor of the train in question, on the platform at the east end of the car which approached and came in collision with plaintiff? Ans. No. (13) If on the platform of the car first approaching the crossing in question, was he or not on the lookout to avoid danger to plaintiff or others? Ans. Was not on platform. (14) While on said platform, was he or not in a position to be

in the immediate command of the brakes of said car? Ans. He was not on platform. (15) On said platform, was he in a position to immediately command and use the bell rope? Ans. He was not on platform. (16) Did or not said Key, while on said platform, as soon as he discovered the plaintiff or wagon and team, make use of the bell rope and of the brakes as soon as he discovered that said team and wagon were about to cross the track? Ans. No." These were all the special findings offered by the defendant.

Our attention is directed to six assignments of error, which we will consider in the order that they are presented:

1. In overruling the defendant's demurrer to the testimony. The allegations set out in the petition are "that the defendant ran and operated its road in a grossly negligent and careless manner, by running the trains thereon backward,—that is, with engines or locomotives attached to the rear end of the train; that such backward running is unnecessary, and highly dangerous to the public safety; that they neglected their duty by not keeping a careful watch on the front end of the train, to avoid collisions; that the train in question was running at a high rate of speed, and they failed to sound the whistle, ring the bell, or give any other signal of approach of danger." Upon all of these allegations testimony was introduced by the plaintiff, which not only tended to prove, but we think established, each and every one of them. In fact, we might say that they stood, for the purposes of demurrer, uncontradicted; and the only facts that could be said to be disputed, or upon which there was any conflict of testimony, are as to the negligence of the plaintiff in attempting to cross the track. And the rule is well established that, where there is a conflict of testimony that reasonable men might differ about, then it becomes a question of fact for the jury; and upon this proposition the jury found that "the plaintiff was not guilty of any negligence," and this finding is upheld by the testimony introduced by the plaintiff; and, should we admit that the testimony upon this proposition was weak, we would not feel warranted in reversing the judgment in this case for that reason alone, when it is so conclusively shown that the employees of the defendant in charge of the train were so grossly negligent in its management, and where the most that could possibly be said of the plaintiff's conduct is that, if he was negligent at all, his negligence was very slight. The supreme court of this state has repeatedly held that "where the negligence of one party is gross, and that of the other is slight, notwithstanding the slight negligence, the party may recover." *Sawyer v. Sauer*, 10 Kan. 466; *Railroad Co. v. Houts*, 12 Kan. 328; *Railroad Co. v. Pointer*, 14 Kan. 37; *Railroad Co. v. Davis*, 37 Kan. 749, 16 Pac. 78.

2. The admission of evidence of any other

accident on this road than this one in question. This needs but little comment. We have examined the record very carefully in this connection, and fail to find any such testimony admitted over the objection of the defendant. In fact, we find that, upon objection made, it was invariably sustained. A motion to strike out was granted. It is true, some testimony looking in this direction was admitted, but without objection, and is raised for the first time in the brief of counsel; and we cannot, therefore, understand how the defendant was prejudiced thereby.

3. That the court erred in giving the following instructions: "(4) If you find that the plaintiff was on a public street, and at a public crossing, when he was struck by the defendant's train, he will not be considered a trespasser upon the rights of defendant by being on its track, the right of the plaintiff and defendant in said street being equal; and the defendant was bound to run its train with reference to the plaintiff and all other persons rightfully on said street, and it was bound to use ordinary care and diligence, so as to avoid injuring him." The petition alleges, and it is admitted in this action, that this line of road was operated upon the public highway and public street in the city of Kansas City, Kan., and that the accident occurred at a public crossing. This being true, the plaintiff cannot be considered as such a trespasser as would relieve the railway company from exercising ordinary care and diligence towards him. In fact, he would not be a trespasser at all. The company would be bound to run its trains with reference to him, and to every other person who might be rightfully occupying the street. Such persons would have the same right to be in the street as the railway company. If the plaintiff and the railway company each have the right to use said ground, then it was incumbent upon each alike to use ordinary care and diligence to prevent and avoid injuries. In commenting upon this proposition, Mr. Justice Valentine, in *Railway Co. v. Pointer*, 9 Kan. 427, said: "In fact, in this case the legal right of the railway company and that of the public to use this ground as a street seems to be about equal. Both derive their right from a city ordinance." And from the record in this case it must be taken for granted that the public used this ground for a street before the railroad was built. "The railway and the streets are equally highways. A legitimate use of either is a public right, and this right rests on the same basis in both. Parties are bound to care and diligence in using either, so their use shall not work an injury to others with the same rights. Persons crossing a railroad on a street or public highway are only exercising an undoubted right; but, in so doing, they must use the same care and vigilance for their safety, and the safety of persons running on the railway, that the operators of the train use. In most cases, as the traveler on the highway can arrest his progress easier and quicker than a railway

train, it would be his duty to stop on the approach of danger; but this obligation does not arise from the superior right of the railroad, but from the condition of the parties." And we think the rule obtains in this state that "the people have the same right to travel on the ordinary highway as the railroad companies to run trains on the railroad (*Railroad Co. v. Morgan*, 43 Kan. 13, 22 Pac. 1000), and that their rights and duties are equal." And this rule is founded upon reason, and supported by the great weight of authorities. But it is contended by the defendant in error that it should not be applied to street railways. We fail to see any good reason for this argument. A street railway has not exclusive rights to the use of its tracks and ground covered by it, as in case of an ordinary railroad company; and the fact that a street railway often occupies a large portion of crowded streets, and that it is constructed and operated on the theory that it is not an additional burden on the highway, but is merely an additional use, contemplated when the street was laid out, necessitates a liberal construction in favor of the rights of the public; and the law is averse to concede any exclusive right to that portion of the street to railway companies, except where the necessities of the case demand; and the great weight of authority that refers to street railways holds that at a crossing neither party has any paramount right of way; in other words, the rights are equal; while it is true, as between a street car and an ordinary vehicle, moving along the track, the car would have the superior right of way, but this superior right of the car does not authorize its owners willfully or negligently to injure one who refuses to recognize it. In *O'Neil v. Railway Co.*, 129 N. Y. 125, 29 N. E. 85, the court says: "As the cars must run upon the tracks, and cannot turn out for vehicles drawn by horses, they must have the preference; and such vehicles must, as they can, in a reasonable manner, keep off from the track, so as to permit the free and unobstructed passage of the cars. In no other way can street railways be operated. As to such vehicles, the railways have a paramount right, to be exercised in a reasonable and prudent manner. But a railway crossing a street stands upon a different footing. The car has a right to cross, and must cross, the street; and the vehicle has the right to cross, and must cross, the railroad track. Neither has a superior right to the other." As was said in *Improvement Co. v. Stead*, 95 U. S. 165: "The mistake of the defendant's counsel consists in seeking to impose upon the wagon too exclusively the duty of avoiding collisions, and to relieve the train too entirely from responsibility in the matter. Railway companies cannot expect this immunity so long as their tracks cross the highways of the country on the same level. The people have the same right to travel on the ordinary highway as the railroad companies have to run trains on the railroad."

4. In giving the following instructions: "If you find from the evidence that the plaintiff or his driver drove upon defendant's track without looking back to see whether an approaching train was in sight, still such carelessness of the plaintiff would be no excuse for the defendant, its officers or servants, to recklessly or wantonly injure him; and if you find from the evidence that after the plaintiff was upon defendant's track, and after the defendant, its officers or servants, saw, or by the exercise of ordinary prudence could have seen, that the plaintiff was upon its track, or in the act of going upon it, then said defendant, its officers, servants, and employes, owed a duty to the plaintiff to use all reasonable means in their power to avert the accident; and if you find that the defendant, its officers, servants, and employes, did not attempt to stop the train as soon as plaintiff was by them seen to be about to cross the track, but allowed the train to run down upon the plaintiff, and only stopped the train when the collision of the train with the wagon in which plaintiff was was imminent, and such train could have been stopped before it collided with such wagon by the exercise of ordinary care, then you will find for the plaintiff." We cannot accept the theory of the defendant that this instruction was erroneous, because it submits to the jury a question not in this case. Upon one branch of the negligence charged it is an important question, proving the conduct of the employes operating this train, and we think there is ample testimony to base this instruction on.

It is also urged that this instruction gave the jury the right to guess as to the distance in which the train, which was running at the high rate of speed testified to, could be stopped. This is not well founded. It was for the jury to say from the testimony at what rate of speed the train was running. They were at liberty to say what testimony had most weight, which they would accept,—that of the engineer or the other witnesses. If they accepted that of the former, then they could find very readily from the testimony whether the train was attempted to be stopped, or could have been stopped, in time to have averted the accident. If they believed the other testimony as to the rate of speed, then we concede that they could not tell in what distance the train could have been stopped, as there is no testimony upon this proposition. Still, they could tell whether an attempt was made to stop the train as soon as the employes saw the plaintiff was about to cross the track; but they evidently disregarded the testimony of the engineer, giving more weight to that of the other witnesses, and so found; and they did not find in reference to the distance in which the train could be stopped, but did find "that no attempt was made to stop when the plaintiff was discovered on the track." It is very clear that this instruction did not mislead the jury, nor was the defendant prejudiced thereby; and, even if the contention of the plaintiff in error was true,

the giving of an instruction upon an abstract proposition of law, and which is irrelevant to the issues in the case, is not reversible error, unless it may fairly be inferred that the jury was misled thereby; nor will an inapplicable, and therefore improper, instruction to the jury require or authorize a reversal of the judgment of the trial court, where such instruction could not have prejudiced any of the substantial rights of the complaining party. *Zimmerman v. Knox*, 34 Kan. 245, 8 Pac. 104; *Railroad Co. v. Karracker*, 46 Kan. 511, 28 Pac. 1027.

5. That instructions 10 and 16 are in direct conflict, and that the giving of both of them was certain to confuse the minds of the jury, and mislead them. Instruction 10 is as follows: "If you find from the evidence that the plaintiff was placed in peril by the carelessness and recklessness of the defendant, its officers, servants, and employes, the propriety of an attempt to escape a reasonable apprehended danger is not to be determined by what a person of ordinary prudence and care would have done under the circumstances." Instruction 16: "And it is further the law that if the jury believe from the evidence that the plaintiff contributed to said injury by leaping or jumping from the place where, if he had remained, he would not have been injured, and, in so leaping or jumping, he did not act as a reasonable and prudent man would have done under the circumstances, then the plaintiff is guilty of contributory negligence, and the jury should find for the defendant; but, in determining whether or not the plaintiff acted with reasonable care and prudence in jumping as he did, you must take into consideration the situation in which the plaintiff was placed at the time,—whether his position was one of great danger, what time he had for deliberation, and all the other conditions and circumstances immediately attending the accident." We fail to see anything misleading or confusing in these instructions, or where they conflict; and that they did not confuse or mislead the jury is clearly shown by the special findings. We think that the trial judge has very clearly, concisely, and ably presented the law in these two instructions. "When one acts erroneously through fright or excitement, induced by another's negligence, or adopts a perilous alternative in the endeavor to avoid an injury, threatened by such negligence, or when he acts mistakenly in endeavoring to avoid an unexpected danger negligently caused by the defendant, he is not guilty of contributory negligence as a matter of law." *Railroad Co. v. Cantrell*, 37 Ark. 519; *Railroad Co. v. McCurdy*, 45 Ga. 288; *Fowler v. Railroad Co.*, 18 W. Va. 579; *Railroad Co. v. Aspell*, 23 Pa. St. 147; *Railroad Co. v. Randolph*, 53 Ill. 510; *Coal Co. v. Healer*, 84 Ill. 126; *Kelly v. Railroad Co.*, 70 Mo. 604; *Railroad Co. v. Stout*, 53 Ind. 143; *Karr v. Parks*, 40 Cal. 188; *Delamaty v. Railroad Co.*, 24 Wis. 578; *Railroad Co. v. Manson*, 30 Ohio St. 451. "Even though the injured person might have escaped the injury brought upon him but for his hasty

and mistaken conduct in the face of danger, yet defendant's negligence is the sole juridical cause for the injury, and the plaintiff's error of judgment only its condition, when plaintiff was placed in the position of danger without previous negligence on his part. When the negligence of the defendant or its agent places a party in such a situation that the danger of remaining where he is at the time is apparently as great as would be encountered in jumping or leaving it, the right of compensation or recovery is not lost by doing the latter; and this rule holds good even where the event has shown that he might have remained where he was with more safety." *Railroad Co. v. Aspell*, supra; *Stokes v. Saltonstall*, 13 Pet. 181.

6. That instruction 17 is erroneous as to measure of damages, in that it told the jury that they might allow plaintiff for loss of time, physical suffering up to the time of trial, and such further damages as appear to be the probable result of plaintiff's injury, there being no allegation of damages in the petition for loss of time. Instruction 17 is as follows: "If you find that the plaintiff is entitled to recover, you will find for him such an amount as you shall deem fair and just, in view of the injuries sustained, without regard to the character of the parties, or the ability of the defendant to pay. There is no exact rule for the computation of damages in the case of personal injuries, but, if the plaintiff is entitled to recover, you may allow for loss of time, and for physical pain which has resulted up to the present time, and, if the plaintiff is still disabled from such injury, such further damages as appear from the evidence to be the natural and probable result of such injuries." The law aims to afford full redress for personal injuries, as well as for others. The sufferer is entitled to compensation from the person by whose fault the injury occurred, for all damages sustained that are the necessary and proximate result of the act complained of, such as physical and mental pain, loss of time, injury to business, and diminished working capacity. The last three mentioned represent very often the chief pecuniary loss from personal injuries. None of these are shown for the purpose of affording or establishing the measure of damages, but to aid the jury in estimating a fair and just compensation for the injuries sustained. A personal injury from a single wrongful act of negligence is an entirety, and affords ground for only one action. In that action recovery may be had for all damages suffered up to the time of the trial, and for all which are shown to be reasonably certain, or probable to be suffered in the future. And we understand the rule to be that, when these are the natural and proximate results of the act complained of, they need not be specially averred, but are recoverable under the general allegation of damages. In other words, all damages which are not the necessary and

proximate result of the act complained of are special, and must be specially alleged. In *Shepard v. Pratt*, 16 Kan. 215, the court says: "It is unnecessary in most cases where the demand is unliquidated, and sounds wholly in damages, and where there is but one cause of action, to state specially and in amounts the different elements or items which go to make up the sum total of damages. It is enough to claim so much in gross as damages for the wrong done. In such case the only limitations upon the size of the verdict are that it shall not exceed the gross amount claimed, and that the jury, in arriving at it, shall have had regard to the true measure of damages." And the rule has been laid down in our supreme court in *City of Atchison v. King*, 9 Kan. 551, as follows: "The measure of damages is for loss of time for expenses, and for physical pain which had resulted from the injury up to the time of the commencement of the action, and, if the plaintiff is still disabled from such injury, such further damages as appear from the evidence to be the natural and probable result of such injuries." And in *Townsend v. City of Paola*, 41 Kan. 581, 21 Pac. 598, it was held: "It is error to instruct the jury that the injured party can only recover for damages resulting from the injury up to the time of the commencement of the action. The injured party is entitled to recover all damages resulting from the injury, whether present or prospective." In that case the instruction given was as follows: "If you find that the plaintiff is entitled to recover, the measure of damages is compensation for the loss of time, for the expense, and for the physical pain which had resulted from the injury up to the time of the commencement of this action, and, if the plaintiff is still disabled from such injury, such further damages as appear from the evidence to be the natural and probable result of such injury." The court held that this instruction was erroneous and prejudicial to the rights of the plaintiff, inasmuch as it told the jury to estimate the damages from the time the injury occurred, January 31st, until the commencement of this action, February 10th, which only covered about 10 days of the time; and under it the jury were not allowed to take into account the condition of the plaintiff in error at the time of the trial, in October of the same year, or at any time between the commencement of the action and the trial. In commenting upon this instruction, the court says: "Elements of damages in cases of this character are loss of time from business or employment, loss of capacity to perform the kind of labor done before the injury, or for which the person is fitted, the expense incurred for medical services, purchases of medicine, cost of nursing, etc., and the physical pain suffered;" citing *City of Atchison v. King*, supra. "In estimating the amount of damages to be given for permanent injury, the elements to be consid-

ered are the former occupation of the plaintiff, the amount of money received from it, in addition to the physical suffering, and some other elements that particular cases may warrant;" citing numerous authorities. These are rules by which the damages are measured, whether the injuries inflicted were temporary or permanent in their character. "In actions for personal injuries, the plaintiff recovers for permanent loss of earning power, which includes both pecuniary loss he has sustained, and that which he is likely to sustain during the remainder of his life;" citing numerous authorities. The text writers on the law of damages all say: "The injured party is entitled to recover in one action compensation for all damages resulting from the injury, whether present or prospective." The allegations of the petition are sufficient to warrant the admission of testimony upon all the elements of damages, and the testimony admitted sufficient to base these instructions upon, and they direct the attention of the jury to the proper items to be considered by them in estimating the amount to be returned in their verdict. If the allegations in the petition were in any manner indefinite and uncertain, as alleged by counsel, application should have been made to make the plaintiff make the petition more definite and certain by amendment. The judgment of the court below will therefore be affirmed. All the judges concurring.

In re BORREGO et al.

(Supreme Court of New Mexico. Sept. 25,
1896.)

**SUPREME COURT—JURISDICTION—HABEAS CORPUS
—APPEAL FROM TERRITORIAL SUPREME COURT.**

1. Act Cong. March 3, 1885 (23 Stat. 437), relating to writs of error and appeals from judgments of territorial supreme courts, was intended to cover the entire subject of appeals, and therefore impliedly repealed Act 1874 (Rev. St. § 1909), and section 10 of the organic act for New Mexico, which made the allowance of appeals in habeas corpus proceedings mandatory.

2. Under Act Cong. March 3, 1885 (23 Stat. 437), authorizing appeals from territorial supreme courts to the federal supreme court in civil cases, only when the matter in dispute is money, or some right the value of which may be ascertained in money, no appeal lies in a habeas corpus proceeding, as it is a civil proceeding, involving merely the civil right of personal liberty.

Habeas corpus proceeding in the matter of the application of Francisco Gonzales y Borrego and others.

Catron & Spiess, for petitioners. John P. Victory, Sol. Gen., H. L. Warren, and J. H. Crist, for the Territory.

COLLIER, J. In this case it is claimed that an appeal should be granted from this court discharging the writ of habeas corpus upon the return made thereto by respondent and remanding the petitioners to the supreme court of the United States. Counsel for petitioners base

their claim for the allowance of an appeal upon two grounds: First, that an appeal is distinctly provided for by the act of 1874 embodied in section 1909 of the Revised Statutes, and by section 10 of the organic act for New Mexico; and, second, that it should be allowed under the act of congress of March 3, 1885 (23 Stat. 437), entitled "An act regulating appeals from the supreme court of the District of Columbia, and the supreme courts of the several territories." It must be conceded that, unless the portions of section 1909 and section 10, *supra*, relating to appeals and writs of error in habeas corpus proceedings are superseded or repealed by the act of March 3, 1885, the allowance of an appeal is mandatory in this character of case, but, if said act governs us in this matter, we must then look to it to ascertain if an appeal lies. We think that the reasoning in *Cross v. Burke*, 146 U. S. 82, 13 Sup. Ct. 22, is controlling on this question, and leads irresistibly to the conclusions that, just as for the District of Columbia the act of March 3, 1885, covered the entire subject of appeals, except as under section 5 of the Act of 1891 (26 Stat. 826), for the establishment of circuit courts of appeal, so, also, it covers the entire subject of appeals from supreme courts of territories to the supreme court of the United States, the act of 1891 providing in no way for such appeals. All antecedent legislation, therefore, providing for appeals from territorial supreme courts, we must consider superseded by the comprehensive plan created by the act of 1885.

An apt illustration as to how section 10 of our organic act and section 1909, Rev. St., pass entirely from consideration as no longer existing legislation, is shown by the argument in the opinion by the chief justice in *Cross v. Burke*, *supra*, pointing out how section 764, Rev. St., no longer applies to the District of Columbia, because of the said act of March 3, 1885. But it is urged that under the act of March 3, 1885, an appeal lies under the terms of section 2, because it is claimed that the justice who tried the cause, and who amended the record while the same was on writ of error in this court, was acting without authority of law, while pretending to act under an authority of the United States, and that everything done by him was *coram non jure*. It is unnecessary for us to say whether or not the application for the writ of habeas corpus distinctly draws in question such an exercise of authority, as, in our view, even if it did, appeal would not lie in habeas corpus cases. Whatever might be our impression as to this, *Cross v. Burke*, *supra*, is again controlling. We quote, as sufficient on this subject, from that opinion. "It is well settled that a proceeding in habeas corpus is a civil, and not a criminal, proceeding. *Farnsworth v. Montana*, 129 U. S. 104, 9 Sup. Ct. 253; *Ex parte Tom Tong*, 103 U. S. 556, 2 Sup. Ct. 871; *Kurtz v. Moffitt*, 115 U. S. 487, 6 Sup. Ct. 148. The application here was brought by petitioner to assert the civil right of personal liberty against the respondent, who is holding him in custody

as a criminal, and the inquiry is into his right to liberty notwithstanding his condemnation. In order to give this court jurisdiction under the act of March 3, 1885, last referred to, the matter in dispute must be money, or some right, the value of which in money can be calculated and ascertained. And as in this case the matter in dispute has no money value, the result is no appeal lies." This reasoning is affirmed in *Re Lennon*, 150 U. S. 393, 14 Sup. Ct. 123.

It is to be said that territorial supreme courts occupy, as to right of appeal in habeas corpus cases, the same position that the supreme court of the district of Columbia occupied between March 3, 1885, and the passage of the act of 1891, referred to the last-named act affecting the District of Columbia, but not the territories. The case *In re Delgado*, 140 U. S. 586, 11 Sup. Ct. 874, is called to our attention, as showing an appeal from this court in a habeas corpus proceeding, but it is to be remarked, as to that case, that the point was not made as to there being no right of appeal from this court to the United States supreme court, and therefore it should not be considered an authority in the light of the cases of *Cross v. Burke* and *In re Lennon*, *supra*. Wherefore it is considered that, there being no authority of law to grant the appeal prayed for, it should be denied.

SMITH, C. J., and BANTZ, J., concur.

SHARP v. GEORGE et al.

(Supreme Court of Arizona. Aug. 24, 1896.)

SCHOOLS AND SCHOOL DISTRICTS—ELECTION TO FORM UNION HIGH SCHOOL DISTRICT—VALIDITY.

1. Laws 18th Leg. Assem., Act No. 32, provides that if a majority of the trustees of a school district, having a certain population, petition the county superintendent for the establishment of a union high school district, the superintendent shall order an election for that purpose; that two or more adjoining school districts may be formed into a union high school district; that in order to form the latter a majority of the trustees of each of the school districts must petition for that purpose; that when they so petition an election must be ordered therein; and that if, at the election, "a majority of such votes be cast in favor of a high school," it is then a district. *Held*, that the majority referred to in such statute is the majority of those voting, and has no reference to the number of qualified electors residing in the district.

2. An election for the purpose and in favor of forming such union high school district out of several adjoining districts was not void because no election was held in one of such school districts, where it appeared that if an election had been held in such district, and all the qualified voters of said district had cast their votes against the proposition, a large majority remained in favor of it.

Appeal from district court, Maricopa county; before Chief Justice A. C. Baker.

Action by Nathaniel Sharp against W. L.

George and others for an injunction to restrain defendants from collecting taxes for the maintenance of a certain union high school. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

Cox & Willis, for appellant. Millay & Bennett, for appellees.

ROUSE, J. The appellant, Nathaniel Sharp, as plaintiff, commenced an action against the appellees, W. L. George et al., as defendants, for an injunction to restrain the defendants from the collection of a tax for the maintenance of a certain union high school in a union high school district, composed of school districts numbered 1, 2, 5, 7, 8, 16, 21, 27, 30, 34, and 38, in Maricopa county, Ariz. All of said school districts were adjoining, and a majority of the trustees of each petitioned the county school superintendent to establish a union high school district, to be composed of said school districts. After receiving such petitions from all of said districts, the said superintendent fixed a date for the election, prepared notices thereof, and elections were held on said date in all of said districts, excepting school district No. 16. It appears from the evidence that by accident no notices of said election were posted up in said district No. 16. The evidence shows that at said election there were, for the establishment of a union high school district, 211 votes, and against it 129 votes. It is evident from the record that the trial court treated the territory embraced within the exterior limits of all the said school districts as one body; the several districts being treated as so many places for voting, as election precincts.

The law for the establishment of union high school districts provides that if a majority of the trustees of a school district, having a certain population, petition the county school superintendent for the establishment of a union high school district, said superintendent shall order an election therein for that purpose. It also provides that two or more adjoining school districts may be formed into a union high school district. In order that a union high school district may be formed of two or more adjoining school districts, it is necessary that a majority of the trustees of each of the school districts shall petition for that purpose, and when that is done an election must be ordered therein. It is evident that in such cases each of said school districts is a part of the proposed union high school district, made such by the said petition; that collectively said school districts form, as it were, a union high school district in embryo. *People v. Union High School Dist. of Solano Co.* (Cal.) 36 Pac. 119. If at the election therein a majority of the votes, in the district as a whole, are for the union high school district, it is then a district; otherwise, it is not. *Id.*; Laws 18th Leg. Assem. Ariz., Act No. 32.

It is admitted that the majority at said election in favor of the proposition was not a

majority of the qualified electors of the district, and for that reason appellant contends that a union high school district was not created. In section 3 of said Act No. 32, *supra*, is the following, viz.: "If a majority of such votes be cast in favor of a high school * * *." These words, considered in connection with other expressions used in said act, lead us to the conclusion that the majority referred to is the majority of those voting, and has no reference to the number of qualified electors residing in the district. *People v. Union High School Dist. of Solano County* (Cal.) 36 Pac. 119; *McCrory, Elect.* § 173, p. 114; *State v. Renick*, 37 Mo. 270; *County of Cass v. Johnston*, 95 U. S. 360; *St. Joseph Tp. v. Rogers*, 16 Wall. 644.

It is admitted that no notice of the election was given, and that no election was held, in school district No. 16. It is contended by appellant that the failure to give the proper notice for the election in said district, and the failure to hold an election therein, made the entire election in said union high school district void. We have already said that each school district was a part of the union high school district, and formed, as it were, a voting precinct therein. It is necessary that a notice of the election be given in some way, either by law or otherwise. *Sheen v. Hughes* (Ariz.) 40 Pac. 679; *McPike v. Pen*, 51 Mo. 63; *State v. Railway Co.*, 75 Mo. 526; *Cooley, Const. Lim.* 603. But it is the law that at a general election for officers a failure to have an election in one or more precincts of a county will not make the election void (*Rev. St. par. 1734*; *Louisville & N. R. Co. v. County Court of Davidson*, 1 Sneed, 637), unless it be shown that the result would have been different if an election had been held in all the precincts. In this case it was shown that if an election had been held in school district No. 16, and all the qualified voters of said district had cast their votes against the proposition, still there would have remained a large majority in its favor. If this had been an application to prevent the establishment of a high school, instituted in due time, the court might have felt constrained to have stopped the proceedings until an election had been held in each school district; but in this case the steps taken were after the high school was established, and heavy obligations had been incurred with reference thereto. Under these circumstances, the failure to have an election in an inconsiderable portion of the district, in which, if an election had been held, it would not have changed the result, did not make the said election void; and the refusal of the court to grant the injunction was proper. The notices of the election were according to the provisions of Act No. 16, p. 35, Laws 1891, which act governs in this case; hence were sufficient. The judgment of the district court, dissolving the injunction, is affirmed.

HAWKINS and BETHUNE, JJ., concur.

SMITH et al. v. BATEMAN et al.

(Court of Appeals of Colorado. Sept. 14, 1896.)

SPECIFIC PERFORMANCE—UNILATERAL AGREEMENT—RESCISSIION.

A written agreement, good for 30 days, to sell certain land to the promisees, and to give them or their assigns a good title thereto, in consideration of a specified sum, to be paid partly in cash and the rest on time (the instrument being signed by the promisor alone, without any consideration being paid by the promisees), is merely a continued offer to sell, and cannot be specifically enforced if withdrawn by the promisor before any offer by the promisees to perform its conditions.

Error to district court, Boulder county.

Bill by C. Edgar Smith and another against James M. Bateman and others for specific performance of an agreement to sell land. There was a judgment dismissing the bill, and complainants bring error. Affirmed.

W. W. Cover, for plaintiffs in error. S. A. Giffin, for defendants in error.

BISSELL, J. The plaintiffs in error brought suit against Bateman and his co-defendants for the specific performance of the following contract: "I hereby agree to sell to T. B. Wilson and C. E. Smith my home place, 157 acres, and to give them or their assigns a good title to same, in consideration of the sum of \$6,000, to be paid as follows: \$3,000 cash, and balance to be paid in one, two, and three years, at 8 per cent., payable annually. This agreement good for thirty days from date. Possession not to be given until Jany. 1, 1891. James M. Bateman." It will be observed the contract does not state a consideration paid by the plaintiffs, and that it lacks any promise on their part to take and pay the purchase price, except at their election. They did not sign it, and in all of its aspects it is unilateral. According to the record, the obligees took no possession under it, nor did they either offer or tender performance until after Bateman had sold the property to his co-defendants. The prospective purchasers were informed of the sale prior to the time of any tender, and were notified by Bateman that he declined to carry it out, and retracted his offer. It is probably true that Bateman made no attempt to notify them of his intended retraction until after the sale, and the parties came to him to inquire what he had done. We regard this as wholly unimportant, because it is exceedingly clear from the testimony that Smith and Wilson were then told that the property had been sold, and Bateman would decline to carry out his arrangement, which he then rescinded. On the hearing, the bill was dismissed, and error is assigned.

The principal proposition urged is that the contract was sufficiently executed to satisfy the requirements of the statute of frauds, and that it is therefore a binding contract, enforceable against Bateman, as well as against the purchasers. It is likewise insisted

there was no such evidence of revocation as is essential to destroy whatever rights Smith and Wilson acquired when they received the option. We cannot assent to either proposition. We do not see the force of the argument respecting the statute of frauds, and are exceedingly clear that what occurred between Bateman and the purchasers was an ample notice to them of the retraction of the offer, and that Bateman only exercised the rights which the law gave him to recede from it, and sell the property to other parties. There was a good deal of testimony offered to the point that, at the time the contract was made, Bateman reserved the right to sell to others providing he should find a purchaser. This we regard as of little importance, since the case is easily disposed of on the general proposition that since the contract was unilateral, executed without any consideration paid by the obligees, and rescinded before an offer to perform, specific performance of the agreement cannot be compelled. This whole subject has been very carefully considered by the supreme court in an analogous case, and its opinion is entirely decisive of the present suit. In the case cited, a similar contract was interpreted to be simply a continuing offer to sell, which, of course, was capable of conversion into a valid contract, either by tender of the purchase money, or performance of the conditions within the proper time, if in the meantime the seller had not withdrawn his offer. Under any other circumstances or any other conditions, such contracts were held not to be enforceable. *Gordon v. Darnell*, 5 Colo. 302. This case is undoubtedly in harmony with all the authorities, and is clearly decisive of the present suit. Accepting it as the law, we must necessarily affirm the judgment. **Affirmed.**

CLIFFORD v. L. WOLFF MANUF'G CO.
(Court of Appeals of Colorado. Sept. 14, 1896.)

ASSIGNMENT OF ERROR.

An assignment of error that evidence was improperly admitted over objection, without reference to any specific instance, is insufficient.

Appeal from district court, Arapahoe county.

Action by L. Wolff Manufacturing Company, a corporation, against Michael D. Clifford. Judgment for plaintiff, and defendant appeals. **Affirmed.**

Doud & Fowler, for appellant. J. B. Willsea, for appellee.

THOMSON, J. Charles F. Gunzert, at the request of the appellant, did a job of plumbing upon the Lindell Hotel, in Denver, for which he charged \$1,031.72. He credited the appellant with payments to the amount of \$700, and assigned the balance of the account to the appellee. The latter, as assignee, brought suit to recover this balance. The case

was referred to Robert H. Given, Esq., to hear and determine the same, and report his findings to the court. After hearing the evidence, the referee found that the value of the work and material was \$1,020.72, and that the amount of payments was \$700, and recommended that judgment be entered accordingly, which was done. To reverse the judgment so entered, this appeal is prosecuted.

The evidence is not as clear or free from obscurity as could be desired, but it seems to be sufficient to warrant the judgment. There are some apparent discrepancies in the testimony of Gunzert, but they do not seem to have arisen out of any attempt at prevarication, and are all explained elsewhere in the evidence.

It is assigned for error that the referee admitted improper testimony over the defendant's objection. The assignment is too general, and entirely fails of compliance with the requirements of our rule on the subject. Our attention is not, either by the assignment or the argument, directed to any specific instance of the admission of improper testimony, and we do not feel called upon to make a critical search through the record to find it. Let the judgment be affirmed. **Affirmed.**

FILBECK v. DAVIES.

(Court of Appeals of Colorado. Sept. 14, 1896.)

ADMINISTRATORS—ACCOUNTS—EXPENSES OF ADMINISTRATION—ATTORNEYS' FEES.

Where an estate was insolvent unless it could collect the amount of an insurance policy on deceased's life, which the company refused to pay, and the administratrix contracted to pay attorneys reasonable fees for services in a suit against the company contingent on collection of the policy, on payment of such fees, without the amount being fixed or approved by the court, the administratrix was entitled to a credit of the amount paid.

Error to district court, Arapahoe county.

On a settlement of the account of Alice R. Filbeck, administratrix of the estate of Thomas E. Davies, deceased, William Davies filed exceptions to certain items, from an order disallowing part of which the administratrix brings error. **Reversed.**

Felker & Dayton and Harvey Riddell, for plaintiff in error. Wm. T. Rogers, for defendant in error.

BISSELL, J. Thomas E. Davies died, intestate, in November, 1892, leaving no relatives in this country. Prior to his death he had been living with Mrs. Filbeck, who was in the same month appointed administratrix of his estate. The deceased left no property, other than one unexpired insurance policy, for \$5,000. Mrs. Filbeck took charge of the estate, attended to his funeral and burial, and generally performed the duties which devolve on relatives. She afterwards entered upon the active administration of the estate, and, when she attempted to collect the amount due

on the insurance policy, the company refused to pay. Evidently, some negotiations were had between the administratrix and the company with reference to proofs and other matters incident to the collection; but it resulted in a final rejection of the claim by the company, which resisted payment on the ground of an alleged breach of the conditions expressed in the policy. It is not needful to state either the history or the nature of the contest, because we are only concerned with the accounts which were filed in the county court by the administratrix in her final accounting. The only claims to which we shall refer are those respecting the fees of Messrs. Felker & Dayton and Mr. Shell, and the commissions of the administratrix. These are the only disputed items. When the company refused to pay the policy, the administratrix employed Mr. Shell to attend to the various matters connected with her administration. On ascertaining that the company would insist on litigation, it was deemed best to employ other counsel, and Felker & Dayton were called into the suit. At the time the lawyers were employed, the estate had no money. It was insolvent unless the policy should be collected. Under these circumstances, the administratrix declined to assume any personal responsibility about it, and would only employ the lawyers on the basis of payment in case the policy should be paid. Such an agreement was made, though there was no specific stipulation as to the amount which the attorneys should receive. The contract was that they should take the matter in charge on a contingency, and receive a reasonable compensation for their services. Suit was begun. It was defended, ultimately went to trial, and the administratrix had judgment. This was paid, less a small reduction of interest, which was permitted by the court. When it was collected, the administratrix settled with the attorneys, paid them their charges, filed her account in the county court, and asked the allowance of the amount paid out and her commissions. This presents all there is in the case. There was an unsuccessful attempt to have the fee fixed by the county court. The matter took the usual course in such cases. The administratrix settled and presented her account for final allowance. The county court deducted a very considerable percentage,—about one-third from the account of Felker & Dayton, and about 50 per cent. from the Shell account, and 60 per cent. from that of the administratrix. As thus scaled, the account was allowed, and the parties interested took the case to the district court, where it was tried, with a similar result.

In determining this case, we do not depart from the general rule which leads us to follow the judgments of trial courts in determining questions of fact. There is no dispute about the facts. The accounts were proven to be just and reasonable by the testimony of nearly all of the witnesses, wheth-

er produced by the claimants or by the father, on whose behalf exceptions were filed. They do not disagree. The fees are almost universally put at a sum beyond that which the lawyers charged. In setting aside the finding of the district court, therefore, we simply accept the testimony, and only disagree with the conclusion. The court itself found that there was no question respecting the authority of the administratrix to employ counsel, and that the fees charged would, under ordinary circumstances, have been reasonable, and, in fact, lower than the usual fees in such cases. We are not very much concerned with the reasons which the court gave for scaling the charges, but we may state that the only one assigned is that the administratrix and the attorneys ought to have reported their doings to the court, in order to give the sole heir, who was the father, in Wales, a chance to protect himself and the estate, by the employment of counsel for an agreed compensation, based on no contingency. We are unable to see the force of the suggestion. As the case stands, we cannot see that the father was unable to protect himself. He might have taken steps both to remove the administratrix, and to assume the control of the administration. It is immaterial what reasons influenced him. This has nothing whatever to do with the question at issue. We are only to inquire whether the proof sustains the judgment, or whether it justifies and requires a different finding from what was embodied in the order. This we are compelled to conclude, because all the evidence establishes the reasonableness of the charges.

It may be laid down as a general proposition that an administrator is entitled to proper credits in his account for all disbursements made in good faith on behalf of the estate, in the course of the administration, whether they concern its necessary expenses, or what may be laid out in recovering assets. This proposition is accepted by all the authorities. The rule extends so far as to justify the representative in making contracts with counsel for fees contingent on the recovery of assets, and therefore estimated at a larger figure than would be proper where the compensation was certain and dependent on a contract which was enforceable in any event as against the representative. 2 Woerner, Adm'n, § 514; Schouler, Ex'rs, § 544; Semmes v. Whitney, 50 Fed. 666; Taylor v. Bemiss, 110 U. S. 42, 3 Sup. Ct. 441; Wilson v. Bates, 28 Vt. 765; Forward v. Forward, 6 Allen, 404. This proposition is conceded by the attorneys for the appellee, with only the limitation that the power does not extend to the making of a special contract, or a contract for a contingent fee. We do not understand the rule to be subject to any such limitation, except as, of course, it must be always subject to the supervision and control of the court charged with the duty of passing on the accounts of personal representatives.

As a general proposition, it is, doubtless, true that the administrator is without the right to pay debts or disburse the funds of the estate, except upon allowance by the court, which must determine the manner and the extent of the payments, as well as the distribution of the general funds to the heirs of the persons entitled. If the administrator pays out money without the direct authority of the court, the account is subject to examination, and it may be surcharged or falsified as circumstances may require or the court deems proper. We do not undertake to say what the general rule is with respect to accounts of this description, or whether the administratrix had a right to pay and present the account for allowance, or whether the account should have been first presented, and paid after allowance. In reality, it makes very little difference in the present case, for the result would be the same in either. Whichever course was pursued, the ultimate approval of the court must be obtained before the account is passed and allowed, and the administrator relieved from any further responsibility. When the administratrix took the responsibility of paying the bills, she likewise took chances on ultimate disapproval if the court should disagree with her respecting the justness of the accounts paid. All we are called upon to determine is whether the accounts as presented were reasonable in their sums, calculated on a just basis, and should have been allowed as they were filed. This was the only question litigated. We cannot conclude otherwise. All agree that the charges were less than the ordinary fees charged in such cases, and to this the trial court assented. This fully justifies us in our conclusion, which is that the accounts as filed in the district court should have been allowed, and judgment entered for those sums. As we have a right to do under the statute, we reverse the judgment of the court below, and direct that judgment be entered allowing the accounts as filed, and that the order of the district court reducing the claims be set aside and held for naught. The proper judgment will be entered. Reversed.

LEONARD v. BOARD OF COM'RS OF GARFIELD COUNTY.

(Court of Appeals of Colorado. Sept. 14, 1896.)

COUNTY CLERKS—COMPENSATION—FOR WHAT SERVICES ENTITLED TO FEES.

1. Under Gen. St. 1883, § 557, as amended by Laws 1885, p. 161, providing that county clerks shall receive reasonable compensation for their services as clerks of the board, where no specific fees are allowed by the board and paid, "provided, that in any county of the third class, the board of commissioners shall not allow, and there shall not be paid by the county to any such clerk, more than the sum of \$600 in the warrants of the county, per annum," such allowance, in counties of any class, does not include payment for services for which fees are fixed by law, but covers all other services rendered in the capacity of clerks of the board.

2. Under Gen. St. § 1452, fixing the fees of county clerks, the provision that in counties of the third class they shall be allowed, "for entering each order of court, thirty-five cents," applies to each order of the board which they are required by law to record.

3. The county clerk, being required by law to preserve and file all accounts acted on by the county board, is entitled to recover therefor, under Gen. St. § 1452, the same fees as fixed by statute for district clerks, which, in counties of the third class, is 15 cents for each paper filed, but he is not entitled to such fees for filing papers not required to be filed by the statute.

4. When a county board directs the clerk to index the record of its proceedings, which is within its general authority and powers, he is entitled therefor to the statutory fee of 10 cents for each entry.

5. A county clerk is not required by statute to either seal or register county warrants, and is not entitled to fees therefor; and, while it is made his duty to sign and attest such warrants, no fees are provided therefor, and the work comes within the class of services covered by his general compensation.

6. Notices sent by a county clerk to the clerks of other counties, that citizens of such counties have become chargeable as paupers in his county, are not process, within the meaning of the statute fixing the fees of district clerks, and no fees are provided or can be collected therefor.

7. For services performed by a county clerk in that capacity, and not as clerk of the board, where such services are performed by requirement of statute, he is entitled to the fees fixed by the statute therefor, if any are provided, and, if not, such services are covered by the general emoluments of the office; for services performed by direction of the county board, acting under their general powers, he is entitled to the statutory fees, if any are provided, and, if not, to reasonable compensation.

Error to district court, Garfield county.

Action by Thomas W. Leonard against the board of county commissioners of Garfield county. Verdict for defendant, by direction of the court, and from a judgment thereon plaintiff brings error. Reversed.

Joseph W. Taylor, for plaintiff in error.
John T. Shumate and C. W. Darrow, for defendant in error.

THOMSON, J. The plaintiff in error was the duly elected, qualified, and acting county clerk of the county of Garfield from the 8th day of January, 1888, to the 1st day of January, 1891, and between those dates, as county clerk, and as clerk of the board of commissioners of that county, performed a variety of services, his claims for which, upon proper demand, the board refused to allow. This proceeding was instituted to recover the amount which he claimed to be due, and from a judgment in the cause, rendered by the district court against him, he has appealed to this court.

The performance of the service is conceded, but the recovery is resisted upon the theory that, by a proper construction of the statutes defining his duties and regulating his compensation, he has received full pay from the county, and cannot, therefore, maintain this suit. The county clerk is charged with the general duties of his office, and is also, ex officio, recorder of deeds and

clerk of the board of commissioners. He therefore acts in three capacities. By the law in force when these services were rendered, he received his pay, as recorder of deeds, from private individuals who had occasion for his services in that capacity. There is no question in this case which affects him as recorder of deeds. It is the compensation to which he was entitled by law as county clerk, and as clerk of the board of commissioners, concerning which counsel disagree. By the law under which these services were rendered, the office of county clerk was not a salaried office, but a compensation was provided by the statute, to which he was entitled, for his services, either as county clerk or clerk of the board, which compensation was payable by the county. His compensation as clerk of the board was not, however, entirely payable in fixed fees; and for services performed as such clerk, for which no specific fees were provided, he was entitled to a reasonable compensation, to be allowed by the board and paid by the county. Gen. St. 1883, § 557. The latter section was amended in 1885 so as to read as follows: "Such clerk shall receive a reasonable compensation for such services as he may perform, as clerk of the board, where no specific fees are allowed by the board, and paid by the county; provided, that in any county of the third class the board of commissioners shall not allow, and there shall not be paid by the county to any such clerk, more than the sum of six hundred dollars, in the warrants of the county, per annum." Sess. Laws 1885, p. 161. The construction of the foregoing section contended for in behalf of the defendant would limit the compensation to which the plaintiff was entitled for any and all services performed by him as clerk of the board to the maximum amount of \$600. It does not seem to us that the language is complicated or involved, or that any recondite learning is necessary to determine what it means. There is but one sentence in the entire amended section. The proviso is dependent upon, and must be interpreted by, what immediately precedes it; and the whole amounts to this: that in all counties, except those of the third class, for services as clerk of the board, for which no specific fees are provided, the county clerk shall receive a reasonable compensation, but that in counties of the third class this reasonable compensation shall not exceed \$600 per annum. Garfield county is a county of the third class, and in that county, therefore, the extreme amount which the commissioners could allow the plaintiff in any one year for services as clerk of the board, for which no compensation in the way of fees was provided by law, was \$600. There is nothing in this section which interferes with his right to claim his statutory fees. On the contrary, his right to them is recognized; and, when services for which they are pay-

able are rendered to the county, the county must pay them, no matter what the amount may be. The foregoing statutory provision affects the county clerk only in his capacity as clerk of the board of commissioners.

Several different accounts are set forth in the complaint. The first claim is for entering and recording on the records of the proceedings of the board 4,529 orders made by the board, at 35 cents for each order. Section 554 of the General Statutes makes it the duty of the clerk of the board to record in a book to be provided for that purpose all proceedings of the board. The act concerning fees and officers provides that county clerks, in counties of the third class, are authorized to receive the same fees as district clerks for like services, and contains the following, among other specific provisions: "For entering each order of court, thirty-five cents per folio." Gen. St. § 1452. Each of these orders consists of one folio. Counsel for the county build an argument upon the phraseology "order of court," to this effect: That section 1452 has come down to us unaltered from the revision of 1868, when the county clerk was ex officio clerk of the probate court; that the words "order of court" therefore refer to proceedings in the probate court; that by the act of the legislature in 1877 the county clerk ceased to be clerk of the probate court; and that, although the words have been retained in subsequent revisions and compilations, yet, the office of the clerk of the court having been abolished, there is nothing to which the words can be applied, and they are therefore no longer operative. The argument would be plausible, if counsel's assumptions concerning the legislation on the subject were correct. By section 7 of an act approved March 11, 1864, the county clerks of certain specified counties were made ex officio clerks of the probate courts in their respective counties. Sess. Laws 1864, p. 118. Very few of the present counties of the third class were named in the act, and the others, or a majority of them, were not then in existence. The act did not embrace all the counties in the state, and its provisions were confined specifically to those named. Nothing can therefore be predicated upon the fact that in those particular counties county clerks were clerks of the probate court. Prior to 1864 the county clerk was not clerk of the probate court in any county. The first act regulating the fees of officers was passed and approved on the 8th day of November, 1861. Counties were not then classified, and the law was equally applicable to all counties. We find in that act the following provisions: "The county clerk shall be and is hereby authorized to receive the same fees as clerks of the district court for like services." "For entering each order of court twenty-five cents." Sess. Laws 1861, p. 392. Section 33 of an act relating to counties and county officers, approved November 6, 1861 (Sess. Laws 1861, p. 90), made it the duty of the county clerk, as clerk of the

board of commissioners, to record in a book to be provided for that purpose all proceedings of the board. In 1861 the county clerk was not *ex officio* the clerk of any court, and the only orders which he was required by law to record were the orders of the board. By the words "each order of court" must have been meant each order of the board, because the duties of the clerk did not concern any orders except those of the board, and he was not entitled to fees, except for the performance of his official duties. In the respects we have noticed, the law has undergone no substantial change from that time to this; and we must hold that the "order of court" is the order of the board, and that for entering and recording the orders made by the board of commissioners the plaintiff was entitled to receive the fees provided by law for the entering and recording of orders.

The next claim of the plaintiff is for filing 3,408 papers, at 15 cents each. These papers consisted of claims allowed and disallowed, and a miscellaneous lot of other papers not pertaining to claims or accounts. Among the duties which the county clerk, as clerk of the board, is required to perform, is that of preserving and filing all accounts acted upon by the board, with their action thereon. For filing such accounts he is entitled by the statute to receive the same fees as clerks of the district court for like services. In counties of the third class the clerk of the district court is entitled to receive "for filing each paper required to be filed fifteen cents." The plaintiff was therefore entitled to 15 cents for filing each paper which he was required to file. He was required to file all accounts acted upon by the board. Except these, we are unable to find that the statute requires any papers to be filed by him. He is entitled to the statutory compensation "for filing the claims allowed and disallowed," but the other items embraced in this account must be rejected.

The charge which follows is for indexing "Book A" of the records of the board. The statute did not require the performance by him of that kind of service, but the board directed him to cause the indexing to be done. Notwithstanding there is no express statutory provision for such work, we think it was clearly within the general authority of the board to order it. Indexing facilitates the examination of the records, and where these are voluminous it would seem to be almost a matter of necessity. It is certainly a benefit to the county to have its records indexed. The authority to order the work need not be conferred in express words. If it results from powers which are conferred, the action of the board in making the order is valid. *Roberts v. People*, 9 Colo. 458, 13 Pac. 630; *Garfield Co. v. Leonard*, 3 Colo. App. 576, 34 Pac. 583. The board has the authority to provide books in which to record its proceedings, and this authority would include the power to cause the books to be supplied with proper indexes. The statute also fixes the fees to be paid for indexing, and

without the authority to order it done the provision would be meaningless. The plaintiff, having done this work by the direction of the board, is entitled to compensation for it. The statute provides specifically that the county clerk shall receive "for each entry in index, ten cents."

The succeeding charge strikes us as being somewhat extraordinary. It is for attesting, sealing, and registering county warrants, on account of which he asks 75 cents for issuing, attesting, and sealing, and 10 cents for registering, each warrant. *Mills' Ann. St. § 801*, says: "Such warrant or order shall be signed by the chairman of the board, * * * attested by the clerk, and when presented to the county treasurer for registry, be countersigned by him." Section 554 of the General Statutes (*Mills' Ann. St. § 809*) makes it the duty of the clerk to sign all orders issued by the board for the payment of money. He is nowhere required to seal the orders or warrants, or register them. There are no fees provided for signing or attesting them. Such work therefore falls within the class of services for which, in counties of the third class, by the terms of section 557 of the General Statutes, as amended by the act of 1885, a sum not exceeding \$600 per annum may be allowed and paid by the commissioners. It is not claimed that this sum was not allowed and paid to the plaintiff. At any rate, he was not entitled to a recovery on account of this charge under the allegations of his complaint.

We come now to a combination of charges of different kinds. Some of them are for notices sent to the clerks of other counties that citizens of those counties had become chargeable as paupers in Garfield county. The statute provides for such notices, but fixes no fees for them, unless, as counsel contends, they come within the following class in the list of fees chargeable by clerks of the district court: "For every summons or other process not herein expressly named, and sealing the same, \$1.25." The "other process" mentioned has no reference to such notices as these. It is process under seal, and these notices are not under seal.

We shall not make specific examination of the remaining charges in the complaint. They are mostly for services performed, not as clerk of the board, but as county clerk; and, as the case must be retried, we shall content ourselves with stating what we conceive to be the rules which should be applied in determining the liability or nonliability of the county upon the several accounts set forth. In relation to services rendered as clerk of the board of commissioners, we think we have stated our opinion with sufficient clearness. The following observations have no application to the county clerk acting in that capacity, but refer solely to his general services as clerk of the county. If a duty is enjoined by statute, and the compensation for its performance is provided, then upon performance of the duty he is entitled to the statutory pay. If the duty is statutory,

but no compensation is provided for its performance, then the law contemplates that it shall be performed without specific compensation, and in consideration of the general emoluments of the office. If the duty is not statutory, but is performed by the direction of the board, given in virtue of the general powers vested in it, and a fee is provided for services of that class, he is entitled to the fee, or if no fee is provided he is entitled to a reasonable compensation. By applying these rules, there need be no difficulty in reaching a just determination of this part of the controversy.

The plaintiff was entitled to a verdict for some amount, upon the undisputed evidence, but the court nevertheless instructed the jury to find for the defendant, which they accordingly did. The instruction was erroneous, and necessitates a reversal of the judgment. Reversed.

PEOPLE ex rel. UNION PAC. RY. CO. v. COLORADO E. RY. CO.

(Court of Appeals of Colorado. Sept. 14, 1896.)

ACTION—STATUTORY PROCEEDING IN NATURE OF QUO WARRANTO—BY WHOM AND FOR WHAT PURPOSES MAY BE MAINTAINED.

Proceedings under Civ. Code, c. 27, providing a substituted remedy by relation for that at common law by information in quo warranto, are quasi public in their nature, to be prosecuted by law officers of the people, and are only available to protect public interests, as distinguished from private rights. Such proceedings cannot be maintained by a private individual or corporation, though with the consent of the law officer of the state, for the dissolution or forfeiture of the charter of a corporation, where the only injury alleged to have been done or threatened is to the private interests of the relator, in which the public has no concern, and where the complaint discloses that the purpose of the suit is to redress or prevent such alleged private wrongs, for which ample remedy is afforded by an ordinary action.

Error to district court, Arapahoe county.

Proceedings, on relation of the Union Pacific Railway Company, against the Colorado Eastern Railway Company. Judgment for defendant, and relator brings error. Affirmed.

Teller, Oranhood & Morgan, for plaintiff in error. Robert W. Steele, Dist. Atty., and Rogers, Cutlbert & Ellis, for defendant in error.

BISSELL, J. This is a proceeding under the statute, which provides a remedy to redress those wrongs which were remediable at the common law by information in the nature of quo warranto. Except, probably, by original proceedings in the supreme court, no information can now be successfully prosecuted. Chapter 27 of the Civil Code has been held to provide a substituted remedy, and to repeal all antecedent legislation on this subject. 2 Wat. Corp. § 380; People v. Londoner, 13 Colo. 303, 22 Pac. 764. The

importance of this suggestion will appear from a brief statement of the complaint. It is filed at the relation of the Union Pacific Railway Company, though signed by the district attorney, as well as by counsel for the company. It is verified by one of the private counsel, which is a circumstance to be remembered in the subsequent discussion. According to the allegations, sundry persons, in 1896, organized a corporation called the Denver Railroad & Land Company. Its objects are stated by quotations from the articles of incorporation. Thereafter divers changes were made, both in the name of the corporation and the extent and character of the corporate purposes. In 1886 the company became the Denver Railroad, Land & Coal Company, and somewhat enlarged its corporate plans. In 1888 a much more elaborate change was effected, by the filing of amended articles, which are conceded to have been in full conformity to the statutory requirements. By these new articles, the company became the Colorado Eastern Railway Company, and, according to its declared objects and purposes, it took the form of a substantial railroad corporation. Theretofore it had been but a short line, running from Denver a few miles out in the adjacent country, to reach the coal fields and lands which had originally belonged to the organizers of the corporation. By the amendment of 1888, the railroad was to extend from the Union Depot in Denver to the eastern boundary line of the state, a distance of several hundred miles. The history of the capitalization of the company, the extent and character of its expenditures, the creation of its bonded indebtedness, and many other details attending its original organization and subsequent development, are set out at length in the bill. In the view we take of the case, no more exact or complete statement need be made. It is averred that the sole purpose of the original incorporation was to carry out the private business of the persons who organized it. After setting up the expenditure of the full capital stock in the construction of the original road, and the creation of a debt of \$500,000, the pleading averred that the new corporation had made no provision for capital to construct the extension, and that it is without the means to carry out its contemplated improvements. The relator then proceeds to state that this defendant corporation, the Colorado Eastern Railway Company, has instituted two suits against it to condemn certain property belonging to the Union Pacific Railroad Company, of the value of about \$175,000, embracing lands indispensably necessary to the successful prosecution of the business of the company. The relator states that these suits are pending in the federal courts, one in the supreme court of the United States, and the other in the circuit court for the district of Colorado. The attempted condemnation is said to be

for private ends and speculative purposes, and not for the bona fide uses of a corporation, organized for a legitimate purpose. The complaint winds up with a general prayer for dissolution, or an injunction to restrain the defendant company from exercising any corporate rights, except as to that portion of the road which was completed under the original charter or the first amendment thereto. It may very safely be said that the cause of action rests on these allegations. The complaint is not fully stated, but adequately to the apprehension of the opinion. The complaint was demurred to, and final judgment entered in favor of the defendant company, from which judgment the relator prosecutes error.

The relator relies principally on the averments concerning the capital stock of the company and its financial condition, its attempt to condemn lands which belonged to the relator, and a provision of our statute which is found in Gen. St. 1883, § 337. According to this statute, any railroad company must, within two years subsequent to the record of its articles, begin the construction of its road, and expend thereon 20 per cent. of its capital stock, within five years, or its corporate organization and power shall cease. This statute was afterwards amended, but not in such a way as to affect any question involved in this proceeding. On these several matters a very elaborate argument has been constructed by counsel to maintain their contention that the Colorado Eastern Railway Company has failed to comply with the statutory mandates, and should be subjected to the penalty of dissolution, and to the destruction of its corporate life. We do not propose to discuss this question, nor to determine the matters which counsel have united in presenting to the court. We do not hesitate to adopt this course because the suit involves a franchise, and the relator can obtain a construction of the statute and a judgment which will be conclusive. If this consideration was not persuasive, we should adopt this course because, in our judgment, it is not a legitimate litigation, which is prosecuted for the enforcement of public rights. According to our best judgment, it is a proceeding brought by the Union Pacific Railway Company against the defendant corporation, to enforce private rights and redress private wrongs. This litigation is, in our judgment, wholly unnecessary to the protection of those rights, or the redress of those grievances; and, while we concede to the litigants the right to institute as many suits and to begin as many proceedings as may seem expedient or necessary to enforce their claims, we do not admit that they may institute such proceedings in the name of the people for any other than public purposes. We confess that the question was not raised by the defendant company, but the consideration is so entirely persuasive and satis-

factory that we unhesitatingly rest our conclusions on that proposition. We are therefore without the aid of argument on this question.

In our judgment, the only matter which we are called on to decide is the proper construction of chapter 27 of our Civil Code. We must ascertain what authority that chapter gives relators to bring proceedings in the nature of quo warranto, to protect their private interests, and to redress their private wrongs, or to bring them in the name of the people, to right some public wrong, and prevent encroachment on the rights of the people. As we view it, the statute is in reality but an enactment of the general provisions of the common law with reference to proceedings by information by way of quo warranto. In some respects it enlarges the remedy, and probably includes some classes of cases to which it was formerly inapplicable. It likewise, undoubtedly, opens the way to a much larger class of persons to institute proceedings for the redress of public wrongs. We need not attempt to enter on any elaborate analysis of the chapter, nor a statement, by inclusion or exclusion, of the cases or the parties in which or by whom such proceedings may be begun. The only inquiry we need to make respects the character of the present suit,—by whom was it begun, and for what is it being prosecuted. Evidently, it was not begun by the district attorney, although his name is signed to the paper. He was, doubtless, a consenting official; and the complaint, perhaps, is not defective in this particular, though it is signed and verified by private counsel, and is prosecuted in this court by them alone. Passing by this apparent irregularity, we need only look at the substance of the complaint to ascertain its substantial character. The complaint discloses no wrong done to the people, nor any act or proceeding by the Colorado Eastern Railway Company detrimental to the public welfare, or likely to occasion harm to the people, as contradistinguished from the private relator. The thing complained of is the attempted condemnation of lands belonging to the Union Pacific Railway Company. There is no other one act or thing charged which can be said to constitute an absolute wrong which calls for redress. In making this statement, we do not intend to be understood as deciding how much capital stock the Colorado Eastern Railway Company must provide for and issue and sell to validate its acts under the amendment of 1888, nor what the company was bound to do with reference to this increase. This whole matter is dismissed from consideration, because the bill charges nothing which tends to show harm likely to come to the people because of any misfeasance in this particular. There is no attempt to show acts of the defendant company which in the remotest manner tend to the prejudice of the public. The thing complained of is the attempted condemnation of the Union Pacific Company's lands for terminal facilities. This is not a matter in which the public are interested. It only concerns the

Union Pacific Railway Company. This is a private wrong, for which there is ample remedy obtainable in other suits and by different proceedings; and we are advised by some of the authorities which the plaintiff in error cites that the matter may be set up by way of defense in the condemnation proceedings. In *re Brooklyn, W. & N. Ry. Co.*, 72 N. Y. 245.

Actions have been begun and are now pending to condemn the lands, and, doubtless, in both of those suits there will be a full adjudication of the claims of the parties. The present proceeding is wholly unnecessary to defend or protect their respective interests, nor does it seem to us to be a legitimate suit to compass that end. In addition, it seems to be pretty generally held that these proceedings are always quasi public, prosecuted by law officers of the people, and only available to protect public interests, as contradistinguished from private rights. As a rule, wherever it is discovered that proceedings are brought for the latter purpose, they are never entertained, but the party is remitted to an action at law or suit in equity to redress his injuries. 1 *Beach, Priv. Corp.* § 58 et seq.; *Com. v. Allegheny Bridge Co.*, 20 Pa. St. 185; *Murphy v. Bank*, Id. 415; *Com. v. Philadelphia, G. & N. Ry. Co.*, Id. 518. This general doctrine is supported by a great many cases. There seems to be no dissent from the general position that, in order to support an action by the people for the redress of a wrong, that wrong must appear to have been done to the people. 2 *Wat. Corp.* § 383; *Leslie v. Lorillard*, 110 N. Y. 519, 18 N. E. 363; *Thompson v. People*, 23 Wend. 537; *State v. Minnesota Thresher Manufg Co.*, 40 Minn. 213, 41 N. W. 1020; *People v. North River Sugar-Refining Co.*, 121 N. Y. 582, 24 N. E. 834.

We are unable to find among the decisions of the supreme court any direct adjudication or construction of this statute. We find in the cases cited some very clear and satisfactory definitions of a franchise, and we find an intimation that the right to institute a proceeding of this sort by a private relator is exceedingly doubtful, although jurisdiction was entertained in another, but in neither was the question exactly determined. *Londoner v. People*, 15 Colo. 248, 25 Pac. 183; *People v. Cheeseman*, 7 Colo. 376, 8 Pac. 716. Notwithstanding this fact, we are very clearly of the opinion that the statute was not intended to give a private person the right to question the corporate existence of another, in order to protect his own rights or redress his own wrongs, unless it may be in that class of cases where the title to an office is involved, or some similar question is presented. If the law officer should refuse, we do not doubt that the private relator could proceed and file an information to remedy a public wrong. In the latter case, however, it must appear that the object aimed at is a public one, and is the protection of the interests and the maintenance of the welfare of the people. The present proceeding has no such object in view. It was begun by the

Union Pacific Railway Company, to defend their title to property which, in their judgment, was jeopardized by the proceedings begun by the defendant corporation. It is without a solitary public feature, and must be taken to be purely a private suit, brought by private parties, to accomplish their private ends. If we are correct in this, the proceeding as begun was not maintainable, nor did the complaint state facts which would justify a judgment against the defendant company. We therefore agree with the trial court, and with its judgment upholding the demurrer to the complaint. It will be affirmed. Affirmed.

MATER v. AMERICAN NAT. BANK OF DENVER.

(Court of Appeals of Colorado. Sept. 14, 1896.)

NEGOTIABLE INSTRUMENTS—ACTION ON NOTE—DEFENSES—ALTERATION—AUTHORITY OF AGENT.

1. In an action on a note payable four months from date, and transferred before maturity to plaintiff, a bona fide indorsee for value, a plea that a memorandum at the bottom of the instrument (reciting that the maker, after the expiration of four months, should "be privileged to have twelve months" on said note) had been torn from the paper after delivery is no defense, in the absence of any allegation or proof of a demand by the maker, at the end of the four months, for an extension of time in accordance with the option given him in the memorandum.

2. Where goods are sold by a traveling agent on four months' time, and a note payable in said time is executed by the purchasers, a memorandum, written at the bottom of the note, reciting that the maker shall be privileged at the expiration of four months to have twelve months in which to pay the note, and executed by the agent alone, who has no authority to grant any extension, is nugatory.

Appeal from district court, Lake county.

Action by the American National Bank of Denver against Charles Mater to recover on a note. Judgment for plaintiff, and defendant appeals. Affirmed.

A. J. Sterling, J. E. Havens, and A. S. Blake, for appellant. John A. Ewing, Frank M. Goddard, and H. B. Babb, for appellee.

BISSELL, J. The foundation of the defense to this action was the alleged alteration of a note, executed by the appellant to his own order, and indorsed by him on the date of its execution, and delivered to Rabb Bros., in settlement of a bill of goods which that firm had theretofore sold to the maker. The note was indorsed by Rabb Bros., and discounted before maturity with the American National Bank of Denver, which passed the proceeds to Rabb Bros.' account, and became, under the law merchant, a bona fide holder for value. Subsequent to the apparent maturity of the note, it was sent to the correspondent of the bank for collection, presented, but not paid. This suit was then begun. The complaint set up the making of a note, dated the 8th of February, 1892, as follows: "Four months after date, I promise to pay to the order of myself nineteen hundred seventeen

and $\$0/100$ (1,917.50) dollars, with interest thereon at the rate of six per cent. per annum after maturity, for value received. Chas. Mater." The plaintiff simply alleged the execution and delivery of the note, its transfer, and their title. The defendant answered, admitted the execution of the note, but alleged an alteration in a material part without his consent. It was averred that, on the bottom of the paper on which the note was written, the following memorandum had been written and signed: "It is hereby agreed that, after the expiration of four months, the above Chas. Mater shall be privileged to have twelve months, instead of four months, on the above note. R. M. Dick. Attest: Robt. J. Grier." The defendant then averred that, at the time of the indorsement, he wrote his name across the back of it in two places. The first was an indorsement of the note. The other was an indorsement of the note and contract, which extended onto the note as well as across the agreement of extension. Mater pleaded the execution of both papers at the same time, and prior to the delivery to Dick, and the alteration of the paper by the tearing off of the memorandum. Mater did not otherwise plead any defense, nor did he set up a request for an extension of time, nor plead any premature institution of the suit. He relied solely and wholly on the legal effect of the alteration, whereby, as he now contends, the contract or promise to pay was destroyed. It is well in this connection to state some facts disclosed by the bill of exceptions which are not to be found in the abstract. The appellant relied on the legal proposition involved in the removal of the subsequent agreement of extension, if such it be, and deemed it wholly unnecessary to present any other portion of the record to our attention. Since we think some of the proof of very considerable significance and of great importance, we shall state it.

Rabb Bros. and Mater had been dealing together as wholesale vendors and retail purchasers of cigars and tobacco, and, in the course of their transactions, Rabb Bros. had sold Mater a bill of goods amounting to the sum named in the note. The goods were sold by Dick, who was their traveling salesman. According to direct testimony, Dick had instructions from the house with reference to the prices at which goods should be sold, and the time to be allowed purchasers for payment. There is no dispute respecting the time on which the goods were bought. The memorandum of sale delivered to the vendee, and the copy which was sent to the vendors, both disclosed the sale to be on four months' time. After the goods had been delivered, the salesman went to Mater for a settlement. The negotiations led to the execution of the note. It is in evidence that Dick was without any authority to settle the claim, or to give more time than that which was stated in the terms of the original sale, to wit, four months. According to the evidence, Dick was an agent

with limited powers, and with no other actual authority than the right to settle the claim by taking a note for the time specified in the original sale. He was not a general agent, nor is there anything in the record to show that Mater had any right to rely on an apparent authority beyond that evidenced by his power to sell and the terms of the contract of sale, as expressed in the memorandum. It did not appear that goods were ever sold on a year's time, that there had been any negotiations between Mater and the creditors for such a credit, nor that Dick had any power to accept a note running 12 months. It will be observed that the memorandum of extension was signed by Dick alone, and not by the maker, nor by the creditors, nor in their name.

A good deal of testimony was introduced respecting the manner in which the original note or memorandum was signed and executed. Mater testifies that the indorsement extended onto the note as well as across the agreement of extension, and attempts to testify that, if it did not so appear, it had been altered and erased from the back of the note. Competent and expert testimony was introduced to show that no alteration whatever had been made on the face or the back of the paper, and that a close inspection by the eyes, as well as by a glass, failed to disclose any erasure, and that an erasure without detection was impossible. We are unable to determine from the record whether the trial court accepted the latter contention, for there is nothing to disclose its views respecting this matter. The original note is preserved in the bill of exceptions, and presented for our inspection. We are very frank to say we do not believe the note was altered, or any name or any writing erased therefrom. Mr. Mater and his clerk are evidently mistaken in regard to the form of the original indorsement, and have forgotten what the facts were about it. A very careful scrutiny of the paper leads us to an undoubting belief that nothing whatever has ever been erased from the face or the back of that note. It may therefore be taken as fact that there is no evidence of any alteration whatever on the face or on the back of the paper. If any alteration was made, it was the separation of the memorandum which Mater says was written at the bottom, and signed by Mr. Dick, from the balance of the note.

The simple issue is as to the legal effect of such an alteration of the paper. It must be conceded there are many reputable authorities which hold that the removal of a memorandum from the bottom of a note destroys the paper as the contract of the maker, though it was so negligently attached as to permit its removal without the possibility of detection. The negligence of the maker is held to furnish no protection to the title of a holder for value. In all the cases which have been presented to our attention, the rule has been laid down where the condition, if taken as a part of the note, would render it a nonnegotiable contract.

the holder would only take title subject to any defenses available against the original payee. There is another line of authorities, of equal repute, and possibly of equal volume, which adjudges the title of a bona fide holder for value good, where the note and memorandum were so negligently executed as to permit a separation without detection. If we did not deem ourselves concluded by antecedent adjudications of the supreme court of the state, we should unhesitatingly follow that line which holds the maker liable on his paper where he has so negligently executed it as to permit the separation of a memorandum which, had it remained, would vary, alter, or completely annul his liability on the instrument. This view seems to us to be recognized by the better authorities, and by learned text writers. It is put on the principle that, where one or two innocent persons must suffer, the loss must fall on him who has furnished the opportunity. This is a complete answer to the appellant's contention. He executed a promissory note in the ordinary form of commercial paper, affixed his name to it, indorsed it, and put it into circulation. There was nothing whatever incorporated in the note itself which would put the purchaser on his guard, nor was there anything in the manner or form of the indorsement which could attract the attention of the most careful and astute purchaser. The memorandum which provided for the extension was at the bottom of the instrument, and there was no reference to it in the note. Under these circumstances, we are quite of the opinion that Mr. Mater should be held liable on his paper. We should incline to this opinion even though it were shown that the memorandum had been removed in bad faith by the payees, so long as the note came into the hands of an innocent holder, who had paid a valuable consideration for it. 2 Daniel, Neg. Inst. § 1407; Phelan v. Moss, 67 Pa. St. 59; Zimmermann v. Kete, 75 Pa. St. 188; Harvey v. Smith, 55 Ill. 224; Brown v. Reed, 79 Pa. St. 370; Nell v. Smith, 64 Ind. 511; Cornell v. Nebeker, 58 Ind. 425; Bank v. Armstrong, 62 Mo. 59; Robertson v. Hay, 91 Pa. St. 242; Palmer v. Largent, 5 Neb. 223; Bachellor v. Priest, 12 Pick. 390; Isnard v. Torres, 10 La. Ann. 103. The general doctrine expressed in these cases has undoubtedly been recognized by the supreme court. We regard the principle underlying these decisions as entirely analogous to those declared in the antecedent authorities. In determining which line we will follow, we are therefore very much concluded by the indicated opinion of the supreme court on cognate questions. Wyman v. Bank, 5 Colo. 30; Bank v. McClelland, 9 Colo. 608, 13 Pac. 723; Coors v. Bank, 14 Colo. 202, 23 Pac. 328.

We are not compelled, however, to go quite to this extent, because, as we view it, the promise with reference to the extension, if such it may be termed, was never executed by the payee, nor by the creditors who were the vendors of the goods, nor by any one having authority to act in their be-

half. It was an independent promise, executed by the agent who drew up the paper; and, unless he had authority to modify or vary the terms of the sale, his agreement could not affect the original obligation. There is nothing in the record which discloses a power on the part of Dick to modify the terms of the sale, or to take paper for any other time than that on which the goods were sold. It is barely possible that a different proposition would have been presented had the agreement been signed by the original vendors. We are very frank to say, however, that our convictions respecting the law would remain unchanged. Mater executed a direct promissory note to pay a given sum of money, at a fixed time, and at an agreed rate. If he desired to qualify that promise in any way, and make the qualification effectual, he was bound to incorporate the modification in his note, or to so execute his paper as to put an innocent holder on his guard. We know there are many authorities to the contrary, which proceed on the theory that the removal of the paper amounts to a forgery, and, on proof, the holder may not recover, even though he pay value. These decisions, in our judgment, do not accord with the general law governing commercial paper; and we are very decidedly of the opinion that, where one of two innocent persons must suffer, the loss should fall on him who has put it in the power of another to defraud an indorsee, who innocently pays value for paper to which the maker has affixed his name. In the present case, however, we do not regard the alteration as coming within the cases which adjudge an altered note invalid in the hands of an innocent holder. Take the memorandum away; the note still remains a promise to pay a fixed sum of money for a valuable consideration, with a definite rate of interest, and at a definite time. Of course, the time expressed in the original paper is four months. If the memorandum is a part of it, then the note would be for 12 months if the option should be demanded. This statement, of course, is on the hypothesis that Dick possessed authority to vary the terms of the sale. It must be remembered, however, that there is nothing in the record to show that Dick had any such authority. The memorandum was not signed by Rabb Bros., who sold the cigars to Mater, and on whose behalf the order was taken, to his knowledge. Under these circumstances, we do not believe the case comes at all even within the extreme authorities which would hold the note invalid in the hands of an innocent purchaser.

It has been decided that, if the modification of the note is by an independent promise of the payee, it will not vary the character of the instrument, and the holder may sue on the original promise, notwithstanding the alteration. Benedict v. Cowden, 49 N. Y. 396; Odiorne v. Sargent, 6 N. H. 401;

Dow v. Tuttle, 4 Mass. 414; *Krouskop v. Shontz*, 51 Wis. 204, 8 N. W. 241. There is very grave question whether this case does not fall within the four corners of those decisions. As we view it, there is an impregnable basis on which to put this decision. There is no specific contract on the part of Dick or Rabb Bros., whereby Mater acquired the right to 12 months' time to pay that paper. It was not agreed that he should have 12 months, nor was there anything in the original contract which indicated that his time should run to that limit. The indorsement is that he shall have the privilege of 12 months. We take it that this means, if it means anything, that he had the option to take 12 months in which to pay the paper, instead of the 4 nominated in the instrument itself. Under these circumstances, the paper still remained a promissory note, payable to his own order, for a specific sum, and bearing a definite rate of interest. If the 12 months is to be incorporated into the note, it would stand as a promise on his part to pay \$1,917.50, with interest at the rate of 6 per cent. after maturity in 1 year from February 8, 1892, instead of within 4 months from the same date. It therefore follows that the note was a negotiable, promissory note, executed by Mater, for a valuable consideration, by him indorsed, and put on the market before maturity, and acquired before maturity by the appellee, who was indorsee, and who brought suit. The instrument was still Mater's note for an unquestioned sum, bearing an undoubted rate of interest, and payable to whoever might hold it. The alteration, if conceded, did not affect or destroy the American National Bank's title, but it simply postponed the day on which suit could be brought. If this be conceded, then the matters set up by Mater constituted no defense. He did not plead in abatement of the action that it was prematurely brought, neither did he plead his election to take the 12 months provided for by the paper; and, without an election on his part, there can be no question that the note fell due 4 months from its date, and the holder was entitled to bring suit, subject, if at all, to his demand for the stipulated extension. His plea, then, tenders no defense. But we cannot regard this as a condition so material to the promise of the maker as to defeat a recovery without both plea and proof of the exercise of the election. We think the present case, under its peculiar facts and circumstances, justifies the application of the rule laid down in the authorities which have been cited. The force and effect of such a condition and of such an alteration are discussed in *State v. Stratton*, 27 Iowa, 420. That authority, with many others, undoubtedly recognizes the rule to be different in those cases where the condition in no manner affects the legal character of the instrument, or gives it any different effect or any new operation. We should

so regard the condition attached to this note, even though it had been executed by Rabb Bros. It was not an absolute promise that the note was to be extended for 12 months, neither did it make the note executed by Mater a 12 months', as contradistinguished from a 4 months', instrument. The most that can be contended for it is that it gives an option, which in no manner affects the original promise, and without a demand at the time required by the terms of the original note, as well as by the terms of the extension, left the note unimpeachable in the hands of a bona fide holder. When the appellant failed to both plead and prove the exercise of his privilege, he lost the right to defend because of the alteration.

Aside from this consideration, there is another already suggested, which is equally controlling. The condition was no part of the note. It was not executed by Mater, nor was his note executed on that condition. The agreement was not executed by the payees, but by an agent who had no authority to make it; and it was therefore nugatory. Had it remained at the bottom of the instrument, the purchaser of the paper before maturity would have taken good title, unless Mater could plead and prove Dick's authority to execute it. In our judgment, the memorandum was not the agreement of the payees. The condition, therefore, whatever it may have been, or however it may have been construed, in no manner tended to modify or control the original promise, and the note signed remained a promise to pay within four months, and, when indorsed and delivered, became, like any other commercial obligation, unimpeachable, because of any matters pleaded or proven. We therefore conclude that the condition attached to the note was not of the class called "material" by the books, even in those cases which adjudge an altered note unenforceable against the maker, regardless of his negligence. The judgment is right, and ought to be affirmed. Affirmed.

PHILLIPS et al. v. CORBIN et al.

(Court of Appeals of Colorado. Sept. 14, 1896.)

ANNEXATION—REGULARITY OF ELECTION—REVIEW —QUALIFICATION OF VOTERS.

1. Under Sess. Laws 1885, p. 158, authorizing appeals to the district court from final judgments of the county court, an appeal lies to it from the finding of the county court, under Act 1893, § 8, declaring that the county court shall examine the report of annexation proceedings, and hear evidence concerning the regularity or irregularity of the proceedings, and, if satisfied that the proceedings are regular, shall approve the report.

2. The qualification prescribed by Act 1893, § 5, for a voter at an election for annexation, that he be a "duly qualified voter in the election precinct," does not require that he be registered.

3. Under Act 1893, § 5, prescribing as a qualification for voting at an election for annexation that the person "shall have in the year next

preceding said election, paid a property tax in said town or city," payment of tax for any year is not sufficient; it appearing later in the same section that it is the "tax for such preceding year."

4. Under Gen. St. § 1272, declaring that "all judges of election shall on being appointed hold their office for a year or until their successors are appointed, and shall serve at all special elections during their term of office," special judges cannot legally be appointed while the regular judges are in office, to hold a special election, and an election held by special judges so appointed is void.

5. A provision of an ordinance for election on the question of annexation of a town to a city, that the ballots be prepared according to the provisions of the Australian ballot law, conflicts with section 2 of such ballot law, providing that it shall not apply to "any special election at which no persons are to be voted for," and also with Act 1893, § 6, in regard to annexation, declaring that "all ballots cast in pursuance of this act shall be 'For annexation' or 'Against annexation' and shall be deposited in a separate ballot box and for that purpose only."

6. Whether bias on the part of the trustees of a town and their appointees existed, and was carried to the extent of preventing a fair declaration of the wishes of the majority in an election on the question of annexation (which, if a fact, would vitiate the election), is a question for the district court, on appeal from the finding of the county court on the question of the regularity of the annexation proceeding.

Error to district court, Arapahoe county.

John J. Phillips and others petitioned for an election to annex the town of Colfax to the city of Denver. Llewellyn E. Corbin and others contested the election, and appealed to the district court, which held the proceedings in the election irregular. Petitioners bring error. Affirmed.

This is a controversy over the result of a special election held in the town of Colfax on the 6th day of November, 1894, to determine whether the town of Colfax should be dissolved, and the territory annexed to the city of Denver. On October 1, 1894, plaintiffs in error, 38 in number, signed, and filed in the county court, a petition asking for an order requiring the trustees of the town of Colfax to call an election, and submit the question of annexation to the voters. The order was made. The mayor and trustees met, and passed an ordinance providing for an election, and the submission of the question. Notice of the election was published in a newspaper, and also posted in public places. The result of such election was reported to be 77 votes for annexation, and 64 against. Defendants in error were opposed to annexation, and contested the validity of the election. A trial was had to the county court, resulting in a decree as follows: "The above-entitled matter coming on to be heard this day by the court, upon the report of John L. King, mayor, attested by Maggie Ramsden, town clerk and recorder for the town of Colfax, Colorado, and filed herein, the same being a report of certain proceedings had in pursuance of the order of this court made on the 1st day of October, A. D. 1894, in said matter; and it appearing from said report that in pursuance of said order a special election was called and held in the

town of Colfax aforesaid on the 6th day of November, A. D. 1894, for the purpose of submitting and determining the question whether the town of Colfax aforesaid should be dissolved, and the territory included therein annexed to the city of Denver aforesaid, and that at said election seventy-seven ballots were cast 'For annexation,' and sixty-four ballots were cast 'Against annexation,' and that the returns of said election were duly made and canvassed as required by law, with the above result; and it further appearing from the certificate of the town clerk and recorder of the town of Colfax aforesaid that due notice of said election was given as by law provided, and that the court having heard and considered the evidence now submitted concerning the regularity or irregularity of said proceedings, and being now sufficiently advised in the premises: It is therefore ordered, adjudged, and decreed that all proceedings in pursuance of said order of this court were and are regular, and said proceedings and report should be, and the same are hereby, approved, and that by virtue of said proceedings, and of this order and decree, the town of Colfax aforesaid is dissolved, and the territory included within the boundaries of the town of Colfax aforesaid is annexed to, and a part of, the city of Denver." Contestants appealed to the district court, where an extended trial was had to the court, a jury having been waived, resulting in the following order and decree on March 21, 1895: "This cause coming on to be heard this day by the court upon the report of the mayor and clerk of the town of Colfax, showing the result of the special election held in the town of Colfax on November 6, 1894, upon the question of annexation of the said town to the city of Denver, and upon the evidence, and upon the protest heretofore made by the protestants therein, and the several amendments thereto, and the several answers of the original petitioners and of the town of Colfax aforesaid, and upon the evidence heretofore produced in open court, and upon the arguments of counsel, and the court being now sufficiently advised in the premises, it is ordered, adjudged, and decreed that the proceedings in the matter in said election were and are irregular, and that said report should be, and the same is hereby, disapproved by the court. Geo. W. Allen, Judge." From which an appeal was prosecuted to this court.

F. A. Williams and G. Q. Richmond, for plaintiffs in error. George N. Hurd and D. J. Davies, for defendants in error.

REED, P. J. (after stating the facts). The first contention of plaintiffs in error is that the district court had no jurisdiction, and consequently the proceedings and decree of that court were void. We can find nothing in the record, abstract, or brief of plaintiffs in error, to show that any objection was made to the jurisdiction in the district court by the plaintiffs. They appeared, and subjected

themselves to its jurisdiction, without protest or suggestion, even, and participated in all pertaining to the trial, and the jurisdiction is first called in question in this court. Although a waiver or failure to raise the objection in the lower court would not confer jurisdiction where it did not exist by the law, yet good faith to the court would require that it should be raised, so that the court would have an opportunity of determining it. Counsel should not submit to the jurisdiction without question, and adopt the finding and conclusion if satisfactory, and reject it if unsatisfactory. In section 11, art. 6, of the constitution it is declared, "The district court shall have original jurisdiction in all causes both in law and equity and such appellate jurisdiction as may be conferred by law." It is provided in the Acts of 1885 (Sess. Laws 1885, p. 158), "Appeals may be taken to the district court of the same county, from all final judgments and decrees of the county court, except judgments by confession, by any person aggrieved," etc. In section 8 of the act of 1893, in regard to annexation, after stating the preliminary requirement, it is declared, "The court [county court] shall examine the report and hear any evidence that may be offered concerning the regularity or irregularity of the proceedings, and if satisfied that the proceedings are regular shall approve the report." Original jurisdiction to determine the regularity of the proceeding is conferred upon the county court. The statutes provide for a legal contest, to be determined upon the evidence, and the finding either for or against the regularity is a judgment, and, as far as that court is concerned, is final. It may be that that court is the only one that has original jurisdiction of such a contest, but that is a question we are not called upon to decide. The legal character of the finding of the county court upon such contest is defined, and placed beyond contest, by *Martin v. Simpkins*, 20 Colo. 438, 38 Pac. 1002, where it is declared that such proceeding is a judicial proceeding, and the finding of the county court a final judgment, to which a writ of error will lie to the supreme court. The finding and defining the character of the result by the supreme court greatly simplify the examination of the question. When the act of 1893, concerning annexation, was passed, the act of 1885, providing the appellate jurisdiction of the district court, was in force; and, this class of cases not having been taken out of its provisions by special enactment, the provision is not repealed, either directly or impliedly. Nor is there any such incompatibility that both cannot stand. The judgment being final, as declared by the supreme court, and not being a judgment by confession, but by adjudication, an appeal will lie to the district court, as in other cases under the general statute. That the proceeding and review in the district court are by a trial *de novo* does not divest it of its appellate character, and we are clearly of the opinion that the

district court had jurisdiction upon appeal; and, under the decision of *Martin v. Simpkins*, the citizens and taxpayers, feeling themselves aggrieved, were legal parties to prosecute an appeal. The language of the statute providing for annexation is peculiar: "The court shall examine the report and hear any evidence that may be offered concerning the regularity or irregularity of the proceedings and if satisfied that the proceedings are regular shall approve the report." The finding must, upon the trial, be a conclusion deduced from the law, the facts, and all the circumstances. In a close contest any refusal of proper votes, or receipt of improper votes, might cause an irregularity. Also any partisan action or bias of those having the election in charge, that influenced the election and prevented a fair expression of the wishes of the majority of the legal voters, would work an irregularity. The court, after a patient and exhaustive trial, concluded that the proceeding had been irregular. In some respects he held the proceeding illegal. We have no means of knowing how far such conclusion was influenced by the law, and how far by facts.

Section 5 of the act in regard to annexation, in plain and unmistakable language, prescribes the qualifications necessary to constitute a legal voter: "(1) The person offering the same shall be a duly qualified voter in the election precinct in which he offers to vote and entitled to vote in such precinct at said election. (2) Shall have, in the year next preceding said election paid a property tax in said town or city." The law is a special statute providing for such an election, and prescribing the qualifications of those entitled to participate. While it must be strictly pursued, strict compliance with its provisions is all that can be legally required. It cannot be added to, or made more onerous, by provisions referring only to general elections. The district court found that the votes of parties were refused because the voters were not registered. No registry was required by the statute. Registry was not necessary to render the person applying a properly qualified voter in his precinct. I have always regarded the fact of registry as an evidence of the proper qualification of the applicant to vote, as the conclusion of some former investigation. While it affords such evidence, it is not conclusive. The vote of a registered person may, upon proper showing, be legally refused. The law provides a course of procedure whereby a person not registered can compel the receipt of his ballot. Hence registry is not, in this case, a condition precedent to the right to vote, but only evidence of such right, where the vote is unchallenged. There being in the special act nothing to require registry, the refusal to receive the votes of those otherwise qualified under the law was illegal, and imposed a qualification and duty not required by the statute.

The statute in regard to taxpaying as a pre-

requisite to the right to vote is plain and unambiguous. It is, "And in addition thereto, shall have, in the year preceding said election paid a property tax in said town or city." This of itself does not specify that it must have been the tax of the last preceding year, but later in the same section it affirmatively appears that the intention of the legislature was that it should be the tax of such year. The language is, "That the person so offering to vote had paid such tax for such preceding year." The court found from the evidence that parties not duly qualified by paying the taxes of the preceding year had been allowed to vote. Such being the fact, such votes were invalid, and, if sufficient in number, would work a serious irregularity, defeating the will of the legal majority.

It appears from the evidence that the special election was held upon the same day as the general election, but was separate and distinct, and that the officers presiding and conducting such election were specially appointed for that purpose by the trustees in the ordinance providing for the election, and a place for holding such election, separate and apart from the general election, was designated. It is contended by counsel that the town trustees had no power to appoint special judges to hold such election. The general statute provides for the appointment of judges of election in each precinct of the county. The power and duty are conferred upon the county commissioners. Section 1272, Gen. St., is as follows: "All judges of election shall on being appointed hold their office for one year or until their successors are appointed, and shall serve at all special elections during their term of office." That duty had been performed, and power to appoint was exhausted. The statute provides a method whereby the qualified voters present at any election may fill any vacancy, but I can find no statute authorizing either town trustees or voters to create a board. The power is impliedly negatived by the statute providing that the three appointees shall serve at all special elections. Our conclusion is that the trustees had no power to create a board of judges, by ordinance or otherwise, and that the persons who conducted such special election, not having been legally appointed, had no power to act, and the election was void, irregular, and illegal.

The ordinance authorizing the election, among its other provisions, contains the following: "Said ballots to be prepared in accordance with the provisions of an act of the general assembly of the state of Colorado entitled 'An act in relation to elections, defining offenses against the same and prescribing punishments thereof,' approved March 26th, 1892." This was an attempt to apply the Australian ballot law, when by such act the election to be held was specially exempted from the operation of that law: "Sec. 2. This chapter shall not apply to any election for school officers held at any time other than a regular election for state, county or city officers, nor to any

special election at which no persons are to be voted for, for any city, county or state office." The provision of the ordinance is also in direct conflict with section 6 of the statute in regard to annexation, which declares, "All ballots cast in pursuance of this act shall be 'For annexation' or 'Against annexation' and shall be deposited in a separate ballot box and for that purpose only." The statute prescribes the only method in which the ballots could be prepared; evidently two simple tickets,—one for, the other against, annexation. There was nothing to which the ordinance for preparation of ballots could apply, and the attempt to apply the general election law could only result in confusion, and an impediment amounting to an irregularity.

In the pleadings, bias, and an attempt on the part of the trustees and their appointees to illegally force and compel a result in favor of annexation, are strongly charged, and much evidence was taken to establish the charges and rebut them. Like all other questions of fact, where the evidence is conflicting the finding of the district court is conclusive upon this. Whether such bias existed, and was carried to the extent of preventing a fair declaration of the wishes of the majority, was a question peculiarly within the province of the district court; and, if the facts as charged were found to have existed, it would amount to an irregularity that would vitiate the election. For reasons stated, we are clearly of the opinion that the election was irregular and void. As a new election will undoubtedly be called, and the question again submitted, we have found it necessary to discuss the different questions presented by counsel, to prevent the recurrence of former errors and irregularities. The judgment of the district court will be affirmed. Affirmed.

RICHARDSON DRUG CO. et al. v.
DUNAGAN.

(Court of Appeals of Colorado. Sept. 14, 1896.)

NOVATION—WHEAT CONSTITUTES—ATTORNEY—POWER TO BIND CLIENT—JUDGMENT—WHEN SET ASIDE OR ENJOINED.

1. Where the purchaser of a stock of goods agrees to pay all outstanding indebtedness of the seller, and a creditor of the seller agrees "to present its account for goods" to the purchaser, there is no substitution, and the seller remains liable to such creditor.

2. Where the purchaser of a stock of goods agrees to assume the seller's debts, the attorneys of the seller's creditor, who have an account for collection, have no power to release such seller, and agree to look to such purchaser for payment of the account, in the absence of express authority.

3. A judgment will not be set aside where on a new trial the judgment must be the same.

Error to district court, Arapahoe county.

Action by Jesse J. Dunagan against the Richardson Drug Company and J. Miller to set aside, and enjoin the enforcement of, a judgment in favor of defendant company against plaintiff and defendant Miller. From a de-

cree in favor of plaintiff, defendants bring error. Reversed.

This was a suit in equity brought by defendant in error to restrain the collection of a judgment obtained by plaintiff in error for \$574.03, October 23, 1888. Plaintiff, a wholesale drug concern in St. Louis, sold to Dunagan & Miller, engaged in drug business in Denver, a bill of goods, for which the suit was brought. After contracting the debt in question, Dunagan & Miller sold and transferred the stock and business to Miller & Benson, after which it was successively sold to two or three other parties, ending with the Jones Drug Company. It is alleged in the complaint that Miller & Benson, as a "part of the consideration of the purchase, assumed the outstanding obligations of Dunagan & Miller, including all indebtedness to Richardson Drug Company, and each successive purchaser did the like; that, at the time of the transfer of Dunagan & Miller to Miller & Benson, the Richardson Drug Company was informed thereof, and agreed to present its account against Dunagan & Miller to said new firm of Miller & Benson, and to look to said new firm for payment." The same allegation is made in regard to each of the subsequent sales. Then follows: "That thereby Dunagan & Miller were released from liability, and it was the duty of Richardson Drug Company to look to Miller & Benson, and said vendees, successively, for payment of any liability of Dunagan & Miller to Richardson Drug Company." The debt remaining unpaid, suit was brought against Dunagan & Miller, who allowed judgment by default, and the present suit in equity was brought to restrain the collection.

The grounds upon which the complainant based his right to equitable relief are stated in the complaint as follows: "That Sampson & Millett were attorneys of record for plaintiff, having full charge of said suit. That on August 29, 1888, and within time to answer, plaintiff, by its said attorneys, executed and delivered to Dunagan its writing, as follows: 'Know all men by these presents, that we hereby agree to hold J. J. Dunagan and J. Miller harmless from any judgment we may now recover against them in suit pending in district court; they agreeing to co-operate with us in every way possible, under advice of our attorneys, to ultimately recover this money from Jones, who by his agreement is justly entitled to pay the same. [Signed] Richardson Drug Company, per Sampson & Millett, Attorneys.' That on August 29, 1888, Richardson Drug Company admitted that Dunagan & Miller were not liable for said indebtedness, and represented to Dunagan & Miller that, as a matter of law, it was necessary to bring said action in manner as then brought, so as to obtain judgment against persons originally liable, and that thereafter this judgment should be made the basis of successive judgments against Miller & Benson and said vendees; that Richardson Drug Company would

not undertake to collect any judgment so obtained against Dunagan & Miller, but would only use it as a basis for subsequent judgments, so as to collect the same from Jones Drug Company. That Richardson Drug Company represented to Dunagan & Miller that, if they would permit judgment to go by default, Dunagan & Miller should be held harmless on account thereof. That, relying upon said representation, Dunagan & Miller did not make defense, but permitted judgment to be taken by default, October 23, 1888, for \$574.03 and costs. That September 20, 1889, execution was issued, and returned unsatisfied December 18, 1889. That on February 25, 1890, an alias execution was issued, and returned unsatisfied June 28, 1890. That at all times plaintiff had property in said county subject to execution, which Richardson Drug Company well knew. That execution was again issued April 15, 1892, and is now in hands of sheriff of Arapahoe county, in and by which the sheriff is commanded to make of the property of Dunagan & Miller said judgment, with costs and interest. That, notwithstanding agreement of said drug company, and all facts hereinbefore alleged, plaintiff is threatening to cause said execution to be levied upon the property of plaintiff, and, unless restrained by writ of injunction, said levy will be made. That plaintiff is engaged in drug business in Denver. That a levy upon the merchandise in said business would close the business of plaintiff, and cause great and irreparable damage, the exact amount whereof could not be estimated. That said judgment, standing unsatisfied upon the records of said county, with the unjust claim of plaintiff therein, is causing constant damage to plaintiff, through injury to his credit. That at all times since August 29, 1888, plaintiff and Miller have been ready and willing to furnish any aid in their power to drug company to collect said judgment from Jones Drug Company, and have communicated such willingness to plaintiff and its attorneys. That defendant Miller is not now in Arapahoe county, and his whereabouts are unknown to plaintiff, wherefore plaintiff makes Miller a party defendant. Demand for judgment; for a temporary writ of injunction, restraining Richardson Drug Company and the sheriff from proceeding with the levy of said execution, and attempting to collect said judgment, until further order of court; that it be decreed that plaintiff is not indebted to Richardson Drug Company on account of said demand; and that said judgment be set aside, and for naught held; for costs of suit, and all other proper relief."

A temporary injunction was granted, restraining the collection of the judgment, after which the defendant (plaintiff in error) filed the following answer: "Denying that Richardson Drug Company executed or delivered the writing set forth in complaint. Alleges that defendants have no knowledge as to whether or not Sampson & Millett executed or delivered such writing, but that if

they did it was done without warrant, authority, knowledge, or consent of Richardson Drug Company, and without consideration to Richardson Drug Company, or any one for it. Alleges that as to whether or not Dunagan & Miller sold their business and stock to Miller & Benson, and as to whether or not Miller & Benson assumed any of the obligations of Dunagan & Miller to Richardson Drug Company, and as to whether or not Miller & Benson sold their business and stock to Jones, Rogers & Co., and as to whether Jones, Rogers & Co. agreed to pay outstanding liabilities of Miller & Benson to Richardson Drug Company, and as to whether or not Jones, Rogers & Co. sold said business to George A. & Charles Jones, and as to whether or not George A. & Charles Jones sold to Jones Drug Company, and as to whether or not each of said vendees agreed to pay outstanding indebtedness of its vendor, defendants have not knowledge, or information upon which to base a belief. Denies that, at time of transfer to Miller & Benson, Richardson Drug Company was informed thereof, or of agreement of Miller & Benson to assume indebtedness from Dunagan & Miller to Richardson Drug Company. Denies that drug company agreed to present its account for goods furnished Dunagan & Miller to Miller & Benson, or to look to Miller & Benson for payment. Denies that drug company at time of said several transfers was informed thereof, or agreed to present its account against Dunagan & Miller to Miller & Benson, or any successive vendee. Denies that Dunagan & Miller have been released from liability. Denies that it became the duty of drug company to look to Miller & Benson, or any successive vendee. Denies that drug company did present accounts for any indebtedness of Dunagan & Miller to said successive vendees. Denies that Miller & Benson, or said successive vendees, have paid any part of said indebtedness of Dunagan & Miller, and denies that Miller & Benson, or any successive vendee, has fulfilled any obligation, or paid or discharged said indebtedness, of Dunagan & Miller to drug company. Denies that drug company admitted that Dunagan & Miller were not liable for said indebtedness, and denies that drug company represented to Dunagan & Miller that, as a matter of law, it was necessary to bring said action as then brought, so as to obtain judgment against persons originally liable, and that this judgment should be the basis of successive judgments against Miller & Benson and said vendees. Denies that drug company represented that it would not attempt to collect said judgment against Dunagan & Miller, but would only use it as a basis of subsequent judgments, so as to collect from Jones Drug Company. Denies that drug company acknowledged Jones Drug Company as vendee actually liable. Denies that drug company represented to Dunagan & Miller that, if

they would permit judgment to go by default, it would be used only for said purpose, and Dunagan & Miller held harmless thereof. Denies that Dunagan & Miller relied upon any such representation, or any alleged admissions of drug company. Denies each and every allegation of paragraph 9 of said complaint."

Replication denying that Sampson & Millett executed and delivered the instrument in writing without warrant and authority of the drug company, and denying that it was without consideration.

A jury was waived; trial had to the court; decree for the plaintiff (defendant in error), as follows: "First, that the temporary injunction be made permanent, and the drug company enjoined from enforcing the judgment rendered October 23, 1888, in this court, the same being No. 9,762, for the sum of \$574.03 and costs, and from causing any process to be issued upon said judgment; second, that the drug company and sheriff are perpetually restrained from enforcing the writ of execution issued upon said judgment April 15, 1892, and that the sheriff do return said writ without further proceedings; third, that plaintiff may, within twenty days from this date, exhibit his petition to the court, together with a copy of his proposed answer, and, upon notice to drug company, apply to the court for an order vacating said judgment, and permitting the said Dunagan & Miller to answer upon the merits in said action; fourth, costs."

James A. Kilton, for plaintiffs in error. Williams & Whitford, for defendant in error.

REED, P. J. (after stating the facts). The first allegation to be considered, upon which the plaintiff based his claim for relief, is, each of said vendees, successively, agreeing to pay all outstanding indebtedness of its vendor; " * * * that Richardson Drug Company, at the time of said several transfers, was informed thereof, and agreed to present its account for goods theretofore furnished to Dunagan & Miller to said Miller & Benson, and each of the successive vendees; that thereby Dunagan & Miller were released from liability, and it was the duty of Richardson Drug Company to look to Miller & Benson, and said vendees, successively, for payment of any liability of Dunagan & Miller to Richardson Drug Company." It will be observed that each of the facts stated is explicitly denied in the answer, but if admitted, or fully established by competent testimony, they are insufficient to operate as a release, or afford ground for equitable intervention; and the legal conclusion of the pleader, "that thereby Dunagan & Miller was released from liability," was a mistaken one. The law of novation or substitution seems so elementary, and so generally understood, that, if the foregoing was not relied upon as a release, I should ask pardon for stating the rules controlling it, and citing authority. In order

to relieve Dunagan & Miller from liability to the drug company, the three parties must have met and agreed; Miller & Benson, and their successors, must have assumed and promised to pay the debt of Dunagan & Miller; the drug company must have accepted them in the place of Dunagan & Miller, and released and discharged Dunagan & Miller. Otherwise there was no substitution and no consideration. The release of Dunagan & Miller would be the consideration. In this case it is not claimed that there was a release; consequently no consideration; hence no substitution. 1 Pars. Cont. 227, 228; Poth. Cont. pt. 3, c. 2, art. 4; Tatlock v. Harris, 3 Term R. 174; Thompson v. Percival, 5 Barn. & Adol. 925; Heaton v. Augler, 7 N. H. 397. The allegation in the complaint is insufficient. It is that the "Richardson Drug Company, at the time of the said several transfers, was informed thereof, and agreed to present its account for goods theretofore furnished to Dunagan & Miller to said Miller & Benson, and each of the successive vendees; that thereby Dunagan & Miller were released from liability." Admitting it as stated, and we have the fact that Miller & Benson agreed with Dunagan & Miller to pay the debt of the latter to the Richardson Drug Company; that the company knew it, and agreed to present the account to it. It was a matter of indifference to the drug company who paid, so that the debt was paid; but there being no substitution, and no release, the liability of Dunagan & Miller was not extinguished, nor in any manner changed. The fact that Miller, of the old firm, became a member of the new firm, the successor, in no way changes the case. "When a new firm takes upon itself the liabilities of the old, and a creditor, with knowledge of that fact, agrees to accept the new firm as debtor, and release the old firm," the substitution is made, not otherwise. Shaw v. McGregor, 103 Mass. 96; Silverman v. Chase, 90 Ill. 37. "The acceptance of the note of an individual partner after dissolution is not enough, without an express agreement." Leabo v. Goode, 67 Mo. 126; Kountz v. Holthouse, 85 Pa. St. 235. "There must be an absolute extinguishment of the original debt." Caswell v. Fellows, 110 Mass. 52. "The creditor can look to the first partnership, in its entirety, unless he has consented or agreed to release the retiring partner." Story, Partn. § 158; Cuxon v. Chadley, 3 Barn. & C. 591.

The next matter for consideration is the paper claimed to be a release to Dunagan, given by Sampson & Millett, the attorneys of the drug company, while they were prosecuting the claim against him to judgment. The paper, if authorized, would operate as a full release and discharge of the judgment, when obtained, and of all claims merged in it. The testimony in regard to authority is very peculiar and unsatisfactory. Before it was admissible in evidence, special authority from the drug company, to its attorneys, to discharge Dunagan & Miller from the indebtedness, should have been shown. No authority whatever was shown.

One Weller, as shown by the evidence, was the traveling salesman of the company. What the extent of his agency was, was not shown clearly. The release and discharge of a debtor to the firm, without payment, was not within the delegated authority of a traveling salesman, and must have been specially conferred. It is not claimed that Sampson & Millett had any authority from the drug company to release Dunagan & Miller. The only explanation of the affair Sampson could give, when testifying in the case, was: "The paper attached to interrogatories is in my handwriting. I did it because of communications received from Weller, verbally and in writing, from which I understood it was his desire; and, knowing the authority to act for the drug company, I supposed it was their desire to hold Dunagan harmless. I signed said paper, and thought I had full authority and instructions to do so. Told Dunagan, if he would co-operate with us to make claim out of Jones, we would never trouble him with the judgment. * * * He said if I would give him such paper he would let the judgment go, to help us collect from Jones, and otherwise he would file an answer and fight us." Weller testified, denying any knowledge of the paper, or any connection with it. He said: "Do not know of any authority being given to Sampson & Millett to do anything about said suit, except such as would usually devolve upon attorneys by virtue of their general retainer. Sampson & Millett had no authority to sign name of drug company to agreement to save Dunagan harmless, as it was contrary to the policy of the house to allow any one not a member of the firm to sign firm name to any agreement. I never saw any such agreement. * * * No agreement was made to release any of the parties until the accounts were settled. I never heard of such a proposition as that mentioned in cross interrogatory 10. * * * Sampson & Millett asked me some questions, at various times, which I answered, but I gave them no authority to act for St. Louis house. In fact, I had no authority to give." James Richardson, Jr., secretary and treasurer of the drug company, testified: "The drug company never promised to hold or save harmless Dunagan & Miller, from said judgment. The suit was brought in district court of Arapahoe county. Sampson & Millett were attorneys or record for drug company. The drug company never authorized Sampson & Millett to agree with Dunagan & Miller that such judgment would not be enforced, or that they would be held harmless, if they permitted judgment to go against them. If Sampson & Millett so agreed, it was not with the knowledge or consent of drug company. * * * The drug company never agreed to release Dunagan & Miller, and never presented said account to Miller & Benson, or any alleged successive vendees. Drug company never admitted that Dunagan & Miller were not responsible for payment thereof, and never represented that it would not undertake to collect said judgment, and never acknowledged that Jones Drug Company was

the vendee actually to promise to save harmless Dunagan from said judgment. * * * Sampson & Millett had no authority to do any acts in suit against Dunagan & Miller, except such as usually devolve upon attorneys by their general retainer. They had no authority to agree to hold Dunagan harmless. If they so agreed about August 29, 1888, it was not ratified by drug company."

There is a rather peculiar confusion, if not shuffling, shown by the letters of the different parties. The letters of the drug company are peremptory and specific, to prosecute the suit to judgment against Dunagan & Miller; say nothing in regard to a release, whatever. The paper purporting to be a release, executed by Sampson & Millett, was dated August 29th. On the 17th of the same month, Sampson & Millett wrote Weller that Dunagan & Miller claimed they had a release executed by him for the company, and asking: "Had you authority to bind the house, in the face of their refusal to agree to it, and was there any legal consideration that would make it binding?" In letters of same day to drug company, Sampson & Millett say: "We have always understood this release was signed by Weller, but now they claim it was signed by the company. The straight cut for you to take is to sue Dunagan & Miller. * * * We do not know what Weller agreed, nor whether he had authority to bind you. If they have a legal release, the claim will be defeated on the trial." Although Sampson & Millett say Dunagan & Miller claimed a release made by Weller, Dunagan, as late as the 16th or 18th of August, made no such claim. On these dates he writes the drug company as follows (August 18th): "Since writing you yesterday, I have had a talk with Sampson & Millett, and they give me to understand that your instruction is to make that money off of me in that suit." On the 18th: "Since writing you, I had a talk with Sampson, and he says their instructions are to make me pay that account, as they know no one else in the transaction." After that date, nothing in regard to a release appears, nor any letter from Weller; yet on the 29th Sampson executed the release in the name of the company, "because he thought Weller wished him to." It is clear, not only from the evidence of Richardson and Weller, but also from the correspondence and attending circumstances, that Sampson & Millett made the release without the authority of either the drug company or Weller. Sampson did not testify to any authority for making it, but that they made it in the exercise of their own judgment. The question is, was the release of any legal force,—one they had authority to make, by virtue of their employment as attorneys? The authorities are all, apparently, against it. The same question, substantially, was decided in the supreme court of this state, in *Hallack v. Loft*, 19 Colo. 74,

34 Pac. 570, when the court said: "The agreement of an attorney to surrender or compromise any substantial right of his client is beyond the scope of his employment, and is not binding, without express authority. His duty is to maintain, not to sacrifice, his client's cause." In *Howe v. Lawrence*, 22 N. J. Law, 99, the chief justice said: "A stipulation to waive a judgment was not an agreement for the conduct of the case. It was a deliberate surrender of his client's right, which I conceive counsel had no power to make, and which, if he had the power, justice would never permit to be enforced. Either the agreement must have been entered into by counsel of the defendant under some misapprehension of its character, in which event it is not his agreement, or it must have been founded on some corrupt consideration, in which event it is utterly void." See *Weeks, Attys.* §§ 218, 219; *Mechem, Ag.* § 813. An agreement not to enforce a judgment is not binding, nor an estoppel. *Smith v. Tyler*, 51 Ind. 512. It was, in effect, a discharge of the debtor from the indebtedness, being prosecuted to judgment. A discharge by an attorney, without special authority, except upon full payment in money, is void. *Moulton v. Bowker*, 115 Mass. 40; *Arthur v. Insurance Co.*, 78 N. Y. 469; *Barrett v. Railroad Co.*, 45 N. Y. 635; *Beers v. Hendrikson*, Id. 665; *Teshune v. Colton*, 10 N. J. Eq. 21; *Lewis v. Dunne* (N. Y. App.) 38 N. E. 322; *Hubbart v. Phillips*, 13 Mees. & W. 702. Authorities might be indefinitely multiplied, showing that, without special authority to execute a release was alleged and proved, the pretended release was absolutely void. There being no question in regard to the indebtedness of Dunagan & Miller to the drug company, and no novation and substitution, there was no question of the right of the company to collect from Dunagan & Miller, the release pleaded being a nullity. The fact that Miller & Benson, and their several successors, had agreed with Dunagan & Miller to pay the debt, was a matter of contract, with which the drug company had no concern. It was the duty of Dunagan & Miller to see that it was paid, and the firm relieved of liability. Failing to do so, if themselves obliged to pay it, they had their remedy, and could reimburse themselves from their successors.

It is a well-settled rule that a court of equity will not enjoin the collection of a judgment at law, when there was no evidence of a good defense that the defendant, for reason beyond his control, had been unable to interpose. See *Story, Eq. Jur.* § 887, and cases cited, and *Id.* § 890. Mr. High (High, Inj.), in section 117, states the rule to be: "It must satisfactorily appear that the judgment is manifestly wrong, and that upon a trial a different result would be produced, and unless these facts satisfactorily appear the bill cannot be maintained. The

complainant must be able to impeach the justice of the verdict at law." The question is, if the judgment were set aside, and a new trial granted, would complainant be entitled to succeed upon the showing made in the equity case? See, also, *George v. Tutt*, 36 Mo. 141; *Duncan v. Gibson*, 45 Mo. 352; *Hazletine v. Reusch*, 51 Mo. 50; *Taggart v. Wood*, 20 Iowa, 236; *Ableman v. Roth*, 12 Wis. 81; *Lindsey v. Sellers*, 26 Miss. 173; *Cotton v. Hiller*, 52 Miss. 7. From all that appears in the case, it shows that if the default had been set aside, and a trial had, the judgment would have been the same. It is also a well-established rule that courts of equity will seldom interfere to enjoin a judgment at law where the defendant was served, and allowed a judgment by default. There is one feature in the decree of the court that is rather peculiar. After decreeing a perpetual injunction, enjoining the enforcement of the judgment, and the issuing of any process upon it, restraining the enforcing of the writ of execution, and ordering its return, the court proceeds: "That plaintiff may, within twenty days from this date, exhibit his petition to the court, together with a copy of his proposed answer, and, upon notice to drug company, apply to the court for an order vacating said judgment, and permitting the said Dunagan & Miller to answer upon the merits in said action." As to the other party, the one aggrieved, the decree appears to be iron-bound, and it is precluded from proceeding in any manner; and as the plaintiff had secured a perpetual injunction, restraining the collection of the judgment, he could hardly be expected to make application, have the former judgment vacated, a trial upon the merits, with the probability of an unjoined judgment against him. The decree of the district court will be reversed, and cause remanded, with instructions to dissolve the injunction and dismiss the bill of complaint. Reversed.

STATE ex rel. BROWN et al. v. SUPERIOR COURT OF WHATCOM COUNTY et al.

(Supreme Court of Washington. Sept. 30, 1896.)

MANDAMUS—APPLICATION FOR WRIT—WHEN TOO LATE.

An application for a writ of mandate to a court, to compel it to entertain an appeal from a justice of the peace, is too late when made four months after the ruling complained of.

Application by the state, on the relation of Thomas R. Brown and others, receivers, for a writ of mandate to the superior court of Whatcom county and John R. Winn, judge. Denied.

Carr & Preston and W. R. Bell, for relators. Preston & Albertson, for respondents.

PER CURIAM. This is an application for a writ of mandate to compel the respondent court to entertain an appeal from a justice of the peace. Although several objections are urged against granting the writ, we find it necessary to pass upon one of them only, and that is the delay of relators in making the application. The ruling of the respondent complained of was made on the 11th day of February last, while the first move made in this court was on June 25th. It was incumbent on the relators to proceed diligently in order to obtain relief by mandamus, and the delay of four months alone would require a denial of their petition.

CARROLL v. BURLEIGH.

(Supreme Court of Washington. Aug. 28, 1896.)

CARRIERS—INJURIES TO PASSENGERS—NEGLIGENCE—INSTRUCTIONS.

1. In an action by a passenger against a railroad company for injuries received by being thrown from the train in attempting to alight, by the sudden starting of the train, it appeared that the train stopped before reaching the depot platform, and that plaintiff then attempted to get off, when the train was suddenly started, whereby plaintiff was thrown to the ground. There was evidence that the train usually stopped at that place for passengers to get off, and that it was customary for them to get off when the train first stopped, and that plaintiff had ridden upon the train several times before. Held, that she was not, as a matter of law, guilty of contributory negligence.

2. In an action for injuries to a passenger, the fact that an instruction as to plaintiff's right to recover left out of consideration the question of contributory negligence is not ground for reversal, where subsequently the court expressly instructed that, notwithstanding defendant's negligence, plaintiff could not recover if her negligence contributed to her injuries.

Appeal from superior court, King county; R. Osborn, Judge.

Action by Sarah Carroll against Andrew I. Burleigh, as receiver. There was a judgment for plaintiff, and defendant appeals. Affirmed.

Ashton & Chapman, for appellant. W. H. Thompson, E. P. Edsen, and John E. Humphries, for respondent.

SCOTT, J. Plaintiff brought this action to recover for injuries sustained by being thrown from the defendant's train, and, obtaining a judgment, the defendant has appealed. The train in question was a freight train, but it also carried passengers. On arriving at plaintiff's destination, the train came to a stop a few feet distant from the depot platform, and plaintiff arose to alight, and, as she got upon the rear platform, the train suddenly started, and threw her to the ground, whereby she was injured.

Appellant contends that the plaintiff should not have been allowed to recover, because she was guilty of contributory negligence in getting up to leave the car before it had pulled up to the platform, or before notice to get off

had been given. But there was testimony to show that the train stopped at this time where it usually stopped, and that it was customary for the passengers to get off at that place, or when the first stop was made, and that the plaintiff had ridden upon such train several times before. Under such circumstances, we could not hold, as a matter of law, that the plaintiff was guilty of contributory negligence in attempting to leave the car as she did. At most, it could have been but a question of fact for the jury, and it was properly submitted to them, under the instructions of the court.

Several of the instructions are also complained of by the appellant. As to the first one, it is contended that the court, in instructing the jury as to the right of the plaintiff to recover in case the defendant was negligent, left out of consideration the question of contributory negligence of the plaintiff. But, conceding this to be true, the court expressly instructed the jury, later on, that notwithstanding the negligence of defendant, if the plaintiff's negligence contributed to the injury, she was not entitled to recover, and consequently there was no error.

We think there is no error in any of the instructions; that the cause was fairly submitted to the jury; and that the proof was sufficient to sustain the verdict obtained by the plaintiff. There being no other matter complained of calling for especial attention, the judgment is affirmed.

ANDERS, GORDON, and DUNBAR, JJ.,
concur.

CARNEY v. SIMPSON.

(Supreme Court of Washington. Sept. 2,
1896.)

DETINUE — DAMAGES — DIVORCE — JURISDICTION — PRESUMPTIONS.

1. Where, pending a suit by the husband to recover community property from a purchaser thereof of the wife, a decree of divorce is granted to the wife, in which the property is awarded to her, plaintiff can only recover the costs, and the damages for the detention.

2. Where, in a decree for divorce, property is awarded to the wife, the jurisdiction of the court over the property will be presumed, in the absence of a showing to the contrary.

Appeal from superior court, Chehalis county; Mason Irwin, Judge.

Action by John J. Carney against George Simpson. There was a judgment for plaintiff, and defendant appeals. Reversed.

Geo. D. Schofield, for appellant. Hogan & McGerry, for respondent.

DUNBAR, J. This was an action brought by a husband after a decree of divorce from his wife, to obtain possession of specific personal property sold by the wife during coverture. It is conceded by the plaintiff (respondent here) that the property was com-

munity property, although one of the contentions of the appellant is that the property was the separate property of the wife at the time the transfer was made to the appellant. There are a great many points raised in this case, but, with our view in relation to one of them, it will not be necessary to discuss the others.

Among other answers to the complaint, and by way of an affirmative defense, the defendant pleaded in bar of this action a decree of divorce, and a distribution of the property of the respondent and his wife, Lestina Z. Carney, to the party from whom the appellant purchased the same. Under this plea, it is contended by the appellant that the only judgment that could be rendered was judgment for costs of suit, and damages for the detention of property. We think this contention must be sustained. This case was commenced on the 16th day of July, 1894, and was tried on the 22d day of May, 1895. The divorce proceedings were commenced on the 27th day of June, 1894, and the decree entered on the 20th day of September, 1894. No appeal was taken from the divorce proceeding. It is apparent that the decree of divorce is a final adjudication of the property rights of plaintiff and Lestina Z. Carney. It is true that the particular property described in this complaint is not described in the decree. It is also true that the pleadings under which the decree was granted were not made a part of the answer in the case at bar; but, in the absence of a showing to the contrary, jurisdiction of the court to enter the decree must be presumed, and we think it is a fair presumption that the rights to all the property in this state were adjudicated in such action.

The decree in this case, outside of the fact that the property is not specifically described, is very full and comprehensive. The sixth finding of the court in the divorce case, which is embraced in the decree, is that the personal property described in said pleadings, mentioning a certain newspaper, and all of the horses, cattle, farming utensils, and all of the household furniture, library, books of account, and all other personal property, of every name, nature, and description, etc., have been acquired since the marriage of the parties to the action. As conclusions of law, after describing the real estate, the decree continues that "the newspaper described in said pleadings as the Elma Chronicle, together with the printing presses, job presses, etc., the horses, cattle, stock, farming implements and utensils, household furniture, library, books of account, and all other personal property, of every name, nature, and description, acquired by the plaintiff and defendant since their marriage, is community property; and said plaintiff is entitled to have all of said community property set aside to her for her sole use and benefit, and said plaintiff is entitled to the immediate possession and control thereof." It seems to us

that this decree, fairly construed, awarded all of the community personal property, of every name, nature, and description, to the plaintiff in the divorce proceedings; and, inasmuch as it expressly provides that all of the personal property shall be awarded to the plaintiff, the jurisdiction over all of the property so awarded must be presumed, in the absence of a showing to the contrary; and inasmuch as the property sued for in this case is personal property, and the character of personal property described in the decree—viz. cattle, horses, and farming implements—is the same character of personal property, we are satisfied that the right of the husband to the possession of the same is barred by the decree, which was properly pleaded. The judgment will therefore be reversed; but, inasmuch as the action was commenced before the decree was entered, the plaintiff will be entitled to the costs of the action, and would have been entitled to damages for the detention thereof. These damages, however, were determined by the jury to be one dollar. The case will therefore be reversed, with instructions to the lower court to enter judgment in favor of the appellant for the sum of one dollar and costs of suit.

HOYT, C. J., and SCOTT and ANDERS, JJ., concur. GORDON, J., did not sit.

SMITH v. SMITH.

(Supreme Court of Washington. Sept. 17, 1896.)

DIVORCE—CUSTODY OF CHILDREN.

On a decree for divorce, the custody of a child four years old should be awarded to the mother, if she is a suitable person.

Appeal from superior court, Jefferson county; James G. McClinton, Judge.

Action by Del Cary Smith against Ella W. Smith for a divorce. From a decree granting a divorce, and awarding the custody of the children to plaintiff, defendant appeals. Modified.

A. W. Buddress and W. R. Gay, for appellant. Trumbull & Trumbull, for respondent.

DUNBAR, J. The only real controversy presented in this case, or, at least, the only error which was alleged in the oral discussion in this court, was the awarding of the care and custody of the daughter Mildred Helen Smith to the plaintiff. An examination of the long record in this case fails to convince us that the mother is not a proper person to have the care and control of her children; and the children both being of tender years, under the general rule, their care and custody should have been awarded to the mother, the defendant in this case. The second paragraph of the decree provides that the four year old girl, Mildred Helen Smith, be awarded to the plaintiff, and that the care and

custody of the infant daughter be awarded to defendant, and that the plaintiff be required to pay to the defendant on the 1st day of each and every month, until further order of the court, the sum of \$15, as alimony and for the support of said child awarded her, and further decrees that each of the parties shall have the right, at reasonable times, to visit and see the child hereby awarded to the other. This case will be remanded to the lower court, with instructions to change said paragraph to the effect that the care and custody of both the children mentioned in the decree be awarded to the defendant, and that the plaintiff be required to pay to the defendant, on the 1st day of each and every month, the sum of \$25, as alimony and for the support of said children awarded the defendant, with the provision in the decree that the plaintiff shall have the right, at reasonable times, to visit and see the children above mentioned. The remaining part of the decree will not be disturbed. The costs of the case will be taxed to the respondent.

HOYT, C. J., and ANDERS and SCOTT, JJ., concur.

MILLION v. SOULE et al.

(Supreme Court of Washington. Sept. 23, 1896.)

MUNICIPAL CORPORATIONS—WARRANTS—DISCOUNTING.

A town contracted for the purchase of certain land for \$2,000. A deed was left by the vendor with a bank for delivery on payment of the \$2,000. The cashier of the bank agreed to deliver the deed on receipt of town warrants for \$2,300, there being no money in the town treasury. The warrants were issued accordingly. Held, that the transaction was merely a discounting of the warrants, and therefore the warrants were invalid, a town being without authority to discount its warrants.

Appeal from superior court, Skagit county; Henry McBride, Judge.

Action by E. C. Million against M. P. Soule and another. There was a judgment for plaintiff, and defendant Soule appeals. Affirmed.

Kerr & McCord, for appellant. Million & Houser, for respondent.

SCOTT, J. This action was brought to restrain the treasurer of Mt. Vernon from paying certain warrants on the general fund, held by the defendant Soule. A decree was rendered in favor of plaintiff, and Soule has appealed.

It appeared that one Jackson was the owner of some real estate which the town desired to purchase, that Jackson's price therefor was \$2,000, that the town did not have the money, and that its warrants were at a discount. A deed of the real estate, to the town, was made by Jackson, and deposited in the First National Bank of Mt. Vernon, to be delivered upon receipt of \$2,000 in money. One Moody,

the cashier of the bank, and agent of the appellant, agreed with the town authorities to pay said sum of \$2,000 in consideration of the receipt of \$2,300 in town warrants; and the same were issued accordingly, payment made, and the deed delivered. There is no substantial dispute as to these matters, but appellant contends that the effect of the proceedings upon the part of the town was an agreement to give \$2,300 in warrants for the real estate, and that the town could do this. We cannot agree therewith. The price for the real estate was \$2,000, and by virtue of the agreement the town issued \$2,300 in warrants for that sum. We held in *Arnott v. City of Spokane*, 6 Wash. 442, 33 Pac. 1063, that a town could not discount its warrants. It is true, there was a direct contract to that effect in that case, but, if it could not be accomplished directly, it certainly should not be permitted by a subterfuge; and that is substantially what the transaction would be, from appellant's standpoint, it being conceded that the price for the property was only \$2,000. The action of the court in restraining the payment of the \$300 is affirmed.

HOYT, C. J., and ANDERS, DUNBAR, and GORDON, JJ., concur.

TURNER et al. v. CALDWELL, Sheriff, et al.¹
(Supreme Court of Washington. Sept. 26, 1896.)

CHATTEL MORTGAGES—REMOVAL OF PROPERTY FROM COUNTY—FAILURE TO RECORD MORTGAGE.

The provision of 1 Hill's Ann. Code, § 1649, that the lien of a chattel mortgage on property removed from the county becomes extinguished, except as between the parties, unless the mortgage is recorded in the county to which the property is removed within 30 days, is absolute, and is not affected by the fact that the mortgagee did not know of the removal, nor by actual knowledge of the existence of the mortgage by a subsequent claimant.

Appeal from superior court, Mason county; Mason Irwin, Judge.

Action by Lester Turner and others against Samuel Caldwell, sheriff, and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Kiefer & Balliet, for appellants. John O. Kleber, for respondents.

PER CURIAM. The appellants' claim to the property in controversy in this action is founded upon a chattel mortgage which was executed in King county, where the property was then situate. Said property was subsequently taken to Chehalis county, and the mortgage was also recorded there. Thereafter it was removed from Chehalis county to Mason county, and remained there until levied upon by the sheriff, by virtue of an execution in favor of respondent Hart, which levy was made long after the period of 30 days from the time of the removal of the

horses to Mason county had expired. The mortgage was never filed for record in Mason county.

Appellants contend that the property was surreptitiously taken from Chehalis county to Mason county, without their knowledge or consent. They furthermore offered to show that the respondents, at the time of the levy, knew of the existence of the mortgage. We are of the opinion that this was insufficient to sustain appellants' claim. The statute (section 1649, 1 Hill's Ann. Code) provides that, when personal property is removed from the county, it is, except as between the parties to the mortgage, exempted from its operation, unless within 30 days after such removal the mortgage is recorded in the county to which the property has been taken, etc.; and this without regard to any knowledge of the existence of such mortgage by the parties subsequently claiming the property. The obligation was upon the mortgagee to keep track of the mortgaged property, and see that the same was not taken from the county where it was mortgaged, or that the mortgage lien was preserved as pointed out by the statute. Affirmed.

HOWARD v. DEVOL.²

(Supreme Court of Washington. Sept. 26, 1896.)

JUDGMENTS—PRIORITY OF LIENS—ACTION TO DETERMINE—COMPLAINT.

In an action to have a judgment for a deficiency due on a mortgage after sale of the mortgaged land adjudged a lien on certain other land, belonging to the judgment defendants, prior to the lien of a judgment obtained against them by a third person, the complaint must allege that such defendants are insolvent, or that an execution has been issued against them for the deficiency, and returned unsatisfied.

Appeal from superior court, Spokane county; James Z. Moore, Judge.

Action by Henry Howard against Mrs. E. A. Devol. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

Richardson & Williams, for appellant. W. A. Lewis, for respondent.

PER CURIAM. Plaintiff brought an action against W. A. Lewis and his wife to foreclose a mortgage upon real estate. He obtained a judgment therein, and a sale of the property was had; but, not enough being realized to satisfy the mortgage, he brought this action to have his judgment for the deficiency adjudged a lien upon certain real estate belonging to the defendants in the other action, prior to the lien of a judgment obtained against them by the respondent. The court sustained a demurrer to the complaint, and the plaintiff has appealed.

We find it unnecessary to consider many of the objections urged against the complaint, as we are of the opinion that the demurrer was

¹ Rehearing denied.

² Rehearing denied.

well taken, for the reason that the complaint failed to state that the defendants Lewis were insolvent, or that any execution had been issued against them for the deficiency upon the mortgage foreclosure judgment, and returned unsatisfied. Before the plaintiff could attack the respondent's lien upon the premises in question, or ask that it be subjected to his lien, it was necessary for him to make one or the other of these allegations. Affirmed.

KENNAH v. HUSTON et al.

(Supreme Court of Washington. Sept. 26, 1896.)

FRAUDULENT REPRESENTATIONS — WHAT CONSTITUTES—VENDOR AND PURCHASER.

1. An agent, having real estate in his hands for sale, who misrepresents the price asked by the owner, and thereby induces another to become a joint purchaser with himself at a fictitious price, and to pay the greater part of the actual purchase money, will be compelled to account to his co-purchaser for a sufficient sum to make the cost to each equal.

2. An allegation by one of two joint purchasers of land that the vendor agreed with plaintiff's co-purchaser that the latter should represent the vendor's price to be greater than it actually was, by which he obtained an interest in the land without the payment of anything, does not state a cause of action against the vendor; it not being alleged that he made any misrepresentation or received any gain from the fraudulent representations. Dunbar, J., dissenting.

Appeal from superior court, King county; R. Osborn, Judge.

Action by Edward Kennah against R. J. Huston and Charles Kakelty. Separate demurrers filed by defendants were sustained, and plaintiff appeals. Reversed as to defendant Huston, and affirmed as to defendant Kakelty.

Stratton, Lewis & Gilman, for appellant. Jas. M. Epler, for respondent Kakelty. W. H. Thompson, E. P. Edsen, and John E. Humphries, for respondent Huston.

HOYT, C. J. Appellant brought this action against two defendants. They separately appeared in the action, and filed demurrers, which were sustained by the superior court. The allegations as to the two defendants were not the same, and those as to each must be considered separately, to determine whether or not they stated a cause of action.

As to defendant Huston, it sufficiently appeared from the complaint that the other defendant, Kakelty, was the owner of a certain piece of real estate; that he placed it in the hands of Huston for sale, at the price of \$4,000; that Huston, in order to induce the plaintiff to purchase the property, represented to him that the price at which Kakelty held it for sale was \$6,000, and, as a further inducement, agreed that he would take a half interest in the property, the plaintiff, for the consideration of \$3,000, to have the other half; that such defendant did not have the money

to pay for his half, and agreed that the plaintiff should pay \$4,000, and take title to two-thirds of the property, one-sixth thereof to be held as security for the repayment to him of the \$1,000, which the plaintiff should so pay over and above his half of the purchase price; that plaintiff, acting upon these representations, paid the \$4,000; and that the defendant Kakelty thereupon deeded the property, two-thirds to plaintiff, and one-third to the defendant Huston. The plaintiff contends that the allegations show that defendant Huston occupied such a relation to him in the transaction which led to the deeding of the property by Kakelty that the benefits flowing therefrom must be mutually shared by said defendant and the plaintiff; while the claim of respondent Huston is that the allegations show no such relation; that all that is made to appear therefrom is the fact that he made certain representations as to the value of the property; and that such representations, under well-settled rules, are simply matters of opinion, and not such that misstatements in relation thereto constitute a cause of action.

That the expression of an opinion as to the value of property offered for sale will not furnish any ground for relief against the party expressing the opinion is well settled; but, in the case at bar, what is alleged to have been done by the defendant Huston was more than the expressing of an opinion as to the value of the property. It amounted to a statement by him that Kakelty was to receive \$6,000 for the property, and that he was willing to take a half interest in the property, and pay one-half of the \$6,000 to Kakelty; and the terms upon which the plaintiff agreed to take an interest in the property were that it should be a joint purchase by himself and defendant Huston from the defendant Kakelty. This being so, the law will not allow said defendant to derive any benefits from the contract which are not shared by the plaintiff. While the circumstances surrounding this case are different from those which were under consideration in the case of *Shoufe v. Griffiths*, 4 Wash. 161, 30 Pac. 93, the principle therein announced is clearly applicable here; and, under it, it must be held that the defendant Huston must so account to the plaintiff that each will derive the same benefit from the contract of purchase.

The only allegation by which it was sought to charge the defendant Kakelty is contained in the thirteenth paragraph of the complaint, which is in the following language: "That, prior to the making of the said sale, the said defendant Huston and the said defendant Kakelty, conspiring together for the purpose of cheating and defrauding this plaintiff, had agreed that said defendant Huston should represent and pretend to the said plaintiff that the purchase price of the said lands was six thousand dollars (\$6,000), and in order to enable the said defendant Huston to obtain an interest therein without paying therefor anything." And, in our opinion, it is insuffi-

cient to warrant any recovery against him. It is true that it is alleged therein, in general terms, that he conspired with Huston for the purpose of defrauding plaintiff; but it is not shown that he in any manner derived, or was to derive, any benefit from any contract made by Huston with plaintiff; nor is it alleged that he said or did anything which led plaintiff to enter into the contract; nor is it shown that he in any manner aided or encouraged defendant Huston in his efforts to mislead or defraud the plaintiff. This being so, the bare allegation that he had agreed that said defendant Huston should make the misrepresentations is not sufficient to make him liable to the plaintiff on account thereof.

The demurrer was rightfully sustained as to defendant Kakelty, but should have been overruled as to the defendant Huston. The cause will be remanded for further proceedings in accordance with this opinion.

SCOTT and GORDON, JJ., concur.

DUNBAR, J. (dissenting). I concur in what is said by Chief Justice HOYT in regard to the responsibility of defendant Huston, but I think the allegation above quoted is sufficient to put defendant Kakelty upon his answer. This kind of a charge is frequently not susceptible of an allegation more specific than was made in this case. It is certainly not necessary to set out the conversation between the conspirators; for that is purely evidentiary. It is alleged that they agreed to defraud the plaintiff, and the manner of defrauding, nothing more, should be required. For this reason I dissent from the disposition of this case made by the majority. The judgment should be reversed as to both.

MASON v. McGEE et al.

(Supreme Court of Washington. Sept. 26, 1896.)

PLEADING—COMPLAINT—LOGGER'S LIEN—PROOF OF LIEN NOTICE.

1. A complaint in an action to enforce a logger's lien, alleging that, under the contract, "defendants became indebted to plaintiff in the sum of three hundred three and $\frac{27}{100}$ dollars," sufficiently alleges that such amount was due plaintiff.

2. In an action to enforce a logger's lien, testimony of plaintiff, admitted without objection, that he had filed the lien notice in the proper recorder's office, is sufficient proof of the recording of the lien notice.

Appeal from superior court, Snohomish county; John C. Denney, Judge.

Action by James Mason against William McGee and others. From a judgment for plaintiff, defendant Ulmer Stinson appeals. Affirmed.

Coleman & Hart, for appellant. Coleman & Fogarty, for respondent.

PER CURIAM. This action was brought to foreclose a logger's lien upon a quantity

of saw logs. Judgment being rendered for the plaintiff, the defendant Stinson has appealed.

The first point raised is that the complaint does not sufficiently allege that anything was due the plaintiff. But this point is not well taken, for it is alleged that, "under the terms and conditions of the said contract, defendants became indebted to the plaintiff in the sum of three hundred three and $\frac{27}{100}$ dollars," and this was sufficient. Furthermore, the cause appears to have been fairly tried, and we have repeatedly held, in equity causes, where the proofs are sufficient, that we would not reverse them upon technical grounds going to the pleadings.

It is next urged that there was no sufficient proof of the recording of the lien notice. The original notice was introduced in evidence, and upon it was what purported to be a certificate of its having been recorded by the auditor. But, independent of this, plaintiff testified, without objection, that he had filed the notice for record in the proper auditor's office, and this was sufficient.

The further objections urged by the appellant go to the findings of fact made by the court, on the ground that there was no testimony to sustain some of them, and that others were contrary to the testimony; but, after an examination of the proofs, we are not disposed to set aside any of the findings, and, as they were sufficient to sustain the decree that was rendered, the judgment is affirmed.

PATTON et ux. v. OLYMPIA DOOR & LUMBER CO.

(Supreme Court of Washington. Aug. 28, 1896.)

EMINENT DOMAIN—OBSTRUCTION OF STREET BY RAILWAY TRACK—RIGHT OF PROPERTY OWNERS.

1. When a railroad switch is constructed upon a street for the purpose of running cars to a saw-mill operated by defendant, defendant is liable for the damages to property owners from the construction of the switch, though it has nothing to do with the running of the trains over it.

2. The construction of a railroad switch track in the street so close to the curb line as to prevent a team standing clear of the track necessarily injures the abutting property which was for dwelling purposes, so as to entitle the owner to damages.

Anders, J., dissenting.

Appeal from superior court, Thurston county; T. M. Reed, Jr., Judge.

Suit by John M. Patton and wife against the Olympia Door & Lumber Company. There was a judgment for defendant, and plaintiffs appeal. Reversed.

Solon T. Williams, for appellants. Chas. H. Ayer and Haight & Owings, for respondent.

SCOTT, J. The appellants are the owners of a lot fronting on Jefferson street, in the city of Olympia. On one side of the lot, a short distance therefrom, said street is crossed by the

track of the Tacoma, Olympia & Gray's Harbor Railroad Company. On the other side of the lot, several blocks distant, is situated a sawmill and manufacturing plant operated by the respondent. In pursuance of an agreement entered into between the respondent and the railroad company, a railroad track was constructed upon said street in front of appellants' premises, to be used as a switch connecting with the main track. While said switch track was being constructed, appellants brought this action to enjoin the same, alleging that the construction thereof would cause great damage to their lot and dwelling house thereon, and that the respondent had not made or paid into court any compensation to appellants therefor. A temporary restraining order was issued, which, upon motion of the defendant, was afterwards vacated; and, upon said hearing, the court made findings of fact, and entered a decree dismissing the action, and the plaintiffs have appealed.

The respondent does not dispute the building of the switch track, but contends that it has nothing to do with the running of trains over it, and is in no wise liable therefor; and, furthermore, that the appellants' premises were not damaged; and, consequently, that the action was properly dismissed. It is evident from the proofs that the track was constructed principally for the benefit of the respondent, for the purpose of running cars over the same to the mill operated by it. This being the plain purpose of the construction of the switch, respondent could not escape liability for damages occasioned to the appellants by the necessary operation of the switch in the customary manner. In the case of *Hatch v. Railroad Co.*, 6 Wash. 1, 32 Pac. 1063, we held that, if the owner of a lot had been damaged in a manner different from that of the public generally by the appropriation of a street for railroad purposes, he was entitled to compensation; and that holding governs this case, for we are of the opinion that the appellants have sustained a peculiar or special damage. It appears that said switch track is built upon a curve, and that it runs in close to the side of the street upon which the appellants reside, so close that a team cannot stand there clear of the track; and, also, there is proof to show that their dwelling house is damaged and rendered of less value by the running of trains over the track. That there was some damage to the premises is apparent, and the court erred in dismissing the bill. Except as aforesaid, the findings of the court will not be disturbed, but the cause will be reversed and remanded, with instructions to give the respondent 30 days after the remittitur goes down within which to take such steps as may be necessary to determine the amount of damages, and to remunerate appellants therefor.

GORDON and DUNBAR, JJ., concur. ANDERS, J., dissents.

BELLINGHAM BAY BOOM CO. v. BRISBOLIS et al.

(Supreme Court of Washington. Sept. 11, 1896.)

BILL OF INTERPLEADER—PAYMENT INTO COURT.

One who brings a bill of interpleader to have adverse claims to a judgment against him determined, in accordance with Code Civ. Proc. § 153, and, disclaiming all interest, undertakes, pursuant to section 154, to deposit the amount due with the clerk of court, is entitled to be discharged from liability only to the extent of the sum actually paid into court.

On rehearing. Affirmed.

For former opinion, see 44 Pac. 153.

Black & Learning, in pro. per. Newman & Howard and Kerr & McCord, for respondent Bellingham Bay Boom Co. Kerr & McCord, for respondents Brisbols and others.

PER CURIAM. It has been suggested that it appears uncertain from the opinion heretofore filed herein whether it was the intention of this court to reverse in whole or in part that portion of the judgment and order of the court below discharging the boom company from all liability upon the judgment in favor of Brisbols; and we are asked by counsel to grant a rehearing of the cause, and to modify or supplement the opinion now on file so that there may be no doubt as to the present status of the company. The writer of the opinion, having especially in mind the determination of the controversy between the appellants and the Citizens' Bank in regard to the ownership of the fund in court, and which was the principal, and should have been the only, controversy in the case, inadvertently omitted to indicate with precision the conclusion of the court as to the propriety of that part of the judgment which particularly concerns the boom company; and, that being so, we deem it proper, without further argument, to so express our views on that question that they may be no longer misunderstood.

We said in our original opinion that the boom company was not entitled to be discharged from the judgment against it held by appellants, and we did so because it appeared that it had not paid the whole amount conceded to be due thereon into court. The proof shows that the respondent company, by reason of inadvertence on the part of its secretary, failed to deposit in the court the costs included in the judgment against it, and which amounted to about \$21.80. It was therefore entitled to be released from its liability thereon only to the extent of the amount actually deposited, viz. \$900, and not entirely, as the court adjudged.

There was some controversy as to whether the plaintiff had invoked the proper remedy, but we were, and still are, of the opinion that it had a right, under the statute, to maintain an action of interpleader; and the only object of this action was to have the

rights and claims of the respective defendants in and to the indebtedness of the plaintiff "adjudged, determined, and adjusted," in accordance with section 153 of the Code of Procedure. The plaintiff acknowledged its indebtedness on the judgment, disclaimed all interest therein, and proposed and undertook, pursuant to section 154, to deposit the whole thereof with the clerk of the court, and thus relieve itself from vexatious litigation and the payment of costs. It was perfectly willing to pay its debt to the party legally entitled to receive it, and it would have been interested in the litigation only to the extent of ascertaining such party if it had paid the whole of such indebtedness into court, as, it seems, it intended to do. If it had asked leave to deposit the balance due, on discovering the mistake, such request would no doubt have been granted, and the present difficulty avoided, as no one could possibly have been injured thereby. All the successful claimant can obtain, in any event, is the amount which was due from the plaintiff at the commencement of the action; and all that the plaintiff need do now in order to obtain the full benefit of the judgment in its favor, and a complete discharge from the indebtedness in question, is to deposit with the clerk the balance due and unpaid at the time the \$900 was deposited. If such deposit is made within 10 days after the remittitur is received and filed, the judgment as to the boom company will be affirmed; but, if not, it will be reversed and set aside, and the court below will enter a judgment discharging and releasing said company to the amount of \$900. No costs will be taxed against the company. The controversy between the other parties to the action has already been disposed of, and nothing further need be said concerning it.

MARSH v. CAVANAUGH et ux.
(Supreme Court of Washington. Sept. 26, 1896.)

BREACH OF CONTRACT TO CONVEY LAND—MEASURE OF DAMAGES.

Defendants agreed, in consideration of \$250 paid, to deed to plaintiff one lot in the plat of a city named, "being the choice of any \$250 lot in said" city, as laid off by defendants, or forfeit \$500 to plaintiff. *Held*, that the measure of damages for breach of the contract by defendants was the amount of money paid to them, with interest thereon from date of payment.

Appeal from superior court, King county; T. J. Humes, Judge.

Action by John L. Marsh against Martin L. Cavanaugh and Mary A. Cavanaugh to recover damages for breach of a contract to convey land. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

E. D. Benson, for appellants. Sapp & Lysons, for respondent.

HOYT, C. J. Respondent paid to the appellants \$250, and took from them a contract or bond in the following language: "This indenture, made this 8th day of August, 1892, between Martin L. Cavanaugh and Mary A. Cavanaugh, his wife, of King county, Washington, the parties of the first part, & John L. Marsh, of the same place, the party of the second part, witnesseth, for and in consideration of the sum of two hundred and fifty (\$250.00) dollars, lawful money of the U. S., to them in hand paid, the receipt whereof is hereby acknowledged, covenants and agrees to make a good and sufficient warranty deed to the party of the second part, or to his heirs or administrators, to one lot in the plat of Duwamish City, being the choice of any \$250 lot in said Duwamish City, as laid off by the parties of the first part; and we agree, for ourselves, our heirs, administrators, and assigns, to make a good and sufficient warranty deed, as above stated, as soon as we get the town plat of Duwamish City recorded, or forfeit in gold coin the sum of five hundred dollars to the party of the second part. In witness whereof, we, the parties of the first part, have set our hands and seals this eighth day of August, 1892." This action was brought to recover for an alleged breach of such contract. The making of the contract, and the breach of its conditions by the appellants, were admitted or clearly established upon the trial. The only question upon which there was any substantial difference between the parties was as to the measure of damages to which the respondent was entitled on account of such breach. The superior court held that such measure of damages was the amount of money paid to the appellants, with interest thereon from the date of such payment, and in so doing correctly interpreted the contract. If such contract had been for the conveyance of a specific piece of property described therein, there might be force in the contention of appellants that it would have been necessary for the respondent to have alleged and proved the value of such piece of property, and that his recovery would have been limited to such value; but, this contract not having provided for the conveyance of any specific piece of land, the principle invoked by the appellants has no application in determining the measure of damages. The receipt of the money, and the making of a contract for the conveyance of an undetermined piece of property, and proof that there had been a refusal on the part of those bound by the contract to comply with its terms, would entitle the party who had paid the money upon the faith of such contract to recover it back, with interest thereon from the date of payment. The judgment will be affirmed.

SCOTT, DUNBAR, and GORDON, JJ., concur.

ATWOOD v. ATWOOD et al.

(Supreme Court of Washington. Sept. 28, 1896.)

DELIVERY OF DEED.

A deed is inoperative, for want of delivery, where the grantor retained possession of the instrument, exercising exclusive control over it and its place of deposit, and died in possession of the premises described therein, without having done or said anything clearly showing an intention that title should pass to the grantees during his lifetime.

Appeal from superior court, Walla Walla county; William H. Upton, Judge.

Action by Eslie Atwood against Willie Atwood and others to remove a cloud from plaintiff's title to certain real estate. From a judgment for defendants, plaintiff appeals. Affirmed.

The superior court found the facts as follows: "(1) That one Aurelius F. Atwood, on the 27th day of October, 1885, signed and sealed a deed conveying to his two sons certain real property situate in Walla Walla county, the then territory of Washington. (2) That, at the time of making such deed, the sons were minors, and did not attain their majority until after the death of said Aurelius F. Atwood. (3) That one of the minor sons was present when the deed was signed. (4) That said Aurelius F. Atwood, after signing the deed, continued to reside on the premises described therein, and kept and held the deed in his possession, and exercised exclusive control over it, and its place of deposit. (5) That said Aurelius F. Atwood told the scrivener who drew the deed that it was his intention that the boys (meaning the grantees named in the deed) should have the land therein described; that he frequently told the grantees that he had deeded the land to them, and, just prior to his last sickness, brought the deed to his house for the purpose, as expressed by himself, of taking it to Walla Walla, and having it recorded; that he told a neighbor, just prior to his last illness, that he had made a will of part of his property, and had deeded the realty to his youngest sons, the grantees named in the deed. (6) That Atwood died March 24, 1889, leaving a will. (7) That, a few days after his death, the deed was found among decedent's papers by his eldest son, and placed of record by him March 28, 1889. (8-13) That the will of said Atwood was admitted to probate by the proper court; an administrator with the will annexed appointed of his estate; that such proceedings were had that the real property described in the deed was distributed to the heirs at law of said Aurelius F. Atwood, viz. an undivided one-fifth to the following named persons: J. Maud Kenoyer, Sarah F. Williams, Willie Atwood, Eslie Atwood, and J. P. Atwood."

Thomas & Dovell, for appellant. Edmiston & Miller, for respondents Whiteaker, Dixon, and Williams. Chadwick, Fullerton & Wyman, for respondent Kenoyer.

HOYT, C. J. The fact upon which the rights of the parties in this action depends is as to whether or not a certain deed found among the papers of the grantor after his death had been so delivered in his lifetime that it became operative, and conveyed the title to the land therein described to the grantees therein named. The cause was tried before a referee, who made findings of fact, upon which he founded a conclusion of law to the effect that the deed had been so delivered. Exceptions having been taken to the findings of the referee, the superior court set aside such findings, and made new findings of fact, and thereon found, as a conclusion of law, that the deed had not been delivered so as to become operative. A careful examination of all of the evidence introduced upon the trial satisfies us that the findings made by the superior court were warranted by such evidence; and, in our opinion, but one conclusion of law could be drawn therefrom, and that was the one which the superior court drew when it found that the deed had not been delivered. Not only are we satisfied that the findings by the superior court fully supported its conclusion as to the law, but, in our opinion, the findings of fact made by the referee failed to support his conclusion of law drawn therefrom, and were such that the proper conclusion would have been that the deed had not been delivered.

In coming to these conclusions, we have not lost sight of the able argument and large array of authorities contained in the brief of appellant, to the effect that the delivery of a deed does not necessarily require any formal act on the part of the grantor; that it is often a question of intention; that a deed may become operative while the manual possession is retained by the grantor. But in such cases, before the court can find a delivery, the intention to consummate the transaction so as to fully vest the title in the grantee must be clearly shown; and neither the findings of fact by the referee nor by the superior court, nor the evidence in the case, satisfies us that the grantor in the deed under consideration ever did anything with the intention that by doing it he had so delivered the deed as to make it presently operative. That which can be gathered from the evidence, construed most strongly in favor of the plaintiff, is that the grantor made the deed, and that he intended that at some time the grantees therein named should become the owners of the land therein described; but there is nothing which even tends to show that he ever did anything in connection with the deed, or said anything in reference thereto, which clearly showed his intention that the title should pass from himself to his children during his lifetime. Nor was there anything which tended to show that the deed had been delivered to any person in escrow to take effect after the death of the grantor. Such being the state of the evidence, no case has been cited by the plaintiff which would justify us in finding that the

deed had been delivered during the lifetime of the grantor. The judgment and decree will be affirmed.

ANDERS, DUNBAR, SCOTT, and GORDON, JJ., concur.

PONCIN v. FURTH et al.

(Supreme Court of Washington. Aug. 20, 1896.)

JURY—PEREMPTORY CHALLENGES—WAIVER—ACTION AGAINST ADMINISTRATOR ON DECEDENT'S NOTE—PROOF OF HANDWRITING—PRODUCTION OF NOTE—PRESUMPTIVE EVIDENCE—PROVISION FOR ATTORNEY'S FEES—VERIFICATION OF CLAIM.

1. Code Civ. Proc. § 348 (2 Hill's Code), providing that when the panel is filled, and passed for cause, and after a peremptory challenge shall have been made by either party, a refusal to challenge by either party in the order of alternation provided shall not deprive the adverse party of the full number of challenges, but "such refusal, on the part of the plaintiff" shall conclude him as to the jurors once accepted by him, and if his right be not exhausted his further challenges shall be confined, in his proper turn, to talesmen only, applies to a defendant who may in like manner waive his right of further challenge as to jurors in the box at the time he is called on to exercise his first peremptory challenge.

2. Error in disallowing defendant's peremptory challenges to certain jurors is not ground for reversal, where no other verdict would be permitted to stand.

3. A witness who testifies that he was intimately acquainted with defendant's intestate for nearly 40 years, a portion of which time he was in partnership with him, and that he was almost as familiar with decedent's handwriting as his own, having frequently seen him sign his name, is competent to give his opinion as to whether the signature on the note in suit is that of deceased.

4. In an action on a note, against the administrator of a deceased maker, the production of the note, and proof of its due execution, are presumptive evidence of consideration, delivery, and nonpayment.

5. In an action on a note, against the administrator of a deceased maker, it was competent for plaintiffs to introduce the claim that had been rejected by the administrator, and the letter accompanying the rejection, to show that no vouchers had been required from plaintiffs.

6. In such action the judgment may properly include the attorney's fee provided for in the note in case of suit thereon.

7. A verification to a claim against the estate of a decedent, presented to the personal representative on February 21, 1894, was sufficient, if in substantial compliance with 2 Hill's Code, § 980, which was in force at that time, and did not need to state "that said claim is correct," as required by Code 1881, § 1468.

Appeal from superior court, King county; R. Osborn, Judge.

Action by Gamma Poncin against Jacob Furth and another, as administrators of the estate of Henry I. Yesler, deceased. From a judgment for plaintiff, defendants appeal. Affirmed.

The claim referred to in the opinion was presented to defendants on February 21, 1894; was verified substantially as required by 2 Hill's Code, § 980, and did not state "that said

claim is correct," as required by Code 1881, § 1468.

Carr & Preston, White, Munday & Fulton, and H. E. Shields, for appellants. Struve, Allen, Hughes & McMicken, for respondent.

GORDON, J. The appellants are administrators of the estate of Henry I. Yesler, deceased, and appeal from a judgment of the superior court of King county, rendered in an action by respondent upon the promissory note of the said Yesler. The complaint in the action alleges, in substance, that the said Yesler on the 2d day of December, 1890, for value received, duly made and delivered his promissory note, payable to the order of the respondent; said note being for the sum of \$23,477.22, bearing interest at 1 per cent. per month from date, payable at maturity; said note being payable "twenty years after date, without grace, or upon my death, should I die before twenty years." The note also contains provision for the payment of 5 per cent. attorney's fees in case of suit or action upon the note. The complaint further alleged the presentation of the claim to the defendants, as administrators, and that the same was rejected by them; that respondent is the owner and holder of the note; and that the same has not been paid. All of the allegations of the complaint were denied by the answer, save only the allegation relating to the presentation and rejection of respondent's claim by the administrators, which allegation is expressly admitted.

The appellants complain of the ruling of the court in disallowing their peremptory challenges to jurors Bradley and Carpenter. The record discloses that both plaintiff and defendants had examined the jurors as to their qualifications, and "passed for cause." Thereupon the plaintiff interposed a peremptory challenge to one of the jurors, and, the juror having been excused, another was called, examined, and passed by both parties. Thereupon counsel for the defendants remarked, "We will take the jury." The plaintiff proceeded to exercise a second peremptory challenge, and another juror having been called, examined, and passed for cause, defendants' counsel proffered a challenge to juror Bradley, who was on the panel when counsel for defendants had waived their first peremptory challenge. The court refused to allow the challenge, holding that defendants had waived their right of challenge as to jurors in the box at the time when defendants were called upon to take their first peremptory, and could only exercise the right as to jurors thereafter called. We think the ruling was right. Section 348, Code Civ. Proc. (2 Hill's Code), is as follows: "The jurors having been examined as to their qualifications, first by the plaintiff and then by the defendant, and passed for cause, the peremptory challenges shall be conducted as follows, to wit: The plaintiff may challenge one, and then the defendant may challenge one, and so alternately until the peremptory challenges shall be ex-

haunted. The panel being filled and passed for cause, after said challenge shall have been made by either party, a refusal to challenge by either party in the said order of alternation shall not defeat the adverse party of his full number of challenges, but such refusal on the part of the plaintiff to exercise his challenge in proper turn shall conclude him as to the jurors once accepted by him, and if his right be not exhausted, his further challenges shall be confined, in his proper turn, to talesmen only." Counsel for the defendants insist that the rule adopted by the court is applicable only to the plaintiff. The statute is incomplete, but we do not think that the legislature could have intended to prescribe one rule for the plaintiff, and a different one for the defendants. The construction contended for by appellants would be most unjust to a plaintiff, and its adoption would not place the parties to the controversy upon an equal footing, as we think the legislature intended that they should be. Jurors Carpenter and Bradley were in the box when the defendants were called upon to exercise their first peremptory challenge. They were then afforded an opportunity of challenging one of said jurors. They elected to waive that right, and were thereafter properly restricted, in exercising subsequent challenges, to jurors thereafter called. Cases cited by the appellants from Michigan and California are not regarded by us as being applicable, inasmuch as the subject in those states appears to be unaffected by statute; but, were we to adopt the construction claimed for this statute by appellants' counsel, we think the ruling of the court should be regarded as harmless error merely, inasmuch as we have concluded, from an examination of the evidence, that the jury would not have been warranted in finding for the defendants. The evidence was all one way, and it was sufficient to have warranted a peremptory instruction in favor of respondent. The answer consisted of denials, and no affirmative defense was set up. The proof upon the part of the plaintiff was full and ample, and the verdict the only one which could be permitted to stand, no matter what the personnel of the jury.

2. We do not think that the court committed any reversible error in overruling defendants' objections to the several questions propounded to witnesses examined by the respondent, or in denying the several motions to strike out the testimony of said witnesses. There was no subscribing witness to the note, nor was any one produced who claimed to have seen the deceased sign it. Various parties were examined, however, who showed themselves to be familiar with the handwriting of the deceased. The witness Denny, for example, testified that he had been intimately acquainted with the deceased for upwards of 40 years, a portion of which time he was in partnership with him; that his business relations with him were extensive and frequent; and that he had frequently seen the deceased sign his

name. Witness added, "I might say I was almost as familiar with his handwriting as I was with my own." Thereupon witness, being shown the note in suit, gave it as his opinion that the signature was the signature of the deceased, adding, "I have no doubt of that being his signature." Similar testimony was given by other witnesses. Appellants insist that no proper foundation had been laid for this testimony, and that none of the witnesses were shown to be competent to give an opinion as to the genuineness of the signature in question. "There is no precise standard fixing the degree of knowledge necessary. The question of qualification depends rather on the source of knowledge than its degree. * * * After showing knowledge of the handwriting, * * * founded on adequate means of knowledge, the witness may testify to his belief or his opinion as to genuineness, and this evidence is sufficient to go to the jury in proof of execution." Abb. Tr. Ev. pp. 384, 385.

3. It is next insisted that the court erred in overruling defendants' objection to the introduction in evidence of the note. The objection is that there was no sufficient proof that it was made for a valuable consideration, or of its delivery and nonpayment. Appellants concede that while, in an action upon a note against the maker, these would be presumed from the proof of due execution and production of the note by a plaintiff, still in this action the suit is not upon the note, but upon the rejected claim, and that no presumptions will be indulged as against the administrators of the deceased maker. As already noticed, the answer to the suit contains denials only. Payment and want of consideration are affirmative defenses, and should be pleaded. We are cited to no authority which supports the contention that the rules of evidence are changed when a suit is brought upon negotiable paper against the legal representative of a deceased person, and that "the death of the maker * * * wipes out the presumptions and rules of evidence which control such paper among living persons." The contrary doctrine is recognized in *Carnright v. Gray* (Sup.) 11 N. Y. Supp. 278; also *Garrigus v. Missionary Soc.* (Ind. App.) 28 N. E. 1009.

4. Upon the trial the court, over the objection of appellants, permitted the claim which had been rejected by the administrators, and the letter accompanying the rejection, to be introduced. The purpose for which these were offered is stated by the respondent's counsel to have been to show that the administrators had required no vouchers of the plaintiff, as they were by law authorized to do. We think the proof was competent; also that it was quite immaterial, under the pleadings. It was, at most, a harmless error, and does not justify argument.

5. The verification to the claim presented to the administrators was sufficient, under section 980, 2 Hill's Code, and that section was in full force at the time when the verification was made. *State v. Halbert* (Wash.) 44 Pac. 538.

6. The effect of the verdict and judgment is determined and controlled by the statute (section 990, 2 Hill's Code), and their form is of the least importance.

7. It was not error for the court to include the attorney's fee provided for by the note. *Wolverton v. Bank*, 11 Wash. 94, 39 Pac. 247. An examination of the entire record fails to disclose any reversible error, and the judgment will be affirmed.

HOYT, C. J., and SCOTT and ANDERS, JJ., concur.

BROOKMAN et ux. v. STATE INS. CO. OF OREGON.

(Supreme Court of Washington. Sept. 8, 1896.)

Action by John U. Brookman and wife against the State Insurance Company of Oregon. Petition for rehearing denied.

For former opinion, see 45 Pac. 655.

PER CURIAM. The argument in the petition for rehearing filed in this cause is founded entirely upon an alleged mistake of facts by the court, in assuming that the lease and chattel mortgage referred to in the complaint were delivered as a part of the same transaction, and should be construed together. In making an argument upon this foundation, petitioners must have overlooked certain allegations in the complaint. Every allegation contained therein which was well pleaded was confessed by the demurrer, and must be taken as true. In the third paragraph of said complaint, after a statement as to the execution of the lease, it was alleged as follows: "To secure said sums and the faithful performance of the covenants and conditions of said lease, and to secure the payment of a certain promissory note made by said C. J. Hall and George B. Hall to the plaintiff herein, John U. Brookman, and which the lessee, C. T. B. Hall, assumed and agreed to pay as a part of the consideration for the making of said lease, and to maintain the control and management of the growing crop of hay in the plaintiffs, thereafter, on the 27th day of April, 1894, at the time of the delivery of the said instrument of lease, and as a part of the same transaction, the said C. T. B. Hall, joined by her husband, Charles J. Hall, made, executed, and delivered to the plaintiffs a certain contract and indenture of mortgage,"—which allegation, taken as true, made it the duty of this court to assume the facts to be as stated in its former opinion, that the delivery of the lease and mortgage constituted a part of a single transaction, and that such instruments must be construed together. It follows that the assumption of a mistake as to the facts was without foundation. Petition denied.

TURNER v. GREAT NORTHERN RY. CO.

(Supreme Court of Washington. Aug. 31, 1896.)

BILL OF PARTICULARS—PRINCIPAL AND AGENT—TICKET AGENTS—CARRIERS OF PASSENGERS—BREACH OF CONTRACT—DAMAGES.

1. Under Code Civ. Proc. § 206, providing that the court may compel plaintiff to file a bill of particulars of his items of damages, the refusing of a motion for a bill of particulars is within the discretion of the trial court.

2. A purchaser of a ticket from a ticket agent at a union depot, selling tickets furnished by defendant railroad company and accepted by it, is, in the absence of a showing that he neglected other reasonable means of information, entitled to rely on the agent's statements as to the time of arrival of the train at his point of destination.

3. Where, on breach by a carrier of its contract to carry plaintiff to his destination, due to the destruction of its road, plaintiff, on the advice of the carrier's conductor, takes the train of another line, and is also delayed on the second line by reason of unavoidable washouts, the first carrier is liable for such second delay.

4. In an action against a carrier for breach of a contract to carry a passenger to his destination, damages for anxiety on the part of the passenger, caused by the delay, are not recoverable.

5. On the question of damages for loss of time by a lawyer, evidence as to the value, in general, of the time of practicing attorneys, is inadmissible as a basis of damages.

Dunbar, J., dissenting.

Appeal from superior court, Spokane county; Jesse Arthur, Judge.

Action by W. W. D. Turner against the Great Northern Railway Company. There was a judgment for plaintiff, and defendant appeals. Reversed.

O. Wellington, Jay H. Adams, and M. D. Grover, for appellant. Graves & Wolf, for respondent.

ANDERS, J. This was an action for damages for the failure on the part of the defendant to transport the plaintiff and his wife over its line of railway from St. Paul, Minn., to the city of Spokane, in accordance with its agreement and duty. The material facts set forth in the complaint are, briefly, that the defendant is, and at all the times mentioned in the complaint was, a corporation operating a line of railway from St. Paul to Seattle by way of the city of Spokane; that on May 30, 1894, the plaintiff purchased from the agent of defendant at St. Paul tickets for himself and wife, and procured checks for their baggage, over defendant's railway from St. Paul to Spokane, and was induced so to do by the representation of said agent that defendant's passenger train which would leave St. Paul on the said day would reach the city of Spokane on the morning of the 2d day of June following, and that the tickets purchased from the defendant's agent were limited to that time and train; that defendant then well knew that it had not been able to run a through train from St. Paul to Spokane for several days prior to that time, and that, owing to a serious break in its roadbed west of

Havre, it would not be able to run such through train for a long time thereafter, which fact it negligently and fraudulently concealed from the plaintiff; that plaintiff and his wife took passage on defendant's passenger train which left St. Paul on the evening of May 30, 1894, and when said train reached Havre the conductor thereof informed the plaintiff that, because of some damage to defendant's road further west, in the state of Idaho, the train would proceed no further, but that the plaintiff and his wife would be taken on defendant's line of railway to Helena, Mont., from which place they would be carried to their destination over the line of the Northern Pacific Railroad Company, and that the tickets then held by plaintiff were good, and would be honored for transportation over that road; that plaintiff arrived at Helena on June 1st, and on the following day boarded the first west-bound Northern Pacific train, and presented his tickets to the conductor, who refused to accept them for transportation, and required the plaintiff to pay the fare for himself and wife to Missoula,—that being the end of the conductor's division; that, owing to serious damage to that road, caused by high water, plaintiff could proceed no further, and was compelled to remain in Missoula from the 2d to the 20th day of June; that on said last-mentioned day plaintiff paid the fare demanded for transportation to his home at Spokane, which place he reached on the 21st day of June, having been delayed over night at Hope, Idaho; and that the expense necessarily incurred for extra railroad fare and for board and lodging during the delays at Helena, Missoula, and Hope was \$86.20. It is averred in the complaint that: "During their detention and delay plaintiff's said wife, in consequence of said delay and her anxiety of mind as to their situation, became sick at said city of Missoula, and was confined to her bed for several days, and plaintiff was much worried, vexed, and annoyed because of his inability to make his wife comfortable, situated, as they were, at an hotel, among strangers, far from home, and without access to their baggage; that because of said detention and delay, and of his inability to reach his said home, plaintiff was greatly harassed, troubled, and perplexed about his business, and it otherwise caused him great annoyance, vexation, and anxiety of mind because of his embarrassed situation, the uncertainty when they would reach their home, and the great dangers incident to traveling at that time; * * * that, in addition to said extra expense made necessary, as aforesaid, because of defendant's negligent and fraudulent conduct in the premises, and of plaintiff's delay and detention, as aforesaid, and consequent loss of time, worryment, trouble, annoyance, and anxiety of mind, as aforesaid, he has been damaged in the further sum of \$1,000." The plaintiff accordingly demanded judgment against the defendant for \$1,086.20. The de-

fendant moved the court to require the plaintiff to furnish a bill of particulars showing the respective amounts claimed for loss of time, trouble, annoyance, disappointment, and anxiety of mind, which motion was denied. The defendant then answered, denying all the allegations of the complaint except that relating to the incorporation and business of the defendant, and that the plaintiff purchased the tickets mentioned in the complaint. From a judgment in favor of the plaintiff for the sum of \$750, this appeal is prosecuted.

It is claimed by defendant that it had a right, under section 205 of the Code of Procedure, to be advised, in advance, of how much plaintiff sought to recover for loss of time, how much for anxiety of mind, etc., that it might be prepared with its proofs to meet the allegations of the complaint, and that, if the allegations as to loss of time, trouble, annoyance, and disappointment of mind authorized the introduction of any proof, the damages were special, and the defendant was entitled to a statement of the particular items. It has been repeatedly held in New York, under a statute like ours, and seems to be the settled rule, that the granting or refusing of a motion for a bill of particulars is within the sound discretion of the trial court, and its ruling in that regard will not be reviewed on appeal, except in cases where there has been a palpable abuse of such discretion. *Tilton v. Beecher*, 59 N. Y. 176; *People v. Tweed*, 63 N. Y. 194; *Dwight v. Insurance Co.*, 84 N. Y. 493. No such case, we apprehend, is presented here. The object of the statute is to enable a party reasonably to protect himself against surprise on the trial (*Butler v. Mann*, 9 Abb. N. C. 49); but we are unable to see how the defendant could have been surprised by the testimony adduced by the plaintiff corroborative of the averments of the complaint, to which defendant's motion for a bill of particulars was especially addressed. So far as the complaint is concerned, its allegations were sufficient to let in the evidence admitted. The damages claimed, or at least those claimed for loss of time, were general, and therefore were not required to be specifically alleged. *Thomp. Carr. Pass.* p. 550.

It appears from the testimony of plaintiff that he purchased his tickets for transportation at the office of the Union Depot at St. Paul, and not at the office of the defendant company, and that the person from whom he purchased them was engaged in selling tickets over various other lines of railway whose trains entered and departed from that depot. Upon the trial the court permitted the plaintiff, over the objection of defendant, to detail a conversation between himself and the ticket seller, which occurred at the time the plaintiff purchased his tickets, in which the ticket seller stated, among other things, that defendant's trains were running through to Spokane on schedule time, and, if there were no accidents, plaintiff would

arrive at his destination on the morning of June 2, 1894. It is contended that this was error, for the reason that it was not shown that the person who made these statements was an agent of the defendant, and authorized to bind it by such declarations. But the fact that the tickets so sold were furnished by the railway company, and were accepted as its tickets by the conductors of its trains, would seem to be sufficient proof that the seller was a ticket agent of the company, and therefore clothed with the usual powers of such agents. It is generally the fact that there is no other person than the ticket agent at a railroad station who can give travelers the necessary information as to the arrival, departure, and running time of trains, and the rule, as formulated by a learned text writer, is that passengers have a right, until otherwise informed, to rely on information received by them from ticket agents, in answer to inquiries concerning those matters, provided they do not disregard other reasonable means of information. 3 Wood, R. R. (Minor's Ed.) 1854. The testimony objected to was certainly competent for the purpose of showing that the plaintiff himself was not in fault in taking the particular train on which he started home. It was also competent as tending to prove the contract between the parties; but, for that purpose, it was comparatively unimportant, in view of the fact that the tickets themselves, which were *prima facie* evidence of the defendant's contract, represented upon their face that plaintiff would be carried to his destination within the time mentioned by the ticket seller.

Objection is made by the defendant to the action of the court in permitting the respondent to state to the jury the amount he was compelled to pay for board and lodging and other necessary expenses for himself and wife while at Missoula, and it is urged with much earnestness that the expense incurred at that place was not the result of the breach of defendant's contract, but of an independent, intervening cause, *viz.* the inability of the Northern Pacific Railroad Company, upon whose line the plaintiff had become a passenger, seasonably to carry him to his destination. The fact is, however, that the plaintiff and his wife, while at Missoula, were not passengers on the Northern Pacific Railroad, and the company operating that road had violated no contract with them, or duty or obligation concerning them. It carried them safely and promptly to that place, and thereby discharged its whole duty. If plaintiff had, on arriving there, requested it immediately to convey him to Spokane, the fact that its road had been so damaged by floods and high water that it could not move its trains would have been a legal excuse for a failure to comply with such request. The plaintiff had no right of action against the Northern Pacific Railroad Company for damages suffered by reason of

the delay at Missoula, and it therefore follows that, if the defendant is not liable therefor, the plaintiff is without remedy, and must suffer a loss occasioned by no fault on his part. But we do not think that the plaintiff is thus remediless. It was his privilege, if not his duty, on being informed that the defendant was unable to transport him in accordance with the terms of its undertaking, to procure some other reasonable means of conveyance, and proceed on his journey. He chose what seemed to him, and apparently to the conductor of the defendant's train, to be the most direct and expeditious route, and which, so far as we are advised, was the only one practicable. The omission of the defendant to fulfill its engagement caused the plaintiff to seek transportation over the Northern Pacific Railroad, and it is therefore justly liable for the expense thereby incurred, including that incident to unavoidable delay. 3 Suth. Dam. (2d Ed.) § 936; 2 Sedg. Dam. (8th Ed.) § 864.

In answer to the question, "Now, Colonel, I wish you would go on and state to the jury what, if any, anxiety, worryment, etc., you suffered on account of your delay, being separated from your baggage, and all of those things that are proper under the ruling of the court, in consequence of this delay," the plaintiff was allowed, notwithstanding the defendant's objection, to testify that he was greatly worried, troubled, and annoyed by the combination of circumstances surrounding him at that time, among which were that he had to pay out more money than he had contemplated paying out; that the Northern Pacific Railroad Company would not board him at Missoula, as they did their passengers; his means were limited, and he did not know how long he had to stay there; that he could not hear from home, the telegraph line being broken down; that his wife was taken sick, and lay in bed three days, in consequence of her worryment, and that he could not make her comfortable under the circumstances. Damages for "worryment" and disappointment resulting from such circumstances are too remote to be recovered in this action. The mental anxiety of the plaintiff induced by the sickness of his wife and his inability to make her comfortable, or his limited means, or his inability to hear from home owing to the interruption of telegraphic communication, cannot be regarded as the proximate result of the alleged wrongful acts, or omissions of the defendant, and the court therefore erred in permitting this testimony to be submitted to the consideration of the jury.

The court also erred, and for the same reason, in instructing the jury generally that the plaintiff was entitled to recover, for worry and mental excitement, such sum as would fairly and reasonably compensate him therefor. "Damages will not be given for mere inconvenience and annoyance such as are felt at every disappointment of one's expectations, if

there is no actual physical or mental injury." 1 Sedg. Dam. (8th Ed.) § 42. And hence damages cannot be recovered for anxiety and suspense of mind in consequence of delay caused by the fault of a common carrier. *Trigg v. Railway Co.*, 74 Mo. 147; *Hobbs v. Railway Co.*, L. R. 10 Q. B. 111; *Hamlin v. Railway Co.*, 1 Hurl. & N. 408; *Walsh v. Railway Co.*, 42 Wis. 23. Nor, in an action against a railroad company for a refusal to carry, can the plaintiff recover damages for fatigue suffered by him in walking to his place of destination, or for mental and physical suffering caused by sickness contracted in such walk. *Railway Co. v. Thomas* (Tex. Civ. App.) 27 S. W. 419. But it is urged by the learned counsel for plaintiff that this court, in the case of *Willson v. Railroad Co.*, 5 Wash. 621, 32 Pac. 468, and 34 Pac. 146, repudiated the doctrine that damages cannot be recovered for mental suffering which is not connected with physical injury, and that the testimony and the instruction as to mental anxiety and excitement above mentioned were in accordance with the principle there announced. That was an action for damages for an unlawful expulsion of a passenger from a railway train, and, while it is true that we held, in accordance with what was deemed to be the weight of authority, that the plaintiff was entitled to compensation for the sense of wrong suffered and the feeling of humiliation and disgrace occasioned by the wrongful act, we did not undertake or intend to announce any rule with respect to the measure of damages in a case like the one at bar. That case is clearly distinguishable on principle from this, and the decision therein, in our judgment, in no wise militates against the views we have here expressed. In the *Willson* case the court proceeded upon the theory that humiliation and mental distress were the natural and proximate, if not in fact the necessary, result of the wrongful act of the defendant; but in the present case the necessary element of proximity is wholly wanting. The case of *Railway Co. v. Berry* (Tex. App.) 15 S. W. 48, cited by plaintiff, and which supports his contention, seems to us to be contrary to sound policy, and opposed to the general current of authority. In fact, the trial court, in one portion of its charge to the jury, recognized and announced what we hold to be the correct doctrine, when it stated to the jury that the plaintiff could not recover damages for any mental suffering experienced by reason of the refusal of the conductor of the Northern Pacific Railroad Company to accept the tickets tendered to him by plaintiff for transportation; and for what reason, then, it told the jury that the plaintiff was entitled to damages for mental anxiety and suffering endured in consequence of his delay, we are unable to perceive. Surely no court could say that, in contemplation of law, the mental agitation or excitement caused by being delayed on a journey is of a different character from that produced by unexpectedly having to pay extra fare for transportation. The mental sen-

sation in each case, whether it be called excitement, anxiety, annoyance, or worry, is manifestly the result of disappointed hope or expectation merely, for which, as we have seen, no damages can be awarded.

It appears from the evidence that the plaintiff is an attorney at law, and well known as such at Spokane, but that he had not been engaged in the practice of his profession for two years prior to the time when his alleged cause of action arose; and upon the trial he testified that he estimated the time lost by his being delayed to be reasonably worth the sum of \$25 per day. Two other attorneys were also called as witnesses for plaintiff, one of whom stated that the services of attorneys of the ability and learning of the plaintiff, who were engaged in active practice in Spokane during the month of June, 1894, were worth from \$25 to \$30 per day, and the other that they were worth from \$30 to \$40 per day. All of this evidence was objected to on the alleged ground that it was incompetent, irrelevant, and immaterial, and it is here insisted that the court erred in overruling the objection. Now, it is evident that, if the plaintiff was delayed in reaching his destination by the fault of the defendant, he was damaged, on account of lost time, to an amount exactly equal to that which he would have earned by the practice of his profession (for it is as a lawyer only that he claims damages for loss of time) had he been at home during such delay; but to entitle him to a recovery it was incumbent upon him to prove such amount by competent and legal evidence. As to the proof of damages for time lost by professional men. Mr. Sedgwick says: "In the case of most professional men, there can be no way of fixing a general scale of remuneration. The exclusive services of such men cannot be measured by any pecuniary scale common to a whole class. The most trustworthy basis of damages in such a case is the amount which the injured party has earned in the past. This is, however, only evidence from which the jury will be enabled to say what the services of such a man as the plaintiff are worth, and the jury should distinctly understand that it is not to be taken as the necessary and legal measure of damages." 1 Sedg. Dam. (8th Ed.) § 180. And this statement of law seems to be amply supported by the authorities. It is apparent, therefore, that the "most trustworthy basis of damages" was not adopted in the trial of this cause. There was no proof whatever of what the plaintiff actually earned as an attorney, either before or after the particular time in question. Of course, he earned nothing immediately before that time, because he had not been engaged in the practice of the law for the preceding two years; but, as he resumed the practice of his profession immediately after his arrival at Spokane, we think it would have been proper to have shown what he earned thereafter, not as establishing in itself the value of his time, but as evidence to aid the jury in fixing it. It would even

have been permissible to submit to the consideration of the jury, under proper instructions, proof of the earnings of the plaintiff when previously engaged in practicing law in the city of Spokane; but we are inclined to the opinion that it was hardly proper to prove what the time of practicing attorneys was worth, as that would constitute no fair basis of damages, where the value of a person's time depends so much upon his individual exertions. Neither was it proper to permit the plaintiff himself to state his own opinion or "estimate" of the value of his time, without stating the facts upon which such opinion was based. Indeed, the testimony of each of the witnesses who testified as to the value of an attorney's time was substantially nothing more than an expression of his individual opinion upon the subject, and the question involved was not one of science or skill, such as could not be determined by a jury of ordinary intelligence, without the aid of the opinions of others. If facts only had been stated, the jury could have drawn their own conclusions. Upon this issue the jury were instructed that for loss of time plaintiff was entitled to recover such sum as his time at home, for the period he was delayed by reason of defendant's failure to transport him, was reasonably and fairly worth in his profession or business; and as an abstract proposition of law the instruction was correct, but as applied to the proofs it was misleading, because it virtually authorized the jury to adopt the amount stated by the plaintiff himself, or that which they might infer from the testimony of either of the other witnesses, to be the reasonable value of plaintiff's time, as the absolute and certain measure of damages. Even if it were conceded that the evidence was admissible, and that it showed a "general scale of remuneration" common to all attorneys such as the plaintiff, the instruction would still be open to the same objection, for it left out of consideration entirely the probability that plaintiff would have had professional employment had he been at home during the period of his detention. *Yonge v. Steamship Co.*, 1 Cal. 353; 3 Suth. Dam. (2d Ed.) § 936; 2 Sedg. Dam. (8th Ed.) § 863. The jury should have been distinctly charged to weigh that probability, for the manifest reason that the plaintiff's right to damages for loss of time depended upon the fact whether the time during which he was delayed would have been of pecuniary value to him if he had arrived at his destination without detention. Under the instruction as given the jury were left to determine, as best they could, the amount of damages, without being informed as to the rule by which such damages should be measured. It is difficult, at best, to determine the value of time in a case like this, where such value is not governed by any established rate of wages; and it is therefore highly important that the jury should be fully informed as to the rules and principles by which they should be guided.

What we have already said renders it unne-

cessary for us to specially consider the remaining points made by the defendant. The judgment must be reversed, and the cause remanded for a new trial.

HOYT, C. J., and GORDON, J., concur.

DUNBAR, J. I dissent. I think no substantial error was committed by the court, and the judgment should be affirmed.

BANK OF BRITISH COLUMBIA v. JEFFS.

(Supreme Court of Washington. Sept. 3, 1896.)

NEGOTIABLE INSTRUMENT—PAROL EVIDENCE OF SURETYSHIP—EXTENSION TO PRINCIPAL—ACCEPTANCE OF INTEREST IN ADVANCE.

1. One of two or more joint and several makers of a note may show by parol that he was in fact a surety, and that such fact was known to the payee when the note was taken.

2. Where the payee of a joint and several note, with knowledge of the fact that one of the makers is a surety only, after maturity of the note accepts from the principal payment of interest to a time in the future, however short, such acceptance amounts to an extension of the note, which releases the surety, unless made with his consent.

3. The fact that a bank, while holding a past-due note of a depositor, which is also signed by a surety, makes a temporary loan to the depositor, which is placed to his credit, and subsequently checked out, does not entitle the surety to have the amount of the deposit credited on the note.

Appeal from superior court, King county; T. J. Humes, Judge.

Action by the Bank of British Columbia against Richard Jeffs. Judgment for plaintiff, and defendant appeals. Reversed.

Thomas B. Hardin and Pierre P. Ferry, for appellant. Burke, Shepard & Woods, for respondent.

GORDON, J. This action is based upon a promissory note executed by T. M. Alvord, his wife, M. J. Alvord, E. H. Alvord, and appellant, Richard Jeffs; said note being for the sum of \$10,000, made November 15, 1890, payable to the respondent, the Bank of British Columbia, one day thereafter, with interest after date at the rate of 10 per cent. The action was brought against the appellant, Jeffs, alone.

The amended answer contains nine separate defenses, the first of which alleges that the sum for which said note was given was loaned by the respondent to the said T. M. Alvord; that the appellant was a surety only; and that, after the execution of said note by appellant, the same was altered, without the knowledge or consent of the appellant, by the addition thereto of the signature of one E. H. Alvord, as an apparent principal. The second, third, fourth, fifth, sixth, and seventh defenses all assert that, after the maturity of the note, the same was, for a sufficient consideration, extended from time to time, as set out in said

several defenses, and that each of said extensions was had without the knowledge or consent of the appellant. The eighth defense was an attempt to set out an agreement to extend, but it lacks definiteness, and the lower court sustained a demurrer thereto. From an examination, we are satisfied the demurrer was rightfully sustained. *Stickler v. Giles*, 9 Wash. 147, 37 Pac. 293.

The ninth defense, in substance, alleged that in June, 1891, at a time when said note was due, T. M. Alvord had on deposit with the respondent the sum of \$3,000, which money had been borrowed by him from the respondent, and had been placed to his general deposit account. This defense proceeds upon the assumption that it was the duty of the respondent to have credited the amount of said deposit upon said past-due note, and that its failure to do so operated as a defense pro tanto. A demurrer to the several defenses having been overruled, excepting only as to the eighth (as hereinbefore noticed), the respondent replied, denying each and all of the allegations contained in the several defenses; and, the cause having proceeded to trial, the court, at the conclusion of the testimony, over the objection of the appellant, withdrew from the jury the second, third, fourth, fifth, sixth, seventh, and ninth defenses, instructing the jury to disregard the same in arriving at their verdict, and submitted the cause to them upon the issue raised by the first defense only, viz. as to whether there had been an alteration or the note subsequent to its execution by the appellant. Upon the issue thus submitted, the jury returned a verdict for the respondent, upon which the court, having denied appellant's motion for a new trial, entered its judgment, and the cause comes here on appeal.

It is contended in this court by the learned counsel for the respondent that the judgment was right in any event, inasmuch as the note in question is signed by the appellant as an apparent maker; and it is urged that it is not competent for him to show that he executed the same in the capacity of a surety. So much has been said by courts and text writers upon the proposition which is here urged that we deem it unprofitable to enter upon a discussion of the subject, and are content to announce that, in our opinion, the great weight of authority upon the question is against the contention of respondent, and that the trend of modern authority is against it. Nor do we think that it can be regarded as an open question in this state, and the right of one or two or more makers of a joint and several negotiable note to show by parol evidence that he was in fact a surety, and that that fact was known to the payee of the note when the same was taken, has been frequently recognized by this court. *Binnian v. Jennings* (Wash.) 45 Pac. 302; *Warburton v. Ralph*, 9 Wash. 537, 38 Pac. 140; *Culbertson v. Wilcox*, 11 Wash. 522, 39 Pac. 964; *Bank v. Harris*, 7 Wash. 189, 34 Pac. 466. Probably a different rule exists where one who is in reality a surety ex-

pressly declares in his contract that he is a principal, or adds the word "Principal" to his signature.

Proceeding to a consideration of the questions relied upon by the appellant for a reversal, aside from the error predicated upon the ruling of the court sustaining a demurrer to the eighth defense, already noticed, we think that the action of the court in withdrawing from the consideration of the jury the so-called "defenses" numbered 2, 3, 4, 5, 6, and 7 involves but a single question, and that it is not necessary to consider said defenses separately. The testimony introduced upon the trial relating to these defenses showed that the entire sum represented by said note, viz. \$10,000, was a loan of money to the said T. M. Alvord, and that the appellant, Jeffs, never received any part thereof; also, that the respondent had full knowledge of that fact at the time when said loan was made, and at all times thereafter. It further appears: That on July 30, 1892, said Alvord gave respondent his check drawn upon the respondent bank against the account of said Alvord in said bank, for the full amount of interest on the note in suit for the month of July, 1892. Said check was accepted by the respondent, and charged to the account of Alvord on that day, and an indorsement thereupon made on the back of said note, as follows: "Int. paid to the 31 July, '92." That on March 30, 1893, a similar check was given in payment of interest for the month of March, and a like indorsement was made by respondent upon the note. That on April 29, 1893, said Alvord, by a similar check, paid the interest on said note for the full month of April. And that the respondent, upon said 29th day of April, made an indorsement upon said note to the effect that the interest had been paid for that month. On May 24, 1893, Alvord gave to the respondent his check, dated the 20th day of May, 1893, for the amount of interest upon said note, in full for said month of May, 1893. Upon the face of said check was contained the statement that it was given in payment of interest for that month. On the same day it was presented to the respondent, and by it marked "Paid," and on that day charged to the account of said Alvord; and at the same time an indorsement was made upon said note, showing that the interest was paid thereon to May 31, 1893. On the 28th of June, 1893, a similar transaction occurred, viz. respondent received from said Alvord payment of the interest upon said note up to the 30th day of June of that year. Thus, it will be seen that the various extensions relied upon were in some instances for a day only, and in none exceeding six days; and appellant's contention that extensions were made, and for definite periods, is based wholly upon the acceptance by the respondent in several instances of interest in advance; and these payments are relied upon as constituting

valid extensions of the time for payment of the principal sum represented by the note. The officials of the bank testified that, when these interest payments were made, nothing was said about the payment of, or extensions of the time for the payment of, the principal. The respondent insists that the payment of interest in advance is not a sufficient consideration to support an agreement to extend the time, but the contrary has been held by this court in the very late case of *Binnian v. Jennings*, supra. After an examination of all of the authorities cited upon the main proposition, we think the proposition is fully supported that where a creditor, without inadvertence or mistake, receives a payment of interest in advance on the note of a debtor, and does not expressly reserve the right to sue before the expiration of the period for which interest is taken, there is a contract created to extend the time of payment during the period for which the interest is paid. *Woodburn v. Carter*, 50 Ind. 376; *Crosby v. Wyatt*, 10 N. H. 318; *Bank v. Pearsons*, 30 Vt. 711; *Hamilton v. Winterrowd*, 43 Ind. 398; *Starret v. Burkhalter*, 86 Ind. 439; *Bank v. Ela*, 11 N. H. 335; *Bank v. Mackey*, 140 U. S. 220, 11 Sup. Ct. 844; *Bank v. Truesdell*, 55 Barb. 602; *Kerns v. Ryan*, 28 Ill. App. 177; *Bank v. McClung*, 9 Humph. 97; *Scott v. Scruggs*, 9 C. C. A. 246, 60 Fed. 721. In the case of *Preston v. Henning*, 6 Bush, 556, the court say upon this question: "But it is argued for the appellees that although the acceptance of payments so made may have authorized an expectation that indulgence was to be given, as no express contract to forbear is proved, none should be inferred. We are of a different opinion. The prepayments of interest being made as the price of indulgence, and received by the appellees with knowledge of that fact, and without notice to the payer that the forbearance thus paid for would not be given, they were bound by an implied promise to forbear to sue until the expiration of the time for which the interest was paid." In *Brandt on Suretyship* (volume 2, § 352) that learned author says: "The decided weight of authority, and it seems the better reason, is that the payment in advance of interest on the debt by the principal to the creditor is of itself, without more, sufficient prima facie evidence of an agreement to extend the time of payment for the period for which the interest is paid, and works the discharge of the surety." Of course, upon principle, the extension of the time of payment for six days, or for a day only, would operate to release the surety as fully and effectually as if made for a year. 2 *Brandt, Sur.* § 344; *Kerns v. Ryan*, supra; *Winne v. Springs Co.*, 3 Colo. 155; *Ducker v. Rapp*, 67 N. Y. 464; *Berry v. Pullen*, 69 Me. 101. Our conclusion, therefore, is that the court erred in withdrawing said defenses from the consideration of the jury.

The remaining question relates to the partial defense urged by the appellant, and is designated "Affirmative Defense No. 2." We do not think that it was the duty of the respondent to have applied the \$3,000, which was on deposit in its bank, to the credit of the said T. M. Alvord, in part payment of the note in question. This deposit was the result of a temporary loan made by the respondent to the said Alvord, and by him subsequently checked out. We think there is no authority that would sustain the contention of the appellant in this behalf. *Voss v. Bank*, 83 Ill. 599.

For the error above noticed, the judgment will be reversed, and the cause remanded.

ANDERS and DUNBAR, JJ., concur.

SMITH et al. v. SMITH et al.

(Supreme Court of Washington. Sept. 17, 1896.)

WILLS—CONSTRUCTION—TRUSTEES.

Testator gave to his "said executors" all his property, "in trust, nevertheless," for certain uses, and then directed a sale of the property and division among certain beneficiaries. One of the executors appointed was a nonresident, who, by statute, was incompetent to act as an executor, and part of the property was held by testator as trustee. Held, that the executors held the property as trustees, and not as executors.

* Appeal from superior court, Pierce county; Emmett N. Parker, Judge.

Action by Mary A. Smith and others against Andrew C. Smith and George O. Kelly. There was a judgment for defendants, and plaintiffs appeal. Affirmed.

Doolittle & Fogg, for petitioners. Parsons, Corell & Parsons, for respondents.

DUNBAR, J. This case involves the construction of a will. The petition of the appellants charges the respondents with mismanaging the estate of decedent, Edward S. Smith, and prays for an accounting by the said alleged executors, for the revoking and setting aside of an order theretofore made by the court accepting the report of said executors, and for the removal from office of said executors, and the appointment of some suitable person in their stead, and for other relief. A demurrer was interposed to the petition, which demurrer was sustained by the court. Judgment for costs was rendered, and from such judgment on the demurrer appeal was taken to this court.

The appellants' brief in this case is exceedingly elaborate. Hundreds of cases are cited, but the brief is so prepared that it is difficult to determine frequently whether the learned author is quoting the decisions of courts, or is setting forth his own argument in the case; and this defect in the brief has necessitated an examination of many cases, which examination might have been otherwise ob-

viated. We have examined many, but not all, of the authorities cited, but have obtained very little light from such cases, for they seem to us not to bear on the construction of such a will as the one which is before us. The petition in this case is extremely redundant, prolix, and tautological, and is attacked by the demurrer for several alleged defects; but outside of the question as to whether or not the petition sets forth facts sufficient to constitute a cause of action, in that it does not show that a sufficient notice of the former settlement of the executors had not been made, and that it was defective for want of all the proper parties plaintiff, we think the first objection to the petition, that the probate court did not have jurisdiction to entertain the petition, must be sustained. We think it will be conceded that if the respondents were made trustees of the property of the estate by the will, instead of executors, the probate jurisdiction could not attach, but that the case should be tried by a court of equity, and the respondents should be called upon to account for their trust under the statute of trusts, instead of under the statute of probate. So that the pivotal question is, were these respondents trustees or executors?

The portion of the will necessary for construction is as follows: "I, Edward S. Smith, of Tacoma, in the county of Pierce and territory of Washington, being of sound and disposing mind, do make, publish, and declare this my last will and testament, in manner following, hereby revoking all former wills by me made: 1st. I appoint my brother Andrew C. Smith, of Rochester, Minnesota, and my friend George O. Kelly, of said Tacoma, executors of this, my last will and testament, to serve without giving bonds, and direct that, in case of the death of either of them, the survivor may act and do all things that both could do if living. 2nd. I give, devise, and bequeath to my said executors all and single my property, real and personal, and all property standing in my name, wheresoever situated, in trust, nevertheless, to and for the following uses and purposes, viz.: I direct my said executors to sell all and singular the said property, both real and personal, at such time, in such manner, and on such terms, and for such prices as is, in their opinion, for the best interest of my estate, and to convey the titles to said real estate by deed, and from the net proceeds of said sales, belonging to said estate, after paying to my wife such sums as, in their opinion, may be required for her support, to divide the remainder equally between my children, share and share alike. 3rd. And, whereas certain real property which I hold is of such a character that it may be considered by my said executors that it should not be sold immediately, the same, or any part of it, may be held by them, in their discretion, for a period not exceeding ten years." It seems to us that this will, construed as an entirety, plainly indicates that it was the intention of the decedent to make trustees of these respondents, although they are denominated "execu-

tors" by the will. All that the deviser probably meant was that these respondents should execute the trust, for the duties which he imposed upon them were purely and simply the duties of trustees. This is set out in the second paragraph of the will, after the words, "I give, devise, and bequeath to my said executors all and singular my property, real and personal, and all property standing in my name, wheresoever situated," by the qualifying words "in trust, nevertheless, to and for the following uses and purposes"; that is, notwithstanding the devise and bequest to the said executors, nevertheless said devise and bequest were in trust for the uses and purposes specified. Had the word "executors" not been used by the deviser, it could not have been contended that the will did more than to appoint the respondents trustees of the estate. Again, under our laws, an executor of an estate must be a resident of the state in which the estate is situated, and this will especially recites that one of the devisees, viz. Andrew C. Smith, is a resident of Rochester, Minn. Again, the will itself shows that a portion of the property of the estate, and which was bequeathed to the respondents, was property not belonging to the deviser, but property for which he was a trustee, and therefore property for which he could not have appointed an executor; for there is no case which goes to the extent of holding that, where the decedent was himself a trustee of the property devised, either his executor or trustee, by whatever name he might be called, or the property so held in trust, would be subject to the jurisdiction of a probate court. Altogether, we think it was the evident intention of the deviser to constitute the respondents here trustees, only, of his estate. This was the view taken by the court below upon the approval of the report of the respondents heretofore mentioned, and the order of the court was: "And it further appearing that the said Andrew C. Smith and George O. Kelly, as devisees and trustees of the estate of said decedent, have not fully closed the trust imposed upon them by said will, and their duties as executors, in connection with their said office as trustees, to which this court, as a court of probate, is without jurisdiction, and as the court is of the opinion that all of said matters can be more fairly and equitably adjusted upon their final report and statement of their account as such trustees, it is ordered that all said matters and the further hearing hereof be continued until such final settlement of such trustees shall be had, including their compensation as such executors, and all such allowances as may seem upon such final accounting to be just and proper, or shall at any time be found and awarded by this court sitting in equity, with leave to said executors at any time to apply for such further order or orders herein as they may be advised are proper for the final completion of their duties." The record shows that an action in equity for an accounting has been commenced in this case, and is now pending. We think all the relief which appellants

claim can be properly obtained in that action, or in some other action brought for an equitable accounting by these trustees, and that the demurrer to the petition was rightfully sustained.

HOYT, C. J., and ANDERS and GORDON, JJ., concur.

STATE ex rel. COMMERCIAL ELECTRIC
LIGHT & POWER CO. v.
STALLCUP, Judge.

(Supreme Court of Washington. Sept. 23,
1896.)

APPEAL FROM ORDER GRANTING INJUNCTION —
EFFECT.

A temporary injunction is operative during the pendency of an appeal from the order granting it.

Original application by the state, on the relation of the Commercial Electric Light & Power Company, for a writ of mandate to John C. Stallcup, judge of the superior court of Pierce county, requiring him to fix the amount of a bond for stay of proceedings pending an appeal. Denied.

Stiles & Stevens, for relator. A. N. Jordan and Bogle & Richardson, for respondent.

GORDON, J. An action was commenced by the city of Tacoma against the Commercial Electric Light & Power Company, defendant (relator herein), to obtain a perpetual injunction restraining and enjoining said light and power company from stringing electric wires on the streets of the plaintiff city. Upon hearing had, the court issued a temporary injunction restraining the defendant therein from doing the acts threatened pending the litigation, and requiring the city to enter into a bond in the sum of \$5,000, conditioned to pay any damages defendant might sustain by reason of the temporary injunction. Thereupon defendant (relator herein) gave notice of appeal to this court from the order granting the temporary injunction, and also filed its cost bond upon appeal. Thereafter the defendant light and power company moved the respondent, as judge of the superior court in which said action was pending, to fix the amount of bond for a stay of proceedings pending the appeal. The court denied the motion, and refused to fix the amount of such bond, in so far as it might "suspend the operation of the temporary injunction." This is a proceeding for a writ of mandate directed to the respondent, as judge, requiring him to forthwith fix the amount of said bond. A single question is presented, viz.: Is a temporary injunction operative during the pendency of an appeal from the order granting it? Upon behalf of the respondent it is insisted that the appeal was perfected by the giving of the cost bond; that "there are no proceedings on such order (an order granting a temporary injunction), and

no process can issue thereon; and that there is nothing to be stayed." The general rule is thus stated in section 391 of Elliott, App. Proc.: "Where a decree specifically forbids a party from doing a designated act, he cannot, by obtaining a supersedeas, acquire a right to do the forbidden act. Thus, a supersedeas confers no right to do an act prohibited by a decree awarding an injunction forbidding the act. It is obvious that to assign to a supersedeas such force as would make it so operate as to give a party power to do what the decree prohibits would make it a remedy creating affirmative rights of a positive nature, rather than a preventive order or writ. This would be to completely transform one remedy into another, of an essentially different class. To adjudge that a supersedeas can create a positive and affirmative right would be, in effect, to annul the decree of the lower court before a hearing upon the merits is had, and this the policy of the law prohibits. The principles declared in analogous cases forbid that the merits of an appeal should be determined upon a preliminary application, and they forbid, also, that the judgment of the trial court should be nullified without a consideration of the merits, in due course, and upon full argument." "The general theory of injunctive relief, except so far as our Code has changed the doctrine, is that some act is about to be done by the defendant which will result in such injury to the complaining party as cannot be compensated in damages that can be recovered in an ordinary action at law. If the party enjoined can, by appealing, go on and do the act which will result in the irreparable damage, compel the party who has obtained the injunction to seek his redress in an action for damages upon the appeal bond, there would seem to be no material advantage in obtaining an injunction in such case against such injurious act." *State v. Chase*, 41 Ind. 356. In *Sixth Ave. Ry. Co. v. Gilbert E. R. Co.*, 71 N. Y. 430, it was held that: "An appeal from a judgment restraining an action on the part of defendant, and a stay of proceedings thereon, do not affect the validity or effect of the judgment pending the appeal. The defendant is not absolved from the duty of obedience to it, or permitted to do that which the judgment absolutely prohibits. The judgment, so far as it enjoins the defendant, needs no execution. It acts directly without process, and the stay only operates to prevent action on the part of plaintiff." At page 433 the court say: "It did not absolve them from the duty of obedience, and permit them to do that which the judgment absolutely prohibited, and the doing of which would, as adjudged by the court, cause irreparable mischief to the plaintiff, or an injury which could not certainly be compensated in damages." See, also, *Klinck v. Black*, 14 S. C. 241; *Central Union Tel. Co. v. State*, 110 Ind. 203, 10 N. E. 922, and 12 N. E. 136; *Slaughterhouse Cases*, 10 Wall. 273; *Mining Co. v. Fremont*, 7 Cal. 120; *High, Inj.* § 1698.

Counsel for the relator concedes that the general rule is that supersedeas bonds do not suspend temporary injunction orders, but he plants himself upon the statute of this state governing appeals (sections 6 and 7, Act March 8, 1893; Laws 1893, p. 119), and the cases of *State v. Jones*, 2 Wash. St. 662, 27 Pac. 452, and *State v. Superior Court*, 12 Wash. 677, 42 Pac. 123. We have, in the course of investigation, examined a great many statutes, but we think that the distinction for which counsel contends—and which contention is supported to some extent by what is said in *State v. Superior Court*, supra—is one of phraseology, and not of principle. We have not been able to find any authority which supports the claim that an appeal from an order awarding a temporary injunction annuls the order, and leaves the parties against whom it is directed as free to act as if the injunction had not been awarded. Rule 93 of the supreme court of the United States provides, "When an appeal from a final decree, in an equity suit, granting or dissolving an injunction, is allowed by a justice or judge who took part in the decision of the cause, he may, in his discretion, at the time of such allowance, make an order suspending or modifying the injunction during the pendency of the appeal upon such terms as to bond or otherwise as he may consider proper for the security of the rights of the opposite party." It will be observed that this rule does not confer an arbitrary right, but reposes in the trial court a discretionary power. Here it is asserted as an absolute right given by the statute. Were we to uphold the claim of relator, it would be to read into the statute that, "In all cases of appeal from orders awarding temporary injunctions, the appellant may, upon giving the general bond provided by section 7, commit the acts forbidden by the order from which an appeal is taken." And, as there are no exceptions in the statute, it follows that, unless it would be the right of a defendant to give a bond suspending the injunction pending an appeal in all cases, it is a right in no case. Did the statute warrant such construction, its constitutionality might well be doubted. To illustrate: It is one of the safeguards of the constitution that "private property shall not be taken for private use." Suppose, in a given case, a party or a corporation was proceeding to intrude upon the premises of another, to cut down timber, or remove and destroy property, claiming a right so to do, and that the owner, either because of the insolvency of the party asserting the right, or because the damage threatened was not susceptible of definite ascertainment, or because of his unwillingness to part with his property for compensation or at all, should resort to equity to prevent the injury. The logic of relator's position is that if a temporary injunction issued the defendant might, upon giving an undertaking on appeal, proceed to do the very acts which by injunction he was restrained from doing, and thereby the own-

er would be obliged to resort to the remedy upon the bond, and be content with compensation in money. What becomes of the constitutional right of the defendant? It is vouchsafed to him that his private property shall not be taken for private use. For private purposes it may not be taken at all. For public purposes it may be taken only upon just compensation, and the question of whether the contemplated use be really public is, by our constitution, a judicial question. It is perfectly manifest that these provisions of the constitution go for naught, if it is within the power of the legislature to enable a party, under the guise of an undertaking upon appeal, to disregard the restraints imposed by an injunctive order. And aside from the fact that under the constitution there are some rights of property which are sacred, and for an infringement of which the law does not require that the injured party shall accept compensation in money, it often occurs that the injury complained of is of such character as that adequate compensation in money cannot be made; and that circumstance, in a given case, might be the sole basis of equitable intervention. "It may be that the tree threatened to be cut is one which he values as an ornament to his dwelling, or one which, in his eyes, is sacred, by its associations. There are some things which bonds will not cover, and which cannot be estimated in dollars and cents; and, if our law cannot fully protect the proprietor in cases like these, it but poorly earns the encomiums which are bestowed upon it." *De La Croix v. Villere*, 11 La. Ann. 39. The remedy afforded by injunction is often sought to prevent irreparable injury, which cannot be estimated in dollars and cents; and, if the injunction is suspended while an appeal is pending, it might and doubtless would often follow that the mischief would be done which the object of the action was to prevent. "Shade trees could be cut down, property removed out of the jurisdiction of the court, beyond recovery, or any other wrong intended to be prevented perpetrated, so that, when a final judgment or perpetual injunction were rendered, it would be vain and useless. The remedy sought by the process might thus become illusory, and success in the suit followed by no benefit to the aggrieved party." *Green v. Griffin*, 95 N. C. 50. We think that the true rule is laid down in *Mining Co. v. Fremont*, supra, viz.: "A stay of proceedings, from its nature, only operates upon orders or judgments commanding some act to be done, and does not reach a case of injunction." Section 3 of the act of 1893, supra, expressly provides that in all cases where a final judgment shall be rendered, wherein a temporary injunction has been granted, and the party at whose instance such injunction was granted shall appeal from such judgment, such injunction shall remain in force during the pendency of the appeal upon giving the bond, etc. The enactment of this section strength-

ens the presumption that the general provisions of section 7 were not intended to embrace cases like the present. It seems plain that, if the general provisions of section 7 are applicable to appeals from orders granting temporary injunctions, they are equally applicable to the cases provided for by section 8; hence, why the necessity for the enacting section 8?

It follows, we think, that the general language of section 7 of the act of March 8, 1893, supra, cannot, in view of the nature of injunctive relief, be held to suspend an injunction pending an appeal from an order allowing it. To hold that the legislature intended to authorize a party to commit the very act which it is the sole object of an action to prevent, in the face of an adverse order or decree standing unreversed, and remand his adversary to another forum, there to seek, in another form of action, damages which he might be loath to accept, and which would oftentimes be difficult of ascertainment, and more often inadequate, upon the mere general terms of a statute that is inapplicable to the very nature of the case, would be unreasonable, and do violence to the spirit, if not the letter, of the law. While there are general expressions used in the opinion in *State v. Superior Court*, supra, which seem to justify the position of the relator herein, such general expressions cannot be considered as decisive either of that case or of the present one; and we think, upon mature consideration, that too broad a construction was there, given the statute under consideration. Of *State v. Jones*, supra, it is only necessary to say that, under the statute in force when that case was decided, no appeal was allowed from an order granting or denying a motion for a temporary injunction; hence the case cannot be considered of any authority upon the question here considered. The writ prayed for must be denied.

SCOTT, ANDERS, and DUNBAR, JJ., concur.

KELLEY v. PIERCE COUNTY et al.

(Supreme Court of Washington. Sept. 25, 1896.)

COUNTY INDEBTEDNESS—HOW DETERMINED.

In determining the indebtedness of a county within the meaning of the constitutional provision limiting the same, there should be deducted the cash assets of the county, the amount of taxes assessed for county purposes on the tax roll for the current year, and the amount of taxes unpaid on the rolls for prior years. *State v. Hopkins* (Wash.) 44 Pac. 134, and *Mullen v. Sackett*, Id. 136, followed.

Appeal from superior court, Pierce county; John C. Stallcup, Judge.

Action by Thomas Kelley against Pierce county, John B. Hedges, treasurer, Frank H. Gloyd, auditor, H. G. Holmes and others, board of county commissioners, for an in-

junction to restrain the payment of county warrants, or the interest thereon, or the printing and exchanging of certain funding bonds, or the incurring of any indebtedness on account of the same, without such warrants being first submitted to and validated by the electors of Pierce county. From a judgment in favor of plaintiff, overruling a demurrer to the complaint, defendants appeal. Reversed.

Colner & Shackleford and Crowley, Sullivan & Grosscup, for appellants. Wickersham & Reid, for respondent.

PER CURIAM. The judgment in this case is directly in conflict with the decision of this court in *State v. Hopkins* (Wash.) 44 Pac. 134, and *Mullen v. Sackett*, Id. 136. The judgment will therefore be reversed, and the cause remanded to the lower court, with instructions to sustain defendants' demurrer to the complaint.

WOLVERTON v. GLASSCOCK et ux.¹

(Supreme Court of Washington. Sept. 26, 1896.)

JUDGMENT—RES JUDICATA—PROVINCE OF JURY.

Where, in an action on a note by an assignee, defendant, the maker, pleads a judgment rendered against him as garnishee in an action against plaintiff's assignor, in which the assignee was not a party, the question whether plaintiff did not in fact defend in the garnishment suit, so as to render the judgment binding upon him, the evidence being conflicting, is for the jury.

Appeal from superior court, Spokane county; James Z. Moore, Judge.

Action by John Wolverton against B. B. Glasscock and wife. There was a judgment for defendants, and plaintiff appeals. Reversed.

Jones, Belt & Quinn, for appellant. Jones, Voorhees & Stephens, for respondents.

DUNBAR, J. Briefly stated, the appellant, John Wolverton, was the indorsee of two negotiable promissory notes executed by respondent Glasscock to appellant's father, W. M. Wolverton. The appellant brought an action on the notes against the maker and his wife, Annie W. Glasscock, the complaint containing the usual allegations. The answer of the defendants denied the indorsement of the plaintiff, denied the allegation that the notes had not been paid, and denied the reasonableness of the attorney's fee. But the answer which raised the issues which are material in this case was a further allegation that the defendants were garnishees in a suit brought by the Exchange National Bank of Spokane against W. M. Wolverton and Maggie Wolverton as defendants; that judgment was rendered against the defendant B. B. Glasscock, as such garnishee, for the amount due

¹ Rehearing denied.

on the said promissory notes sued on; and that the said B. B. Glasscock, in accordance with the demand of said judgment, had since paid and discharged said judgment so rendered against him as such garnishee, in full. The reply of the plaintiff was a general denial. Upon the trial of the cause, the judge discharged the jury, and decided the case adversely to the plaintiff, holding that the judgment in garnishment was a bar to the action.

It is urged by the appellant that the court erred in permitting any proof of the garnishee judgment or proceeding against Glasscock, because the appellant was not a party to the garnishee proceedings, and is not bound by any judgment rendered therein. The defendant in the garnishment case, in his answer, alleged that he had been informed and believed that the notes sued upon had been assigned by the defendant in that action, W. M. Wolverton, to the plaintiff in this action, John Wolverton. It is insisted by the appellant that, under section 152 of the Code of Procedure, it was the duty of the defendant garnishee to apply to the court for an order to substitute the assignee, and that, this not having been done, he is bound to answer to the assignee for the debt. We think that the mode provided by the statute is not intended to be exclusive, and that the attention of the court was sufficiently called by the answer to the fact of the assignment, and especially would this be irrelevant if the assignee actually appeared in the case; and this case must really be determined upon the proposition of whether or not the assignee, John Wolverton, appeared in the garnishment proceedings. It was upon the theory that he did appear that the court decided the case. But it seems to us that it was the duty and province of the jury to determine that question (which was purely a question of fact), rather than the court. The opinion of the court, which is a part of the record in this case, would have been a very good argument to have been presented to the jury by the defendants' attorneys. The court proceeds in this opinion to allege reasons tending to show that Belt, one of the attorneys for the plaintiff in this case, appeared in the garnishment case as attorney for John Wolverton, and the court concludes its opinion with the following words: "Now, the court concludes from the evidence in this case that the plaintiff was represented at the trial at Sprague, and is concluded by the judgment there. The jury will be discharged." As we have before indicated, it was the province of the jury to reach conclusions from the evidence, and the case cited by the court—viz. Douthitt v. MacCulsky (Wash.) 40 Pac. 188—does not sustain the doctrine that in a case of this kind, where the testimony is conflicting, the court has a right to take the ascertainment of questions of fact from the jury, and deprive the litigants of their constitutional

right of trial by jury. For this error alone, the cause will be reversed, and a new trial granted.

HOYT, C. J., and ANDERS, J., concur.
GORDON, J., concurs in the result.

DONNERBERG v. OPPENHEIMER et al.¹
(Supreme Court of Washington. Sept. 28, 1896.)

PROMISSORY NOTES—GUARANTY—INDORSEMENT—
PRINCIPAL AND SURETY—DISCHARGE
OF SURETY.

1. The absolute guarantors of a note waiving demand, protest, etc., are not entitled to have the note presented for payment on maturity.
2. On negotiating a note before maturity by the payee, a guaranty of payment waiving demand, etc., indorsed on the note, is an indorsement with an enlarged liability.
3. A purchaser of a note after maturity from a bona fide indorsee acquires all the rights of the indorsee.
4. In case of an absolute joint guaranty of the payment of a note, the release of the principal guarantor, by failure to present the note against his estate within the required time, does not release the surety.
5. The death of the surety, the principal surviving, does not release the surety's estate.

Appeal from superior court, Spokane county; Norman Buck, Judge.

Action by John Donnerberg against Harriet Oppenheimer and others. There was a judgment for plaintiff, and defendant W. R. Newport and others appeal. Affirmed.

Jones, Voorhees & Stephens, for appellants.
Jones, Bell & Quinn, for respondent.

SCOTT, J. One Winnie executed a note to Solomon Oppenheimer, and said Oppenheimer and E. J. Brickell guarantied the payment of the note, waiving demand, protest, etc., by a written guaranty upon the back thereof, and Oppenheimer, before its maturity, sold the note to one Dekum, and it was thereafter transferred several times, and was finally purchased by the plaintiff, who brought this action upon the guaranty against the representatives of said guarantors, they both having died, to collect a balance due upon the note. There is no controversy as to the facts in the case. Oppenheimer's estate had been duly settled through the probate court, and, the claim not having been presented, the court held that said estate was not liable. Brickell, by his will, appointed the appellants Newport, Dyer, and Cheney as trustees of his property, directing them to manage and settle the estate without the intervention of the court. The will was proven, and said trustees were managing and settling the estate without the intervention of the probate court at the time of bringing this action. No notice to present claims against said estate was published. It was agreed, also, that Oppenheimer was principal in said guaranty, and that Brickell was surety.

Appellants' first contention is that plaintiff's

¹ Rehearing denied.

cause of action was barred in consequence of a failure to present the note for payment within one year after they qualified as trustees of Brickell's estate. They contend that the statute requires claims to be presented against estates being settled in such a manner, as well as those regularly administered or settled in the probate court. But, conceding this for the purposes of this case only, and not deciding it, it would also have been necessary for the trustees to have published a notice to present claims, and, not having done so, it would not be barred by any failure to present it.

It further appears that the note was presented for payment after the expiration of one year, and that payment was refused, and that the action was not brought until some four months after such presentation, and appellants contend that the plaintiff cannot recover (1) because there was no affidavit of the justness of the claim, etc., and (2) in consequence of the delay in bringing the suit. But appellants stipulated that, prior to the commencement of the action, plaintiff had duly presented said note, and demanded payment, and therefore cannot now raise the objection that there was no affidavit as to the justness of the claim. Nor is the position in regard to the delay in bringing the action well taken, for there was no obligation upon the plaintiff to present the note at all, as said above.

It is next contended that the plaintiff took the note subject to all defenses, and that the guaranty was executed some time after the execution of the note, and was executed by Brickell without any consideration, etc., and that the complaint alleges that the plaintiff obtained the note by assignment, and that no indorsement of the note was pleaded or proven. It appears, however, that the note had been transferred, before its maturity, to several parties other than the plaintiff, who were holders in good faith and for value; and the plaintiff, although obtaining the note after maturity, would take as good a title thereto, and stand in as good a position, as such prior holders. *Bank v. Gove*, 63 Cal. 355; 1 Daniel, Neg. Inst. § 726a. As to the transfer of the note by indorsement, the written guaranty was set forth in full as being upon the back of the note, and signed by the guarantors; and under the authorities this constituted an indorsement of the note with an enlarged liability. *Robinson v. Lair*, 31 Iowa, 9; *Heard v. Bank*, 8 Neb. 19; *Crosby v. Roub.*, 16 Wis. 616; *Heaton v. Hulbert*, 3 Scam. 489.

It is further contended that, the guaranty being joint, the release of one joint obligor released the other, and that the release of the principal discharged the surety, and, as the Oppenheimer estate had been released, the effect of it was to release the Brickell estate also. But this rule only applies where the discharge is brought about by some affirmative act upon the part of the creditor, and there was none in this case. All that is claimed is a failure to present the note against

the Oppenheimer estate. *Dye v. Dye*, 21 Ohio St. 86; *Gage v. Bank*, 79 Ill. 62; *Davis v. Graham*, 29 Iowa, 514; *Darby v. Bank (Ala.)* 11 South. 881; 2 Daniel, Neg. Inst. § 1339.

It is next urged that when the surety dies and the principal survives, the surety's estate is absolutely discharged, and the survivor only is liable. But this is not so under our statutes (2 Hill's Ann. Code, §§ 704, 1042), which provide that in certain cases, which would include this one, where actions could have been maintained against the party if living, the same may be prosecuted against his representatives. Finding no error, the judgment is affirmed.

HOYT, C. J., and DUNBAR, ANDERS, and GORDON, JJ., concur.

CITY OF TACOMA v. KRECH.

(Supreme Court of Washington. Sept. 28, 1896.)

CONSTITUTIONAL LAW—SPECIAL LEGISLATION—SUNDAY LAWS—BARBERS.

An ordinance prohibiting barbers from pursuing their calling for compensation on Sunday violates the constitutional inhibition against special legislation.

Appeal from superior court, Pierce county; Emmett N. Parker, Judge.

Henry Krech was convicted for violating an ordinance of the city of Tacoma prohibiting barbers from pursuing their occupation on Sunday, and appeals. Reversed.

O'Brien & Robertson, for appellant. J. P. Judon, W. H. H. Kean, and Stacy W. Gibbs, for respondent.

PER CURIAM. The appellant was convicted in the municipal court for violating a city ordinance of the city of Tacoma, which ordinance prevents barbers from pursuing their calling, from shaving or doing any work in connection with their trade, for compensation, on Sunday. Appeal was taken to the superior court of Pierce county. On the trial, appellant was again convicted, and from the judgment of that court this appeal is taken.

This judgment is attacked for various reasons by the appellant, but, with the view we take of his last contention,—viz. that the law is special, and is obnoxious to the provisions of our constitution in relation to special legislation,—a discussion of the other propositions will not be necessary. One class of people is singled out by this law, while other laboring people, in different characters of employment, are allowed to prosecute their work. Conceding, for the purpose of this case, the right of the legislature to pass a law restricting or forbidding manual labor on Sunday, yet, under the provisions of our constitution, the restriction must be imposed alike upon all residents of the state, or the effect of the law would be to work privileges and immunities

upon one class of citizens which did not equally belong to all citizens. If this law is valid, then the legislature would have the right to prohibit farm labor on Sunday, to prohibit working by printers on Sunday, to prohibit nine-tenths of the employments which citizens usually engage in in this country, and leave the other one-tenth of the people to pursue their vocations. This would plainly be granting privileges and immunities to one class which did not belong equally to all citizens. The object of the constitution was to prohibit special legislation, and substitute in its place a general law, which bore on all alike. It seems to us that the ordinance in question is "special legislation," within the meaning of the constitution; and, of course, if the legislature had no right to pass such a law, it could not delegate such power to a city council. This view is sustained by *Ex parte Jentzsch* (Cal.) 44 Pac. 803; *Keim v. City of Chicago*, 46 Ill. App. 445; *City of Pasadena v. Stimson*, 91 Cal. 238, 27 Pac. 604; *State v. Granneman* (Mo. Sup.) 33 S. W. 784; and *Eden v. People* (Ill. Sup.) 43 N. E. 1108. It is true, there have been some decisions, notably in the state of New-York, holding the contrary view; but we are satisfied with the reasoning of the cases cited, and therefore hold the ordinance to be unconstitutional. The judgment will be reversed, and the cause dismissed.

CITY OF TACOMA v. GERMAN-AMERICAN SAFE-DEPOSIT & SAVINGS BANK.

(Supreme Court of Washington. Sept. 28, 1896.)

MUNICIPAL CORPORATIONS—WARRANTS—ESTOPPEL.

Where a bank accepts city warrants, for which it gives the city credit, it cannot, after the expiration of two years, defeat an action by the city to recover the amount of the deposit by pleading illegality of the warrants, without having made an offer to return the same, or to account therefor.

Appeal from superior court, Pierce county; Emmett N. Parker, Judge.

Action by the city of Tacoma against the German-American Safe-Deposit & Savings Bank. There was a judgment for plaintiff, and defendant appeals. Affirmed.

B. F. Heuston and T. W. Hammond, for appellant. John Paul Judson, W. H. H. Kean, and James Wickersham, for respondent.

PER CURIAM. This action was brought by the city against the respondent bank to recover a balance due of moneys deposited by a former city treasurer at various times from April, 1892, to April, 1894, the amount thereof being something over \$80,000. Some \$22,000 of this was subsequently paid to the city upon warrants by its treasurer, McCauley, who had succeeded Boggs, the former treasurer. The defendant answered, admit-

ting that it had given credit for the amount claimed, as money received by it from the city treasurer, and had entered the same in a pass book, which was delivered to and kept by the treasurer. But as a defense it was alleged that no money in fact had been deposited, and that said warrants were void, etc. But no offer was made to return the warrants, and they were not accounted for in any way. Plaintiff demurred to the answer, and the court sustained the demurrer; and, upon the failure of the defendant to amend, judgment was rendered for the plaintiff. We think the demurrer was rightly sustained. It appears from the pleadings that there was no attempt upon the part of the defendant to avoid the transaction until October, 1895; that it allowed the city to transact its business upon the statement or assumption that the money in question was on deposit with the defendant. One treasurer had gone out of office, and another succeeded him. Furthermore, the defendant had no right to accept the warrants as it alleges it did accept them, and should not at this time be permitted to interpose the defense set up. It was also incumbent upon the defendant to return, or offer to return, the warrants. Affirmed.

MUNSON v. MUDGETT, County Treasurer.
(Supreme Court of Washington. Sept. 30, 1896.)

COUNTIES—BONDS—INTEREST COUPONS—WARRANT—PRIORITY OF PAYMENT.

Act March 21, 1890, § 8 (1 Hill's Code, § 2681), provides that interest coupons on county bonds shall be considered, for all purposes, county warrants. Act March 10, 1893, § 2, provides that all county warrants shall be paid in the order of their issuance. *Held*, that interest coupons cannot be postponed in favor of warrants subsequently issued, but previously presented for payment.

Appeal from superior court, Spokane county; Jesse Arthur, Judge.

Application by B. A. Munson against George Mudgett, county treasurer, for a writ of mandate. There was a judgment for defendant, and plaintiff appeals. Affirmed.

James Hopkins, for appellant. B. N. Carrier, for respondent.

GORDON, J. This was an application in the lower court for a writ of mandate. The affidavit for the writ states that the appellant was on the 17th of July, 1896, the owner of certain warrants drawn on the general county fund of Spokane county, aggregating \$322.30; that on that day he presented said warrants to the respondent (county treasurer), and demanded payment thereof; that although the respondent had on hand, belonging to said general fund, sufficient funds wherewith to pay the same, payment was refused. In answer to the alternative writ the respondent set up that on January 1, 1892, Spokane county, pursuant to authority conferred under the act of March 21,

1890, issued and sold its bonds amounting to \$183,000; that said bonds draw interest at 6 per cent. per annum, payable on the 1st day of January of each year, in accordance with interest coupons attached thereto; that said bonds and coupons were prior in date and issue to the relator's warrants; and the inability of respondent to pay both the interest and the warrants, because of insufficient funds. The court below denied the writ, and dismissed the suit at relator's costs, from which he has appealed.

The only question for determination is whether the interest coupons are entitled to priority of payment over appellant's warrants. As already stated, the bonds and coupons were issued prior to the date of the issuance of relator's warrants. Section 8 of the act of March 21, 1890 (section 2681, 1 Hill's Code), is as follows: "The coupons hereinbefore mentioned for the payment of interest on said bonds shall be considered for all purposes as warrants drawn upon the general fund of the county issuing bonds under the provisions of this chapter, and when presented to the treasurer of the county issuing such bonds, and no funds are in the treasury to pay the said coupons, it shall be the duty of the treasurer to indorse said coupons as presented for payment, in the same manner as county warrants are indorsed, and thereafter said coupons shall bear interest at the same rate as county warrants so presented and unpaid." Section 2 of the act of March 10, 1893 (Laws 1893, p. 250), provides, "All warrants drawn on the funds of the county shall be redeemed by the treasurer in the order of their issuance." We are unable to determine from the record whether relator's warrants were issued before or subsequent to the passage of the act last referred to; but, in aid of the presumption of regularity which attends all judgments of a court of record, we would be bound to presume that the warrants were issued subsequent to the passage of said act, and upon that assumption we think that the judgment was right. Independent of this consideration, we think the judgment must be sustained upon the further ground that the interest coupons were by their terms payable at a designated time, and required no presentation for the purpose of fixing the time and order of payment, and that appellant received his warrants with full knowledge of the outstanding bonds and their conditions. It is not unreasonable to presume that the certainty of payment of the interest at the times fixed by the contract was an element tending to enhance the market value of the bonds, and that the county was enabled thereby to obtain the money upon more favorable terms than it could have otherwise done. Our conclusion is that payment of the interest coupons cannot be postponed, and the rights of the holders subordinated to those of the holders of warrants subsequently issued. The judgment is affirmed.

HOYT, C. J., and DUNBAR, J., concur.

v.46P.no.4—17

LUTZ v. KINNEY, Sheriff. (No. 1,476.)
(Supreme Court of Nevada. Oct. 13, 1896.)

CHattel Mortgage—Notice—Affidavit.

In the absence of a statute requiring the affidavit annexed to a chattel mortgage to be signed by affiants, the mortgage is notice to and valid against third persons, though the affidavit is not signed by the mortgagor or mortgagee.

Appeal from district court, Ormsby county;
C. E. Mack, Judge.

Action by Martin Lutz against William Kinney, sheriff of Ormsby county. Judgment for defendant, and plaintiff appeals. Reversed.

Alfred Chartz, for appellant. A. J. McGowan and C. A. Jones, for respondent.

BONNIFIELD, J. The defendant, as sheriff, and by virtue of an execution issued on a money judgment recovered against Archer Baker, levied upon, seized, and took from the possession of said Baker a certain lot of his personal property, on which Martin Lutz, the plaintiff herein, held a chattel mortgage executed to him by said Archer Baker; said mortgage having been duly recorded in the office of the county recorder. The defendant disregarded said mortgage, and complied with none of the provisions of the statute with reference to the seizure, under attachment or execution, of mortgaged personal property; hence this suit by the plaintiff against the defendant.

The question to be determined is as to the sufficiency of the affidavit annexed to the mortgage. It is in part as follows:

"State of Nevada, County of Ormsby—ss.: Archer Baker, the mortgagor in the foregoing mortgage named, and Martin Lutz, the mortgagee in said mortgage named, being duly sworn, each for himself, and not one for the other, doth depose and say: * * *

"Subscribed and sworn to before me, this 18th day of March, 1896. J. D. Kersey, Notary Public, Ormsby Co., Nevada. [Seal.]"

The trial court found: "(5) That Martin Lutz, the mortgagee in said mortgage named, while it is evident that he intended to subscribe his name to the affidavit, as required by the statute in such case made and provided, in fact wrote his name opposite the words 'State of Nevada' in the venue of said affidavit, and underneath the name of the mortgagor as signed by him to the mortgage; and that Martin Lutz did not subscribe his name to the affidavit, and therefore the mortgage as executed was not a sufficient notice to bind creditors." "(8) That defendant is entitled to judgment dismissing this cause, and for costs of suit expended by him." Judgment was entered accordingly. The plaintiff appeals from the judgment and order of the court denying his motion for new trial.

There is no statute or rule of court in this state requiring the affidavit annexed to a chattel mortgage to be subscribed or signed by the affiants, and, in the absence thereof,

we are of opinion that it was not necessary for the affidavit in question to have been subscribed by either the mortgagor or mortgagee, to make the mortgage notice to or valid against third parties. Several legal definitions of an affidavit are given in the books, which in the main are substantially the same. "An affidavit is a voluntary, ex parte statement, formally reduced to writing, and sworn to or affirmed before some officer authorized to take it." 1 Enc. Pl. & Prac. 309. "The essential requisites are, apart from the title in some cases, that there shall be an oath administered by an officer authorized by law to administer it, and that what the affiant states under such oath shall be reduced to writing before such officer. The signing or subscribing of the name of the affiant to the writing is not generally essential to its validity. It is not, unless some statutory regulation requires it, as is sometimes the case. It must be certified by the officer before whom the oath was taken. * * * The certificate, usually called the 'jurat,' is essential, not as a part of the affidavit, but as official evidence that the oath was taken before the proper officer. The signature of an affiant can in no case add to or give force to what is sworn, and what is sworn is made to appear authoritatively by the certificate of the officer. This seems to us to be a reasonable view of the principal requisites of an affidavit, and, although there is some contrariety of judicial decisions upon the subject, the weight of authority sustains it." *Alford v. McCormac*, 90 N. C. 151. "An affidavit, as defined by Blackstone, is 'a voluntary oath before some judge or officer of the court, to evince the truth of certain facts.' 3 Bl. Comm. 304. In practice it is said to be 'an oath or affirmation reduced to writing, sworn or affirmed before some officer who has authority to administer it.' *Bouv. Law Dict. tit. 'Affidavit,' 79*. It is not necessary that the affiant should sign the affidavit. He must make it,—that is, he must swear to the facts stated; and they must be in writing. It is then his affidavit, and, as evidence that it was sworn to by the party whose oath it purports to be, it must be certified by the officer before whom it was taken, which certificate is commonly called the 'jurat,' and must be signed by such officer." *Gill v. Ward*, 23 Ark. 16. "An affidavit need not be signed by the affiant, unless such signature is required by some statute or by a rule of court." *Hitsman v. Garrard*, 16 N. J. Law, 124; *Norton v. Hauge*, 47 Minn. 405, 50 N. W. 368; *Shelton v. Berry*, 19 Tex. 154; *Bloomington v. Chittenden*, 75 Mich. 305, 42 N. W. 836. In reference to an affidavit attached to a chattel mortgage in *Ede v. Johnson*, 15 Cal. 53, the court said: "It was not necessary that the parties should sign the affidavit. This is too well settled to require discussion. It sufficiently appears that the affidavit was taken by a competent officer." "In the making of the statement of

the mortgagee required on a chattel mortgage, the agent of the corporation omitted to affix his name thereto. Underneath the statement was a certificate by a notary public, duly signed and sealed, which, in effect, stated that the statement was sworn to by the mortgagee before him. Held, that this verification is sufficient *prima facie*, and can only be overcome by evidence that the statement was not in fact sworn to by a proper agent of the corporation." *Stock Co. v. Weber*, 41 Ohio St. 689. In *State v. Board of Com'rs of Washoe Co.*, 5 Nev. 820, the court expressed the opinion that an affidavit need not necessarily be subscribed, and cited 15 Cal. 53, *supra*, and other cases, in support thereof. We are of opinion that the district court was mistaken in its conclusions of law, and erred in dismissing the action. The judgment and order appealed from are therefore reversed.

BIGELOW, C. J., and BELKNAP, J., concur.

TUDOR et al. v. DE LONG et al.

(Supreme Court of Montana. Oct. 5, 1896.)

FRAUDULENT CONVEYANCES.

A deed and chattel mortgage given by a debtor, who was being pressed by his creditors, to secure his surety on obligations already assumed, and in consideration that the surety assume the payment of other debts due by the debtor, are not per se fraudulent as to the other creditors of the debtor.

Appeal from district court; Gallatin county; F. K. Armstrong, Judge.

Action by David Tudor and another against Ira De Long and another. There was a judgment for defendants, and plaintiffs appeal. Affirmed.

This is an action to set aside a conveyance made by defendant Burk to defendant De Long to certain real estate in Gallatin county, and also a chattel mortgage to certain personal property made by said Burk to said De Long, for alleged fraud in the execution of said instruments. Both of said instruments were executed on the 13th day of February, 1894, and both are attacked on the same ground of alleged fraud in the execution thereof. The complaint alleges generally that both of said instruments were executed for the purpose of cheating, defrauding, hindering, and delaying the creditors of Burk, and that they were both executed and delivered without any consideration whatever having passed from De Long to Burk. Plaintiffs were creditors of Burk before and at the time of the execution of said instruments. The answer denies the material allegations of the complaint. The case was tried by the court without a jury. The judgment of the court was for the defendants. Plaintiffs appeal from the judgment and the order of the court refusing a new trial.

J. L. Staats, for appellants. Luce & Luce, for respondents.

PEMBERTON, C. J. (after stating the facts). An inspection of the record in this case discloses the fact that on the 13th day of February, 1894, the date of the two conveyances attacked and sought to be set aside for alleged fraud, and prior thereto, the defendant Burk was indebted to divers creditors, and that he was being pressed for payment of his debts, especially by the Gallatin Valley National Bank, to which he owed a considerable sum. It appears that at this time De Long was surety for Burk on notes for about \$2,700. To secure De Long against this liability, and to secure De Long against damage and loss by reason of his (De Long's) assuming about \$2,000 additional indebtedness of Burk to said bank and other creditors, who were crowding him for payment, Burk executed and delivered to De Long the deed and chattel mortgage sought to be set aside in this proceeding. The plaintiffs, who were creditors of Burk, were not secured or preferred by the conveyances above mentioned. There was no other consideration for the execution of the deed and chattel mortgage involved than that stated above. No money passed from De Long to Burk as a consideration for the making of such instruments. The appellants contend that the deed and chattel mortgage made by Burk to De Long, under the circumstances stated above, to secure De Long as Burk's surety, and also to protect De Long against damage on account of his assuming the payment of Burk's debts, were made without consideration, and were and are therefore void as to plaintiffs. The court evidently found that there was sufficient consideration shown for the execution and delivery of the instruments attacked, and that there was no fraud in the arrangement between Burk and De Long, by and on account of which Burk transferred his property to De Long, and upon such view of the case the court evidently made its finding, and rendered its judgment. This action of the court constitutes the principal, if not the sole, ground of complaint of the appellants. It is the only error really relied upon, though others are assigned. It is the alleged error against which counsel directs his main argument. The court simply found that De Long was surety for Burk on notes to about \$2,700, and had assumed, in addition thereto, the payment of about \$2,000 of Burk's debts, and that, to secure himself against such liabilities, he had taken the deed and chattel mortgage attacked in this proceeding. It is not claimed that the transaction between Burk and De Long was not bona fide for the purpose and for the consideration stated above. We are at a loss to see how the court could have found otherwise than it did. De Long had a legal right to demand and take security against the liabilities he assumed for Burk. Burk had a legal right to secure him in the manner he did. That the giving of the deed and chattel mort-

gage to De Long amounted to a preference by Burk of other creditors gave the plaintiffs no right of action. Such a preference is not of itself fraudulent, nor is it prohibited by law. *Priest v. Brown* (Cal.) 35 Pac. 323, and cases cited; *Ross v. Sedgwick* (Cal.) 10 Pac. 400; *Smith v. Rankin* (Kan. Sup.) 25 Pac. 586; *Warren v. His Creditors* (Wash.) 28 Pac. 257. If it were necessary to cite authorities in support of the finding and judgment of the lower court in this case, we think the above amply sufficient. There is no pretense, supported by the evidence, that there was any actual or intentional fraud in the execution of the deed and chattel mortgage sought to be set aside in this case. The appeal appears to us to be without merit, if not absolutely frivolous. The judgment and order of the district court appealed from are affirmed. Affirmed.

DE WITT and HUNT, JJ., concur.

STATE ex rel. BARTLETT v. SECOND JUDICIAL DISTRICT COURT.

(Supreme Court of Montana. Sept. 28, 1896.)

EXECUTORS AND ADMINISTRATORS — POWERS OF SPECIAL ADMINISTRATORS — PAYMENT OF DEBTS — JURISDICTION OF DISTRICT COURT — WRIT OF REVIEW.

1. The duties of a special administrator, as defined by Code Civ. Proc. § 2500, being "to collect and take charge of the estate of the decedent * * * and to exercise such other powers as may be necessary for the preservation of the estate," his powers are limited, as by general law, to the collection and preservation of the property for the general executor or administrator when appointed, and he has no power to allow or pay claims against the estate.

2. It not being one of the functions of a special administrator to audit and pay claims against the estate, the district court, as a court of probate, is without jurisdiction to order him to pay any claim in advance of general administration.

3. An order of a district court, which it is without jurisdiction to make, though in a proceeding from which an appeal lies, is subject to review and annulment by writ of review.

4. Where an order is made by the district court, without jurisdiction, requiring a special administrator to pay out money of the estate, such administrator is "a party beneficially interested," within the meaning of Code Civ. Proc. § 1842, authorizing such a party to obtain a writ of review.

Application by Henry R. Bartlett, special administrator of the estate of John F. Kelly, deceased, for a writ of review to the district court of the Second judicial district, and for the annulment of an order of said court. Writ granted and order annulled.

H. R. Bartlett, special administrator of the estate of John F. Kelly, deceased, petitions the court to issue a writ of review commanding the district court of the Second judicial district to certify to this court a transcript and record of the proceedings considered by said district court in the matter of the estate of said John F. Kelly, deceased, and the petition of Mary Ellen Kelly for an order directing the special administrator to pay

the indebtedness of the First National Bank of Butte, and the order of the district court directing the payment thereof. The petitioner alleges that the district court had no jurisdiction or authority to make the order directing the special administrator to pay the indebtedness of said bank. The affidavit of H. R. Bartlett sets forth that he is the special administrator of the estate of John F. Kelly, deceased; that said Kelly died on April 16, 1896; that on April 18, 1896, affiant offered for probate in said district court a document purporting to be the last will and testament of said deceased, and dated April 16, 1896, wherein deceased made bequests to various relatives amounting to the sum of \$22,000, and bequeathed the residue of his estate to his widow and minor child; that on April 18, 1896, the district court duly made an order appointing this petitioner special administrator to collect and take charge of the estate, and exercise such other powers as might be necessary for the preservation of the estate, and to do such further acts as might be ordered by the court; that bonds were given and approved; that on April 29, 1896, the said Mary Ellen Kelly, the wife of the deceased, for herself and as guardian of her minor child, filed objections and contest to the probate of the document purporting to be the last will and testament of the deceased. Petitioner also avers that the petition for probate and the contest are still pending and undetermined; that, as special administrator, he proceeded to take charge of and collect the property and effects of the deceased, and realized the sum of about \$83,000, which he still has on hand. On August 3, 1896, the said Mary Ellen Kelly filed in the district court a petition setting forth, among other things, that the special administrator was in possession of about \$90,000, and that the estate was indebted to the First National Bank of Butte in the sum of \$67,000, which was drawing interest at the rate of 10 per cent. per annum, and secured by first lien upon the real property belonging to the estate; that no claim had been presented by the bank for said sum, but she prayed for an order directing the special administrator to pay out of the funds then in his hands the indebtedness so owing to the bank, together with accrued interest. On August 5, 1896, the special administrator filed his answer to the petition of the widow, saying that he had no knowledge of the indebtedness to the bank, for the reason that no claim had been presented therefor, and that he was informed and believed that there were a great many claims and demands against the estate, but could not state the nature, character, or amount thereof. He also set forth other matter in his answer, much of which is immaterial to the question raised by this proceeding. It is averred that on August 11, 1896, the judge of the district court, at chambers, made an order wherein the court found that the estate was indebted to the First Na-

tional Bank of Butte in the sum of \$69,381.37, which was interest-bearing, and secured by deed of trust, and was a first lien on the real property belonging to the estate. The court also found that the estate was solvent, and that the assets were sufficient to pay all the debts and liabilities of the estate. The Honorable John J. McHatton, judge of the Second judicial district court, for his return makes a transcript of the record and proceedings used and considered by him. His return sets forth the petition of Mary Ellen Kelly praying for an order requiring the special administrator to discharge the debt due the First National Bank. The special administrator's answer is also part of the return. The order appointing H. R. Bartlett special administrator recites that, as special administrator, he is ordered "to collect and take charge of the estate of the deceased, in whatever county or counties the same may be found, and to exercise such other powers that may be necessary for the preservation of the estate, and to do such further acts as may be ordered by the court," etc. It appears that the judge heard testimony before he made the order directing the special administrator to pay the indebtedness of the First National Bank. The cashier of the bank was called, and permitted to testify in relation to the indebtedness, against the objection of the special administrator. The basis of the objection was that the court had no power to receive proofs of claims by oral testimony, and no authority to order the special administrator to pay the debts of the deceased. It appears also by the return that contests were filed to the probate of the document purporting to be the last will of said John F. Kelly. The order of the court embracing the findings as to the condition of the estate, and the amount due to the First National Bank, and directing the special administrator to pay the bank, is also included in the return. The respondent moved to quash the writ issued, upon the grounds that there is an appeal from the order complained of, and that it does not appear from the record that the application was made on the affidavit of a party beneficially interested.

James W. Forbis, for relator. Thompson Campbell and Wm. Scallon, for respondent.

HUNT, J. (after stating the facts). It has been established by the decisions of this court that the jurisdiction of the district court, sitting in probate matters, is limited to the powers conferred upon it by statute; that is, to the control of the "administration of decedents' estates, the supervision of the guardianship of the infants, the control of their property, the allotment of dower, and other powers pertaining to the same subject." In *re Higgins' Estate*, 15 Mont. 474, 39 Pac. 516; *Chadwick v. Chadwick*, 6 Mont. 566, 13 Pac. 388. If, therefore, there was no authority of statute for the district judge to authorize the payment of the debt due by the Kelly estate to the bank, the

whole proceeding directing such payment was void, and the writ should issue. The powers of a special administrator are limited. He is "to collect and take charge of the estate of the decedent * * * and to exercise such other powers as may be necessary for the preservation of the estate." Code Civ. Proc. § 2500. Again, the statute authorizes him to collect and preserve for the executor or administrator all incomes, rents, issues and profits, claims and demands of the estate. He must take charge and management of, enter upon and preserve from damage, waste, and injury, the real estate, and, for any such and all necessary purposes, may commence and maintain or defend suits and other legal proceedings as an administrator. He may sell perishable property, in certain instances, and "exercise such other powers as are conferred upon him by his appointment, but in no case is he liable to an action by any creditor." Code Civ. Proc. § 2504. These statutes limit the functions of a special administrator to the exercise of powers necessary to collect and preserve the estate for the executor or administrator to be regularly appointed. The enumeration of particular powers, such as to sell such perishable property as may be ordered sold, and to collect rents, etc., is but to enable a special administrator to collect and preserve what otherwise might not be collected and preserved for the estate by any one in authority. The authority "to exercise such other powers as are conferred upon him by his appointment" is but a further power to do what may be necessary to collect and preserve. It is not a power to exercise the powers and duties conferred upon a regular executor or administrator, such as the allowance or payment of claims. "The paramount duty of this special administrator is to collect all the personal estate of the deceased, and preserve the same for the general executor or administrator, when appointed." Schouler, *Ex'rs*, § 135; *Crow. Ex'rs & Adm'rs*, § 223; *Long v. Burnett*, 13 Iowa, 28; *Henry v. Superior Court*, 93 Cal. 569, 29 Pac. 230. The provision of the statute that in no case is a special administrator liable to an action by any creditor on a claim against the estate confirms the view just taken. He cannot be sued upon a claim. If he cannot be sued, plainly he cannot reject a claim; otherwise a creditor would be remediless where a special administrator might unjustly reject a creditor's claim. In *re Sackett*, 78 Cal. 300, 20 Pac. 863; *Pickering v. Wetling*, 47 Iowa, 242.

It is contended that the court was authorized to make the order, under section 2623, Code Civ. Proc., which is as follows: "If there be any debt of the decedent bearing interest, whether presented or not, the executor or administrator may, by order of the court or judge, pay the amount then accumulated and unpaid, or any part thereof, at any time when there are sufficient funds properly applicable thereto, whether said claim be then due or not; and interest shall thereupon cease to accrue upon the amount so paid." But we think that this stat-

ute is part of the method of administration governing general administrators. It is appropriately placed in the chapter entitled "Claims against the Estate," and has relation to the payment of claims during the regular and orderly administration of estates and not to the duties of a special administrator, to whom claims need not even be presented. It is therefore unnecessary to discuss the powers of a general administrator under the statute quoted.

It is argued that the relator has a remedy by appeal, and therefore is not entitled to the writ prayed for. But, inasmuch as the court had no authority to direct the special administrator to pay the debt ordered to be paid, the order of payment was made without the jurisdiction of the court, and is subject to review and annulment in this proceeding.

It is also contended that the relator does not appear to be a party beneficially interested, and therefore is not entitled to the writ. Code Civ. Proc. § 1942. But, as the special administrator is authorized to commence and maintain or defend suits and other legal proceedings necessary to collect and preserve the estate, surely he should be entitled to a writ of review of an order of the district court made without jurisdiction, and under the terms of which, as special administrator, he would be obliged to pay to a creditor the sums he had collected, and ought to preserve for the general administrator or executor. We think, too, that the relator has a direct, beneficial interest in this proceeding, because, if he pays out the funds of the estate upon an order of the court made without jurisdiction, such an order may not protect him, and he may be held personally liable on his bonds. The motion to quash is denied, and the order of the district court is annulled.

PEMBERTON, C. J., and DE WITT, J., concur.

CONGDON v. OLDS et al.

(Supreme Court of Montana. Sept. 28, 1896.)

GENERAL PARTNERSHIP—WHAT CONSTITUTES—APPEAL—REVIEW—HARMLESS ERROR—WEIGHT AND SUFFICIENCY OF EVIDENCE.

1. In an action on a note signed by one person, against him and several other persons alleged to be partners, under the name of the person signing the note, in which defendants claimed that the partnership, if any, was a mining partnership, it was error to charge that where several persons associate themselves together, and agree to contribute funds for, and to bear losses and share the profits of, the business, "such an association constitutes a general partnership," since such elements do not absolutely constitute a general partnership.

2. In an action on a note signed by one person, against him and several others alleged to be partners, under the name of the person signing the note, in which defendants claimed that the partnership, if any, was a mining partnership, an instruction that defendants were liable as a general partnership was not harmless, though the evidence showed that defendants were liable even if they were a mining partnership.

3. Where appellants claim that the verdict is supported only by incompetent evidence, but

they do not in their brief point it out, as required by the rules of the supreme court, such court will not review the evidence.

Appeal from district court, Silver Bow county; J. J. McHartton, Judge.

Action by E. E. Congdon against L. B. Olds and others on a note. From a judgment in favor of plaintiff, and from an order denying a motion for a new trial, defendants other than Olds appeal. Reversed.

The plaintiff and the defendant Olds together signed a promissory note payable to the Silver Bow National Bank of Butte. After renewals of the note, the plaintiff was obliged to pay the same. He then brought this action against all these defendants. The reason for joining these defendants other than Olds was that plaintiff claimed, and so alleged in his complaint, that, when the note was signed, the defendant Olds, together with defendants Hoffman, Northrup, Cox, Kountz, Whitefoot, Ferris, Cooper, and Hartman, constituted a partnership, which partnership was engaged in the business of operating the Kittle Morris Mine, and that the partnership was carried on in the firm name of L. B. Olds, and that the signature of L. B. Olds on the note in question was not the individual signature of Mr. L. B. Olds, but was the signature of said partnership. Upon this theory the case was tried. The plaintiff recovered judgment. The defendant Olds did not appear upon the trial, and the case proceeded as against the defendants other than him. Those defendants now appeal from the judgment, and from the order denying a new trial.

Hartman Bros. & Stewart and Smith & Wood, for appellants. F. T. McBride, for respondent.

DE WITT, J. (after stating the facts). There are three alleged errors complained of, of which we shall treat. The first is the action of the court in treating the partnership as a general or trading partnership. This matter arose in several ways upon the trial, and in the giving of the instructions. It is not necessary to follow this error into every place where it occurred. It is sufficient to treat it as it occurred in instruction No. 3, which the court gave. That instruction is as follows: "The court instructs the jury that where several parties associate themselves together for the purpose of carrying on a business, and mutually agree to contribute funds for, and to bear losses and share the profits of, the business, that such an association constitutes a general partnership, and it is immaterial whether the business to be engaged in is mining or other business; and in such cases each partner becomes the agent of the partnership for the purpose of the partnership."

The appellants complain that by this instruction the court treated the partnership of the defendants as absolutely a general or trading partnership, and excluded from consideration the question of whether the defendants were

a mining partnership. They contend that the court proceeded upon the theory that there was no such thing as a mining partnership in this state prior to the enactment of the Civil Code of July 1, 1895 (section 3350 et seq.). If this were the case, it was error, for mining partnerships, differing from general partnerships, have been recognized in the decisions of this court as existing in this state for many years. Nolan v. Lovelock, 1 Mont. 227; Boucher v. Mulverhill, id. 306; Hirbour v. Reeding, 3 Mont. 15; Southmayd v. Southmayd, 4 Mont. 112, 5 Pac. 318; Galigher v. Lockhart, 11 Mont. 113, 27 Pac. 446; Harris v. Lloyd, 11 Mont. 406, 28 Pac. 736; Anaconda Copper Min. Co. v. Butte & B. Min. Co., 17 Mont. 323, 43 Pac. 924.

Respondent also contends that the court properly gave this instruction for the reason that it appears from the evidence that there was no mining partnership in this case. We think that there was evidence tending, at least, to show that the partnership in question was a mining one, and not a general one. But the court instructed the jury, in No. 3, quoted, that if parties associate themselves together for the purpose of carrying on a business, and agree to contribute funds, pay losses, and share profits, such an association is a general partnership, without regard to whether the business is mining or not. We are of opinion that this was not correct, for, while these elements recited are those of a general partnership, they are certainly also elements of a mining partnership. In every partnership the parties associating themselves together contribute funds and share losses and profits. One partner may make his contribution in money, and another may make it in labor or in furnishing the mining premises to the partnership. One may bear the loss of money that he puts in; another may bear the loss of his time and labor which he contributes. We cannot imagine a mining partnership in which the parties do not share losses and profits. Certainly, no one will enter a mining partnership with the agreement that he shall pay all the losses, nor with the agreement that his partner shall receive all the profits. The facts recited in instruction No. 3 may be those of a general partnership, but they are also part of the facts existing in a mining partnership; and it was error to hold absolutely that those facts constitute a general partnership only. It is true that a general partnership may exist if the contract between the parties is to that effect, even if the business of the partnership is solely in mines. Duryea v. Burt, 28 Cal. 574; Sennembre v. Putnam, 30 Cal. 400; Decker v. Howell, 42 Cal. 636. It is held in Decker v. Howell, supra, that an agreement to share profits and losses equally tends to prove the existence of an ordinary partnership, instead of a mining partnership; but it is not there held that simply the sharing of losses and profits in itself constitutes absolutely a general partnership. The distinction

between a general or trading partnership and a nontrading partnership is recognized, not only in the mining states, where mining partnerships are frequent, but in other jurisdictions where nontrading partnerships other than mining ones are of frequent occurrence. Many of the rules of general partnerships obtain in mining partnerships, but the latter have other rules peculiar to themselves. Some of the great distinctions between a general partnership and a mining partnership are the questions of the delectus personarum, and the authority of one partner to bind the firm by the issuance of commercial paper of the firm. As to joint owners operating a mine, it is said in *Skillman v. Lachman*, 23 Cal., at page 204: "They form what is termed a 'mining partnership,' which is governed by many of the rules relating to ordinary partnerships, but which has also some rules peculiar to itself, one of which is that one person may convey his interest in the mine and business, without dissolving the partnership. *Fereday v. Wightwick*, 1 Russ. & M. 49. Still, there may be a partnership in the working of a mine subject to the rules relating to an ordinary partnership in trade. *Story, Partn. § 82*. And this relation of partnership may be constituted either by express stipulation or by implication deduced from the acts of the parties. *Rock, Mines*, 575. But in the case of an ordinary mining partnership something more will be required to raise the presumption of liability arising from persons holding themselves out to the world as partners than would be necessary in the case of an ordinary partnership. Such persons, in the absence of other circumstances, cannot fairly be presumed to have intended to render themselves liable to all the consequences of a commercial partnership." Mr. Justice Field said, in *Kahn v. Smelting Co.*, 102 U. S. 645: "Mining partnerships, as distinct associations, with different rights and liabilities attaching to their members from those attaching to members of ordinary trading partnerships, exist in all mining communities. Indeed, without them successful mining would be attended with difficulties and embarrassments much greater than at present." The learned justice then quotes with approval *Skillman v. Lachman*, above quoted. See, also, *Quinn v. Quinn*, 81 Cal. 14, 22 Pac. 264; *McConnell v. Denver*, 35 Cal. 365; *Jones v. Clark*, 42 Cal. 180; *Charles v. Eshleman*, 5 Colo. 107; *Higgins v. Armstrong*, 9 Colo. 38, 10 Pac. 232; *Judge v. Braswell*, 13 Bush, 67; *Manville v. Parks*, 7 Colo. 128, 2 Pac. 212; *Deardorf's Adm'r v. Thatcher*, 78 Mo. 128; *Pease v. Cole*, 53 Conn. 53, 22 Atl. 681; *Bissell v. Foss*, 114 U. S. 252, 5 Sup. Ct. 851; *Bates, Partn. § 163*; also, *Id. §§ 14, 329*, with cases cited; *T. Pars. Partn. § 37*, with note; *Id. § 306*, with note; and *Id. § 35*, and cases cited.

We are therefore of opinion that the court, in giving instruction No. 3, was in error, for the reason that the elements of a partner-

ship there recited do not in themselves absolutely constitute a general partnership.

Respondent, however, contends that, if instruction No. 3 were error, it was not material, because the evidence shows that the defendants were liable even if they were a mining partnership; that is to say, that their conduct in reference to this note and the money obtained thereby was such as to render them liable even as a mining partnership. But, even if the evidence supports the respondent's contention in this respect, the error in instruction No. 3 was prejudicial, because it instructed the jury absolutely that the defendants were liable as a general partnership; and, under such instruction, the jury would not be required to make any inquiry as to whether the defendants were a mining partnership, or any inquiry as to whether the facts showed that the defendants were liable as a mining partnership.

Another alleged error is as follows: The defendants alleged, and sought to prove, that they were not conducting the mine as a partnership at the time this note was given, but that an incorporated company, called the Butte & Bozeman Mining Company, of which defendants were stockholders, was conducting the business. The court instructed the jury, in effect, that if they found that the corporation was conducting the business, and not these defendants, they must find for the defendants. Appellants contend that the evidence was uncontradicted that the corporation was doing the business, and that, therefore, the verdict was contrary to the instructions. But we think that this contention cannot be sustained, for the reason that, in our opinion, there was evidence tending to show that, while the corporation had been formed, it was not in fact conducting the business. This assignment of error, we are therefore of opinion, cannot be sustained.

Appellants contend that almost, if not entirely, all of the testimony tending to establish a partnership between the defendants was that of statements made by the defendant Olds, who was not in court, and made to the effect that the other defendants did sustain the relation of partners to him. The appellants, in their brief, do not point out, under the rules of this court, this testimony by page in the transcript. They cannot therefore expect us to pick it out of the 300 pages of the record in this case. We will say, however, that our reading of the record discloses that there was very much testimony as to partnership other than that of the statements by Olds. If it were permitted by the district court to prove the fact of the partnership by the admissions of one of the alleged partners, who was not present, this would not be evidence of the partnership as against the other partners. 1 Rice, Ev. pp. 441, 473; 2 Rice, Ev. p. 1154; Greenl. Ev. § 177; *Wiggin v. Fine*, 17 Mont. 575, 44 Pac. 73. We mention this matter, although we are not required to pass upon it, for the reason

that it is not pointed out in the record, as required by the rules.

For the reasons assigned, the judgment and order denying a new trial are reversed, and the case is remanded, with directions to grant a new trial. Reversed.

PEMBERTON, C. J., absent. HUNT, J., concurs.

HASTINGS v. MONTANA UNION RY. CO.

(Supreme Court of Montana. Oct. 5, 1896.)

MASTER AND SERVANT—FELLOW SERVANTS.

A section hand is a fellow servant of the section boss and of an engineer employed by the same company.

Appeal from district court, Silver Bow county; J. J. McHatton, Judge.

Action by Darby Hastings, administrator of the estate of Tim Hastings, deceased, against the Montana Union Railway Company, for the death of plaintiff's intestate, caused by defendant's negligence. From a judgment in favor of plaintiff, and from an order denying a motion for a new trial, defendant appeals. Reversed.

Geo. Haldorn, for appellant. Carroll & Leehey, for respondent.

HUNT, J. Tim Hastings, the plaintiff's intestate, was a day laborer, employed under a section foreman to keep portions of the roadbed of the defendant company in repair. The foreman had power to employ and discharge the men and superintend their work, and himself worked with the men. The foreman employed the deceased, who, with a gang of five others, was working upon defendant's road upon the day he was killed. On November 23, 1893, at dusk, about 25 minutes past 5 o'clock in the evening, the deceased and five others were repairing a track near the Parrot smelter, at Butte. They had with them a low, flat, push car, with handles extending beyond the ends. About quitting time the foreman told the men to move the car from the track, and carry it across to another track, about 50 feet away. Observing an engine on the track which the men had to cross, the foreman remarked that there was time enough to get over, and ordered the men to pick up the car and proceed. The deceased had hold of the center of this push car, on the north side; the other men holding the respective corners. Before the men got it clear of the second track, one corner of the flat car went down. The deceased was on the side that went down. Just then a locomotive came up behind the men. No bell was rung, and no whistle blown. One of the men was knocked down, and Hastings, the deceased, was run over, dragged beneath the engine, and so seriously injured that he

died shortly afterwards. The complaint alleged negligence in the following respects, viz.: That the defendant was negligent and careless, through its engineer and fireman of the yard engine, in operating such yard engine without having the whistle blown or the bell rung, and without having the headlight of the engine lighted; and in being negligent, through its foreman, for not warning the deceased of the approach of the yard engine in time for him to escape, although the foreman knew of the danger in ample time to have warned the deceased. The defendant moved for a nonsuit, raising the point under the issues of the pleadings that the foreman as well as the engineer of the locomotive which struck the deceased and the deceased were fellow servants, and that the negligence of the defendant, if any there were, was not such as to render the defendant company liable in damages. The court overruled the motion. The defendant then introduced evidence tending to show that the deceased was careless in not getting out of the way, as there was ample time for him to do. The court charged the jury, substantially, that if the deceased was injured by reason of the negligence or want of care of the foreman under whose orders he was acting, or the engineer, and not through his own carelessness, defendant was liable; thus assuming that the foreman and the engineer were not fellow servants of the deceased. The jury returned a verdict for the plaintiff in the sum of \$4,250, upon which judgment was entered. Defendant moved for a new trial, which was denied. This appeal is from the order denying the motion for a new trial and from the judgment.

Cases involving questions of who are fellow servants have not been very frequent in this court. While the statutes of the territory were controlling, and the rule obtained that in every case where a servant acted under the order of his superior the liability for injury sustained by the fault of the superior was the same as if such servant were a passenger, questions were necessarily determined by the local law, and the liability of domestic railroad corporations was much more extensive than it is under the general law. This was decided when the question was presented in the first opinion in the case of *Criswell v. Railway Co.*, 17 Mont. 189, 42 Pac. 767. But, as we said in the case of *Goodwell v. Railway Co.*, 18 Mont. 293, 45 Pac. 210: "Since the decision of this court on the rehearing of the case of *Criswell v. Railway Co.*, 18 Mont. 167, 44 Pac. 525, announcing that the statute of the territory of Montana, which modified the common-law rule of the liability of a master to his employes for injuries to the latter by the negligence of a superior, was repealed by the adoption of the state constitution, the courts are obliged to determine questions such as the one now before us by the general law." Looking now at the general law of fellow service as expounded by the supreme court of

the United States, we find that plaintiff in the case under consideration cannot recover. In *Railroad Co. v. Hambly*, 154 U. S. 349, 14 Sup. Ct. 983, it was decided that a day laborer, who, while working for the railroad company, under the order and direction of a section foreman, on a culvert on the company's road, is injured by the negligence of a conductor and engineer in moving and operating a train upon the company's road, is a fellow servant with such engineer and such conductor in such a sense as exempts the company from liability for the injury so inflicted. The court there said: "The question first arose in the case of *Randall v. Railroad Co.*, 109 U. S. 478, 3 Sup. Ct. 322, in which a brakeman, working a switch for his train on one track in a railroad yard, was held to be a fellow servant of an engineer of another train upon an adjacent track, upon the theory that the two were employed and paid by the same master, and that their duties were such as to bring them to work at the same place at the same time, and their separate services had as a common object the moving of trains. It is difficult to see why, if the case under consideration is to be determined as one of general, and not of local, law, it does not fall directly within the ruling of the *Randall* Case. The services of a switchman in keeping a track clear for the passage of trains do not differ materially, so far as actions founded upon the negligence of trainmen are concerned, from those of a laborer engaged in keeping the track in repair. Neither of them is under the personal control of the engineer or conductor of the moving train, but both are alike engaged in an employment necessarily bringing them in contact with passing engines, and in the "immediate common object" of securing the safe passage of trains over the road. As a laborer upon a railroad track, either in switching trains or repairing the track, is constantly exposed to the danger of passing trains, and bound to look out for them, any negligence in the management of such trains is a risk which may or should be contemplated by him in entering upon the service of the company. This is probably the most satisfactory test of liability. If the departments of the two servants are so far separated from each other that the possibility of coming in contact, and hence of incurring danger from the negligent performance of the duties of such other department, could not be said to be within the contemplation of the person injured, the doctrine of fellow service should not apply."

In accordance with the doctrine of the *Hambly* Case, and the later decision of *Railway Co. v. Peterson*, 162 U. S. 346, 16 Sup. Ct. 843, this court, in *Goodwell v. Railway Co.*, cited above, held that where an employe—a laborer repairing defendant's roadbed, and under the orders of a section boss—was injured through the negligence of such boss, the laborer and the section boss were fellow servants, and for an injury so received the company was not liable. In principle there is,

under the facts of the case at bar, no difference between the *Hambly* Case and this one. The negligence if any there was, which caused the death of the deceased, was the negligence of his co-servants in performing duties devolving upon them. The general principles of the law of master and servant as set forth in the *Goodwell* Case, *supra*, and the authorities cited in the opinion in that case, are controlling in this instance. We note, too, that the supreme court of the United States, in *Railroad Co. v. Charles*, 162 U. S. 359, 16 Sup. Ct. 848, has reiterated the doctrine of the *Hambly* opinion. In the *Charles* Case the plaintiff was an ordinary laborer, employed under a section boss or foreman to keep a certain portion of the roadbed in repair. The foreman employed the men. On the day of the accident the foreman and plaintiff were upon a hand car, going to inspect some work. While turning a curve in a narrow cut, an engine and freight train came in an opposite direction. No warning was given by the engineer of the freight train. *Charles* undertook to jump from the hand car, but fell in front of it, and was seriously injured by being run over by it. One of the grounds of negligence relied on was the negligence of the foreman; another was the negligence of the train hands on the approaching train in not giving signals of their approach around the curve and through the cut. The court held that the foreman was the fellow servant of the laborer, and referred on that point to the *Peterson* Case, above cited, as governing the case. It was also held error to have submitted to the jury the question of the negligence of the employes on the extra freight train in failing to give the signals of its approach. "This failure," said the court, "assuming that it constituted negligence, was nothing more than the negligence of co-servants of the plaintiff below in performing the duty devolving upon them. The principle which covers the facts of this case was laid down in *Randall v. Railroad Co.*, 109 U. S. 478, 3 Sup. Ct. 322, and that case has never been overruled or questioned. The *Ross* Case, 112 U. S. 377, 5 Sup. Ct. 184, is a different case, and was decided upon its own peculiar facts. See *Railroad Co. v. Baugh*, 149 U. S. 368, 390, 13 Sup. Ct. 914. Among the latest expressions of opinion of this court in regard to views similar to those stated in the case in 109 U. S. and 3 Sup. Ct., *supra*, is the case of *Railroad Co. v. Hambly*, 154 U. S. 349, 14 Sup. Ct. 983. It seems to us that the *Randall* and the *Hambly* Cases are conclusive, and necessitate a reversal of this judgment. * * *

We are unable to distinguish any difference in principle arising from the facts in these two cases."

It is clear to us that the case at bar was tried upon an erroneous theory of the law, arising, doubtless, by the belief on the part of the learned judge who presided that the old territorial statute fixing a railroad company's liability was in force. But, as it was not, the errors discussed were material, and require a

reversal of the case. Judgment and order reversed. Reversed.

PEMBERTON, C. J., concurs. DE WITT, J., not sitting.

STATE ex rel. WALLACE et al. v. STATE BOARD OF EQUALIZATION.

(Supreme Court of Montana. Sept. 28, 1896.)

TAXATION—STATE BOARD OF EQUALIZATION—POWERS.

The state board of equalization was empowered by Const. art. 12, § 15, to "adjust and equalize the valuation of the taxable property among the several counties of the state." Section 9 limits the rate of taxation to be imposed for state purposes. *Held*, that the state board of equalization was without power to increase proportionately the valuation of the property in the several counties of the state, and thereby increase the aggregate total.

Application on the relation of R. C. Wallace and others against the state board of equalization consisting of the governor, the secretary of state, the state treasurer, the state auditor, and the attorney general, for a writ of certiorari.

The relators are resident taxpayers in the state of Montana. The respondent, the state board of equalization, is composed by law of the state officers above named. It is charged in the application of relators that the respondent, at its session held under the law at the state capital, in July last, assumed to exercise, and did exercise, the power to adjust the taxable property of the several counties of the state as to the valuation thereof among the several counties of the state, and made certain changes and increases in the valuation and assessment of the real and personal property as returned and transmitted by the assessors and county boards of equalization of the several counties, which said changes and increases are specifically set forth in relators' application, and that by reason of such changes and increases the respondent increased the valuation and assessment of divers classes of property in the several counties of the state, and that by reason of such changes and increases said board increased the aggregate total of all the values of property in the several counties of the state from the sum of \$111,084,350, which was the total value of property as disclosed by the abstracts and statements transmitted to and received by said board from the county boards of equalization and assessors, to the sum of \$114,231,720.04, which was an aggregate increase of the total assessed valuation of all the property in the several counties of the state, as shown above, of \$3,147,370.04. The facts as alleged in the application are not denied by respondent's return.

Carpenter & Carpenter and Toole & Wallace, for relators. H. J. Haskell, for respondent.

PEMBERTON, C. J. (after stating the facts). The principal question presented for

adjudication is as to the power of the state board of equalization, under our constitution, to so increase the valuation of property returned to it by the assessors and county boards of equalization of the several counties as to increase or decrease the total valuation of property of the state as fixed by the county boards and assessors. The relators contend that under the constitution of the state the respondent board had no power to make such change and increase in the total valuation of the property of the state. Section 15, art. 12, of our constitution is as follows: "The governor, secretary of state, state treasurer, state auditor and attorney general shall constitute a state board of equalization, and the board of county commissioners of each county shall constitute a county board of equalization. The duty of the state board of equalization shall be to adjust and equalize the valuation of the taxable property among the several counties of the state. The duty of the county boards of equalization shall be to adjust and equalize the valuation of taxable property within their respective counties. Each board shall also perform such other duties as may be prescribed by law." We have been unable to find a constitutional provision exactly like ours in any of the states. The constitution of the state of Colorado contains provisions upon this subject so nearly like ours that it may be fairly claimed that they are substantially the same. In fact, it seems from their substantial similarity that our state may be said to have adopted the Colorado constitution upon this subject. Section 15, art. 10, of the Colorado constitution is as follows: "There shall be a state board of equalization, consisting of the governor, state auditor, state treasurer, secretary of state and attorney general; also in each county of this state, a county board of equalization, consisting of the board of county commissioners of said county. The duty of the state board of equalization shall be to adjust and equalize the valuation of real and personal property among the several counties of the state. The duty of the county board of equalization shall be to adjust and equalize the valuation of real and personal property within their respective counties. Each board shall also perform such other duties as may be prescribed by law." It will be observed that the only difference in the phraseology of the two constitutional provisions quoted is found in the use of these words: Where our constitution uses the words "taxable property," the Colorado constitution uses the words "real and personal property." The supreme court of Colorado, in *People v. Lothrop*, 3 Colo. 423,—an elaborate and well-considered case, involving the powers of the state board of equalization under the provision of the constitution just quoted,—said: "The purpose of the creation of this board is imported in its title. Its duties, as stated in terms in the constitution, are to 'adjust and equalize the valuation of real and personal property among the several counties of the state.' Perfect equality in the assessment of taxes is unattainable; approximation to it is

all that can be had. The object of the provision is to apportion as equitably as may be the burthen of the state government among the several counties, to prevent a disproportionate share of the state tax from being thrown upon any county or counties by reason of the action of the local assessors. The grossest inequality might prevail in the valuations in the different counties, and possibly with reference to escaping a fair proportion of the state tax; and, without a power lodged somewhere to adjust and equalize the several county valuations, the greatest injustice might be done, and there would be a practical annulment of the constitutional provision that 'all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax.' It was to meet this difficulty and accomplish this end that the state board of equalization was created with powers to adjust and equalize." The court then proceeds to discuss the duties and powers of assessors and county boards of equalization under the constitution and laws of Colorado, which are very similar to ours, and say: "Section 38 (Gen. Laws, p. 754) provides that the county commissioners of each county shall constitute a board of equalization for the correction and completion of the assessment rolls, with power to supply omissions in the assessment rolls, and, for the purpose of equalizing the same, to increase, diminish, or otherwise alter and correct any assessment or valuation. It provides, in case of change of the assessment of any taxpayer, that he shall be notified, and have a hearing before the board. It constitutes them a quasi court to hear any and all complaints of the taxpayer touching the valuation or listing of his property, with full power to adjust and correct the assessment roll as in their judgment they may deem proper and right; thus adding statutory duties to their constitutional duties 'to adjust and equalize.' Other sections of the law might be cited, but those mentioned suffice for our purpose. We find here a complete system, with well-defined and minutely prescribed rules and regulations guarding the property right of the citizen; guarding equally the revenue necessities of the state, acting through the instrumentalities of owners and the assessors chosen by the electors of the several counties, listing, valuing, and returning taxable property under the sanction of an oath, with the board of county commissioners acting as a board of appeal and review; all for the one purpose of ascertaining, determining, and fixing the value of taxable property in each county of the state as a basis of taxation. The statute provides for the transmission of these assessment rolls of the county to the board of equalization, and contemplates that one assessment shall be made for both state and local taxes. The only exception to this that we find is the express provision for the assessment of railroad property by the state board of equalization. For this, in the opinion of the legislature, there was, doubtless, an obvious necessity and authority,

found in the last clause of section 15 of article 10 of the constitution, which provides that the board shall perform such other duties as shall be prescribed by law. The assessor is thus made an integral part of the revenue system, which not only thus specifies and defines his duties, but assigns to other officers and boards equally well-defined and separate duties. The assessor shall list and value; the board of commissioners shall equalize, adjust, increase, and diminish, supply omissions, and correct errors, and hear complaints; the county clerk shall prepare assessment rolls, and compute and extend the tax therein; the state board of equalization shall adjust and equalize valuations; and, lastly, the county treasurer shall collect the tax. In seeking for legislative intent, reference must be had not only to the form and phraseology of the particular section under consideration, but any part must be viewed in connection with the whole, so as, if possible, to harmonize and give effect to the whole. Looking, then, to the provisions of the constitution and the statute, we are clearly of the opinion that the power to fix and determine the valuation of taxable property is lodged by them in the assessor and the board of county commissioners of the several counties of the state; and that when they have, under the law, performed this duty, and exercised this power, the sum of the valuations of the several counties so by them found must be taken as the aggregate valuation of all the property in the state, and is conclusive and final as against the state board of equalization. The state board may, for the purpose of adjusting and equalizing, increase the aggregate valuation of one county, and decrease the aggregate valuation of another, but they have no power to increase the sum of all the valuations of the several counties of the state. The aggregate valuation has been found for them and fixed by the authority and in the mode prescribed by the law. This view is not only sanctioned by the force of the general provisions of the statute considered as a whole, but also by the phraseology of the sections under consideration. The board is to adjust and equalize the valuation. This term 'valuation' here imports values already estimated and fixed, and must be referred, for the measure of its force and meaning, to the mode prescribed by law for estimating and fixing valuations. The aggregate material with which the board can deal is thus limited. They may adjust and equalize it among the several counties, but they cannot add to its volume."

Section 9, art. 12, of our constitution is as follows: "The rate of taxation of real and personal property for state purposes in any one year shall never exceed three (3) mills on each dollar of valuation; and whenever the taxable property in the state shall amount to one hundred million dollars (\$100,000,000), the rate shall not exceed two and one-half (2½) mills on each dollar of valuation; and whenever the taxable property in the state shall amount to three hundred million dollars

(\$300,000,000), the rate shall never thereafter exceed one and one-half (1½) mills on each dollar of valuation; unless a proposition to increase such rate specifying the rate proposed and the time during which the same shall be levied, shall have been submitted to the people at a general election, and shall have received a majority of all the votes cast for and against it at such election." Section 11, art. 10, of the Colorado constitution reads as follows: "The rate of taxation on property, for state purposes, shall never exceed six mills on each dollar of valuation; and whenever the taxable property within the state shall amount to one hundred million dollars, the rate shall not exceed four mills on each dollar of valuation; and whenever the taxable property within the state shall amount to three hundred million dollars, the rate shall never thereafter exceed two mills on each dollar of valuation, unless a proposition to increase such rate, specifying the rate proposed, and the time during which the same shall be levied, be first submitted to a vote of such of the qualified electors of the state as in the year next preceding such election shall have paid a property tax assessed to them within the state, and a majority of those voting thereon shall vote in favor thereof, in such manner as may be provided by law." Commenting on this section of the constitution of Colorado, the supreme court, in the case of *People v. Lothrop*, supra, says: "If this claim of power on behalf of the state board to increase the valuation be admitted, why limit in the constitution the per cent. that it may levy? It matters little whether the limitation be one mill or ten, if increase of valuation be unrestrained. Limited upon the one hand, it is unlimited upon the other. We may neither calculate its extent nor challenge its pretensions. Over five million dollars increase this year, it may be over fifty million dollars increase the next. Under this construction of the statute the efforts of the people to establish and maintain legitimate restraints on the power to tax will have been unavailing, and the checks and guards which they have embodied in their constitution to that end cease to be of practical force or value. The spirit of the law, and not 'the letter, which destroys,' must prevail. We cannot believe that any such grant of power to the state board of equalization was within the intent of the legislative authority. We are therefore of the opinion that the board of equalization, in making the increased valuation, acted without authority of law, and that their action in this respect is void." These comments by the Colorado court upon the constitutional restrictions placed upon the powers of the state board of equalization of that state apply with exactness and force to our constitution and the powers of the respondent board thereunder. We think the authority quoted above is absolutely decisive of the case at bar. We therefore are of the opinion that the respondent board, in increasing the total valuation of

the property of the state as disclosed and fixed by the abstracts and statements transmitted to it by the assessors and county boards of equalization, acted without authority, and that its action in this respect was and is wholly void. Having reached this conclusion upon the main question involved in the case, we deem it unnecessary to pass upon the power of the respondent board to increase or decrease the valuation of any specific class or classes of property from that fixed by the county boards and assessors, as shown by the county abstracts and statements transmitted to the state board. It may not be out of place, however, to say that we think the weight of authority is decidedly against the exercise of such right or power by the state board. *People v. Lothrop*, supra; *Wells, Fargo & Co. v. State Board of Equalization*, 56 Cal. 194; *Lead Co. v. Simma*, 108 Mo. 222, 18 S. W. 906. It is therefore ordered that the proceedings of the state board of equalization be annulled as prayed for in the application of relators.

DE WITT and HUNT, JJ., concur.

BRIGHTON & N. P. IRRIGATION CO. v. LITTLE et al.

(Supreme Court of Utah. Aug. 20, 1896.)

IRRIGATION—CONTRACTS—CONSTRUCTION—PLEADING—CROSS COMPLAINT.

1. The Jordan Irrigation Company entered into a contract with one Little whereby the latter transferred his title to a certain dam and canal, and granted a right of way through his land for said canal, to the irrigation company, in consideration that it would permit Little to water from the canal, which the company enlarged, 200 acres of his land. The plaintiff herein became the legal successor of the irrigation company, and defendants became successors to Little. Defendants took the water from the canal at six different places, but not subject to the direction and control of the water master. *Held* that, assuming the land to be undulating, said defendants might take the water from the canal in said number of different places, if convenience and necessity so required, and that defendants were not subject, like stockholders, to the control of the water master, but should follow the directions of the water master, as far as they may be according to the agreement.

2. As it did not appear by the weight of evidence that Little agreed to contribute proportionately with the stockholders in keeping the canal cleaned and in repair, his successors were not bound to do so.

3. Where, in the prayer of the complaint, the plaintiff asks that the defendants might be required to set forth their alleged adverse claim, and that the court might decree it to be null and void, and the defendants set up the agreement, and the facts upon which they base their rights to the water, and pray that their rights as shown by the allegation in their answer may be decreed to them, the court may grant to defendants an affirmative decree without a cross complaint having been filed.

(Syllabus by the Court.)

Appeal from district court, Third district; S. A. Merritt, Judge.

Action by the Brighton & North Point Irrigation Company against Charles O. Little and

others. From a judgment for defendants, plaintiff appeals. Affirmed.

Brown, Henderson & King, for appellant. Williams, Van Cott & Sutherland, for respondents.

ZANE, C. J. It appears from the evidence in this record that in the year 1860 the late Feramorz Little owned a canal through which he was irrigating about 200 acres of land from the Jordan river; that the canal was four miles long, two of which were on his land; that it was six feet wide at the bottom, and wider at the top, and was more than a foot deep. It also appears that certain owners of land situated below Little's farm organized a corporation known as the Jordan Irrigation Company; that in 1864 Little transferred to it his dam and canal, and the right of way through his land for the distance of over two miles, in consideration that the company would permit him to take as much water as he was using for the irrigation of the 200 acres. The company was also given the right to remove a house of his to enable the company to straighten the canal, for which he was to be paid \$1,000. It appears further that the company took possession of the canal and dam, and that said company and the plaintiff, its successor, have since enlarged it, and hitherto have kept it in repair, and that \$200 has been paid on the \$1,000. It also appears that the North Point Irrigation Company, the plaintiff, was organized in 1882, and succeeded to the rights and obligations of the Jordan Irrigation Company, as far as they relate to the canal in question. After hearing the evidence and argument of counsel for the respective parties, the court below made a number of findings, among which were the following: "(7) That the said defendants herein have succeeded * * * to the said land owned by Feramorz Little, and own the same in fee simple, and also have succeeded to, and that they now * * * own, all of said Feramorz Little's rights in and to the water owned by the said Feramorz Little, and have succeeded to all of his rights in and to said dam, ditch, and water right. (8) That said defendants and their predecessor in interest, to wit, the said Feramorz Little, have for a long time past used, and are now using, for useful purposes of the water of said canal and ditch, and are entitled to such use, as a reasonable necessity for said Little farm from said canal and ditch, a quantity of water, continuously flowing, equal to a stream thirty-six inches wide by six inches deep, flowing through a wooden box set level, and not less than four feet long; and the water may be taken out at six different places along where the canal passes through the Little farm. (9) That said defendants are entitled to said quantity of water described in said finding 8, for the use of said Little farm, without any expense to themselves whatever, except that the said

defendants are to take the water from said canal where it passes through the said Little farm." The evidence was conflicting as to the quantity of water necessary to irrigate defendants' 200 acres of land. Competent experts, as well as farmers of observation and experience with respect to irrigation, were examined, and the finding as to the quantity appears to be supported by the weight of evidence.

Objection is also made to the finding that defendants have the right to take the water out at six different places. Assuming that the land is undulating, the irrigation of it is less difficult and less expensive when the water is taken out of the canal at different points. It appears that the water has been taken from the canal at as many as six places.

It is insisted that the defendants should be required to take water under the direction of the water master, as the stockholders of the plaintiff are required to do. The court below held that the defendants had a right to take water under the agreement made between the late Feramorz Little and the Jordan Irrigation Company, and not as stockholders. In this we think the court found correctly, but, while this is so, the defendants should follow the directions of the water master, so far as they may be, according to the agreement, reasonable; and they should not take out water at more points than convenience and necessity require, and they should use all reasonable care not to injure its banks, or interfere unreasonably with its waters.

The plaintiff also insists that the defendants should contribute proportionately with the stockholders to the cost of cleaning out and keeping the canal in repair. The court below found that the agreement by which all the parties were bound exempts the defendants from the payment of such cost and expense, and this finding seems to be supported by the weight of evidence.

The plaintiff also insists that the court erred in granting an affirmative decree for the defendants, without a cross complaint having been filed. In the prayer of the complaint the plaintiff asked that the defendants might be required to set forth their alleged adverse claim, and that the court might decree it to be null and void. And the defendants in their answer set up the agreement, and the facts upon which they based their right to use the waters of the canal, and prayed that their right, as shown by the allegations of their answer, might be decreed to them, and for such other relief as might be just and equitable. Under the pleadings, the court was required to determine from the evidence the rights of the respective parties with respect to the canal and the waters thereof. The pleading in this case presents an exception to the general rule that affirmative relief on an affirmative decree will not be granted to the defendants without a counter-

claim or a cross complaint. *Kitts v. Austin*, 83 Cal. 167, 23 Pac. 290; *Wilson v. Madison*, 55 Cal. 5; *Miller v. Lugo*, 80 Cal. 257, 22 Pac. 195.

We find no reversible error in this record. The judgment is affirmed.

BARTCH and MINER, JJ., concur.

HODSON v. UNION PAC. R. CO.

(Supreme Court of Utah. Sept. 19, 1896.)

APPEALS—TERRITORIAL AND STATE DISTRICT COURTS.

Appeals lie from the district courts of the late territory of Utah, when the decisions of such courts are rendered in cases appealed from the justices' courts, even when such appeals are perfected after statehood. In such cases the laws of the territory regulating appeals control, and not the following clause of article 8 of section 9 of the constitution: "Appeals shall also lie from the final judgment of justices of the peace in civil and criminal cases to the district courts on both questions of law and fact, with such limitations and restrictions as shall be provided by law; and the decision of the district courts on such appeals shall be final, except in cases involving the validity or constitutionality of a statute." The district court referred to in this section is the district court of the state, and not that of the territory.

(Syllabus by the Court.)

Appeal from district court, Weber county; W. H. King, Judge.

Action by J. R. Hodson against the Union Pacific Railroad Company. Judgment for plaintiff. Defendant appeals. Motion to dismiss overruled.

Williams, Van Cott & Sutherland, for appellant. Evans & Rogers, for respondent.

ZANE, C. J. The respondent has submitted a motion to dismiss this appeal on the ground that it was forbidden by the constitution of the state. It was perfected after statehood, and was taken from the judgment of the district court rendered under the late territorial government in a case that had been appealed from a judgment of a justice of the peace. The territorial law authorized such appeal. The first clause of section 2 of article 24 of the constitution is as follows: "That all laws of the territory of Utah now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitation, or are otherwise altered or repealed by the legislature." And section 9 of article 8 of the constitution is as follows: "From all final judgments of the district courts there shall be a right of appeal to the supreme court. The appeal shall be upon the record made in the court below, and under such regulations as may be provided by law. In equity cases the appeal may be on questions of both law and fact; in cases at law, the appeal shall be upon questions of law alone. Appeals shall also lie from the final orders and decrees of the court in the administration of decedent estate and in cases

of guardianship, as shall be provided by law. Appeals shall also lie from the final judgment of justices of the peace in civil and criminal cases to the district courts on both questions of law and fact, with such limitations and restrictions as shall be provided by law; and the decision of the district courts on such appeals shall be final, except in cases involving the validity or constitutionality of a statute." The district court referred to in this section is the district court of the state, not the district court under any other government, territorial or otherwise. The district court of the state is not a continuation of the district court of the territory; it is instituted by a different government, and its jurisdiction differs in many respects from the territorial court. The third clause of the section above referred to provides that "appeals shall also be from the final orders and decrees of the court [the same court] in the administration of decedent estates, and in cases of guardianship, as shall be provided by law." The administration of estates and cases of guardianship under the laws of the territory were in the probate court; under the state government they are administered in the district court. We are of the opinion that the provision relied upon expressed in the last clause of the section, "the decision of the district courts on such appeals shall be final," refers to the district courts of the state. We hold that the territorial law providing for appeals from such judgments under the territorial government is not repugnant to the constitution of the state, and that this appeal was properly taken. The motion to dismiss is overruled.

BARTCH, J., and RITCHIE, District Judge, concur.

SALISBURY v. BURR (PERKINS, Intervener. L. A. 79).

(Supreme Court of California. Oct. 6, 1896.)

FRAUDULENT CONVEYANCES.

A transfer by an insolvent debtor to one not a creditor, made to prevent the property from being ratably distributed among his creditors, is void as to creditors, as a transfer with intent to delay or defraud them (Civ. Code, § 8439), if the transferee had reasonable cause to believe that the debtor was insolvent, and was making the transfer with such fraudulent intent.

In bank. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Action by A. B. Salisbury against John Burr, in which Gregory Perkins intervened. From an order granting plaintiff a new trial, defendant and intervener appeal. Reversed.

Graff & Latham, for appellants. Walter Rose and W. H. Young, for respondent.

HENSHAW, J. Defendant and intervener appeal from the order of court granting plaintiff a new trial. The action was in claim and delivery, to recover of the defendant sheriff a stock of groceries, fixtures, horses, wagons,

etc., of the alleged value of \$2,800. The defendant denied plaintiff's ownership or possession, and justified his seizure and detention under a writ of attachment issued in an action between Perkins and Randall. Upon March 15, 1880, the writ was levied upon the property as the property of Randall. The sheriff further showed that on said March 15th, the day of the levy, Randall filed his petition in insolvency, and was adjudged an insolvent, whereupon defendant was appointed receiver of his property. Under this appointment he qualified, took the property, and at the commencement of this action so held it as receiver. Within 30 days before filing his voluntary petition in insolvency, Randall made sale of the property to plaintiff, which sale it is alleged was pretended, fraudulent, for the purpose of defrauding the creditors of said insolvent, and to prevent the property from coming into the possession of Randall's receiver. Further, it is charged that the pretended sale and transfer were out of the usual course of business, and with full knowledge by plaintiff that Randall was at the time insolvent, that the transfer would prevent the property from being ratably distributed among Randall's creditors, that Randall had no other property whatever with which to pay his debts, and that plaintiff, for the purpose of defrauding the creditors of the insolvent, pretends to have purchased the property, and is now wrongfully claiming to be the owner thereof. Gregory Perkins intervened, as assignee in insolvency of Randall, and tendered the same issues of fraud as did the sheriff. The jury returned the following special verdicts: (1) Randall was insolvent at the time the goods were transferred by him to plaintiff. (2) At the time he accepted the transfer plaintiff had reasonable cause to believe that Randall was insolvent. (3) The transfer was made by Randall to prevent his property from coming to the assignee in insolvency. (4) The transfer was made by Randall to prevent the property from being ratably distributed among his creditors. (5) The transfer was made by Randall with the view to defeat the insolvency act of 1880. (6) At the time the transfer was made, plaintiff believed, or had reasonable cause to believe, that Randall was making the transfer with a view to defeat the insolvency act of 1880. (7) Randall did not make the transfer with a view to give a preference to any creditor or person having a claim against him, or to any one who was under liability for him. (8) Neither Randall nor plaintiff, at the time the transfer was made, intended that the property Randall received from plaintiff in exchange should not go into the hands of his assignee in insolvency, or should not be ratably applied to pay his debts. The jury also rendered a general verdict, finding for the intervenor "for the recovery of the property described in the complaint."

The motion for a new trial was based upon the minutes of the court. One of its grounds was errors in law occurring at the trial, and excepted to by plaintiff. As no specification

of errors is found in the notice, this ground could not properly have been, and presumably, therefore, was not, considered by the court. *Packer v. Doray*, 98 Cal. 815, 33 Pac. 118. The sole remaining ground, and that, consequently, upon which the order must have been granted, was the irreconcilable conflict and inconsistency which the court believed to exist between the special verdicts or findings of the jury upon the questions of fact presented to them, and their general verdict in favor of the intervenor; also because, as claimed by plaintiff, he was entitled to judgment under the special findings, which judgment could not be entered in his favor, by reason of the jury's failure to find the value of the property (Code Civ. Proc. § 667), from all which a mistrial necessarily resulted.

By section 3439 of the Civil Code, every transfer of property made with intent to delay or defraud any creditor or other person of his demands is void against all creditors, and against any person upon whom the estate of the debtor devolves in trust for the benefit of others than the debtor. This broad provision renders void, at the instance of creditors or of the assignee in insolvency, any transfer of property made by the debtor with the intent to delay or defraud any of his creditors. Under this section it matters not whether the transfer be made to a creditor, or, as in the present case, to one between whom and the insolvent such relation does not exist. It is a void transfer if made with the intent—which intent is to be found as a matter of fact—to hinder or defraud. Section 55 of the insolvency act of 1880 creates a limitation upon the otherwise general right of a debtor to prefer certain creditors, and declares void enumerated acts of an insolvent, or of one in contemplation of insolvency, which have for their view the giving of a preference to any creditor or person having a claim against, or who is under any liability for, the insolvent, provided, also, that the person receiving the benefit of the act has reasonable cause to believe that the person making it is insolvent, or that it is done with a view to prevent the insolvent's property from coming to his assignee, or that it is done to prevent the same from being distributed ratably among his creditors, or that it is done to defeat the object of, or in any way hinder, impede, or delay the operation of, or to evade any of the provisions of, the insolvency act. Section 55 of the insolvency act of 1880 contemplates, therefore, a somewhat narrow and special class of acts which the insolvent may be tempted to perform, and declares them void. Those acts have each and all to do with transfers, assignments, and generally with attempts upon the part of the insolvent to favor and prefer a creditor, or one under liability for him. And it must be held that, if a particular transfer by one in contemplation of insolvency be not made with a view to give preference to a person standing in this relation to the insolvent, the act does not come within the purview of section 55. But it by no means follows therefrom that the transfer

by the insolvent, because it is not in violation of section 55 of the insolvency act, is therefore valid. A man in contemplation of insolvency might, for a very inadequate consideration, make a transfer of property to one who did not stand in the relation of creditor to him, trusting to a secret understanding with the transferee that he should in due time receive back from him the property transferred. The purpose and object of the transfer would thus be to defraud all the creditors of their just dues, for the benefit of the insolvent himself, and not for the benefit of any creditor. It would be absurd to say that such a transaction could be upheld, while the much more honest attempt of the insolvent merely to prefer one creditor at the expense of the others should come within the ban of the law. Such a transaction would be void at the instance of creditors or of the insolvent's assignee; but it would be void, not as violative of section 55 of the insolvency act, but as violative of section 3439 of the Civil Code. In *Hass v. Whittier*, 87 Cal. 613, 25 Pac. 917, the transfer was made to a creditor, and it was charged that the transfer was in violation of section 55 of the insolvency act. The complaint did not aver, however, that the insolvent transferred the property to the defendant creditors with a view to giving them preference. It was there held that, if the complaint sought to attack the transfer to a creditor as being void under the provisions of section 55 of the insolvency act, it should be averred and found that the transfer was made with a view to give such preference. The finding was that the property was received by the defendants with a view to give said defendants a preference, but it was held that, so far as the provisions of section 55 were concerned, unless the insolvent transferred the property with the view to give preference, the views or motives of the transferee in receiving it were of no importance. It was nowhere found in that case that the transfer was made either with a view to give a preference, or with a view to hinder or delay or defraud creditors, or to prevent the property from coming to the assignee, or to prevent it from being ratably distributed among creditors. The intent of the insolvent in making the transfer was not found by the court.

In *Ohleyer v. Bunce*, 65 Cal. 544, 4 Pac. 549, it was claimed that the findings of fact did not bring the sale by the insolvent to the defendant within the provisions of the insolvency law, because it was not found by the court that the sale was made with a view to give a preference to a creditor, or a person having a claim against the insolvent vendor. The question presented to and passed upon by the court was whether such a finding was necessary to avoid a transfer to a purchaser for value. The opinion sets forth the finding of the trial court, which was to the effect that Marcuse, being insolvent and in contemplation of insolvency, and with a view to prevent his property from being distributed ratably among his creditors, made the sale and transfer of the goods, wares, and merchandise, and that the vendee had reasonable cause to

believe that Marcuse was insolvent, and that said sale and transfer were made with a view to prevent said property from being distributed ratably among his creditors. It was held that these findings sufficiently evidenced a fraud which would avoid the sale. The court, in so deciding, held, it is true, that the findings were sufficient to bring the case within the prohibitory provisions of the insolvency act of 1890. The determination that the sale was void under the provisions of the insolvency act is not in harmony with the conclusion reached in *Hass v. Whittier*, and here reaffirmed, namely, that section 55 of that act deals only with the transfers made with the design to give preference to a creditor. The decision in *Ohleyer v. Bunce* was, however, sound. The sale and transfer, as found by the court, were clearly violative of section 3439 of the Civil Code. Where a transfer or sale is made in contemplation of insolvency, with a view to prevent the property from being distributed ratably among the creditors, and the transfer is accepted with knowledge that it is made for this purpose, all of which was found in *Ohleyer v. Bunce*, it is plain that the transfer is made by the insolvent with the intent to delay, if not to defraud, those creditors. In the case at bar the findings of the jury were to like effect. They found that Randall made the transfer with intent to prevent his property from coming to the assignee, and to prevent it from being ratably distributed among his creditors, and that Sallsbury, at the time he accepted the transfer, knew, or had reasonable cause to believe, that it was being made with this intent and for this purpose. Under such circumstances the transfer was void, under section 3439 of the Civil Code. The general verdict of the jury in favor of the assignee was not, therefore, in conflict with the special findings. Under the specifications of errors, no valid ground appears why the order for a new trial was granted. The order is therefore reversed, and the cause remanded, with directions to the court to enter judgment in favor of the intervenor.

We concur: TEMPLE, J.; McFARLAND, J.; VAN FLEET, J.; GAROUTTE, J.; HARRISON, J.

FIRST NAT. BANK OF FT. COLLINS v. HUGHES. (Sac. 94.)

(Supreme Court of California. Sept. 16, 1896.)
NEGOTIABLE INSTRUMENTS—TITLE OF PLAINTIFF—
SALE—WARRANTY—REMEDY FOR BREACH.

1. A finding that plaintiff bank was not the owner of the note sued on, which was in evidence, indorsed by the payee, cannot be sustained, as against the positive testimony of plaintiff's president and cashier that the note was bought by plaintiff of the payee before maturity, though plaintiff, on sending the note after maturity to another bank for collection, sent a new note to be executed by defendant, extending the credit for six months, which was made payable to the payee of the first note,—plaintiff's president testifying that it was customary to have renewal notes so executed, and then indorsed by

the payee,—and though the cashier of another bank testified that it was customary to have notes discounted by a bank marked differently from the one in question.

2. Transfer of a note to a bank for collection gives it such ownership thereof that it can sue the maker thereon.

3. A bill of sale of a stallion merely guarantying him to be a breeder excludes a guaranty of his being pure-bred.

4. A promise by the seller, in a bill of sale of a stallion guarantying him to be a breeder, that, on satisfactory proof that he is not a breeder, the seller will give another in exchange for him, on his being delivered at a certain place, limits the buyer's remedy, in the absence of a refusal of the seller to comply with such agreement.

5. After consummation of a sale, the buyer cannot rescind it for breach of a warranty not intended to operate as a condition, though a note for the balance of purchase money has not been paid; his remedy being for damages suffered from the breach.

Commissioners' decision. Department 1. Appeal from superior court, Stanislaus county; William O. Minor, Judge.

Action by the First National Bank of Ft. Collins against George T. Hughes. From a judgment for defendant, and an order denying a new trial, plaintiff appeals. Reversed.

Needham & Dennett, for appellant. L. J. Maddux, for respondent.

SEARLS, C. This is an action to recover upon a promissory note dated May 25, 1891, made by defendant George T. Hughes, for \$700, payable to the order of Jesse Harris, three years after date, at the First National Bank, Ft. Collins, Colo., with interest, etc. Plaintiff sues as the indorsee and owner of the note. Defendant's amended answer denies plaintiff's ownership of the note, or that it was ever the lawful owner thereof, or that it was ever, for a valuable consideration or at all, assigned to plaintiff, or that he is indebted to plaintiff on account thereof. Further answering, defendant avers that, at the date of the note, he purchased from the payee thereof, Jesse Harris, a "Cleveland bay stallion," for \$2,100, for which he gave three promissory notes, of \$700 each, payable in one, two, and three years,—the note in suit being the last thereof. The answer then proceeds to aver that Harris, as an inducement to the purchase of said horse, represented that the horse was a pure-bred Cleveland bay horse, and would transmit his color and general characteristics to all his progeny; that at the end of two years the horse proved to be not a pure Cleveland bay, and his progeny was of mixed and off colors, and but few of them were Cleveland bays; that the representations of Harris were false and fraudulent, and made with a view to misleading defendant, and inducing him to purchase and give the three notes; that before the development of the progeny defendant had paid the first two notes, amounting to \$1,500, which was in excess of the value of the horse; that before this action was brought he tendered the horse to Harris, and demanded the note here in suit,

etc.; that the consideration of the note has failed, etc. He further avers, on information and belief, that the note was not transferred to plaintiff for a valuable consideration, "but only for the purpose of collection," and was made after maturity thereof.

Among the errors assigned by the appellant, an important one is that a special finding of the jury is unsupported by and is contrary to the evidence. The court submitted to the jury the following interrogatory: "Interrogatory No. 1. Was the plaintiff the owner of the note in suit at the time of the commencement of this action?" To which the jury returned for answer, "No." Plaintiff, on its part, for the purpose of establishing its case and its ownership of the note in question, (1) introduced the note in suit, duly indorsed by Jesse Harris, the payee thereof. (2) It introduced the depositions of three witnesses, viz. of Franklin P. Avery, president, G. A. Webb, cashier, and L. C. Morse, assistant cashier, of the plaintiff bank, all of whom testified clearly and positively that the bank was the absolute owner, by purchase for a valuable consideration before maturity, of the note in question. Their testimony does not differ, and we quote that of Moore as a sample of the whole. It is as follows: "I am a resident of Ft. Collins, Colo. Am assistant cashier of the First National Bank of Ft. Collins. I was in the bank at the time of the transfer of the note in question, and examined the books again to-day. The note was transferred to the First National Bank of Ft. Collins before it became due, for a valuable consideration. The transfer to the bank was made March 21, 1894 (it fell due May 25, 1894). \$739.25 was the price paid for the note. We bought the note for its present worth at that time, and gave Mr. Harris the money for it. The note was not left by Mr. Harris with us for collection or as a collateral security." Defendant also offered in evidence a letter from Jesse Harris to said defendant, dated before the maturity of the note, viz. May 7, 1894, in which he says "that the First National Bank of this place [Ft. Collins] owns your note coming due this month."

As opposed to this positive evidence, two circumstances were relied upon by defendant: First. After the note fell due plaintiff sent it to the First National Bank of Modesto on two occasions for collection, and on the last occasion sent a new note, to be executed by defendant, extending the credit for six months. This new note was, like the first, made payable to Jesse Harris. This was explained by the officers of plaintiff as their usual custom in such cases. Avery, the president of the plaintiff, in his testimony said: "The name of Jesse Harris, probably, was placed upon the new note. That was our customary way of taking renewals of notes of this class. We desired the note in the same form as the original, with Jesse Harris indorsing it, which at that time we considered good." The other circumstance is this: Each time when the

note was sent out by plaintiff, it was marked for collection as follows: "First Nat'l Bank, Ft. Collins, Col." "Col. No. 21,735; also, 22,574." Defendant sought to prove by J. E. Ward, cashier of the First National Bank of Modesto, that these marks indicated that plaintiff held the note for collection simply, and not as an owner. The witness, however, did not so testify. He did testify that it showed the note had gone through plaintiff's collection register, and said it was customary, where bills were discounted, to mark them "D. B.," but, when pressed to say that it indicated that it was only turned over for collection, replied that "he could not say." The following question was put to the witness: "Q. Don't the collection number mean that it is in their hands for collection?" "A. Yes, sir; or it may be transferred from one department of the bank to another. You can't tell as to that."

It is matter of common knowledge with those who have transacted business with and for banks that many of them divide their business into departments, as, for instance, exchange department, collection department, discount department, etc. Under such circumstances it is quite natural that the collection department, receiving a security for collection, should treat it simply as a collection, to be accounted for to the bank or department from which it came. These considerations tend to weaken any inference or deduction of nonownership by the bank from the circumstance in evidence. Again, the answer of defendant avers, in substance, that the note was transferred to plaintiff for collection. This gave such an ownership in the note to the plaintiff as entitled it to maintain the action. True, if indorsed without consideration or subsequent to maturity, as is averred, it would be subject to any valid defense of the plaintiff, but a recovery could not be defeated for want of ownership in plaintiff, alone. Under these circumstances, we are of opinion the evidence militating against the showing of ownership by plaintiff of the note in suit did not raise a substantial conflict, and is wholly insufficient to support the special finding of the jury. For the foregoing reasons a new trial should be had.

There is further matter involved in the case, which, in view of another trial, calls for some notice. As hereinbefore stated, the defendant pleaded fraud on the part of Harris, whereby he was induced to purchase the stallion and make the three promissory notes. The answer in this respect is not as full and explicit in its statement as is desirable. At the trial defendant testified as to certain representations made to him, prior to the purchase of the horse, touching his breed, and that his colts, instead of being all bay in color, were not over one-fourth of them of that color, etc., when it transpired that defendant had received a written warranty upon the purchase of the horse, which warranty was without objection admitted in evidence. It is as follows:

"Original. No. 252. Office of Jesse Harris, Importer of English, French, and Scotch Horses. Ft. Collins, Colo., May 25, 1891. This is to certify that I have this 25th day of May, 1891, sold and delivered to George T. Hughes the imported stallion Emancipation, No. 209, recorded in volume L of the American C. B. Stud Book. I hereby guaranty the above-named horse to be a breeder, and if, after two seasons' use, I have satisfactory proof that he is not a feal getter, I will, upon delivery of said horse at my establishment in Ft. Collins, Colo., give in exchange for him a horse of same breed, of equal value and merit, provided the above-named horse be returned to me in as sound and in as good condition as when purchased from me. Agents not allowed to deviate from this contract. Jesse Harris.

"I hereby accept conditions of above guaranty. George T. Hughes."

Upon the back of the bill of sale was the following further stipulation:

"Modesto, Cal., May 25, 1891. I hereby agree that if the horse Emancipation (No. 209), A. C. B. S. Book, is in as good and sound condition as when purchased from me, I will exchange for him another horse of same breed and value at any time I may be through this state within two years with other stock for sale, but I do not agree to make a special shipment of one horse to this state for that purpose. [Signed] Jesse Harris."

Printed letter heads from Harris were also introduced in evidence, showing him to be an importer and breeder of "Cleveland bay" and other breeds of horses, and of the former it is said: "The Cleveland bays are the purest breed and most prepotent coach horses in the world. * * * No other breed of horses transmits its color, form, and general characteristics to its progeny in such a marked degree as the Cleveland bay."

These letters were written after the sale to defendant, and could not have entered into the warranty. The warranty must be presumed to be a crystallization of the meaning of the several oral declarations which preceded it. A glance at that instrument shows that the parties settled upon the mode and measure of relief in case the animal sold did not fill the requirements of the warranty. This was that, at the end of two years, if he failed, Harris was, upon his delivery in sound condition at Ft. Collins, Colo., to exchange him for another horse of the same breed, of equal value and merit; or, as in the agreement of the same date indorsed on the warranty, to exchange him in like manner, at any time within two years, when Harris might be in California with other stock for sale, but he was not to make a special shipment of one horse for that purpose. There was no attempt made by defendant to prove that he ever returned the horse to Ft. Collins, or offered to do so, for exchange, or that Harris was in the state with horses, and refused to make an exchange. The fact is, as appears by the testimony of

defendant, that he never offered to cancel the contract until October, 1894, when he proposed to deliver the horse to the agent of Harris upon the surrender of the note in suit, and that the agent then proposed to him to "ship the horse to Ft. Collins, Colo., and we will ship you a horse out here that we know to be a thoroughbred and true breeder." This was substantially what Harris had agreed in his warranty to do. "The breach of a warranty entitles the buyer to rescind an agreement for sale, but not an executed sale, unless the warranty was intended by the parties to operate as a condition." Civ. Code, § 1786. The sale in this case had been consummated for years, and was not open to rescission. If there was a breach of the warranty, and defendant suffered damages thereby, he is, upon proper pleadings, entitled to deduct the same from plaintiff's recovery, upon it appearing that plaintiff is not an innocent purchaser for value before maturity.

The judgment and order appealed from should be reversed, and a new trial ordered, with leave to defendant to amend his answer if he shall be so advised.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and a new trial ordered, with leave to defendant to amend his answer if he shall be so advised.

PACIFIC COAST S. S. CO. v. KIMBALL et al. (S. F. 123.)

(Supreme Court of California. Oct. 3, 1896.)
PRIVATE WHARVES—LEASE BY CITY—VALIDITY—
CONSTRUCTION.

1. The state granted to the city of Monterey all the water front included within its corporate limits, with the condition that it should not be subject to execution, but might be leased, for a period not to exceed 10 years, on such terms as might be deemed most advantageous. The city had about 2,000 inhabitants, and there were about two miles of seashore within its limits. *Held*, that such city could lease a small portion of the water front to a steamship company for its special or private use.

2. A lease by the city of Monterey of a small portion of its water front to a steamship company recited that such company should erect a wharf thereon, and keep the same in good repair during the lease; that it could collect wharfage and dockage; and that in case of its failure to keep said wharf in repair, or its becoming unfit for use, and so continuing for 90 days after notice by the city, the lease should cease. The order of the city authorizing the lease stated that the company should not charge to exceed 50 cents per ton wharfage. *Held*, that there was nothing in the lease, or the order authorizing it, requiring such company to permit the use of the wharf by others.

Department 2. Appeal from superior court, Monterey county; N. A. Dorn, Judge.

Action by the Pacific Coast Steamship Company against John S. Kimball and others for an injunction to restrain defendants from landing their passengers and freight at plaintiff's

wharf at the city of Monterey. From a judgment in favor of plaintiff, and from an order denying a motion for a new trial, defendants appeal. Affirmed.

W. A. Kearney, for appellants. Geo. W. Towle, Jr., S. F. Gell, and J. J. Wyatt, for respondent.

TEMPLE, J. This action was brought to obtain an injunction restraining defendants from landing their passengers and freight at plaintiff's wharf at Monterey. In 1868 the legislature granted to the city of Monterey all the water front included within the corporate limits, for the use and benefit of the city, with the condition that it should not be subject to execution, but might be leased for a period not to exceed 10 years, by the city trustees, "in such manner and upon such terms as may by them be deemed most advantageous." Monterey contains about 2,000 inhabitants, and has railroad connections, as well as its advantages as a seaport. In 1880 it leased to the plaintiff a small portion of its water front, upon which was an old wharf, which, however, had become so dilapidated as to be unsafe. The indenture of lease contained the following: "In consideration whereof, the said party of the second part do hereby agree to erect a wharf on the said premises, and to keep the same in good repair during the term of this lease. Said parties of the second part shall be entitled to collect wharfage on goods and merchandise passing over said wharf at the rate of fifty cents per ton, and such rates of dockage for vessels as is ordinarily charged at other wharves on the Southern coast. And it is hereby agreed and understood by the parties hereunto that in case of failure by the party of the second part to keep said wharf in repair, or if the same shall become dilapidated and unfit for use, and should so continue for the space of ninety days after notice from the party of the first part to repair the same, then this lease shall cease, and thereafter shall be null and void." Plaintiff owned and operated several steamships, which made weekly trips between different ports of California, and was a carrier of freight and passengers. It at once, after obtaining the lease, proceeded to rebuild the wharf, and occupied and used it exclusively for its own business. It so continued to use the wharf up to 1888, when the present lease was obtained. During that period no vessels made use of the wharf, save their own, and a few schooners loaded with lumber, which used the wharf by plaintiff's consent. In 1888 a new lease was obtained from the city, identical in terms with the first lease. The order of the city council authorizing the new lease contains the following: "The lease to be executed and entered into with said company upon the condition that said company shall promise to keep said wharf in good repair, and shall not charge to exceed fifty cents per ton wharfage." There are about two miles of seashore within the city of Monterey. The portion leased extended 150 feet on each side of the wharf, and was an in-

considerable portion of the harbor. There is not now, and has never been, another wharf at Monterey. It is claimed that under the circumstances the city could not lease any portion of the harbor for a private wharf. I am unable to see, however, any ground whatever for this contention. A wharf is not, like a toll-bridge or a ferry, in its very nature a public utility. Wharves are often appropriated to the use of an individual or a company, and it cannot be doubted that Monterey could lease small portions of its water front for bathing grounds, or for any lawful purpose not injurious to the harbor, or an inconvenience to commerce. That being so, I see no reason why it might not lease a small portion to a steamship company for its special use. The sole question, in my opinion, is whether there is anything in the language used in the lease, or in the resolution of the council authorizing it, which requires plaintiff to permit the use of the wharf by others. I cannot see that it makes any difference that this is the only wharf at Monterey. The city did not obligate itself not to build, or to permit others to build. That it should constitute the only wharf was no part of the understanding. It was the grant of an estate in land, and not a mere franchise. If the right to collect wharfage and dockage is a franchise, the circumstances show that this franchise was at least not the reason which influenced plaintiff in seeking the lease. It was not exclusive. The lease was not obtained for the sake of the franchise, but, on the contrary, if the franchise constituted any part of the consideration which moved plaintiff, it must have been a very unimportant part. Monterey had no commerce, and, until the proceedings by defendants, it does not seem that any one has desired to use the wharf, except in connection with plaintiff's boats, and a few schooners with lumber. The stipulation to keep the wharf in repair is accounted for by the fact that at the termination of the lease the city will become the owner of the wharf. The regulation, however, was evidently not regarded as a grant of the right to collect wharfage and dockage, but as a restriction upon a right which it was assumed was incident to the privilege of building a wharf. It is so expressed in the resolution authorizing the lease. As the city had a right to lease a wharf for private use, the grant must be judged like any other, and we cannot put a condition upon the estate which is not expressed or clearly implied. Counsel admit that, if there were other wharves by which commerce could be accommodated, such a lease could be made. As already stated, whether there are other wharves or not is an immaterial circumstance. I cannot find in this mere limitation upon the charges which could be made a condition of the estate granted. The giving of the lease has promoted commerce at Monterey. It has secured the landing of at least five steamers per week. Whether otherwise she would have any commerce, does not appear. It is no monopoly, for the city can easily cause other wharves to be constructed

for general use. It is conceded by appellant that, if the defendants are not entitled to demand the use of the wharf by tendering the maximum wharfage allowed, plaintiff is entitled to the remedy demanded. For this reason I have not stated the nature of the trespass threatened. The judgment and order are affirmed.

We concur: **McFARLAND, J.; HENSHAW, J.**

SLOSSON v. GLOSSER et al. (S. F. 422.)
(Supreme Court of California. Sept. 29, 1896.)
APPEAL — ATTACHMENT — MOTION TO DISSOLVE — SECURED DEBT.

1. An order refusing to dissolve an attachment will not be reversed on appeal where the evidence is conflicting.

2. Under the provision of Code Civ. Proc. § 538, excluding from the debts on which an attachment may be obtained those secured "by any mortgage or lien upon real or personal property, or any pledge of personal property," the fact that a debt is secured by a bond executed by the debtor with sureties will not defeat an attachment thereon.

Department 1. Appeal from superior court, city and county of San Francisco; James M. Troutt, Judge.

Action by Edw. P. Slosson against George W. Glosser and others. Defendants appeal from an order refusing to dissolve an attachment. Affirmed.

Wal. J. Tuska, for appellants. Rhodes & Rhodes, for respondent.

PER CURIAM. Appeal from an order refusing to vacate and dissolve an attachment. The order must be affirmed. The showing made by plaintiff on the motion directly contradicted that of the moving defendant as to the purposes for which the bicycle installment contracts were assigned to plaintiff; the defendant claiming that they were so assigned as security for the debt sued on, and plaintiff's affidavit setting up that they were not taken for that purpose, but that he was simply to take the contracts and collect the installments due on them for defendants, and expressly declined to take them for any other purpose. The evidence was thus substantially conflicting, and it is therefore unnecessary to inquire whether, had the contracts been assigned to secure the debt, they would have constituted such security as would preclude plaintiff from the remedy of attachment, since, upon well-established principles, the finding of the lower court is conclusive, and the order cannot be disturbed. *Barbieri v. Ramelli*, 84 Cal. 174, 24 Pac. 113.

The further question whether plaintiff held the bond for \$1,000 claimed to have been executed by Glosser and two sureties to plaintiff's assignor as security for the defendants' indebtedness, is wholly immaterial, since such security does not prevent the right of attachment. The requirement is that the debt

shall not be secured "by any mortgage or lien upon real or personal property, or any pledge of personal property." Code Civ. Proc. § 538. Order affirmed.

WOLTERS et al. v. HENNINGSAN et al.
(Sac. 99.)

(Supreme Court of California. Oct. 3, 1896.)

**CONTRIBUTION—BETWEEN STOCKHOLDERS IN DISTILLING CORPORATION—TAXES PAID
UNITED STATES—EVIDENCE.**

1. The stockholders in a corporation engaged in distilling being individually liable to the federal government, under Rev. St. U. S. § 3251, for the tax on the product of such corporation, stockholders who are compelled to pay such tax may maintain an action for contribution against other stockholders; but the liability of the defendants in such action is not in the nature of an assessment on their stock, but is based on their joint and several liability for the amount paid by plaintiffs under the act of congress.

2. In an action by stockholders of a corporation against other stockholders for contribution on the ground that plaintiffs were compelled to pay a certain sum to the federal government as taxes on spirits distilled by the corporation, a judgment obtained by the United States against the plaintiffs for such taxes, while not conclusive on the defendants as to the validity or amount of such taxes, is properly admissible in evidence, together with an execution issued thereon and levied on the property of plaintiffs, as evidence that plaintiffs were compelled to pay the amount.

Department 2. Appeal from superior court, Fresno county; J. R. Webb, Judge.

Action by Henry Wolters and others against A. Henningsan and others. Judgment for plaintiffs, and defendant Blasingame appeals. Affirmed.

Sayle & Coldwell, for appellant. C. B. Graham and F. H. Short, for respondents.

McFARLAND, J. Plaintiffs recovered a money judgment against the defendants, and the defendant Blasingame appeals from the judgment. He also gave notice of an appeal from an order denying a new trial, but it seems to be admitted that the notice of the motion was not made in time, and the brief of his counsel asks for a reversal upon the grounds of the insufficiency of the complaint and of the findings.

The plaintiffs and defendants were all stockholders in a certain corporation called the Fruit Vale Wine & Fruit Company, which was engaged in the business of distilling brandy and proof spirits. This action is brought by plaintiffs to enforce contribution from defendants, as such stockholders, on account of money paid by plaintiffs to the government of the United States for certain taxes which said corporation should have paid for the spirits distilled by it. Judgment was rendered against the defendants for \$12,158.20, which was proportioned among the defendants in accordance with the number of shares of stock held by each.

The proposition that a stockholder in a corporation engaged in distilling is a person

"interested in the use of" the still, etc., owned by the corporation and used in its business, within the meaning of section 3251, Rev. St. U. S., was determined by this court in the case of Richter v. Henningsan, 110 Cal. 530, 42 Pac. 1078, and also that such stockholder is liable to contribution to other stockholders who have been compelled to pay taxes upon the spirits distilled by such corporation. But, as was said in that case: "We must not confound the liability of a stockholder in a corporation, under the law of its creation, with that imposed upon him by the act of congress. His liability under the latter is quite independent of the former, and is just what the act of congress has imposed upon him." When, therefore, certain stockholders of such a corporation have been compelled to pay, and have paid, taxes for which the corporation is liable, they may compel other stockholders to contribute their share of the payment thus made; but this liability is not in the nature of an assessment upon a stockholder under our incorporation laws, but upon the theory that under said section of the Revised Statutes all the stockholders as individuals are jointly and severally liable for the tax.

It is contended by appellant that in the case at bar both the complaint and the findings are insufficient to warrant or sustain the judgment. The complaint contains some long sentences considerably involved and somewhat difficult to follow, and the same may, in some measure, be said of the findings. But, looking through them, we think that enough can be detected to maintain the judgment. There are some averments in the complaint which should not have been there, but they were immaterial, and were not considered by the court in fixing the amount of the judgment. For instance, it is alleged that the officers of the United States government seized and took into its possession the distillery of said corporation, together with all the property connected therewith, including several acres of land, and that, in order to procure a release of said property, it was necessary to pay certain costs incurred on such proceeding, amounting to a considerable sum of money, which the plaintiffs in this case paid; and we see no grounds upon which said costs voluntarily paid by the plaintiffs to release said property could be recovered in this action. Whether or not the plaintiffs could recover that sum of money against the corporation, or against defendants, upon regular assessments made by the corporation, is not a question which here arises, for it is not an obligation created by said section of the United States Revised Statutes. But the court did not consider that item at all in rendering its judgment, and therefore the defendants were not prejudiced by that averment being in the complaint. The United States also brought an action against the plaintiffs in this case for taxes upon spirits distilled by said corporation which it had not

returned to the government, and had neglected and refused to pay, and it is averred in the complaint that in that action the government recovered a certain sum of money against the plaintiffs in this present action, who were defendants in that action; and appellant contends that the judgment in the case at bar is founded solely upon said judgment recovered by the United States, and that, as the appellant was not a party to that action, he is not bound by it. We do not understand, however, that the present judgment is based upon said judgment in favor of the United States, but that the latter, together with an execution which was issued upon it and levied on plaintiffs' property, was admitted in evidence merely for the purpose of showing that the plaintiffs in the present action were compelled to pay the amount of taxes which they did pay. We think that the complaint sufficiently shows that the said corporation, during the months of August, September, October, November, and December of the year 1887, distilled a large amount of spirits, upon which it neglected and refused to pay the taxes owing to the government, which taxes the plaintiffs were compelled to pay. The court found that the amount of spirits so distilled, which was not reported, and upon which the taxes were not paid, was 20,500 gallons. The tax due to the government upon said amount of distilled spirits would be in excess of the judgment rendered for said taxes in this case; but the court also found that the amount for which judgment was rendered in the suit brought by the United States, which plaintiffs were compelled to pay and did pay, was the sum of \$15,969.80; and this last sum was made the basis of the judgment in this present action. From this last-named sum the court deducted the proportion which should be borne by the plaintiffs and certain other persons who were not made defendants herein, which left the sum of \$12,158.20, for which judgment was entered against the defendants in proportion to their shares. Under these circumstances we see no reason for reversing the judgment. The findings sufficiently show that appellant is liable for at least his proportionate share of that part of the delinquent taxes of the corporation which the respondents were forced to pay by the said judgment and execution in favor of the United States. We see no other points which call for special notice. The judgment and order appealed from are affirmed.

We concur: TEMPLE, J.; HENSHAW, J.

PEOPLE'S SAV. BANK OF FRESNO v.
JONES et al. (Sac. 101.)

(Supreme Court of California. Oct. 3, 1896.)
REPLEVIN -- WHEN LIES -- RIGHT TO POSSESSION.

Where mortgagors of a lot remove a house from it after sale of the lot on foreclosure of

the mortgage, replevin by the purchaser to recover the house will not lie before the period of redemption has expired and he is entitled to possession.

Commissioners' decision. Department 2 Appeal from superior court, Fresno county; J. R. Webb, Judge.

Replevin by the People's Savings Bank of Fresno, a corporation, against T. E. Jones and others. From a judgment in favor of plaintiff, and from an order denying a motion for new trial, defendants appeal. Reversed.

Sayle & Coldwell and E. S. Van Meter, for appellants. Geo. L. Warlow and H. H. Welsh, for respondent.

BELCHER, C. The defendant T. E. Jones was the owner of two lots of land in the city of Fresno, on which he and his wife, the defendant Annie Jones, executed to the plaintiff two mortgages, one on the 2d day of March, 1892, and the other on the 6th day of May, 1892, to secure payment of certain promissory notes made by them. In April and May, 1893, the defendants caused a frame dwelling house to be erected on said lots, which they thereafter occupied as their place of residence. The house rested on mudsills which were placed on top of the ground. Afterwards plaintiff commenced an action to foreclose its mortgages, and on April 24, 1894, a decree of foreclosure was duly and regularly made and entered, directing the sale of the said lots. By the decree a commissioner was appointed to make the sale; and thereafter, on May 22, 1894, he duly and regularly sold to the plaintiff all the property mentioned in the decree, and on the same day executed and delivered to plaintiff a certificate of such sale. The property sold was not redeemed, and on November 24, 1894, the commissioner executed and delivered to plaintiff a deed for all the property so sold. On November 17, 1894, the defendants, without the knowledge of plaintiff, caused the house erected by them as aforesaid, and which they were then occupying with their family, to be removed about 40 feet to and upon an adjoining lot. Two days later, on November 19th, plaintiff commenced this action in claim and delivery to recover possession of the said house or its value, alleged to be \$500, together with damages for its detention. The complaint alleges that on the 17th day of November, 1894, the plaintiff was, and still is, the owner and entitled to the immediate possession of all the following goods and chattels, to wit, one frame dwelling house, etc.; that, on the day named, defendants, without plaintiff's consent, and wrongfully took said goods and chattels from the possession of plaintiff, and still unlawfully withhold and detain the same, to plaintiff's damage, etc. The balance of the complaint is in the usual form. The answer denies all the material averments of the complaint, and sets up that, on the day the complaint was filed, the plaintiff, upon affidavit and undertaking, required the sheriff of the county to take said

house from the possession of defendants, and that he did take the same from the possession of the defendant Annie Jones, who is the owner and entitled to the possession thereof, to her damage, etc.; wherefore, judgment is asked for a return of the said property, or for its value, with damages. The case was tried before a jury, and the verdict and judgment entered thereon were in favor of the plaintiff, from which judgment and an order denying their motion for a new trial the defendants appeal.

It is earnestly contended for appellants that the house never became a fixture on the land, and was never subject to the lien of the plaintiff's mortgage, and hence that the plaintiff had no right to recover its possession. This proposition is controverted by respondent, but whether it be sound or not need not be considered, in view of our conclusion upon another proposition.

The law seems to be settled by an unvarying line of decisions that, in order to maintain an action of this kind, the plaintiff must be entitled, at the time the action is commenced, to the immediate possession of the property sought to be recovered. In *Fredericks v. Tracy*, 98 Cal. 658, 83 Pac. 751, it was held that, "to sustain an action of claim and delivery, the plaintiff must have the right to the immediate and exclusive possession of the property at the time of the commencement of the action." And in *Cobbey's work on the Law of Replevin* it is said, in section 94: "The right to the possession at the time of bringing the action is essential to a recovery. It cannot be maintained without showing either a general or special property in the plaintiff, together with the immediate right of possession." And again, in section 96, it is said: "An after-acquired interest will not support replevin. The plaintiff must have the exclusive right to the possession at the commencement of the suit. * * * The plaintiff in replevin must prove a right to the possession at the time the action was commenced. In order to maintain an action for the recovery of chattels in specie, the plaintiff must have, as against the defendant, a present, unqualified right to the possession of the chattel in its present form; and hence, if there be any preliminary act or condition precedent to be performed before the unqualified right of possession attaches, the action cannot be maintained." And see the numerous authorities cited. It is settled law in this state that a mortgage of real property does not pass the title to the mortgagee, and no right of possession is conferred by it when not authorized by express terms. *Smith v. Smith*, 80 Cal. 323, 21 Pac. 4, and 22 Pac. 186, 549; *Hall v. Arnott*, 80 Cal. 348, 22 Pac. 200; *Locke v. Moulton*, 96 Cal. 21, 30 Pac. 957. It is true that when a mortgage is foreclosed, and the property sold, the purchaser is substituted to and acquires all the right, title, interest, and claim of the judgment debtor thereto, subject to redemption; and the certificate issued to the purchaser "is the evidence of a sale whereby, subject to

the right of redemption and of possession in the judgment debtor for the time allowed therefor, the entire equitable title is vested in the purchaser, subject to be defeated by redemption." *Boorman v. Wallace*, 75 Cal. 556, 17 Pac. 682. In case of such a sale the judgment debtor is entitled to remain in possession of the property until the expiration of the time allowed for redemption, and during that period the purchaser has and can assert no right to the possession thereof, though on his application the court may restrain the commission of waste on the property. Code Civ. Proc. § 706; *West v. Conant*, 100 Cal. 231, 34 Pac. 705. When this action was commenced, the time allowed by the statute for redemption had not expired, and the plaintiff was therefore not entitled to the immediate possession of the property. This being so, the action was prematurely brought, and the court erred in refusing to give the instructions numbered 9, 10, and 11, asked by defendants. The judgment and order appealed from should be reversed, and the cause remanded.

We concur: SEARLS, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and the cause remanded.

CONLIN v. BOARD OF SUP'RS OF CITY AND COUNTY OF SAN FRANCISCO. (S. F. 299.)¹

(Supreme Court of California. Oct. 3, 1896.)
CONSTITUTIONAL LAW—APPROPRIATION OF MUNICIPAL FUNDS FOR INDIVIDUALS—
SPECIAL ACTS.

1. An act of the legislature directing municipal officers to pay to an individual, out of the municipal treasury, a sum of money for which there is no legal and enforceable claim, is a "gift of public money," within the inhibition of Const. art. 4, § 31, and hence is void.

2. Act March 28, 1895 (St. 1895, p. 848), directing the board of supervisors of the city and county of San Francisco to order a certain sum of money paid to C., and the auditor to audit, and the treasurer to pay, said sum, is a special law "regulating county or township business," within the inhibition of Const. art. 4, § 25, and hence is void, whether the amount so ordered paid be a liquidated or unliquidated claim.

3. Such act is also a special law "prescribing powers and duties of officers in cities and counties," within the inhibition of Const. art. 4, § 25, inasmuch as it imposes upon the officers named therein duties different from those to be exercised in other cases, by requiring them to pay the claim without examining into its validity, as they are required to do by general law in all payments of public money.

Department 1. Appeal from superior court, city and county of San Francisco; D. J. Murphy, Judge.

Petition by John J. Conlin for a writ of mandate to compel the board of supervisors of the city and county of San Francisco to allow a claim. A demurrer to the petition was sustained, and petitioner appeals. Affirmed.

¹ Rehearing denied.

Rodgers & Paterson and Edward R. Taylor, for appellant. Harry T. Creswell, for respondents.

HARRISON, J. At the last session of the legislature the following act was passed March 28, 1895 (St. 1895, p. 348):

"Section 1. The board of supervisors of the city and county of San Francisco is hereby authorized and directed to order paid to John J. Conlin, or his assigns or legal representatives, the sum of sixty-one thousand five hundred and seventy-seven (\$61,577) dollars.

"Sec. 2. The auditor of said city and county of San Francisco is hereby authorized and directed to audit the demand for said sum of money named in section one, and to issue his warrant therefor to John J. Conlin, his assigns or legal representatives; and the treasurer of said city and county is hereby directed to pay said demand and warrant for said sum of money upon presentation therefor.

"Sec. 3. This act shall take effect immediately."

The appellant thereafter presented his claim to the board of supervisors for said sum of money, together with a duly-authenticated copy of said act, and demanded that the same be allowed and ordered paid. The board of supervisors refused to allow the same, and thereupon the plaintiff made application to the superior court for a writ of mandate compelling said board to allow the claim. A demurrer to his petition was sustained by the superior court, and from the judgment entered thereon the present appeal has been taken.

The validity of this act is assailed by the respondents upon the ground that the legislature has not the power to direct the payment of moneys out of the treasury of the city and county of San Francisco, against its will, or without its consent. It is conceded by the appellant that the legislature has not the power to direct or command the municipality to make a gift of its funds, but it is contended on his behalf that the legislature has such control over these funds that it may appropriate them for any public purpose, and that, as courts cannot look outside of the act making such appropriation, but must determine the character of the appropriation from the terms of the act alone, it is to be presumed that the legislature made the appropriation for a public purpose; that if the legislature had the power under any circumstances to pass the act in question, it must be assumed that the circumstances existed in the present case, and authorized its passage. In support of this proposition are cited *Stevenson v. Colgan*, 91 Cal. 640, 27 Pac. 1089, and *Rankin v. Colgan*, 92 Cal. 606, 28 Pac. 673. These cases, however, involved the power of the legislature to appropriate money from the state treasury, and did not touch upon the power of the legislature to deal with the moneys in the treasury of a

municipal corporation. Assuming, however, that the legislature may appropriate the funds in the state treasury for any public purpose, it does not follow that it has the same power over municipal funds. While the funds in a municipal treasury are in a certain sense public, they are so only for the limited public which has contributed them, but not for the entire state, and the power of the legislature over these funds is not co-extensive with its power over the state funds, but is limited by certain provisions of the constitution.

We are not aware that it has ever been held, and counsel for appellant has not cited us to any authority in support of the proposition, that the legislature has power to appropriate the funds of a municipality to the discharge of an obligation against the entire state, or to direct the payment of such funds for any other purpose than pertains to the municipality itself. Mr. Cooley, in his treatise on Taxation, lays down the rule in the following language: "All the property of a municipal corporation may be assumed to come from taxation. It is public property, but public for the purposes of the municipality, and not for purposes of the state. If, in fact, it has been raised for special purposes, under state authority, the state may compel its proper application. The state must have a power of direction also in cases where municipal powers are so modified as to preclude the contemplated purpose being followed; but it is believed to be an unsound doctrine that the legislature of the state may, for that reason, or any other, apply it to state uses, or even to local uses, against the consent of the people concerned." See, also, *Cooley, Const. Lim.* (6th Ed.) p. 283 et seq.; *Dill. Mun. Corp.* § 75. It was never held under the former constitution of this state that the legislature had unlimited control of the moneys in a municipal treasury, or that it could direct their appropriation to other than municipal purposes. Certainly, it was never contended that the legislature could cause such funds to be transferred to the state treasury and be made a part of the state funds; and there can be no distinction in principle between such power and the power to direct their payment for a state obligation or purpose. In *Blanding v. Burr*, 13 Cal. 351, it was said: "The power of appropriation which the legislature can exercise over the revenues of the state for any purpose which it may regard as calculated to promote the public good, it can exercise over the revenues of a county, city, or town for any purpose connected with their present or past condition, except as such revenues may by the law creating them be devoted to special purposes." In *Sinton v. Ashbury*, 41 Cal. 525, the act was upheld upon the ground that the purpose for which the money was to be paid was a municipal purpose, and the further ground that "the legislature has the constitutional power to direct and control the af-

fairs and property of a municipal corporation for municipal purposes, provided it does not impair the obligation of a contract, and, by appropriate legislation, may so control its affairs as ultimately to compel it out of the funds in its treasury, or taxation to be imposed for that purpose, to pay a demand, when properly established, which in good conscience it ought to pay, even though there be no legal liability to pay it;" and, in giving the opinion of the court, Mr. Justice Crockett said: "I am not aware that any case has gone so far as to hold that the legislature may devote the funds of a municipal corporation to purposes confessedly private, and having no relation to municipal affairs." The statute involved in *Creighton v. Manson*, 42 Cal. 440, was sustained upon the principle that: "Where an individual has no legal claim in the sense of being capable of an enforcement by judicial proceedings against a municipal government, he has, nevertheless, in equity and justice, in the larger sense of those terms, a right to indemnity and compensation out of the public treasury." The principle by which these cases were governed was fully illustrated in *Hoagland v. Sacramento*, 52 Cal. 142, where the converse rule was enforced, and it was held that the legislature could not compel a city to pay a claim made against it for which it was under no moral or equitable obligation; saying: "While the legislative power may, as it frequently does, interpose to furnish a remedy or remove an impediment which prevents the enforcement of a legal or equitable right or duty already existing, it cannot, even against a municipal corporation, create a claim without the consent of those who are to be taxed with its payment. Such a procedure, while taking on the form of a statutory enactment, would amount to mere spoliation."

The power of the legislature to appropriate any of the public moneys in the state treasury, or to direct the appropriation of the public moneys of a municipality, in cases like the foregoing, was taken away by the present constitution,¹ and it can now make no appropriation of public moneys for which there is no enforceable claim, or upon a claim which exists merely by reason of some moral or equitable obligation, which the mind of a generous, or even a just, individual, dealing with his own moneys, might prompt him to recognize as worthy of some reward. *Conlin v. Board*, 99 Cal. 17, 33 Pac. 753. It was held in this case that the legislature holds the public moneys in trust for public purposes, and under this limitation of the constitution can make no disposal of these funds except in accordance with such purposes; that it has no authority to appropriate public moneys for purposes

for which there is no legal or equitable obligation, and can no more direct a municipality to make a gift of the public moneys in its treasury than could the municipality without such direction. As, therefore, the legislature is precluded from directing a gift of municipal funds, and as any appropriation of moneys for which there is not a legal and enforceable claim falls within the meaning of this term as used in the constitution, it follows that, even if it be conceded that the legislature has any control over municipal funds, the only circumstances under which it could direct their payment would be for some municipal purpose, or in satisfaction of some valid claim against a municipality. It must, therefore, be assumed, for the purpose of sustaining the validity of the act in question, that the legislature directed the money to be paid to the appellant in satisfaction of some obligation of the municipality. Such a statute would, however, be in direct violation of the constitutional limitations upon the power of the legislature. Section 25 of article 4 of the constitution declares that the legislature shall not pass any special or local law regulating county and township business, or prescribing the powers and duties of officers in cities and counties, or in any case where a general law can be made applicable. The act in question is both special and local. It is special in that it is applicable to a single individual and to a single transaction. It is local in that by its terms it is applicable to only one place, viz. San Francisco. That it is an attempt to regulate the business of San Francisco is equally apparent. To "regulate," as here used,—a word derived from the Latin word "rego," signifying to guide or direct, through the noun "regula," a rule,—is to prescribe a rule for acting, to direct the mode in which a transaction shall be conducted. The act in question directs the mode in which the money named therein shall be transferred from the city treasury to appellant. It prescribes the exact amount to be paid, directs the board of supervisors to order it paid to the appellant, and the auditor to audit and the treasurer to pay his demand for this amount of money. As the public moneys can be transferred from the treasury to an individual only in connection with some public transaction, and for some public purpose, such transfer is of necessity a part of the public business, and a law prescribing the mode by which the transfer may be effected is a law regulating such business. It is none the less a regulation of business because it is limited to a single transaction. It is as much a regulation of business to prescribe the mode in which a single transaction shall be conducted as to prescribe a rule for conducting all transactions. If the legislature can direct this payment to the appellant, it can also direct the payment of every claim against the municipality, and upon the same prin-

¹ Const. art. 4, § 31, provides that the legislature shall not have power to make any gift, or authorize the making of any gift, of public money to any individual, municipal or other corporation.

ciple can direct the payment of any claim against every municipal body in the state. That this would be a regulation of municipal business throughout the state cannot be denied, and that each of the acts authorizing payment would be a part of such regulation and in contravention of the constitution is equally apparent. A law limited to a single transaction is as much within the constitutional limitation upon the power of the legislature as would be a law applicable to more than one transaction, and a rule which would uphold a law limited to a single transaction would necessitate the upholding of a law which embraced any number of transactions less than the entire business of the municipality. A similar question was presented in *Williams v. Bidleman*, 7 Nev. 88. The constitution of Nevada contained the same provision on this subject as is contained in the constitution of this state, and an act was passed by the legislature directing the county of Lander to pay a certain claim. It was held that the act was within the constitutional provision, and to the contention of counsel that, as the act was limited to a special case, it was not a regulation of business within the meaning of the constitution, the court said: "We think this statute is clearly a regulation of business. Any law prescribing a rule to govern business, or an order or direction for its management, is a regulation of that business, whether it be a limited and temporary law, intended to secure a particular end or object, or a general and permanent law, according to the provisions of which all county affairs are to be conducted." See, also, *Montgomery v. Com.*, 91 Pa. St. 125. Whether the claim of the appellant for which payment is directed is liquidated or unliquidated is immaterial. If it is unliquidated, the legislature is not authorized to determine the amount, and direct its payment against the will or without the consent of the city. Such an act would be to except the appellant from the general law requiring a judicial determination of his claim before he could demand its payment. If it be assumed that the payment is to be made for a public purpose, and in satisfaction of a claim that has been judicially determined to be a valid claim in favor of the plaintiff and against the city, the act is none the less a regulation of the business of San Francisco, and a special law exempting the plaintiff from the general law requiring all claimants against the city to enforce their claims by proceedings in the courts of the state. The act, moreover, prescribes the duties of the several officers named therein, and imposes upon them duties different from those which they are required to perform in all other instances in which the public money is to be paid. In all other cases the board of supervisors are prohibited from ordering the payment of any claim, and the auditor from approving, and the treasurer

from paying, the same, unless presented in a particular form, and the auditor before approving, and the treasurer before paying, any claim, are required to examine into its validity, and to satisfy themselves whether the same is a valid charge against the city and county. But by the act in question these provisions of the general law applicable to all other claimants are dispensed with, and the legislature has peremptorily directed these officers to audit and pay the claim without any such examination, and irrespective of the result of whatever examination they may make. The act thus prescribes a special rule for the duties of these officers in this case, and takes from them the right of acting in accordance with the general rule prescribed for all other payments of money. The judgment is affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

PEOPLE v. TALLMADGE. (Cr. 138.)
(Supreme Court of California. Oct. 3, 1896.)
CRIMINAL LAW—NEW TRIAL—NEWLY-DISCOVERED EVIDENCE.

On trial for theft, an accomplice testified in detail to the stealing by himself and defendant. There was other testimony to connect defendant with the crime. On a motion for new trial, defendant filed an affidavit of the accomplice stating that the testimony he gave on the trial was willfully false, that he had sworn falsely at the suggestion of the district attorney and deputy sheriff, that the deputy promised him that he would give him \$200, and that such deputy had refused to pay him the money. Such statements were denied by the deputy and the district attorney, by affidavits. *Held*, that the denial of the motion was not an abuse of discretion.

Department 2. Appeal from superior court, Tulare county; Wheaton A. Gray, Judge.

Walter Tallmadge was convicted of the larceny of hogs, and appeals from the judgment, and from an order denying a new trial. Affirmed.

Power & Alford and Forrest L. Alford, for appellant. Atty. Gen. Fitzgerald, for the People.

McFARLAND, J. The appellant was charged with the larceny of a number of hogs, the property of one Bertch, and was convicted of grand larceny. He moved for a new trial, and the motion was denied; and from the judgment and the order denying a new trial he appealed.

The only point pressed by appellant is that the court erred in not granting a new trial upon the ground of newly-discovered evidence. One Harry Lynde was a principal witness against the appellant, and was, according to his testimony, an accomplice. He testified that on or about the 15th of November, at 9 or 10 o'clock at night, he, in company with the appellant, visited the ranch of said Bertch, and drove out of the field 21 or 22 hogs, and

took them a few miles to a place where they were corraled that night; that the next night they drove them to a place called "Armona," reaching the latter place about 3 or 4 o'clock in the morning, where the hogs were corraled; that on Sunday morning they loaded them into two wagons belonging to the appellant, from which place they were hauled in said wagons to various places throughout the country, and sold. There was a great deal of other testimony tending to connect the appellant with the larceny of said hogs, and corroborative of the testimony of said Lynde. It was proven by other witnesses that appellant sold portions of the hogs at various places, and he admits that he did so sell them,—his explanation being that he was hired by the said Lynde to haul said hogs from Armona; that he did not know, or have any reason to believe, that they were stolen; and that after he left Armona, and before he sold any of the hogs, he purchased the same from the said Lynde, giving him a certain sum of money, and agreeing to pay the balance at a future time. On the motion for a new trial there was presented an affidavit made by the said Lynde, in which he testified that the testimony which he had given on the trial against appellant was willfully false; that appellant did not participate in the larceny of the hogs, and did not know that they had been stolen; and that he (Lynde) and another person called Epperson had committed the larceny. He gave as the reason for swearing falsely at the trial that the district attorney and the deputy sheriff had told him that they disliked Tallmadge, and that if he (Lynde) would stand in and help to convict him, by swearing that Tallmadge was with him and helped steal the hogs, the charges against Lynde would be dismissed; and, further, that the deputy sheriff promised him that he would also give him, if he would so testify, \$200, and that since then the said deputy sheriff had refused to pay him the said sum of money, or any part thereof. These statements as to the district attorney and the deputy sheriff were entirely denied by said deputy sheriff and district attorney, in affidavits filed on the motion.

Applications on the ground of newly-discovered evidence are addressed to the discretion of the trial court, and its action will not be set aside, except for an abuse of such discretion, and the presumption is that the discretion was properly exercised; and it has been repeatedly held by this court that such applications are to be regarded with disfavor. *Hayne*, New Trial & App. par. 87, and cases there cited; *People v. Sutton*, 73 Cal. 243, 15 Pac. 86; *People v. Freeman*, 92 Cal. 359, 28 Pac. 261. It cannot be said that, as a matter of law, a new trial should be granted whenever an important witness against the defendant shall make an affidavit that he committed perjury in his testimony. If that were so,

justice would be defeated in many grave cases. Notwithstanding such an affidavit, the appellate court will rest largely upon the discretion of the judge who heard the trial, and will not disturb his ruling except in clear cases of abuse of discretion. The strongest case in favor of appellant's contention is that of *Mann v. State*, 44 Tex. 642. In that case the appellant was convicted of rape upon the person of a young girl, and without her testimony there was no shadow of a case against the appellant. In her testimony at the trial she first said that the appellant was innocent, but, being examined by direct questions, she finally made statements tending to show the appellant's guilt. Afterwards, upon a motion for a new trial, she made oath that her first statements when on the stand were true, and that she did not fully understand the bearing of the questions which she afterwards answered, and that her answers to those questions were not true. Upon appeal the supreme court held that the motion for a nonsuit ought to have been granted. But its ruling rested upon a consideration of all the circumstances in the case, and the court said: "Looking at the entire case, including the affidavits, it is our opinion that the guilt of the appellant was left too uncertain, and the character of the evidence against him appeared too frail and unreliable, to justify the court in refusing him another trial." There the ruling of the appellate court was not based upon the mere fact that a witness had afterwards testified to perjury at the trial. In fact, there was no perjury, but a mistake, and the testimony of a witness that he was mistaken is certainly entitled to more consideration than a statement that he committed absolute perjury. The court made its ruling after "looking at the entire case," and we have no doubt that a case might arise where an important witness had afterwards testified to having committed perjury, in which this court would hold, looking at the whole case, that a new trial ought to have been granted. But we do not think the circumstances of this case call for such ruling. The case at bar is very similar to that of *People v. McGuire*, 2 Hun, 269. In that case the court, speaking of a witness who afterwards made affidavit that he had committed perjury at the trial, said: "The affidavit of such a person is not entitled to so much weight as to justify the conclusion that the evidence given by him, and which the jury may have regarded as credible and reliable, was corruptly and willfully false. The conclusion of the jury would rather warrant the presumption that his testimony was truthful, and his affidavit false." Upon the whole, we do not see any reason for disturbing the discretion of the court below. The judgment and order appealed from are affirmed.

We concur: TEMPLE, J.; HENSHAW, J.

PEOPLE v. CUMMINGS. (Or. 153.)
(Supreme Court of California. Oct. 6, 1896.)
FALSE PRETENSES—OBTAINING LAND THEREBY.

Under Pen. Code, § 532, providing that any person obtaining "money or property" by false pretenses is punishable to the same extent as for larceny, a person so obtaining land is not punishable.

Department 1. Appeal from superior court, city and county of San Francisco; George H. Bahrs, Judge.

James H. Cummings was accused of obtaining property by false pretenses. A demurrer was sustained to the information, and the state appeals. Affirmed.

Atty. Gen. Fitzgerald, for the People. B. M. Morgan and A. J. Morganstern, for respondent.

VAN FLEET, J. Defendant was accused by information of the crime of obtaining property by false pretenses, under section 532 of the Penal Code, the property charged to have been obtained being described as two certain parcels of land. He demurred to the information as not stating an offense. The demurrer was sustained, and the people appeal, the sole question being whether land is such property as to be the subject of the offense sought to be charged. We think the demurrer was properly sustained. Looking at the history of the offense, and the evil which it has always been designed to correct, and regarding as we must the contemporary construction given to statutes of like purpose and effect both in England and the United States, we are satisfied that the provision of the Code was not designed to include an instance of defrauding another of real estate, and consequently that the information did not charge an offense thereunder. The language of the Code defining the offense is: "Every person who knowingly and designedly by false or fraudulent representation or pretenses defrauds any other person of money or property, or who causes or procures others to report falsely of his wealth or mercantile character, and by thus imposing upon any person obtains credit, and thereby fraudulently gets into possession of money or property, is punishable in the same manner and to the same extent as for larceny of the money or property so obtained." Similar provisions, varying slightly in verbiage, but having a common purpose, are to be found in the statutes of every state of the Union, so far as our investigation extends, and like their English prototypes, the earliest of which is 30 Geo. II. c. 24, § 1, are the outgrowth and expansion of the old offense of "cheats" or "cheating," as it existed at the early common law proper, and later under the statute of 33 Hen. VIII. §§ 1, 2, "which," as suggested by Mr. Bishop, "is common law with us." These later statutes have been enacted, Mr. Bishop tells us, "to supply defects in the earlier law, which, as trade in-

creased, was plainly seen not to go far enough in the protection of fair dealing against knavery." 2 Bish. New Cr. Law, § 410. Cheating at common law was a fraud perpetrated by means of a false symbol or token, such as selling goods by false weights or measures, or other like act or thing of a character calculated to deceive and defraud the public or the individual to their pecuniary injury, and against which ordinary prudence could not guard. The inadequacy of this offense to meet the demands of advancing methods of trade arose in part from the fact that it did not embrace any act or thing accomplished without the aid of some false token. Mere spoken lies or misrepresentations, or verbal perversions of the truth, of whatsoever nature, employed to defraud, did not constitute the offense; and it was in part to remedy this defect or omission that the statutes creating the offense of false pretenses were enacted, and which, by reason of their wider comprehension of the arts and methods of cheating, have largely superseded the common-law offense. 2 Bish. New Cr. Law, §§ 143-145; 1 Bish. New Cr. Law, § 571.

In their origin, both the common-law and statutory offenses were undoubtedly designed and aimed solely at protecting personal property, and in aid of the laws against larceny and theft. Indeed, they appear to have sprung into being largely by reason of certain defects in the application of the laws against larceny. Among the reasons stated in the statute (33 Hen. VIII.) for enlarging the offense of cheating are that "many light and evil-disposed persons, not minding to get their living by truth, &c., but compassing and devising daily how they may unlawfully obtain and get into their hands and possession goods, chattels and jewels of other persons for the maintenance of their unthrifty living; and also knowing that if they came to any of the same goods, chattels and jewels by stealth, then they, being thereof lawfully convicted, &c., shall die therefore,—have now of late falsely and deceitfully contrived, devised, and imagined privy tokens and counterfeit letters in other men's names, unto divers persons their special friends and acquaintances, for the obtaining of money, goods, chattels, and jewels of the same persons, their friends and acquaintances; by color whereof the said light and evil-disposed persons have deceitfully and unlawfully obtained and gotten great substance of money, goods, chattels, and jewels into their hands and possession, contrary to right and conscience," etc.; and in one of the early statutes relating to false pretenses it is recited that whereas "a failure of justice frequently arises from the subtle distinctions between larceny and fraud," etc.—one of which distinctions being that when property was obtained by consent of the owner, intending to part with the title, although by the grossest fraud, it would not constitute larceny. And the offense of false pretenses, under the Eng-

lish statutes, has always been construed as largely analogous to, and closely bordering upon, that of larceny, and as applying only to personal property, which was capable of manual delivery, and the subject of the latter offense, and has always been punishable in much the same manner as larceny. Real property under the English law was never the subject of the offense either of cheating or of false pretenses. Being incapable of larcenous asportation, it was not regarded as requiring at the hands of the criminal law the same protection as personalty. Since it could not be carried away and dissipated like chattels, although a man might be deprived of his landed estate by means of fraudulent practices and devices, yet the property was bound to remain stationary, and accessible to the reach of the law, and he was relegated to the civil courts for his redress of the wrong.

Our American statutes upon the subject have all followed more or less closely those of England. As indicated, there are slight differences in language, but in substantive purpose and effect they are the same. Some, instead of employing the specific terminology of the English statutes in designating the character of the property made the subject of the offense, have used more general and perhaps more comprehensive terms, such, for instance, as those found in the provision of our Code above quoted. In their interpretation, however, of the purpose and effect of these statutes, the American courts, by reason, no doubt, of the origin of the offense, and in obedience to a well-established rule of statutory construction, have closely followed in a general way that of the English courts; and the statutes of the various states, however general their terms, have been uniformly held to apply only to personal property. In one case from Indiana (*State v. Snyder*, 66 Ind. 203) this rule seems to have been relaxed to the extent of holding that the fraudulent obtaining of board and lodging by false pretenses was within the statute. But in Wisconsin it was held that such an act was not within the law. *State v. Black*, 75 Wis. 490, 44 N. W. 635. The language of the Wisconsin statute was quite as general as our Code provision, reading, "Any money, goods, wares, merchandise or other property"; and it was contended, as by the attorney general it is urged here, that this language was sufficiently comprehensive to include any property. But it is there said: "The word 'property' is in many cases construed to include 'things in action, and evidences of debt.' Rev. St. § 4972, subsecs. 3, 4. But the words 'other property,' in the statute quoted, must, under the familiar rule, '*Noscitur a sociis*,' be limited to such identical classes of property as are therein previously enumerated; that is to say, 'money, goods, wares, merchandise and other property' of that description." The Indiana case above cited takes the widest departure from the original scope of the offense that has come

under our observation. In no case, so far as an extended research discloses, has the offense ever been held to include transactions in land or real estate. In fact, but two instances are cited in which this claim has heretofore been made, and in both it was overruled. The first was in *State v. Burrows*, 11 Ired. 477, where it is said: "There are three fatal objections to the indictment: (1) Land is not included within the operation of the statute. It is true, the words are very general: 'Money, goods, property or other things of value,' 'or any bank note, check or order for the payment of money, etc.' But they must be construed with reference to the nature of the offense, the mischief intended to be guarded against, and the particular terms used in connection with the general terms. Larceny at common law was confined to 'goods and chattels.' It did not extend to land, because land could not be feloniously taken and carried away, except insignificant parcels thereof, and there was no mischief complained of in that regard." And, referring to the fact that the punishment for the offense was the same as that for larceny, it is further said: "Thus, we are furnished with a key whereby to unlock the meaning of the statute. It was justly considered as great a mischief to be defrauded of property by means of a forged or counterfeited paper, etc., as to be deprived of it by means of a felonious taking and carrying away, and the object was to extend the principle to cases where property was obtained in this fraudulent manner. * * * It may be that 'other things of value' was inserted to include corn, wheat, etc., growing and standing ungathered; but it would be a strained construction to make it include the very land, for that is not the subject of larceny at common law, and as extended by the statute. It would be to make the corollary or sequent embrace a subject not embraced by the original proposition, which is bad logic as well as bad law." The other instance arose in *Com. v. Woodrun*, 4 Pa. Law J. 362, where, discussing the sufficiency of an indictment for cheating in a real-estate transaction, it is said: "There is another objection to this bill of indictment, which to my mind is equally fatal. The subject-matter of the charge laid in it is land, and the title to it. Does not the same reason apply against making real estate the subject of a criminal charge for depriving its owner of it by cheating, as applies against making land, or any portion of it, the subject of larceny? In both cases it is the mobility of the article obtained which makes the transaction a public evil, as it enables the offender to remove or conceal the property from its owner, with himself from public justice. And it strikes me as nugatory to prepare a penalty for obtaining property which the offender cannot pass if obtained by fraud, and which he cannot remove from its actual location. In all legislation against obtaining property by false tokens or cheats, the obtaining real

estate thereby, I believe, has never been made the subject of criminal charge and punishment."

Speaking of this offense, in Whart. Cr. Law, at section 1193, it is said: "As will be hereafter seen, under the statutes, as first drafted, only larcenous property is protected. By the statutes now existing in most jurisdictions this limit is obliterated, and the obtaining by false pretenses both of land and of written securities is made indictable." But to the point that land is now the subject of the offense, the single authority cited is *State v. Burrows*, from 11 Ired., above cited and quoted from, which, as will be noted, holds directly to the contrary. Later on, at section 1204, the same work again adverts to the point in this wise: "As we have seen, property not larcenous was not at first covered by the statutes, and hence the words 'money,' 'goods,' 'property,' have been held not to include * * * land." Here, curiously enough, to support this suggestion is again cited the same case of *State v. Burrows*. It will be thus observed that this case is cited as supporting directly opposite views of the same question,—an infirmity under which that case can in no manner be said to rest, and the implied suggestion of which was no doubt the result of the merest mistake or inadvertence on the part of the eminent writer or his reviser. In this immediate connection, however, it is further said, "It is otherwise, however, by special statutes, in most jurisdictions." In view of what precedes it, this language is, we think, ambiguous, and liable to be misapprehended. If by it the writer intended thereby to reaffirm the idea previously suggested, that the offense is now held to include land as one of its subjects, his authorities do not support him. The only cases cited to sustain the text are two,—one the case of *State v. Snyder*, supra, which is simply to the effect that the statute included the fraudulent obtaining of board and lodging; and the other is that of *Reg. v. Burton*, 54 Law T. R. (N. S.) 765, where it was held that one was properly convicted under the statute for false representations made to obtain food. To this extent, it may be, our own statute would go. Its exact limitations in that respect are not involved, and need not be determined. But from a consideration of its language, and an examination and review of all the authorities that have come to our attention, either from the briefs, or as a result of our own search, we are satisfied that it was not intended that the offense as there defined should take so wide a departure from its universally accepted scope, as theretofore limited and understood, as would be required to include the facts upon which this charge is laid. As suggested in *State v. Burrows*, supra, the very language of our statute furnishes us a key to its intended limitation, in providing that the offense shall be "punishable in the same manner and to the same extent as for larceny of

the money or property so received." Since real estate is not the subject of larceny, this language would be meaningless, in attempting to apply it to the facts alleged in the information. The judgment is affirmed.

We concur: GAROUTTE, J.; HARRISON, J.

LIVE-STOCK GAZETTE PUB. CO. v.
UNION STOCK-YARD CO. et al.
(S. F. 184.)

(Supreme Court of California. Oct. 6, 1896.)

NEW TRIAL—PRACTICE—REPLEVIN—DAMAGES.

1. Under Code Civ. Proc. § 648, requiring, on motion for a new trial on the ground of the insufficiency of the evidence, that the objection must specify the particulars in which such evidence is insufficient, a bill of exceptions to a decision denying a recovery of damages for the detention of property, setting out the evidence on the issue of damages, and alleging as the particulars wherein the evidence is insufficient that, "the real question before the court being a question of damages claimed by plaintiff for the wrongful detention of his property, and the evidence being wholly undisputed and uncontradicted as to the damage, the decision of the court should have been for such an amount as would compensate the plaintiff," is sufficient to sustain the granting of a new trial.

2. Plaintiff is entitled to recover his actual damages for the wrongful detention of his property, without proving oppression, fraud, or malice on defendant's part.

Department 2. Appeal from superior court, city and county of San Francisco; Charles W. Slack, Judge.

Action by the Live-Stock Gazette Publishing Company against the Union Stock-Yard Company and others. There was a judgment for plaintiff, and from an order granting it a new trial defendants appeal. Affirmed.

Lloyd & Wood, for appellants. F. Wm. Reade, for respondent.

PER CURIAM. This is an action to recover the possession or value of certain personal property alleged to be wrongfully detained by defendants, and damages for its detention. The court below found, among other things, as follows: That the plaintiff was the owner and entitled to the possession of the property described in the complaint, and that the defendants unlawfully withheld the same from the plaintiff; "that the value of said property is seven hundred and fifty dollars;" "that the plaintiff has not suffered any damage by reason of the detention of said personal property by the defendants, nor have the defendants been guilty of oppression or fraud or malice." And as conclusions of law the court found "that the plaintiff is entitled to the possession of all the personal property described in the complaint, if a delivery thereof can be had, or the value thereof, viz. the sum of seven hundred and fifty dollars, in case a delivery cannot be had, with costs of suit." Judgment was accordingly so entered, and in due time the plain-

tiff moved for a new trial upon the ground of the insufficiency of the evidence to justify the decision. The motion was made upon a bill of exceptions, which stated that "upon the trial of said cause the following evidence was submitted to the court, and which was all the evidence offered or introduced upon the matter, or relevant to the issue of damages claimed to have been suffered by plaintiff." There was then set out the testimony of six witnesses, which tended to show that the plaintiff had been damaged by the detention in a very considerable sum. Following this evidence was a specification of the particulars wherein the evidence is insufficient to justify the decision, as follows: "The real question before the court being a question of damages claimed by plaintiff for the wrongful detention of its property, and the evidence being wholly undisputed and uncontradicted as to the damage, the decision of the court should have been for such an amount as would compensate the plaintiff." The motion was heard by the successor of the judge who tried the case, and granted "upon the ground that the evidence is insufficient to justify the decision." From that order the defendants appeal.

The only point made for a reversal is that the specification was insufficient to meet the requirements of the statute, and the order of the court was therefore unauthorized. Under our statute, a motion for new trial may be made upon a bill of exceptions or a statement of the case. Code Civ. Proc. § 648. And it is provided as to bills of exceptions that "no particular form of exception is required, but when the exception is to the verdict or decision, upon the ground of the insufficiency of the evidence to justify it, the objection must specify the particulars in which such evidence is alleged to be insufficient." We think that under the circumstances of this case the specification should be held sufficient. The bill of exceptions expressly shows that the only question to be raised on the motion for a new trial was as to whether or not plaintiff was entitled, under the evidence, to damages for the detention of the property. The bill includes all the evidence bearing on that question; and the specification points to the sole question professedly involved in the motion, and directs attention to that point, so that the opposite party might see that all the evidence bearing on the issue, and proper to be considered by the court, was set forth in the bill. *McCullough v. Clark*, 41 Cal. 304; *Eddelbuttel v. Durrell*, 55 Cal. 279; *Newell v. Desmond*, 63 Cal. 242; *Tromans v. Mahlman*, 92 Cal. 5, 27 Pac. 1004, and 28 Pac. 579. We certainly think the specification sufficient in the case at bar, where the court made an order granting the motion for a new trial, and all intendments are in support of the correctness of that order; and we may justly presume, from the facts appearing on the face of the record, that the only issue raised by the mo-

tion was fairly and fully presented to the consideration of the court.

It was not necessary for the plaintiff to prove oppression, fraud, or malice. Under such proof he might have been awarded exemplary damages (Civ. Code, § 3204), but without it he was entitled to such damages as would compensate him for all the detriment proximately caused by the wrong complained of (Id. § 3383). The order appealed from is affirmed.

VENTURA & OJAI VAL. RY. CO. v. COLLINS. (L. A. 232.)¹

(Supreme Court of California. Oct. 3, 1896.)

STOCK SUBSCRIPTION—CONSTRUCTION—PLEADING.

1. A complaint on a stock subscription is not inconsistent because alleging that defendant, by his subscription, agreed to pay a certain amount "when and as it might be demanded," while this promise is not expressed, but merely implied, in the subscription set out as an exhibit.

2. In a stock subscription, by which the subscribers agreed "to take the number of shares set opposite our names respectively, and thereon to pay the amount in cash named, to wit, ten per cent. of the amount of stock by us subscribed, to B., treasurer of said corporation," opposite the name of each subscriber, under the words "Stock Subscribed," was written "\$2,000," and under the words "Amount of Cash" was written "\$200 pd." Held, that the obligation on the subscription was not limited to the \$200, but this amount was to be paid contemporaneously with the subscription, and the balance on call.

Commissioners' decision. Department 2. Appeal from superior court, Ventura county; B. T. Williams, Judge.

Action by the Ventura & Ojai Valley Railway Company against J. S. Collins. Judgment for plaintiff. Defendant appeals. Affirmed.

Blackstock & Ewing, for appellant. Barnes & Selby, for respondent.

VANCLIEF, C. The plaintiff is a corporation organized in accordance with the laws of this state for the purpose of constructing and operating a railroad in this state. Its capital stock, as fixed by its articles of incorporation, is \$250,000, divided into 2,500 shares of \$100 each, of which shares only 200 had been subscribed prior to the commencement of this action, and 200 of which were subscribed prior to the incorporation. Subsequent to the incorporation, in June, 1892, the defendant subscribed for 20 shares at the price of \$2,000, and at the same time paid to plaintiff 10 per cent. of the par value thereof, and on June 15, 1893, paid a call of the corporation for an additional 10 per cent. of the subscription, and on July 13, 1893, paid another call for 10 per cent.; said payments aggregating \$400. On June 6, 1895, the corporation made another call on all the subscribers for 40 per cent. of their subscriptions, the defendant's proportion of which was \$800. The defendant refused to pay this last call, and thereupon this action was commenced to enforce payment thereof. The defendant's demurrer to the complaint having

¹ Rehearing granted.

been overruled, and he having declined to answer the complaint, judgment was rendered against him for said sum of \$800, with interest and costs. Defendant brings this appeal from the judgment, upon the judgment roll, and asks a reversal of the judgment on the alleged ground that the court erred in overruling his demurrer.

The alleged grounds of the demurrer are that the complaint is ambiguous and uncertain, and that it does not state a cause of action. In addition to the facts above stated the complaint contains the following allegations: "(4) That prior to the incorporation of the plaintiff corporation there was actually subscribed to its capital stock for each mile of the contemplated work proposed by said corporation \$1,000 per mile, to wit, two hundred shares of stock of the corporation of the par value of \$100 each, aggregating \$20,000, and thereon there was paid for the benefit of the corporation, to a treasurer elected by the subscribers, ten per cent. of the amount subscribed, the agreement for which is more fully set forth in a copy of the original agreement attached to this complaint, and marked 'Exhibit A,' reference being thereto had. (5) That thereafter, and subsequent to the incorporation of the plaintiff, to wit, on or about the 1st day of June, 1892, defendant herein subscribed and agreed to take twenty shares of the capital stock of said plaintiff corporation, and then and there agreed to pay for the same the sum of \$2,000, when and as it might be demanded by said plaintiff, a copy of his (defendant's) subscription to the capital stock of plaintiff corporation being hereto annexed, and marked 'Exhibit A'; and that said defendant, pursuant to said subscription, thereupon and thereafter became and was, and ever since then has been and now is, a stockholder of plaintiff corporation, holding and owning twenty shares of the capital stock of plaintiff corporation of the par value of \$100 each; that said defendant has not paid the said sum of \$2,000, or any part thereof, except as hereinbelow stated, though often requested so to do by the plaintiff." "(8) That in the management of its business operations and in the construction of its railroad this corporation expended about \$16,000, and therein and for its said purposes purchased material, and agreed to pay for the same, and borrowed money, and that the aggregate of its said obligations was about \$10,500 over and above the aggregate of amounts received by it from its stockholders. That to provide the funds to pay the indebtedness of said corporation so created in and about its business and in and about the construction of its railroad as hereinbefore stated, plaintiff corporation herein demanded from each and all of the subscribers to its capital stock and stockholders an additional payment of forty per cent. of the amount of their several subscriptions respectively. (9) That on or about the 6th day of June, 1895, plaintiff herein demanded from defendant the payment of the sum of \$800, being said forty per cent. of the amount of the capital stock for which defend-

ant had subscribed, as hereinbefore stated, and had agreed to pay, and forty per cent. of the par value of the stock of the plaintiff corporation then held and owned by defendant. (10) That said defendant refused to pay said sum of \$800, so demanded by plaintiff herein, or any part thereof, and still refuses to pay the same, or any part thereof, though often requested so to do by plaintiff herein."

The following is a copy of Exhibit A, referred to in the above:

"Exhibit A. Agreement.

"Whereas, for the development of the material interest of the town of San Buenaventura and the territory embraced within the Ranchos Santa Ana and Ojal, it is deemed necessary to have railway communication in and between said town and territory, and in the nature of a street railway; and whereas, a local corporation can best attain such object: Now, therefore, we, the undersigned, hereby agree to and with each other that we will together form a corporation to be known as the Ventura Railway Company, having all the corporate powers that may be deemed necessary or appropriate in the premises. We further agree that we will subscribe to the capital stock of said corporation in and at its organization the sum severally set by us opposite our respective names, and thereon pay in cash ten per cent. in accordance with the law regulating the formation of railway corporations, and upon the subscription hereto of not less than \$20,000; that such corporation shall be formed by the subscribers hereto for the purposes suggested herein.

Subscribers.	Stock Subscribed.	Amount of Cash.
W. S. Chaffee.....	\$2,000	\$200 Pd.
Richard Robinson ..	2,000	200 Pd.
Joseph Hobart	1,000	100 Pd.
E. P. Foster.....	2,000	200 Pd.
K. P. Grant.....	2,000	200 Pd.
E. S. Hall.....	2,000	200 Pd.
J. K. Gries.....	2,000	200 Pd.
G. W. Chrisman....	2,000	200 Pd.
W. H. Wilde.....	2,000	200 Pd.
A. D. Barnard.....	2,000	200 Pd.
A. Bernheim	1,000	100 Pd.

"Whereas, under and pursuant to the foregoing agreement and subscription, there was incorporated the Ventura & Ojal Valley Railway Company, to the capital stock of which there was subscribed the amounts above named by the parties named respectively: Now, therefore, we, the undersigned, subscribe and agree to take the number of shares set opposite our names, respectively, and thereon pay the amount in cash named, to wit, ten per cent. of the amount of stock by us subscribed, to A. Bernheim, treasurer of said corporation:

Subscribers.	Stock Subscribed.	Amount of Cash.
J. S. Collins.....	\$2,000	\$200 Pd.
F. Hartman	2,000	200 Pd.
J. R. Thorpe.....	2,000	200 Pd."

1. Counsel for appellant contend that the averment in the fifth paragraph of the complaint, that the defendant, by his subscrip-

tion, agreed to pay the sum of \$2,000 "when and as it might be demanded," is inconsistent with the subscription itself, as exhibited and made a part of the complaint, because, they say, there is no express promise of Collins, Hartman, and Thorpe, who subscribed after the incorporation, to pay more than 10 per cent. of the \$2,000 subscribed by each of them. The pleader evidently attempted to state the subscription contract according to its legal effect; and, if he did so, the alleged inconsistency does not exist. The only question, therefore, to be considered is one of construction of the subscription agreement. Read in the light of the circumstances alleged in the complaint, I think the subscription agreement implies a promise to pay the full sum subscribed upon such demands or calls as should be made therefor by the corporation; and surely whatever is implied in an agreement, though not expressed, may consistently and properly be alleged in a complaint upon such agreement. A subscriber for stock is one who has entered into an express contract to take a certain definite number of shares of the original issue of stock. Cook, Stock, Stockh. & Corp. Law, § 10, and notes. "The contract of subscription for shares of stock in an incorporated company may be entered into in various ways. Whenever an intent to become a subscriber is manifested, the courts incline, without particular reference to formality, to hold that the contract of subscription subsists. * * * Formal rules are, for the most part, disregarded." Id. § 52, and notes. "A subscription for shares implies a promise to pay for them, and this promise sustains an action to collect, without proof of any particular consideration. This rule of law is sustained by the great weight of authority. The signing of the subscription paper is an implied promise to pay the subscription." Id. § 71. "As a general rule, a call must be made in order to render a subscription, or any part thereof, due and payable to the corporation. A contract of subscription, unlike other contracts to pay money, is a promise to pay; but, by implication of law, the payment is to be only at such times and in such part payments as may be designated by the corporate authorities in a formal declaration known as a 'call.' In other words, the subscription is a debt payable at a future time. The time when it shall be paid is indefinite until fixed by a call." Id. § 105, and notes. The subscription under consideration is an agreement "to take the number of shares set opposite our names, respectively, and thereon to pay the amount in cash named, to wit, ten per cent. of the amount of stock by us subscribed, to A. Bernheim, treasurer of said corporation." The amount in cash named is \$2,000, set opposite the name of the defendant. It seems manifest that it was not intended by the phrase under the videlicet to limit the \$2,000

obligation to 10 per cent. of that sum. The 10 per cent. mentioned was evidently intended to designate merely that portion of \$2,000 which was to be paid contemporaneously with the subscription. Indeed, this construction was practically given it by the acts of the defendant in voluntarily paying two additional calls of 10 per cent. each, long after the subscription, and is the only construction which gives effect to all the language of the contract. The construction contended for by counsel for appellant would make the clause under the videlicet repugnant to that which precedes it, which is not allowable in construing a contract if it can be avoided consistently with the apparent object of the contract and the intent of the parties, which object and intent are to be ascertained by a view of all parts of the contract in connection with the circumstances under which it was made, and the subsequent acts of the parties tending to show how they understood it. Even in pleading, where the office and effect of the videlicet has been somewhat diverse, it was never allowed an effect repugnant to that which it purported to explain or define. Am. & Eng. Enc. Law, and authorities cited. That which the videlicet clause is said to qualify and define in this case is perfectly explicit, and could not have been made more so by definition or explanation. Even on the face of the instrument, and exclusive of the circumstances and subsequent acts of the parties, it is apparent that the parties did not intend to say that the agreement to pay \$2,000 meant the payment of only 10 per cent. of that sum, but only that 10 per cent. was to be paid at the time of the subscription; and this intent is satisfactorily verified by the subsequent acts of the parties in accordance therewith.

2. It is claimed by appellant that the complaint is ambiguous and uncertain as to whether the action is founded upon the subscription agreement or upon the statutory liability of a stockholder to the creditors of the corporation. But I perceive no ambiguity nor uncertainty in this respect. The action is brought by the corporation, and not by a creditor thereof, and unequivocally counts upon defendant's subscription to the capital stock of the corporation.

3. It is claimed that the complaint does not state a cause of action for the same reasons that it is said to be ambiguous and uncertain, and no other reason is specified by counsel. These reasons having been disposed of, no further consideration of this ground of demurrer is necessary. I think the judgment should be affirmed.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

LANE v. TURNER. (S. F. 151.)

(Supreme Court of California. Sept. 28, 1896.)

SALE—ACTION FOR PRICE—SUFFICIENCY OF EVIDENCE—COUNTERCLAIM—INTEREST.

1. The fact that goods sold are charged on the seller's books to another than the one to whom they are delivered is not conclusive evidence that such other was the real purchaser, but is open to explanation.

2. Where one of two partners in farming operations, who was to furnish, as his contribution to the expense of plowing and seeding the land, seed and feed, the value of which was not to exceed \$1,500, furnished seed and feed to a greater amount, and brought assumpsit against his co-partner for the value of the excess, items of indebtedness of plaintiff to defendant, arising out of the partnership transactions between them, which were mere unadjusted claims which might be the subject of an accounting, did not constitute proper counterclaims.

3. A vendee of goods is entitled to interest from the time of filing his complaint, in an action for the price, in the absence of an agreement to pay the account at a specified date.

Department 1. Appeal from superior court, San Joaquin county; W. E. Greene, Judge.

Action by Frank E. Lane against R. M. Turner for goods sold and delivered to defendant, and for money paid as freight on the same, by plaintiff. From a judgment for plaintiff, defendant appeals. Modified.

Freeman & Bates, for appellant. J. H. & J. E. Budd and R. M. Fitzgerald, for respondent.

PER CURIAM. Defendant and one John Herd, Jr., formed a co-partnership for the purpose of farming a large tract of land. A memorandum of their contract was in writing, dated August 20, 1891, and one of its provisions was that Herd, as his contribution to the expense of plowing and seeding the land for the first year, would furnish all seed and feed, "such feed in no case to exceed the sum of \$1,500." October 3, 1891, Herd assigned his interest in said contract to Lane, the plaintiff, who was a grain dealer at Stockton; such assignment being, in terms, "security for feed, grain, and seed furnished to put the land in." On October 7, 1891, Herd wrote to defendant a letter containing this statement: "I arranged on Saturday last with the Lanes, at Stockton, to provide you, as per agreement, with the seed and feed you require. Therefore kindly write them direct, and they will forward the same." Defendant took the letter to plaintiff, who indorsed thereon: "Accepted. Frank E. Lane." Upon the order of defendant, plaintiff shipped to him, before December 31, 1891, feed to the amount in value of \$3,138.38. The purpose of this action is to recover the sum of \$1,638.38, the excess in value of the feed thus supplied above that which Herd promised to furnish, and the further sum of \$121, cash advanced for freight on the same. The complaint is in the ordinary form for the value of goods sold and delivered, and for money paid to the use of defendant.

In his answer, defendant first denied the allegations of the complaint, and then in a separate paragraph—numbered 4—alleged matters which, if true, showed that plaintiff sold the feed and paid the money in question to and for Herd only. He also pleaded as counterclaims, on information and belief, that in February, 1892, plaintiff succeeded to the interest of Herd in said partnership, and is indebted to defendant on account of certain described transactions of the partnership; and, separately, that plaintiff owes him the sum of \$52 for boarding one Harry Lane at plaintiff's request. Plaintiff demurred to the answer and to the counterclaims. The court ordered that "the demurrer to that part of the answer alleging counterclaims—paragraphs 4 and 6—be sustained." At the trial, plaintiff testified that he supplied the feed upon Turner's order, in accordance with the terms of said partnership contract, the written memorandum of which was held by him. Defendant testified that such contract had been changed by oral agreement of himself and Herd, made before the assignment by the latter of his interest thereunder to Lane; that by the terms of such oral modification Herd promised to furnish all the feed, without limitation to \$1,500 in amount, as originally provided, and that the land was farmed under the new contract. These statements were positively denied by Herd, testifying for plaintiff in rebuttal. Judgment went for plaintiff, and included \$224 for interest on his demands from the time of the commencement of the action to date of judgment,—October 8, 1892, to September 5, 1894.

The principal question before the trial court was one of fact. Herd directed Lane to supply Turner with the seed and feed he required "as per agreement"; and with this direction as part of his arrangement with plaintiff, Turner received the goods. The court, upon conflicting evidence, determined that the agreement thus referred to and incorporated into the contract with plaintiff was the stipulation of the original partnership contract, unchanged as claimed by defendant; consequently defendant was chargeable with notice that Herd's credit for the feed procured from plaintiff was limited to the sum of \$1,500, and he was himself liable for what he ordered in excess of that amount. Civ. Code, §§ 2318, 2443. The fact in proof that all the goods were originally charged against Herd on the books of plaintiff was pertinent, but not conclusive, evidence in ascertaining who was the real purchaser, and was open to explanation. Rice v. Heath, 39 Cal. 609.

It is said that the demurrer was improperly sustained to paragraph 4 of defendant's answer. But it was not sustained to the defensive matter there pleaded, and which was really provable under the preceding denial. Most of defendant's evidence at the trial related to the allegations of said paragraph 4 and it is manifest that neither the court nor the parties understood the ruling on the de-

murrer to be a decision that those matters constituted no defense.

As to the averments of indebtedness of plaintiff to defendant arising out of alleged partnership transactions between them,—mere unadjusted claims, which might be the subject of an accounting,—it is not, and hardly could be, seriously contended that they constitute proper counterclaims in this action. *Case v. Maxey*, 6 Cal. 276; *Haskell v. Moore*, 29 Cal. 437. But the counterclaim of \$52 for boarding Harry Lane was valid, and the demurrer thereto should have been overruled. Plaintiff concedes this, and consents that the judgment be reduced accordingly.

The court properly allowed interest on the plaintiff's demands from the filing of the complaint. Civ. Code, § 3287; *Insurance Co. v. Fisher*, 106 Cal. 224, 39 Pac. 758. In this case it was held that, in the absence of an agreement to pay at a specific date for goods purchased, the vendor would be entitled to interest from the time of filing his complaint, the court saying: "At the time he commenced the action his right to recover the open account was vested in him, and was capable of being made certain by calculation, and he was entitled to recover interest thereon from that date." The superior court is directed to modify its judgment by deducting therefrom the sum of \$52 as of its date of entry, and, as so modified, the judgment and order denying a new trial are affirmed.

BUSWELL v. SOUTHERN PAC. CO. (S. F. 494).¹

(Supreme Court of California. Oct. 6, 1896.)
RAILROADS—FRANCHISE TO USE STREETS—CONSTRUCTION OF STATUTE.

In Act May 20, 1861, authorizing municipalities to grant to any railroad company the use of streets for the purpose of reaching an accessible point for a depot, the provision that no company availing itself of the act should use its road "for street railroad purposes, or for the purpose of carrying passengers for a consideration from one point to another in the same city," was inserted to prevent competition between railroad companies covered by the act and local street railways, and not for the purpose of giving the public at large the right to travel free on such railroad within the city limits.

Department 1. Appeal from superior court, Alameda county; John Ellsworth, Judge.

Action by E. G. Buswell to compel the Southern Pacific Company, by perpetual and mandatory injunction, to allow all persons in the city of Oakland to ride on defendant's trains within the city without compensation. From a judgment for defendant, plaintiff appeals. Affirmed.

C. M. Jennings and Thomas V. Cator, for appellant. Jas. C. Martin, A. A. Moore, and Foshay Walker, for respondent.

GAROUTTE, J. This is an action by plaintiff to compel defendant, by perpetual and

mandatory injunction, to grant to all persons in the city of Oakland the right to ride upon defendant's trains on Seventh street within said city without compensation. Upon the 20th day of May, 1861, the legislature of the state of California passed an act giving the power to any county, city, or town to grant to any railroad company now organized, or that might be hereafter organized, under the laws of this state, the use of its streets or highways which were necessary to enable it to reach an accessible point for a depot in such county, city, or town, or to pass through the same, on as direct a route as possible. By such act it was further provided, "Nor shall any railroad company who may avail themselves of the provisions of this section ever use their road for street railroad purposes, or for the purpose of carrying passengers for a consideration from one point to another in the same city." Defendant secured from the city of Oakland the use of Seventh street for its road, under this act. And the question now presents itself, what is the true construction of the foregoing provision of that act?—it being contended upon the part of appellant that by this provision the defendant company is bound to allow all persons to ride free upon its road between any and all points in the aforesaid city. The defendant is forbidden to use its road "for street railroad purposes, or for the purpose of carrying passengers for a consideration from one point to another" in the city of Oakland. We are satisfied this provision was inserted in the act for the purpose of preventing competition between railroad companies covered by the act and local street railways within cities, and was not enacted for the purpose of extending to the public at large the right to travel free upon such railroad within the city boundaries. To forbid the defendant company from carrying passengers from one point to another in the city of Oakland for a consideration is not the equivalent of a declaration that the company must carry all passengers between those points without consideration. It would be a very exceptional case which would invoke a rule of construction that the forbidding of the doing of one thing included a command to do another thing. If it had been intended to impose upon this defendant and others similarly situated the burden of carrying within the city limits all people, without charge, the legislature should have, and would have, used more apt language to express such intention. If it had been intended to give the public the right and privilege of riding free upon the railroads referred to in the act, it was an easy matter to have said so, and language in some degree apt for the purpose would have been used, but here there is no such language. If such was the purpose of the legislature,—if the right of the public to ride free was the consideration which actuated the city in granting the use of its street to the defendant,—why was anything

¹ Rehearing denied.

said in the provision about street railroads? For upon such construction they are totally foreign to the question with which the legislative mind was dealing. If the provision we have quoted was inserted in the act for the benefit of street railroads, by preventing competition,—as we think is apparent,—a construction of the provision giving all the people the right to travel free would be directly antagonistic to the legislative intention, and accomplish the very object the legislature was trying to prevent by the enactment. Again, it is insisted that defendant is a common carrier, and as such is bound to carry all passengers who present themselves; but this can only be so when the carrier is entitled to charge a reasonable compensation for the carriage. We are clear that the intention of the lawmaking power in the enactment of this statute was not such as is contended for by appellant. We find nothing further in the record demanding our consideration. For the foregoing reasons the judgment is affirmed.

We concur: VAN FLEET, J.; HARRISON, J.

HARRIS v. GIBBINS. (Sac. 93.)¹

(Supreme Court of California. Oct. 8, 1896.)

COUNTY SUPERVISORS—CONTRACTS.

A board of county supervisors, under its power to supervise the official conduct of all county officers and direct prosecutions for delinquencies, may employ an expert to examine the books and accounts of county officers.

Department 2. Appeal from superior court, Modoc county; C. L. Claffin, Judge.

Application by G. F. Harris for mandamus to I. W. Gibbins. Judgment for defendant. Petitioner appeals. Reversed.

G. F. Harris, in pro. per. John E. Raker, for respondent.

McFARLAND, J. The board of supervisors of Modoc county, upon the recommendation of the grand jury, employed the appellant as an expert to examine the books and accounts of the county officers of said county at an agreed compensation of five dollars per day. He faithfully performed his duties under said employment, and made his report to the board. He duly presented to said board his itemized claim for his services, in the sum of \$105, which was the just amount due him under the contract, and the claim was by said board regularly approved and allowed. But the respondent, who is county auditor of said county, refused to draw his warrant for said allowed claim, or any part of it, whereupon appellant commenced this proceeding in the superior court to obtain a writ of mandate commanding said respondent to draw such warrant. The case was submitted in the court below upon a demurrer to the petition, and the court rendered judgment in favor of respondent,

and dismissing the writ. From this judgment petitioner appeals.

The only question involved is whether or not appellant's claim is an account "legally chargeable against the county," and this depends upon the solution of the question, did the board have legal authority to employ the appellant for the purpose above stated? The board of supervisors constitute the general governing body within the domain of local county governmental affairs; and, while their jurisdiction is confined within the limits marked by the statutory law by which such jurisdiction is granted, still it includes, not only the powers expressly enumerated, but also those implied powers which are necessary to the exercise of the powers expressly granted, except in the instances where such implied power is expressly or impliedly prohibited. And we think that authority to employ the appellant for the purposes set forth in the petition in the case at bar is necessarily implied from the powers specifically given the board in the county government act. St. 1893, p. 346 et seq. It is there provided (section 1) that counties "are bodies corporate and politic, and as such have the powers specified in this act, and such other powers as are necessarily implied." It is also provided that—speaking of a county—"its powers can only be exercised by the board of supervisors, or by agents or officers acting under their authority, or authority of law." Section 2. It is also provided that a county—acting, of course, through its board of supervisors—has power "to make such contracts, and purchase and hold such personal property, as may be necessary to the exercise of its powers." Section 4. It is further provided (section 25) that the board of supervisors shall have jurisdiction and power "to supervise the official conduct of all county officers, and officers of all districts and other subdivisions of the county charged with the assessing, collecting, safe-keeping, management or disbursement of the public revenue; see that they faithfully perform their duties, direct prosecutions for delinquencies, and when necessary require them to renew their official bonds, make reports and present their books and accounts for inspection," and (same section, subd. 35) "to do and perform all other acts and things required by law not in this act enumerated, or which may be necessary to the full discharge of the legislative authority of the county government." The foregoing provisions of the lawfully warranted the board to employ the services of the petitioner in order to obtain the information necessary to enable it to discharge the duties enjoined on it in the matter of the supervision of county officers, directing prosecutions against them for delinquencies, if necessary, etc. The county government act requires many things of the supervisors which they could not wholly accomplish personally, or do manually with their own hands. It is difficult to conceive how a board of supervisors, in its capacity as a body corporate and politic, could expert books, or

¹ Rehearing denied.

be an expert accountant, and yet the experting of books seems to be necessary to that supervision of county officers which the law expressly imposes upon such board. Power to accomplish a certain result, which evidently cannot be accomplished by the person or body to whom the power is granted, without the employment of other agencies, includes the implied power to employ such agencies; and in such case, when the law does not prescribe the means by which the result is to be accomplished, any reasonable and suitable means may be adopted. Of course, a different rule applies where, from the nature of the act to be done, or the language used in the grant, it is apparent either that the power is to be exercised and the duty performed entirely by the personal exertions of the officer or agent named, or that he is to be limited to the means and agencies enumerated in the law by which the power is granted. There is nothing in the decision of the case of *Modoc Co. v. Spencer*, 103 Cal. 498, 37 Pac. 483, which conflicts with the views above expressed. Indeed, it is in clear accord with the principle above stated, as above limited. The decision of that case rested upon the maxim "*Expressio unius est exclusio alterius*"; it being there held that, the cases in which the board of supervisors might employ counsel being enumerated in the statute, power to employ counsel in other cases was impliedly excluded. The judgment is reversed, with direction to the superior court to grant the writ of mandate as prayed for in the petition.

We concur: TEMPLE, J.; HENSHAW, J.

HAYFORD v. WALLACE. (Sac. 84.)

(Supreme Court of California. Oct. 6, 1896.)

FRAUDULENT CONVEYANCES—INSOLVENT TRUSTEES—QUIETING TITLE—WHO CAN MAINTAIN ACTION—EQUITABLE OWNER—EVIDENCE.

1. Land conveyed to a father in trust for his minor son, who pays the consideration with money earned by himself, or given to him by the father, who is then solvent, is not subject to the lien of subsequent judgments against the father, so as to render his voluntary conveyance of the land, after becoming insolvent, fraudulent as to his creditors.

2. Land which had been conveyed in trust for the sole use of the minor son of one of the trustees was, after the minor reached his majority, conveyed by the joint deed of the father and son to the mother, in consideration of love and affection, the second trustee not joining in the conveyance. Held that, as the purpose of the trust had ceased on the son's becoming of age, his equitable title passed to the grantee, so far as to enable her to maintain suit to quiet title against all persons except the holders of the legal title.

3. In an action to quiet title, where defendant set up that the deed of plaintiff was made to defraud the grantor's creditors, among whom was defendant, an offer by defendant to prove by the grantor, on cross-examination, that while the latter was insolvent he sold certain other land to another person for a nominal consideration, with a view of defrauding his creditors, was properly refused as not legitimate cross-examination.

4. Error in rejecting evidence is cured by its subsequent admission.

Commissioners' decision. Department 1. Appeal from superior court, Placer county; Matt. F. Johnson, Judge.

Action by Abbie A. Hayford against Emeline Wallace to quiet title. Defendant answered, setting up that the conveyances to plaintiff were fraudulent, and filed a cross complaint to quiet title to the same lands. A decree was rendered quieting plaintiff's title to one part of the land, and quieting defendant's title to another portion, and both parties appealed from orders denying their motions for new trials. On defendant's appeal. Affirmed.

Wallace & Wallace and Henley & Costello for appellant. John M. Fulweiler and Ben. P. Tabor, for respondent.

SEARLS, C. This is an action by Abbie A. Hayford to quiet her title to certain parcels of land situate in Placer county. Defendant, by her answer, denied the title of plaintiff, and in apt terms averred that the land was the property of W. B. Hayford, the husband of plaintiff, who in December, 1886, was insolvent, and in contemplation of insolvency, and for the purpose of defrauding his creditors, without consideration other than love and affection, on the 7th day of December, 1886, executed a deed of conveyance of certain of the lands to his wife, the plaintiff, and that afterwards, and on the 8th day of November, 1889, under like circumstances, with a like intent and upon a like consideration, he, the said W. B. Hayford, executed another deed of conveyance to the plaintiff of the remainder of the land and premises in the complaint described. Plaintiff is averred to have had full notice of the facts. Defendant was, as is alleged, at the date of said deeds a creditor of said W. B. Hayford to the extent of more than \$2,500. Other facts tending to show the conveyances fraudulent are alleged, but need not be noticed here. Defendant also interposed a cross complaint, in which she showed that subsequent to such conveyances she procured judgment against W. B. Hayford upon a portion of the indebtedness due her from him, and issued execution, under which a levy was made upon such lands, a sale had, and the lands purchased by her, and that in due time she received a sheriff's deed for all of said lands, and thereby became the owner thereof, and prays that her title thereto may be quieted. Plaintiff answered the cross complaint, and denied all fraud, etc. The cause was tried by the court, written findings filed, and a decree was entered thereon quieting the title of plaintiff to the parcel of land described in the deed of November 8, 1889, and quieting the title of defendant to the parcels of land described in the conveyance of December 7, 1886. Each of the parties moved the court for a new trial as to so much of the issues as were adverse to her, and, their several motions having been denied, each of the parties has appealed from the orders. This case (No. 84) is on defendant's appeal.

So far as this appeal is concerned, we may

dismiss consideration of the deed of 1886, as the findings relating thereto are in favor of appellant, and she is not assailing them. Turning to the deed of November 8, 1889, we find the findings and conclusions of law are assailed by appellant upon various grounds, the more important of which are: (1) The deed of November 8, 1889, is either void or voidable for the reasons: (a) That the testimony showed that W. B. Hayford was insolvent at the date thereof; and while the court found that he was insolvent in December, 1886, it failed to find upon the issue of such insolvency in 1889, when the deed of the last-mentioned date was executed. (b) That the testimony and findings show that W. B. Hayford and E. W. Moore held the property in trust for W. M. Hayford, the son of W. B. Hayford, and that, as said Moore did not join in the deed to plaintiff, it is void under sections 860 and 870 of our Civil Code. (c) The consideration of the deed is love and affection.

If the father, W. B. Hayford, held as a trustee, the deed is void for want of proper execution by the proper parties. On the other hand, if the father had a beneficial interest in the property, it is void because the father was in debt, and could not make a voluntary conveyance.

The following statement of facts, as found by the court, or illustrated by the evidence, is essential to a correct understanding of the points made by appellant: On the 17th day of May, 1882, one J. R. Johns, being the owner thereof, by grant, bargain and sale deed, conveyed to one E. W. Moore and to W. B. Hayford, in trust for W. M. Hayford (his son, then of the age of, say, 17 years) the tract of land in question, consisting of 80 acres of land. The consideration of the deed was \$400, of which sum the infant son paid one-half, viz. \$200 of his own money, which the evidence shows he earned by selling fruit, etc., at the railroad depot, Colfax, and which he had deposited in bank at Sacramento. E. W. Moore paid his half of the purchase money. W. M. Hayford, the infant, entered into possession of the land so purchased, and paid his share of the expense of improving and cultivating the same, amounting to a large sum of money. It is quite apparent, we think, from the testimony, that the parties did not understand that any trust relation existed, except as to the undivided half of W. M. Hayford, the minor. The conveyance, however, is worded in part as follows: "This indenture, made the 17th day of May, 1882, between J. R. Johns, of Amador county, state of California, party of the first part, and Ellsha W. Moore, of Beaver county, state of Pennsylvania, and W. B. Hayford, in trust for W. M. Hayford, a minor, parties of the second part, for and in consideration of the sum of \$400, * * * doth grant, bargain, sell, and convey unto the parties of the second part and their heirs and assigns forever," etc. There is in the deed no other indication of a trust, save in the foregoing

quotation. On the 8th day of November, 1889, the minor, W. M. Hayford, who was at the last-mentioned date 24 years of age, united with his father, W. B. Hayford, the latter of whom is described as "trustee," in a conveyance of the undivided one-half of the said 80 acres of land to the plaintiff herein. Love and affection are mentioned as the consideration of the conveyance, which is in the usual form of a grant, bargain and sale deed. There is not in the pleadings any allegation, nor was there any evidence tending to show, that W. B. Hayford was insolvent prior to 1886. The appellant here was not a creditor of Hayford until 1885. When, on the 17th day of May, 1882, Johns conveyed the property in question to Moore and W. B. Hayford in trust for W. M. Hayford, a minor, the effect of that conveyance was (conceding that the whole estate, and not one-half thereof, was intended to be held by the grantees for the benefit of the minor, as claimed by appellant) to vest the title in Moore and W. B. Hayford, for the sole benefit of the minor. Appellant contends that as the minor lived at the time with his parents, and as there was no evidence that W. B. Hayford had relinquished his right to the earnings of his son, the \$200 paid by the latter is to be regarded as the money of the father. We think, when the father permitted his son to engage in the business of selling fruit, receiving and banking the proceeds in his own name, and, without objection, permitted him to pay it out as the consideration for land purchased for his benefit, it was sufficient evidence that the father had assented to the ownership of the money by the son, as found by the court. The question is of no practical importance, however, in the determination of the case, for the reason that W. B. Hayford, being, so far as appears, entirely solvent at that date (1882), might with the utmost propriety give to his minor son the modest sum of \$200 to enable the latter to purchase land with which to engage in the fruit and vineyard business. In either aspect of the case, then, the minor son had, as against his father, the entire beneficial interest in the land, with only the naked title in the father, or in the father and Moore. W. B. Hayford never had any interest in the land to which the lien of appellant's later judgment could attach, or which in 1886, when he became insolvent, or at any time thereafter, he could convey in fraud of his creditors, or of any one except his cestui que trust. A bankrupt may continue to discharge his duty as a trustee, and trust property in his possession does not go to his assignee or to his creditors. Perry. Trusts & Trustees, §§ 345-358. Under these circumstances, the insolvency of said Hayford in 1889, when he united with his son in a conveyance to the respondent here, becomes a false quantity in the problem, and it was not necessary to find thereon.

The deed of November 8, 1889, is a joint one by W. B. Hayford, trustee, and W. M. Hay-

ford, as parties of the first part, and, in consideration of love and affection, conveys the undivided one-half of the 80 acres of land theretofore, and since 1882, held in trust for W. M. Hayford, to Abbie A. Hayford, her heirs and assigns. W. M. Hayford, as before stated, had reached his majority. The entire object of the trust, viz. to hold the legal title during the minority of said W. M. Hayford, had been accomplished. "When the purpose for which an express trust was created ceases, the estate of the trustee also ceases." Civ. Code, § 871. It is true, the naked legal title was vested in W. B. Hayford, or in him and Moore. It is equally true that, as a rule, two or more trustees must join in a conveyance of the legal title. But W. M. Hayford, having at the date of his conveyance a perfect equitable title, could convey the same; and, having done so, his grantee, the respondent here, became and is vested with such equitable title, and by virtue thereof is in a position to command a conveyance of the legal title, if desired. As such holder of the equitable title, respondent is in a position to maintain an action to quiet her title against the defendant and all persons except the holders of the legal title. *Orr v. Stewart*, 67 Cal. 273, 7 Pac. 693; *Smith v. Brannan*, 13 Cal. 107; *Wilson v. Madison*, 55 Cal. 5.

The alleged error of the court in refusing to permit defendant to prove by W. B. Hayford, on cross-examination, that while he was insolvent, to wit, on December 3, 1886, with a view of defrauding, hindering, and delaying his creditors, etc., he sold to Jacob H. Neff 972 acres of land for the nominal consideration of \$500, cannot be maintained for the reasons: (1) It was not legitimate cross-examination. (2) For the reason that as he did not own any interest in the tract of land here in dispute at that time, and had not for years prior to the time he is averred to have become insolvent, it was wholly irrelevant and immaterial. (3) And for the further reason that the court at a later period in the trial permitted this very proof. We recommend that the order appealed from be affirmed.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is affirmed.

GOLINSKY et al. v. ALLISON et al.
(Sac. 118.)

(Supreme Court of California. Oct. 7, 1896.)
POWER OF ATTORNEY—CONSTRUCTION—RATIFICATION OF ACT OF AGENT.

1. A power of attorney to an agent authorizing him to "superintend" property of his principals, and to "preserve, manage, sell, and dispose of" the same, and to "manage, work, sell, and dispose of" other property, did not confer authority on the agent to execute a promissory note in the name of his principals, or to mortgage

their property to secure the same, though the note was given in settlement of an antecedent debt contracted by the agent in the management of the property.

2. Under the provision of Civ. Code, § 2310, that a ratification can be made only in the manner that would have been necessary to confer an original authority for the act ratified, the fact that principals made no objection to the execution of a mortgage by an agent in their names, to secure a prior indebtedness contracted by the agent, will not constitute a ratification of the act, it not appearing that they had knowledge of the fact until action to foreclose was brought.

Department 1. Appeal from superior court, Shasta county; Edward Sweeney, Judge.

Action by Golinsky and others against Allison and others. Judgment for plaintiffs, and defendants appeal. Reversed.

C. P. Robinson, L. D. McKislick, and T. M. Osmond, for appellants. Clay W. Taylor and J. Chadbourne, for respondents.

HARRISON, J. The plaintiffs brought this action to foreclose a mortgage upon certain property—mining claims and other real estate—situate in the county of Shasta. The mortgage, and also the promissory note for which it was given as security, were executed to the plaintiffs by the defendant Barron for himself and as the attorney in fact of his co-defendants, Allison and Sackett. The power of attorney from Allison and Sackett to Barron, under which these instruments were executed, gave him authority "to superintend all our property in Shasta county, and state of California, known as the 'Snyder Mine,' and all other mines acquired by us by purchase or otherwise, and also all water rights and mill property; and to preserve, manage, sell, and dispose of any and all of the said mines, mills, or other property in such manner as he shall deem meet and proper and for our best interest; and also to locate mill sites, town sites, mining claims, and water rights, and take all the necessary legal steps or proceedings to accomplish the same, and manage, work, sell, and dispose of any and all of them to our best advantage." The court held that the authority given by this power of attorney was sufficient to authorize the execution of the note and mortgage, and rendered judgment in favor of the plaintiffs. The defendants have appealed.

A power of attorney, like any other instrument, is to be construed according to the natural import of its language; and the authority which the principal has conferred upon his agent is not to be extended by implication beyond the natural and ordinary significance of the terms in which that authority has been given. The attorney has only such authority as the principal has chosen to confer upon him, and one dealing with him must ascertain at his own risk whether his acts will bind the principal. By the above letter of attorney given by Allison and Sackett to Barron, he had authority to "superintend" the property of his principal-

pals, and to "preserve, manage, sell, and dispose of" the same, and also to locate mill sites, mining claims, and water rights, and "to manage, work, sell, and dispose of them." A power to sell and convey real estate does not authorize the attorney to mortgage it. *Jeffrey v. Hursh*, 49 Mich. 31, 12 N. W. 898; *Wood v. Goodridge*, 6 Cush. 117; *Brown v. Rouse*, 93 Cal. 237, 28 Pac. 1044. For an exhaustive discussion of the subject, see *Campbell v. Association*, 163 Pa. St. 609, 30 Atl. 222, 224. "The power is not to be extended by construction. The principal determines for himself what authority he will confer upon his agent, and there can be no implication, from his authorizing a sale of his lands, that he intends that his agent may, at discretion, charge him with the responsibilities and duties of a mortgagor." *Jeffrey v. Hursh*, supra. In *Billings v. Morrow*, 7 Cal. 171, it was held that an attorney who was authorized to "superintend" the real and personal estate of his principal had no authority to make a sale of the property. There is clearly no power conferred by the above instrument to execute a promissory note in the name of the principals, or to mortgage their property to secure its payment. The authority to "preserve and manage" the property, or to "manage and work" it, cannot, by any reasonable construction, be held to include an authority to mortgage it, and is inconsistent with the idea of imposing a personal charge upon the principals, except for such expenses as may be incurred in its preservation and management. It was shown that the promissory note in question was given for money paid out by the plaintiffs to the workmen in the mines, and also for merchandise purchased for the mines, upon the order of Barron, and the respondents contend that this was within the authority given to Barron to preserve and manage the mining claims, and formed a sufficient consideration for the execution of the promissory note. It does not appear at what time the money was paid or merchandise furnished for which the note was executed, but it was shown that it had all been paid and furnished prior to its execution. The note and mortgage were, therefore, executed in consideration of an antecedent obligation, and not for the purpose of preserving or managing the property. The money and merchandise thus furnished by the plaintiffs would doubtless have formed a sufficient consideration for the execution of the promissory note by Allison and Sackett; but, unless they had given to Barron authority to execute the note for them, they could not be held liable for its payment, even though they had derived an advantage by reason of the consideration upon which he had executed the note; and, even if they could have been held liable for the moneys so paid and the merchandise so sold upon his order, they had not given him any authority to bind them for the payment of interest thereon at

the rate of $1\frac{1}{2}$ per cent. per month, or to secure the same by a mortgage. The testimony of Sackett that neither he nor Allison ever objected or found fault with the giving of the mortgage, did not constitute a ratification of its execution by Barron. Civ. Code, § 2310. It did not appear that the execution of the mortgage was known by either Allison or Sackett prior to the commencement of the action. The judgment and order are reversed.

We concur: GAROUTTE, J.; VAN FLEET, J.

In re SILVAR'S ESTATE. (S. F. 831.)
(Supreme Court of California. Oct. 7, 1896.)
ADMINISTRATORS—APPOINTMENT OF STRANGER—
REVOCATION OF REQUEST BY HEIR—APPEAL.

1. Code Civ. Proc. § 1379, having authorized a court to appoint a stranger as administrator of an estate upon the written request of one who would himself be entitled to letters of administration, where such request and a renunciation have been filed by a petitioner, and proceedings for his appointment have been instituted, the heir will not be permitted to revoke it without reason.

2. Where an order refusing to permit an heir to withdraw a request for the appointment of another as administrator of an estate is based on conflicting testimony, it will not be reversed on appeal.

Department 1. Appeal from superior court, Santa Cruz county; J. H. Logan, Judge.

Application for the appointment of Joseph L. Enos as administrator of the estate of Silvar, deceased. From an order granting the petition, Antonio Silvar appeals. Affirmed.

Frank B. Josepha, Delmas & Shortridge, Edw. A. Holman, and Edw. H. Shaw, for appellant. Lindsay & Cassin, for respondent.

PER CURIAM. A petition for letters of administration upon the estate of the above-named decedent was filed in the superior court by Joseph L. Enos, who stated therein that he had been requested by Antonio Silvar, the brother of the deceased, to act as administrator of the estate, and accompanied his petition with the written renunciation by said Antonio of his right to letters of administration upon the estate, and a request to the court to appoint Enos as such administrator. Prior to the day set for hearing the petition, Antonio filed a revocation of his said renunciation, and a petition that he might himself be appointed administrator of the estate, and also filed an opposition to the appointment of Enos, upon the ground of his incompetency. The petitions were heard together, and the court granted that of Enos, and ordered letters of administration to be issued to him. From this order Antonio has appealed.

The court found "that the revocation of the waiver of said Antonio of his right to act as such administrator, and his request for the appointment of said Enos, as stated in the

findings herein, was without reason in fact, but such revocation was solely on the ground that said Antonio had changed his mind in relation thereto"; and, as a conclusion of law, found "that said revocation by said Silvar was not authorized in law, and was for that reason void." The principal grounds urged upon the appeal are that the request of Antonio for the appointment of Enos was obtained by fraud, and was made upon the agreement by Enos that he would withdraw whenever Antonio should so wish, and that since making the request Enos had manifested such hostility to the rights of Antonio as to justify the withdrawal of his request. The evidence upon these several questions of fact was sharply conflicting at the trial, and we are therefore precluded from disturbing the conclusions of the court thereon. The statute (Code Civ. Proc. § 1379) authorizes the court to appoint a stranger as administrator, upon the written request of one who would himself be entitled to letters of administration; and in *Re Kirtlan's Estate*, 18 Cal. 161, it was held that after having made such request, and encouraged the petitioner to go to the expense and trouble of applying for the office, the heir would be estopped from withdrawing his renunciation. See, also, *In re Bedell's Estate*, 97 Cal. 339, 32 Pac. 323. The order is affirmed.

In re BULLARD'S ESTATE. (S. F. 564.)
(Supreme Court of California. Oct. 7, 1896.)
APPEAL—DISMISSAL—NECESSARY PARTIES—PROBATE PROCEEDINGS.

1. An appeal from an order approving the report of an administrator, by a contestant, on the ground that the report contains a claim improperly allowed against the estate, will not be dismissed because no notice of appeal was served on the claimant, where it does not appear that such claimant was a party to the proceeding below.

2. The fact that an order may have been made by a court in a probate proceeding without having before it necessary parties constitutes no ground for the dismissal of an appeal from such order.

Department 1. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

Appeal from an order approving the report of the administrator of the estate of Bullard, deceased. Motion by respondent to dismiss the appeal. Denied.

Geo. D. Collins, for appellant. H. H. McKee and Tobin & Tobin, for respondent.

HARRISON, J. The administrator of the estate of the above-named decedent rendered to the superior court his account of the administration of said estate for settlement, and in connection therewith reported a claim against the estate, in favor of the Hibernia Savings & Loan Society, which had been presented and allowed by him, for the sum of \$1,816.25, and afterwards approved by the

judge, and filed in the court. On the hearing of the settlement of said account one of the heirs of the decedent contested the allowance of this claim, and excepted to the account in this respect; but his exception was overruled, and the account was settled and allowed. In his appeal from this order the notice of appeal was served upon the administrator alone, and the motion is now made to dismiss the appeal upon the ground that the notice of appeal was not served upon the claimant; that the claimant is in reality the adverse party, without whose presence this court has no jurisdiction to review the order appealed from.

In *Re Delaney's Estate*, 110 Cal. 563, 42 Pac. 981, it was held, in reference to the appeal then before the court, that the executor was the only adverse party upon whom it was necessary to serve the notice of appeal from the order settling his account, for the reason that he was the only party adverse to the contestant in the matter then appealed from. It was not held, nor was it stated as a rule of procedure, that, in every appeal from an order settling the account of an executor, he is the only adverse party upon whom the notice of appeal must be served. In an appeal from such order, as in any other appeal, whenever it appears that there are others affected by the appeal, whose interests are adverse to the appellant, their presence in the appellate court is necessary to give that court jurisdiction to review the matter appealed from. It is only the record upon the appeal, however, which can be examined for the purpose of ascertaining who are adverse parties to be served with the notice of appeal. *Harper v. Hildreth*, 99 Cal. 265, 33 Pac. 1103. "And the record which is to be considered for that purpose is the record of the proceeding in which the appeal is taken." In *re Ryer*, 110 Cal. 556, 42 Pac. 1082. It does not appear from the bill of exceptions in the present case that the Hibernia Savings & Loan Society was in any respect a party to the proceedings in the superior court from which the present appeal is taken, and unless it was a party thereto it was not necessary to serve the notice of appeal upon it.

The suggestion by the respondent that the superior court had no jurisdiction to pass upon the contestant's exception to the allowance of its claim, for the reason that no citation had been issued to the claimant, and that the claimant had had no opportunity to be heard upon the exception, is unavailing as a reason for dismissing the appeal. It was held in *Re Ryer's Estate*, 110 Cal. 556, 42 Pac. 1082, that while a failure to serve the adverse party with notice of the intention to move for a new trial might be a reason for denying the motion in the superior court, and might upon an appeal, if such service was necessary, be a ground for affirming or reversing the order appealed from, it does not deprive this court of jurisdiction

to hear the appeal, or constitute a ground for its dismissal. See, also, *Herriman v. Menzies* (Cal.) 44 Pac. 660. The principles applicable to an appeal from an order denying a new trial are applicable to the present appeal. The motion is denied.

Weconcur: GAROUTTE, J.; VAN FLEET, J.

ASCHA et al. v. FITCH. (Sac. 115.)
(Supreme Court of California. Oct. 8, 1896.)
MINING LIEN CLAIM—SUFFICIENT—ACTION TO ENFORCE—NONSUIT.

1. Under Code Civ. Proc. § 1187, which requires the claimant of a lien for labor performed on a mining claim to file for record his claim, containing a statement, among other things, of "the name of the owner or reputed owner, if known, and also the name of the person by whom he was employed," a lien claim which fails to state by whom the claimant was employed is fatally defective.

2. A claim for lien, after describing the mining claim, stated that F. was the owner of the claim, "the said lien being held and claimed for and on account of work and labor performed by me as a miner for said F. on said mining claim" for a period definitely stated, "under an agreement with said F.," etc. *Held*, that such claim stated by whom the claimant was employed, as required by Code Civ. Proc. § 1187.

3. Such claim of lien contained a sufficient statement of the "terms, time given, and conditions of the contract," as required by statute.

4. Where the precise words of the statute have not been used by the claimant of a lien for labor done on a mining claim, but substantially equivalent expressions have been resorted to, it is a sufficient compliance with the statute.

5. In an action to enforce a lien for labor done on a mining claim, where it appears that the claim for lien is insufficient because it fails to state by whom the claimant was employed, the claimant is entitled to a personal judgment against defendant for the amount due him, and it is error to grant a motion for nonsuit.

Commissioners' decision. Department 1. Appeal from superior court, Siskiyou county; J. S. Beard, Judge.

Action by Nathan Ascha and others against C. S. Fitch to enforce three several liens, one in favor of each of the plaintiffs, on the Gold Nugget mining claim. From a judgment of nonsuit, plaintiffs appeal. Reversed.

Warren & Taylor, for appellants. Herbert R. Raynes and L. F. Coburn, for respondent.

SEARLS, C. This action is brought to enforce three several liens, one in favor of each of the plaintiffs, for labor performed upon the Gold Nugget mining claim, situate in the county of Siskiyou, Cal. The three plaintiffs united in the action, as under section 1195 of the Code of Civil Procedure they may properly do. At the trial the liens were severally offered in evidence. To their introduction, and to the introduction of each of them, counsel for defendant objected, "upon the grounds that it is incompetent, irrelevant, immaterial, and, further, that it does not comply with section 1187 of the Code of Civil Procedure, which section provides what these claims of lien shall contain.

It is not verified, as provided by law it shall be. It does not contain the name of the person by whom this man was employed. It does not contain a statement of the terms, time given, or conditions of the contract." The court sustained the objection, to which ruling counsel for plaintiffs duly excepted. Thereupon counsel for plaintiffs rested, and on motion of defendant's counsel a nonsuit was granted. These several rulings were relied upon by the plaintiffs in a motion for a new trial, and from an order denying such motion they appeal.

There was proof of the performance by plaintiffs of the labor for defendant upon the mining claims, and of the filing of the liens in due time, and the first question involved relates to the sufficiency of the several liens and of the affidavits thereto. We are of opinion that the ruling of the court in excluding the lien of George F. Ascha, one of the plaintiffs, was correct. Under section 1187 of the Code of Civil Procedure, the lien claimant is required to file for record his claim, containing a statement, among other things, of "the name of the owner or reputed owner, if known, and also the name of the person by whom he was employed," etc. The lien filed by said George F. Ascha states that C. S. Fitch is the owner and reputed owner, but fails to state by whom he was employed. This was a fatal omission. *Wood v. Wrede*, 46 Cal. 637. Different considerations apply to the other two liens. They are substantially alike, and we set out one in full, with the affidavit attached thereto, as a type of the other. It is as follows:

"Know all men by these presents, that I, L. F. McCoy, of Sawyer's Bar, Siskiyou county, state of California, do hereby give notice of my intention to hold and claim a lien, by virtue of the statute in such case made and provided, upon that certain real estate in said Siskiyou county, in Liberty mining district, and known as the 'Gold Nugget Mining Claim'; that C. S. Fitch is the owner and reputed owner of said mining claim, the said lien being held and claimed for and on account of work and labor performed by me as a miner for said C. S. Fitch upon said mining claim for the period of thirty-six days from the 10th day of April, 1894, up to and including the 30th day of May, 1894, under an agreement with said C. S. Fitch, for an agreed per diem of \$2.50, amounting in the aggregate to the sum of \$90; that by the terms of said agreement I was to receive my pay at the end of each and every week; that I have received for said work and labor the sum of \$16, and no more, leaving a balance still due, owing, and unpaid to me of the sum of \$74; that thirty days have not elapsed since the performance of said work and labor. L. F. McCoy.

"State of California, County of Siskiyou—ss.: On this 23d day of June, 1894, personally appeared L. F. McCoy, who, being by me first duly sworn, on his oath says that the abstract of indebtedness mentioned and described in the foregoing notice is true and correct, and that there is still due and owing to him from

the said C. S. Fitch, for the work and labor aforesaid, the sum of \$74, after deducting all just credits and offsets. L. F. McCoy.

"Subscribed and sworn to before me this 23d day of June, 1894. [Seal.] John S. Hughes, Notary Public for Siskiyou County, Cal."

From the foregoing notice it will be observed that the claimant states, among other things: (1) That the owner and reputed owner of the mining claim is C. S. Fitch. (2) That the lien is claimed on account of labor performed by claimant upon the mining claim for said C. S. Fitch. (3) That it was performed under an agreement with said C. S. Fitch, for an agreed price of \$2.50 per day, payable at the end of each week. (4) That he has received for such work a given sum, and no more, leaving a balance of \$74 due and owing. (5) The affidavit states that said sum of \$74 is still due and owing him, after deducting all just credits and offsets.

To say that A. performed labor for B. does not necessarily imply that B. employed him; but to assert that A. performed labor for B. under an agreement with the latter as to the rate of wages and time of payment is to allege substantially that A. was employed by B. The notice of lien contained a sufficient statement of the "terms, time given, and conditions of the contract." It is true that a mechanic's lien is purely a statutory creation, and that he who would avail himself of its benefits must show a substantial compliance with the terms of the statute. It by no means follows, however, that courts should give to the statute a construction tending, by its technicality, to fritter away, impair, or destroy the benign objects aimed at in its adoption. Whatever is made necessary to the existence of the lien must be performed, or the attempt to create it will be futile. But we are not called upon to hold the claimant to a rigid technicality as to the manner of performance; and where it appears that the precise words of the statute have not been used by the claimant, but that other and substantially equivalent expressions have been resorted to, it will be deemed a sufficient compliance with the requirements of the law. In this view of the case, the liens of L. F. McCoy and Nathan Ascha were sufficiently explicit to entitle them to be admitted in evidence, and their exclusion was erroneous.

2. The order granting defendant's motion for a nonsuit was erroneous. The lien of O. F. Ascha, as before stated, was without validity, but, upon the evidence disclosed by the record, he was entitled to a personal judgment against the defendant for the amount due him. *Morris v. Wilson*, 97 Cal. 644, 32 Pac. 801; *Lacore v. Leonard*, 45 Cal. 394; *Code Civ. Proc.* § 580. We recommend that the order denying a motion for a new trial be reversed, and a new trial ordered.

We concur: VANOLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order denying a motion for a new trial is reversed, and a new trial ordered.

KELLEY v. SERSANOUS, County Treasurer.
(Sac. 166.)

(Supreme Court of California. Oct. 6, 1896.)

EVIDENCE—BURDEN OF PROOF.

In an action to compel a county treasurer to pay a warrant, plaintiff alleged that under a contract with the county he had collected certain money due it, for which his compensation was to be 50 per cent.; that he presented his claim to the supervisors, who allowed it; that the auditor drew a warrant, and that the treasurer refused to pay it. The answer denied any agreement with plaintiff except a certain written contract, substantially as alleged by plaintiff. The answer averred that such contract was ultra vires and void, denied that plaintiff rendered any services under the contract, and alleged that the county from which the money was collected had instituted an action to recover it back, and that the same was still pending. The contract with plaintiff did not, on its face, appear to be ultra vires or void. *Held*, that the pleadings made a prima facie case in favor of plaintiff, and the burden of proof was on defendant to show facts, if any existed, to defeat the case thus made.

Commissioners' decision. Department 1. Appeal from superior court, Glenn county; Frank Moody, Judge.

Petition by K. E. Kelley for a writ of mandate to compel J. F. Sersanous, treasurer of Glenn county, to pay a warrant drawn on said treasurer by the county auditor, and payable to petitioner. From a judgment in favor of defendant, petitioner appeals. Reversed.

John T. Harrington, for appellant. George D. Dudley, for respondent.

SEARLS, C. Writ of mandate to compel the defendant, as treasurer of the county of Glenn, to pay a warrant for \$811.36, drawn upon the said treasurer by the county auditor, and payable to petitioner. Defendant had judgment in the court below, from which judgment plaintiff appeals.

At the trial the plaintiff or relator read to the court his petition and the answer thereto, and rested his case. Thereupon defendant declined to introduce any evidence, and the cause was submitted to the court, and thereafter it filed written findings, specifying that the "contract alleged and set out in the answer of the defendant, and alleged as the contract upon which the claim of the plaintiff and relator is based, is ultra vires and void." The question involved in the case is this: Under the pleadings, upon whom did the burden of proof rest? Had the plaintiff moved the court for judgment upon the pleadings, he would, in effect, have admitted that all of the averments of the answer were true. *Ward v. Flood*, 48 Cal. 46; *Fleming v. Wells*, 65 Cal. 339, 4 Pac. 197; *People v. Johnson*, 95 Cal. 474, 31 Pac. 611; *McGowan v. Ford*, 107 Cal. 177, 40 Pac. 231. He did

not, however, thus move the court, but contented himself with submitting his case upon the admissions of the pleadings, upon the theory that under such pleadings the burden of proof was cast upon the defendant. The following is a summary of so much of the pleadings as are important for the purpose in view. The petition for the writ of mandate shows, among other things: (1) Defendant is treasurer of Glenn county. (2) That on the 15th day of November, 1892, the board of supervisors of Glenn county, being advised that said Glenn county had divers claims and demands against the county of Colusa, entered into an agreement with petitioner whereby they employed him, as an attorney at law, to collect the same, by action at law or otherwise, for the use of Glenn county, and for his compensation he was to receive 50 per cent., or one-half, of all he should collect. (3) That he performed services under said agreement, whereby there was paid into the state treasury, for the credit of Glenn county, in November, 1894, on account of railroad taxes, under what is known as the "Reassessment Act," in cases where former assessments were void, etc., the sum of \$1,622.72. The 4th, 5th, 6th, 7th, and 8th paragraphs of the petition, all of which are by the answer and findings of the court admitted and found to be true, are statements in apt words and proper form of the making and filing with the clerk of petitioner's claim for one-half of the sum collected, viz. for \$811.36, duly verified, etc.; the consideration thereof by the board of supervisors, and the allowance thereof by said board, and an order for its payment; the drawing of a warrant therefor by the auditor in his favor on the common fund; the presentation thereof to the county treasurer, and the indorsement thereon by the treasurer, "Not paid, for the want of funds;" that on June 13, 1895, there were in the treasury funds to pay said warrant, and demand of payment thereof, and refusal of the treasurer to make such payment. The answer denies that there was any agreement with petitioner except a certain written contract, which is set out in *hæc verba*, and which, not being denied, as provided by section 448 of the Code of Civil Procedure, is to be taken as admitted. This contract, which is duly executed and approved by the district attorney, recites that the board of supervisors of Glenn county, by and with the advice and consent of the district attorney, agrees and contracts with K. E. Kelley that all debts, dues, and demands within the province and power of the board against the county of Colusa, growing out of the division of Colusa county and the formation of Glenn county, and due to said Glenn county, are turned over to Kelley for collection, and he is authorized to sue therefor in the name of Glenn county, and to take all necessary steps to recover the same. Kelley is to pay all costs and expenses, and to give a bond

to hold Glenn county harmless therefrom. Suit to be brought on or before May 1, 1893, and to be diligently prosecuted, unless a satisfactory settlement is reached before the last-named date. Kelley to receive one-half of all sums collected (except school moneys); the other half to be turned over to Glenn county. The answer avers this contract "so entered into by the board of supervisors was ultra vires and void." The answer sets up other defenses, among which are: (1) That it denies, on information and belief, that Kelley rendered any services under the contract, but that the sum of \$1,622.72 was apportioned to Glenn county by the state board of equalization on account of back taxes collected from a railroad company upon its road extending through said Glenn county. (2) That Colusa county claims this identical money from Glenn county, has instituted an action to recover the same, which is pending and undetermined, etc.

In *McGowan v. Ford*, 107 Cal. 177, 40 Pac. 231, it was held, in substance, that where it is averred in the petition, and not denied, that the board of supervisors allowed the claim, and ordered a warrant drawn therefor, and that a warrant was regularly drawn by the auditor, and delivered to the petitioner, it must be presumed that official duty in allowing and issuing the warrant was regularly performed, and the burden of proof is upon the treasurer to show that he was justified in refusing payment, and it does not rest upon the plaintiff to show, by affirmative proof, that the board of supervisors had jurisdiction to issue the warrant, merely because the averments of the answer show that the board of supervisors had no jurisdiction to allow the claim. *McFarland v. McCowen*, 98 Cal. 329, 33 Pac. 113, and *Colusa Co. v. De Jarnett*, 55 Cal. 375, are to like effect. This doctrine is subject to the exception that, if it appears on the face of the claim that it is one over which the board of supervisors had no jurisdiction, or that they acted in excess of their jurisdiction, the auditor may refuse to draw his warrant in payment of the claim, or, having done so, the treasurer may refuse payment. *Linden v. Case*, 46 Cal. 171; *Merriam v. Board*, 72 Cal. 518, 14 Pac. 137; *Carroll v. Sieben-thaler*, 37 Cal. 193; *McFarland v. McCowen*, supra. There is no brief on file on behalf of defendant, and, if the contract set out in the answer is ultra vires the powers of the supervisors, we fail to see wherein. It is substantially such a contract as was upheld in *Lassen Co. v. Shinn*, 88 Cal. 510, 26 Pac. 365. We are of opinion that the due allowance of the claim by the board of supervisors for the services of petitioner as an attorney (the fact that he is an attorney at law is not denied), and the presentation to the treasurer of a warrant therefor in favor of petitioner, issued in due form by the auditor, when there were funds in the treasury applicable to the payment thereof, made a

prima facie case in favor of the petitioner; and, these facts being admitted, the burden of proof was cast upon the treasurer to show facts, if any existed, to defeat the case thus made. It follows that the judgment should be reversed, and a rehearing had.

We concur: BRITT, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, and a rehearing had.

HAYFORD v. WALLACE. (Sac. 79.)

(Supreme Court of California. Oct. 6, 1896.)
GIFT—FRAUDULENT CONVEYANCES—INSOLVENCY OF GRANTOR—EVIDENCE.

1. A voluntary promise on the part of a husband to assign a life insurance policy to his wife, without delivery of possession of the policy, does not constitute a gift to the wife, so as to serve as a valuable consideration for a note subsequently given by the husband to the wife for the proceeds of the policy, which were collected and used by him.

2. On the issue as to the solvency of the grantor at the time of a voluntary conveyance, there was evidence that he was a member of a firm whose books showed assets considerably in excess of liabilities, but that the firm shortly afterwards assigned for the benefit of creditors, and that the assignee, after seven years, had been unable to reimburse himself for money advanced to pay firm debts; that judgment was rendered against the grantor on an individual debt, which he compromised for 50 per cent.; that he owed several thousand dollars in individual debts, and that he owned an interest in a land speculation, the value of which was placed by witnesses at between \$20,000 and \$30,000, but which proved worthless. *Held*, that a finding that the grantor was insolvent was warranted.

3. An assignment of error that the findings do not support the judgment cannot be considered on appeal from an order denying a new trial; an appeal from the judgment is necessary.

Commissioners' decision. Department 1. Appeal from superior court, Placer county; Matt. F. Johnson, Judge.

Action by Abbie A. Hayford against Emeline Wallace. There was a judgment for defendant, and from an order denying a new trial plaintiff appeals. Affirmed.

Wallace & Wallace and Henley & Costello, for appellant. John M. Fulweiler and Ben. P. Tabor, for respondent.

SEARLS, C. Action to quiet title to separate parcels of land conveyed to appellant by separate deeds. Defendant, as a defense and by way of cross complaint, averred the tract of land involved in this appeal was conveyed to plaintiff, who is appellant, by W. B. Hayford, her husband, November 7, 1886, without other consideration than love and affection; that at said date said W. B. Hayford was insolvent, and that defendant was a creditor of said Hayford, and that she secured a judgment, under which the land was sold, and she claims title under a sheriff's deed, etc. Defendant also pleaded ac-

tual fraud on the part of Hayford, and knowledge thereof on the part of his wife. Defendant had a decree in her favor as to the land conveyed to plaintiff December 7, 1886. Plaintiff moved for a new trial, which was refused, and this appeal is from the order of refusal. The court found, among other things: (1) That W. B. Hayford, the husband of plaintiff, on the 7th day of December, 1886, conveyed the land in question to the plaintiff, who entered into possession. (2) That the only consideration for the conveyance was love and affection, and there was no valuable or money consideration therefor. (3) That at the time of such conveyance W. B. Hayford was insolvent, and unable to pay his debts, and among his creditors at that time was the defendant, Emeline Wallace, to whom he was indebted in the sum of \$2,500 upon two promissory notes of \$1,250 each. (4) Hayford did not execute the deed to his wife in contemplation of insolvency, or to hinder, delay, or defraud his creditors. (5) Plaintiff did not know, at the date of the execution of the deed, that her husband was insolvent, and did not accept the deed with knowledge of any fraudulent intent on the part of her husband.

The second of the foregoing findings is assailed upon the ground that the evidence is insufficient to justify the finding "that love and affection was the only consideration for the deed, and that no valuable nor money consideration was paid therefor." It is true, there was evidence tending to show that W. B. Hayford, who was a merchant at Colfax, and a member of the firm of Hayford, Perkins & Co., held a policy of insurance upon his life, payable, about 1883, to his then wife, or, in case of death, to said Hayford. His wife died, and he intermarried with the plaintiff and appellant in 1876. The plaintiff testified that the first year of their marriage her husband told her of the policy, and said when it was paid she should have the money, but that when it was paid he wanted to use the money, and promised to give her his note, with interest at 10 per cent. This was in 1883, and on April 10, 1886, he gave her a note for \$2,000, which was the consideration for the deed in question. Hayford himself testified that he assigned the policy to his wife, and that she kept it until it was due, in 1883, when she delivered it to him for collection, and that he neglected to give her a note, as he had promised, until 1886. On the other hand, there was testimony tending to show that this insurance policy was pledged to Mr. Wallace, the husband of defendant, as security for a debt due him from said Hayford, and remained in his hands until his death, and until it was due, in 1883, when it was delivered to Hayford by order of the respondent, as representative of her deceased husband, and the money collected and paid over to her in satisfaction of the debt, or a portion of it, owing by said Hayford. This in-

volved a contradiction of the statement that the policy was delivered by Hayford to his wife, and retained by her. The court evidently believed the statement of Mrs. Emeline Wallace. In this view the policy did not constitute a gift to the plaintiff for want of delivery of possession, and did not serve as a valuable consideration for the note of April 10, 1886, made by Hayford to plaintiff. Again, according to all the statements, the policy of insurance was for \$1,800. Hayford paid in premiums, after the alleged gift to his wife, the sum of say \$800 from his own money, and then gave his wife a note for \$2,000 on account thereof. There are a variety of minor circumstances disclosed by the record tending in the same direction, and which serve to create such a conflict in the evidence as to preclude our interposition to set aside the finding upon the ground that it is not supported by the evidence.

2. Appellant also attacks the third finding, wherein it is found that W. B. Hayford was at the date of the execution of the deed to his wife (December 7, 1886) insolvent and unable to pay his debts, and that among his creditors was defendant, whom he owed \$2,500, etc. Upon this issue there was testimony tending to show that the firm of Hayford, Perkins & Co., in December, 1885, and December, 1886, owed some \$35,000 to \$40,000, and was possessed of assets in lands, buildings, book accounts, notes, etc., sufficient to meet all their liabilities and leave a balance of say \$25,000 to \$28,000; that Hayford owed several thousand dollars in individual debts, but had an interest in a colony known as "Chicago Park," which, in the opinion of witnesses, was worth, in 1886, from \$20,000 to \$30,000. This Chicago Park enterprise, it is easy to see, was a speculative business, with valuations fixed at "boom prices," and which was a disastrous failure, becoming worthless as an investment. There is no pretense that any considerable portion of the land was or could be sold in 1886 at any price. Hayford was sued for some \$2,200, and a judgment obtained against him for that amount, which he was able to and did compromise for \$1,100. He admitted that he was pushed by his creditors, and did not pay; and, notwithstanding the favorable showing as to assets, the stubborn fact remains that in the same month that Hayford conveyed the land in question to his wife, viz. December, 1886, the firm of Hayford, Perkins & Co. assigned all their property to one Egbert, for the benefit of their creditors; that said Egbert advanced \$17,000 of his own funds to pay firm debts, and up to the time of trial of this cause (November, 1893) had not been able to reimburse himself from the firm assets for the money thus advanced, while Hayford had gone through insolvency. In the face of this testimony it is futile to argue against the sufficiency of the testimony to uphold the finding of insolvency on the part of W. B. Hayford on December 7, 1886.

3. Appellants further contend that the findings do not support the judgment. This question is not involved in an appeal from an order denying a motion for a new trial. Errors in the conclusions of law, drawn from the facts as found and in the judgment entered thereon, are not errors of law occurring during the course of the trial, but subsequent thereto, and can only be taken advantage of by an appeal from the judgment. *Shepard v. McNeil*, 38 Cal. 74; *Martin v. Matfield*, 49 Cal. 42; *Jenkins v. Frink*, 30 Cal. 595. An error of the trial court in rendering conclusions of law which are not supported by the findings is an error which should be reviewed by a direct appeal from the judgment, and is not a "decision against law," for which a new trial should be granted. *Shanklin v. Hall*, 100 Cal. 26, 34 Pac. 636; *In re Doyle*, 73 Cal. 565, 15 Pac. 125; *Mazkewitz v. Pimentel*, 83 Cal. 450, 23 Pac. 527; *Kirman v. Hunnewill*, 93 Cal. 526, 29 Pac. 124; *Brisson v. Brisson*, 90 Cal. 323, 27 Pac. 188. *Simmons v. Hamilton*, 56 Cal. 493, which seems to hold a contrary doctrine, was concurred in but by two judges, and has not been followed.

A number of exceptions were taken at the trial to the admission and exclusion of evidence. We have examined them with care, and find them either groundless or not of sufficient importance to warrant a reversal. To discuss them at length would occupy much space, and, as they contain no novel questions, would be productive of no good. We recommend that the order appealed from be affirmed.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

MCKINSTRY et al. v. CITIZENS' BANK OF WICHITA.

(Supreme Court of Kansas. Oct. 10, 1896.)

UNAUTHORIZED CONTRACT OF AGENT—RATIFICATION IN PART.

One who accepts the benefits of a contract made without authority in his behalf, after being fully informed of all its terms, must also accept the burdens imposed on him by the contract; and where C., without authority, purchases and has conveyed to M. a tract of land, for which a part of the purchase price is paid in cash, and a mortgage is executed for the unpaid balance in the name of M. by C., as his attorney in fact, if the grantee accepts the deed and retains the land, he must also accept the mortgage for the unpaid purchase money.

(Syllabus by the Court.)

Error from district court, Sedgwick county; Reed, Judge.

Action by the Citizens' Bank of Wichita against James McKinstry and others. Judgment for plaintiff. Defendants bring error. Affirmed.

McKinstry & Fairchild and J. D. Houston, for plaintiffs in error. W. E. Stanley, for defendant in error.

ALLEN, J. The Citizens' Bank of Wichita, as plaintiff, brought suit against Grant A. Hatfield and wife and James McKinstry and wife on a note, and to foreclose a mortgage for \$3,148 and interest, on certain lands therein described, alleged to have been executed by the defendants Hatfield and wife in person, and by the defendants McKinstry and wife by W. R. Colcord, their attorney in fact. McKinstry and wife answered, alleging ownership of an undivided half of the lands described in the petition, but denying the execution of the note and mortgage, and the authority of any person to execute such note and mortgage for them. The plaintiff claimed the note and mortgage by assignment from Butler & Fisher. Hatfield and wife answered, pleading a judgment in a former action brought by Butler & Fisher to foreclose the same mortgage. The case was tried before the court without a jury. It was admitted at the trial that on and prior to March 15, 1887, Butler & Fisher were the owners of the property covered by the mortgage. It was shown by the evidence that on that day they sold the land to Hatfield and Colcord, claiming to act on behalf of McKinstry; that Butler & Fisher executed a deed to Hatfield and McKinstry, conveying the land to them for an expressed consideration of \$8,148. Of this sum, it appears that \$5,000 was paid in cash, and the mortgage in suit was executed for the balance. Colcord held a power of attorney from McKinstry and wife to sell and convey all real estate held by them in Sedgwick county. The power of attorney does not, in terms, authorize the execution of notes or mortgages. On the 20th of October, 1887, Hatfield and wife executed a deed to McKinstry for the undivided half of a certain part of the land, covenanting against all incumbrances except one-half of a \$3,148 mortgage and interest; and Colcord, as attorney in fact for McKinstry and wife, executed to Hatfield a deed conveying to him the undivided one-half of another part of the land, covenanting against all incumbrances except the \$3,148 mortgage. At the trial McKinstry testified that he claimed the land, and had no other source of title than the deed from Butler & Fisher. The court found, in favor of the plaintiff, that there was due from the defendants the sum of \$2,114.41, which was a lien on the lands in controversy, and rendered judgment foreclosing the mortgage.

The contention of the plaintiffs in error is that Colcord was never authorized to execute the note and mortgage, and that it is therefore void; that in this state there is no such thing as a vendor's lien for purchase money, where no writing is duly executed securing it; that the power of attorney, by its express terms, authorized Colcord only to sell and

convey the lands of McKinstry; and that parties dealing with him were chargeable with notice of the limitations of his authority as defined in the power of attorney. We are not furnished any brief by the defendant in error, nor has any oral argument been made in its behalf. It is apparent, however, that the plaintiff in error seeks to retain the benefit of the contract made in his behalf by Colcord, and to repudiate the burden. This he cannot do. He must either accept or reject the transaction as a whole. If he retains the land, as he claims the right to do by his answer, he must pay for it according to the terms of the contract under which he got title to it. This is in accordance with the plainest and best-established principles of equity. The plaintiff cannot ratify so much of the transaction as is beneficial to him, and reject so much as is burdensome. An entirely different question would be presented, if, when informed of the contract, he had tendered a reconveyance of the land, and demanded a return of the purchase money. Nothing of this kind was attempted. The deed itself, under which he claims, shows the consideration paid to have been \$8,148. There is no claim that more than \$5,000 was paid in cash, and Hatfield and Colcord, who assumed the right to act, and did act, in McKinstry's behalf, executed the mortgage in controversy for the balance. Conceding that the mortgage was utterly void when executed, so far as McKinstry was concerned, when he accepted the conveyance of the land, and asserted title to it, he ratified everything that his unauthorized agent had done of which he was informed when he so accepted the title. The judgment is affirmed. All the justices concurring.

CHICAGO, K. & W. R. CO. v. EVANS et al.
(Supreme Court of Kansas. Oct. 10, 1896.)

PLEADING AND PROOF—AMENDMENT.

In an action on a cost bond, where the plaintiff alleges that the penalty of the bond, as executed, was \$2,500, and asks a recovery of that sum, and it is shown on the trial, and found by the jury, that the bond, as originally executed, was in the penal sum of \$1,500 only, no recovery can be had without an amendment of the pleadings so as to correctly describe the instrument sued on as it was in fact executed. The fact that the alteration was by a stranger to the instrument, without the knowledge or consent of the plaintiff, does not relieve the plaintiff of the necessity of correctly describing in his petition the instrument on which he seeks a recovery.

(Syllabus by the Court.)

Error from district court, Chase county; Lucien Earle, Judge.

Action by the Chicago, Kansas & Western Railroad Company against D. C. Evans and others. Judgment for defendants. Plaintiff brings error. Affirmed.

A. A. Hurd and Stambaugh & Hurd, for plaintiff in error. Madden Bros., for defendants in error.

ALLEN, J. The plaintiff in error brought suit in the district court of Chase county to recover the sum of \$2,500 on a cost bond alleged to have been signed by the defendants in error. The defendants denied the execution of the bond set up in the plaintiff's petition. At the trial the principal contention was whether the bond executed by the defendants was for \$1,500 or for \$2,500. The amount was stated in the instrument in figures only, and the first figure appears to have been changed, but by whom, and at what time, is not shown. The jury found, in answer to special questions submitted to them, that the bond, as originally written and signed, was for the sum of \$1,500, and that they did not know who altered it. A general verdict in favor of the defendants was also returned, and judgment entered accordingly. The plaintiff in error complains of the instructions of the court, and insists that it was entitled to recover on the bond as the jury found it to have been when executed. It is said that in the absence of any showing that the instrument was altered by the plaintiff or any of its agents, and especially in view of the fact that the instrument was kept in the custody of a public officer, no presumption arises that the alteration was made by its direction, and that a recovery may be had upon a spoliated instrument where the party is innocent of any wrongdoing. Conceding for the purposes of this case the correctness of the legal propositions advanced in behalf of the plaintiff in error in reference to spoliated instruments, an insurmountable difficulty still obstructs the plaintiff's case. The petition sets up a \$2,500 bond, on which the plaintiff seeks to recover. No application was made at any time for leave to amend, and recover on a \$1,500 bond. The jurisdiction of this court to review the case depends on the plaintiff's claim of a right to recover more than \$2,000. The penalty of the bond set up in the petition, and on which the plaintiff relied throughout all stages of the trial, was \$2,500. This court cannot treat the petition as having been amended so as to set up another and different instrument, for the purpose of overturning the judgment rendered by the district court. In the absence of any amendment of the pleadings, the answer of the jury to the first special question submitted to them precluded a recovery, and it was unimportant whether the other questions were answered or not. The judgment is affirmed. All the justices concurring.

PATTERSON v. PATTERSON.

(Supreme Court of Kansas. Oct. 10, 1896.)

DIVORCE—JUDGMENT BY DEFAULT—SERVICE BY PUBLICATION—AFFIDAVIT.

Where a divorce was granted to the husband by default, as upon service by publication, and the only affidavit on file was apparently intended to combine in one the facts required to be stated by sections 73 and 641, respectively, of the Civil Code, but it was fatally defective as to section 73, and the appearance docket refer-

red to one affidavit only, and there was no evidence that any other had ever been made or filed, the court did not err in refusing leave to file another affidavit upon the hearing of a motion to vacate the decree, nor in sustaining said motion, nor in dismissing the case when regularly reached for trial on the failure of the plaintiff to offer evidence in support of his petition.

(Syllabus by the Court.)

Error from district court, Wyandotte county; Henry L. Alden, Judge.

Bill for divorce by W. E. L. Patterson against Ellen A. Patterson. Decree for plaintiff. Motion by defendant to set aside decree granted, and bill dismissed. Plaintiff brings error. Affirmed.

Junius W. Jenkins, for plaintiff in error. Charles O. Littick and J. G. Littick, for defendant in error.

MARTIN, C. J. On November 5, 1887, the plaintiff obtained a decree of divorce from the defendant and for the custody of children. The court found that the defendant had been duly summoned by publication in the Wyandotte Herald, and that she was in default. No further proceedings were had in the case until May 22, 1891, when the defendant filed a motion to set aside said decree as void, on the ground that the service by publication was invalid, and that she had no notice thereof. Notice was duly given for the hearing of said motion, and the matter was heard July 25, 1891, when the plaintiff moved the court for leave to file an amended affidavit for service by publication, on the ground that the original affidavit was not on file with the papers in the case, and in support of said motion the plaintiff offered in evidence two entries in said case from the appearance docket, as follows: "1887. Sept. 13. Petition in divorce filed, ent., and cause docketed. Sept. 13. Affidavit for publication filed and ent." But the court overruled said motion, and thereupon the cause came on to be heard on the motion to set aside said decree, and the plaintiff offered in evidence a paper purporting to be an affidavit, and the only one found on file, the body of the same being as follows: "Personally came before the undersigned, a notary public in and for the county of Jackson, state of Missouri, W. E. L. Patterson, plaintiff in the foregoing cause, who, being by me duly sworn, states on oath as follows: That he is informed and believes that the defendant, Ellen A. Patterson, resides out of the state of Kansas, and that a service of summons cannot be made on her in said state; that her residence and post office are unknown to him, and cannot be ascertained by any means in his control." This paper was indorsed: "Affidavit as to Nonresidence. Filed Sept. 13—'87." No further evidence was offered by either party. The court found that said paper was totally defective and void as an affidavit for publication, and the decree was vacated and set aside. The plaintiff then moved the court to have the

cause entered on the trial docket, and that it stand for trial, and this motion was sustained, and the cause came on for hearing February 15, 1892, both parties appearing by counsel, but the plaintiff failed to produce any evidence, and the court dismissed the case at his cost, and subject to his exception. On the same day the plaintiff filed a motion for a new trial, which was overruled on February 24, 1892. The plaintiff alleges error of the court in overruling his motion for leave to file another affidavit for service by publication, and in sustaining the motion to set aside the decree, and in dismissing the cause, and in overruling the motion for a new trial. Section 72 of the Civil Code authorizes service by publication "in actions to obtain a divorce when the defendant resides out of this state," but section 73 of said Civil Code, as in force in 1887, required that, before such service could be made, an affidavit must be filed that service of a summons could not be made within this state upon the defendant, and showing that the case was one of those mentioned in section 72. The paper introduced in evidence was scarcely an affidavit in form at all. *City of Atchison v. Bartholow*, 4 Kan. 124; *State v. Gleason*, 32 Kan. 245, 250, 4 Pac. 363. It would seem, however, that the court might have allowed an amendment so as to make the same positive in form, instead of a statement of mere information and belief. *Harrison v. Beard*, 30 Kan. 532, 2 Pac. 632. Yet the affidavit would be insufficient by reason of the entire want of any showing that the case was one of those mentioned in section 72 of the Civil Code specifying the cases in which service may be made by publication. The filing of an affidavit complying substantially with the terms of said section 73 is a condition precedent to the obtaining of service by publication. *Shields v. Miller*, 9 Kan. 390, 398; *Claypoole v. Houston*, 12 Kan. 324; *Harris v. Clafin*, 38 Kan. 543, 551, 13 Pac. 830. Under the rule laid down in the case last cited, the foregoing affidavit was void. The plaintiff in error contends, however, that it was sufficient as an affidavit required by section 641 of the Civil Code, excusing the mailing of the publication notice and a copy of the petition to the defendant in a divorce case, and that, as the appearance docket showed the filing of an affidavit for publication, it should be treated as lost, and presumed to be sufficient, especially in view of the fact that the decree of November 5, 1887, recited that due service had been made by publication. The record does not justify this contention. Such a recital of service is prima facie evidence thereof (*O'Driscoll v. Soper*, 19 Kan. 574), but the whole record must be taken and construed together, and, if the evidence as to service is complete in the record, the same must be given full effect, although contrary to a recital of service. It would seem from the reading of the affidavit that it was

intended to combine in one the facts required to be stated by sections 73 and 641, respectively. The appearance docket shows one affidavit only, and it is presumable, in the absence of evidence to the contrary, that this is the one on file. The court was right in refusing leave to file another affidavit and in sustaining the motion to set aside the decree. It may be added that the plaintiff recognized the correctness of the ruling of the court, for he moved to have the cause entered on the trial docket for disposition on the merits; but, when confronted by his wife in open court, he was dumb; he opened not his mouth; and there was no course left for the court but to dismiss his case, and its action in so doing is not a proper subject of complaint. The judgment must be affirmed. All the justices concurring.

BRANCH v. AMERICAN NAT. BANK et al.

(Supreme Court of Kansas. Oct. 10, 1896.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—COM- PENSATION OF ASSIGNEE—OBJECTIONS —SECURITY FOR COSTS.

1. The compensation of an assignee, or of the attorneys and others who assist him, is to be ascertained and awarded by the district court; and the allowances therefor, being largely within the discretion of the court, will not be disturbed unless there is a clear abuse of discretion.

2. The refusal of the court to require creditors objecting to the allowance of the assignee's accounts to give security for the costs of the hearing upon the objections is not reversible error. *Caldwell v. Matthewson*, 45 Pac. 614, 57 Kan. 258.

3. The testimony examined, and held to be sufficient to sustain the findings and judgment of the trial court.

(Syllabus by the Court.)

Error from district court, Mitchell county; Cyrus Heren, Judge.

In the matter of the Security Investment Company of Cawker City, W. T. Branch, as assignee, filed his first account. The American National Bank and others objected to the same. From the judgment of the court the assignee brings error. Affirmed.

D. M. Thorp, A. W. Hicks, Waters & Waters, and V. H. Branch, for plaintiff in error. Caldwell & Ellis, Clark A. Smith, and Geo. V. McConahey, for defendants in error.

JOHNSTON, J. This proceeding was brought to review the rulings of the district court in the allowance made for services of an assignee and two others who assisted in the settlement of an assigned estate. In February, 1891, the Security Investment Company of Cawker City, Kan., made an assignment for the benefit of creditors, and W. T. Branch was duly appointed as assignee. On March 9, 1892, the assignee filed his first annual report, and undertook to give an account of his trust up to and including February 8, 1892. When the report came on for hearing the court determined that an additional notice should be

given in the official paper of the county, and the hearing was continued for that purpose. A number of the creditors appeared, and objected to certain items of the report, alleging that some of the claims were extravagant, and the expenses unnecessary and wasteful. Upon motion of the creditors the assignee was required to make his report more definite and certain in respect to certain items in the expense account, one of which was for salaries and attorney's fees, \$11,560.64. When the claim for salaries and attorney's fees was itemized, it developed that it was made up in part of the salary of the assignee for one year, at \$250 per month, \$3,000; to V. H. Branch, who was called "general assistant," one year, at \$175 per month, \$2,100, and the charge in favor of D. M. Thorp for attorney's fees and expenses was \$4,689.02. An extended inquiry was made, and after much testimony and argument were submitted the court found that \$200 per month was reasonable compensation for the assignee, and a reduction of \$600 from the charge made in his accounts for the year was ordered. It was found that \$125 per month was fair compensation for the services of V. H. Branch, and a reduction of \$600 in the charges made in the accounts in his behalf was ordered. It was further found that reasonable and fair compensation for the services performed by D. M. Thorp as attorney on behalf of the estate for the year was from \$2,000 to \$2,500, and that a reasonable allowance including expenses and hotel bills, was \$2,689, making a reduction in the bill of Thorp in the sum of \$2,000. An item of \$6.25 for proxies was found to have been erroneously charged to the estate, but all other items charged in the accounts of the assignee were approved. As a conclusion of law, it was found that the amount charged in the accounts of the assignee should be allowed as reported, less the sum of \$3,206.25. Several objections are made to the rulings and the final decision of the court. It was the duty of the court, whether objections were made by the creditors or not, to supervise the management of the estate, and to examine the accounts of the trust. The statute requires that the assignee shall annually exhibit on oath a statement of the accounts of the trust, with proper vouchers, to the district court. It is the province of the court to require the giving of such notice of the hearing thereon as the circumstances of the case seem to require. Gen. St. 1889, pars. 357, 359. The objecting creditors were entitled to be heard, and the assignee has no cause to complain that he was required to give an additional notice of the hearing upon his accounts, nor of the order requiring him to itemize several of the charges in his report.

An objection is made that the court refused to require the objecting creditors to give security for costs, but it has recently been held that such refusal is not reversible error. *Caldwell v. Matthewson*, 57 Kan. 238, 45 Pac. 614. The assignee acts under the direction of the district court, and the allowances for salaries

and attorney's fees are largely within the discretion of the court. Gen. St. 1889, par. 387. The assignee is entitled to reasonable compensation for the services performed and the responsibilities assumed. But he cannot be permitted to arbitrarily fix his own compensation, or that of those who assist him. It is to be ascertained and awarded by the court upon the rendering of his accounts, and from an examination of the testimony in the record we cannot say that injustice was done in the allowances that were made. Aside from the testimony in the case, a large part of the services of the assignee, V. H. Branch, and D. M. Thorp were performed under the eye of the court, and in the courts of the counties over which the district judge presided. The judge was therefore much better qualified to weigh the testimony, and to determine what is reasonable compensation, than we are, but a mere reading of the testimony leads us to the conclusion that fair compensation was awarded. The fact that the assignee obtained the approval of the court of some charges shortly after the assignment was made does not prevent a re-examination of the accounts for the entire year, nor conclude the creditors or the court as to the amount of the allowances to be made. It appears that the approval of the court to these charges was obtained from the judge at chambers, without notice to the creditors, and upon ex parte hearings. Such orders can have little binding force, but in any event they do not deprive the court of the right and power to make an equitable adjustment and a proper allowance for the services of the complaining parties for the entire year. The objections to the testimony are deemed to be immaterial, and none of the errors assigned can be sustained. The judgment of the district court will be affirmed. All the justices concurring.

DEETS, Sheriff, v. NATIONAL BANK OF PITTSBURG.

(Supreme Court of Kansas. Oct. 10, 1896.)

DIRECTING VERDICT — WRITTEN INSTRUCTIONS — HARMLESS ERROR.

1. Under the evidence adduced in this case, the court did not err in directing a verdict for the plaintiff.

2. Where the court is duly requested to instruct the jury in writing, and it is necessary that any rule of law be stated to them by the court for their guidance in arriving at a verdict, it is the duty of the court to give its instructions in writing; but where a verdict for the recovery of specific personal property is rightly directed, and the jury are told to find the value of the property at the time it was taken from the possession of the successful party, and add interest from the date of the taking to the rendition of the verdict, and no further or different instruction is asked, and where it does not appear that counsel trying the case, or the jury, could have misunderstood the direction given, or that it was erroneous in any particular, the judgment will not be reversed merely because the instructions were not reduced to writing.

(Syllabus by the Court.)

Error from district court, Crawford county; J. S. West, Judge.

Action by the National Bank of Pittsburg against John T. Deets, sheriff of Crawford county. Judgment for plaintiff, and defendant brings error. Affirmed.

J. B. Ziegler, for plaintiff in error. Morris Cligitt, for defendant in error.

ALLEN, J. The plaintiff in error, as sheriff of Crawford county, levied certain attachments on a stock of merchandise in Pittsburg, as the property of C. A. Patmor. The bank brought this action to recover the property, claiming it under a chattel mortgage given to secure divers notes, aggregating \$8,302.67. The sheriff answered, justifying his possession of the property under the attachments, and alleging generally that the mortgage was fraudulent. After the conclusion of the testimony, the court instructed the jury to find for the plaintiff, and to determine the value of the plaintiff's right of possession at the time the property was taken by the sheriff, and add 6 per cent. interest from that date. Prior to the commencement of the trial, both parties had requested the court to instruct the jury in writing. This was not done, and the defendant excepted to the giving of oral instructions. It is insisted by the plaintiff in error that there was evidence of fraud which should have been submitted to the jury, and that the statute gives a party an absolute right to have the instructions in writing when he so requests; that the court erred in taking the main case away from the jury, and also erred in giving instructions as to the measure of damages orally, after having been requested to instruct in writing.

We have carefully read all the testimony, and find nothing indicating fraud on the part of the bank. There is no question as to the validity of the indebtedness to the bank, nor is it clear that all of the security taken is sufficient to pay the debt. The only question the jury were required to determine for themselves, under the testimony, was the value of the goods in controversy. With reference to this, they were told, in substance, to find the value of the plaintiff's right of possession at the time they were taken. This, of course, could not exceed the value of the property; and, as the value found was much less than the balance still due the plaintiff under its mortgage, the instruction was clearly correct.

It was, doubtless, error for the court to refuse to instruct in writing on any proposition of law necessary for the guidance of the jury; but we are only authorized to reverse when errors committed by the trial court affect the substantial rights of a party. Code Civ. Proc. § 140. Unless we can see that the defendant might have been prejudiced by the action of the court, we cannot reverse because the court refused to comply with the defendant's request to instruct in writing. Railway Co. v.

Stone, 54 Kan. 88, 37 Pac. 1012. Even in criminal cases an oral direction by the judge to the jury with reference to their conduct will not necessarily compel a reversal of the judgment. State v. Garrett, 57 Kan. 182, 45 Pac. 93. We are clearly of the opinion that where all the evidence offered is favorable to one party, and is sufficient to require a verdict in his favor, the court may give such direction orally. Where it is necessary to instruct with reference to the measure of damages, if duly requested so to do, the instructions ought to be reduced to writing before they are given; but unless there is some question either as to the correctness of the rule declared by the court, or some doubt as to whether the rule announced could have been misunderstood by the counsel who argued the case, or by the jury, we do not think the error committed by instructing orally can fairly be said to be one affecting the substantial rights of a party. In this case there could hardly have been more room for misapprehending the instruction given with reference to the measure of damages than with reference to the party entitled to recover. The jury were told to find the value of the property, and to add thereto interest from the time of the taking to the date of their verdict. No request was made for any further or different instructions, and none appears to have been necessary. The verdict actually returned was much less than might have been found under the evidence, and there is nothing indicating mistake, or unfairness on the part of the jury. Under these circumstances, it seems to us that substantial justice requires us to permit the verdict to stand, rather than to prolong the litigation by granting a new trial. The judgment is affirmed. All the justices concurring.

LONGWELL v. HARKNESS.

(Supreme Court of Kansas. Oct. 10, 1895.)

APPEAL—SETTLEMENT OF CASE—ATTESTATION.

In settling a case-made, the district judge failed to direct that it be attested, and it was not done. Not being attested by the signature of the clerk and the seal of the court, it is not duly authenticated, and the rulings of the trial court cannot be reviewed.

(Syllabus by the Court.)

Error from district court, Greenwood county; C. W. Shinn, Judge.

Action by L. V. Harkness against W. H. Drew and B. J. Newman. On the death of Newman the action was revived against H. A. Longwell, his administrator. Judgment for plaintiff, and the administrator brings error. Dismissed.

R. P. Kelley and W. S. Marlin, for plaintiff in error. Clogston & Fuller, for defendant in error.

JOHNSTON, J. This action was brought by L. V. Harkness against W. H. Drew and B. J. Newman to recover upon a promissory

note for \$2,000, dated December 20, 1888, and which was due one year after date. After the trial was instituted, Newman died, and the cause was revived in the name of the administrator. The trial resulted in favor of the plaintiff below, and judgment was awarded against W. H. Drew and the estate of B. J. Newman in the sum of \$2,900. H. A. Longwell, as administrator of the estate of B. J. Newman, complains of the judgment, and attempts to bring the case here for review. The sufficiency of the record is challenged by the defendant in error. It purports to be a case-made, and is so designated by the district judge who signs the same. It is not attested by the clerk of the court, nor is the seal of the district court attached. Indeed, it appears that the judge did not order the case to be attested, but, instead, directed the clerk of the court to file and seal the same. The case not being authenticated as the statute requires, it cannot be reviewed in this court, and the proceeding will therefore be dismissed. All the justices concurring.

MARSHALL et al. v. VAN DE MARK.

(Supreme Court of Kansas. Oct. 10, 1896.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—VALIDITY—FRAUDULENT INCUMBRANCES.

1. Where an assignment is made for the benefit of creditors, which by its terms conveys all of the property of the assignors in trust for the benefit of all their creditors equally, and the bulk of the assigned property is delivered to the assignee, the assignment will not be rendered void by the execution of void chattel mortgages for small amounts at substantially the same time, nor by the assignors making an invalid claim to a small part of their estate as exempt, where it appears that the whole estate can be applied for the benefit of all the creditors substantially as the law provides.

2. It is the policy of the law in this state to uphold assignments made by insolvent debtors for the benefit of their creditors, and to strip the assigned estate of all attempted fraudulent claims or incumbrances, and apply the whole property to the payment of the debts of the assignor pro rata.

(Syllabus by the Court.)

Error from district court, Cloud county; F. W. Sturges, Judge.

Action by C. W. Van De Mark against Edward Marshall and others. Judgment for plaintiff. Defendants bring error. Affirmed.

This action was brought by C. W. Van De Mark against Edward Marshall, sheriff of Cloud county, and others to recover the value of a stock of merchandise claimed by the plaintiff as assignee of Mottin Bros., and which had been taken from the plaintiff's possession by the sheriff under divers writs of attachment issued against Mottin Bros. A jury was waived, and the court made special findings of fact and conclusions of law, a part of which were in answer to special questions submitted by counsel for the defendants. The method pursued occasions much needless repetition and verblage. The

firm of Mottin Bros. consisted of F. J. and Ferd Mottin. They were retail merchants at Clyde. In March, 1889, their stock of goods and fixtures inventoried about \$12,500, and they owed debts amounting to about that sum. F. J. Mottin also owned certain lands covered by mortgages which had been given to Van De Mark Bros., and by them transferred with a guaranty of payment. On March 21st the plaintiff, who was a member of the firm of Van De Mark Bros., demanded payment of certain interest coupons secured by these mortgages, and a commission note, amounting in all to \$584. Being unable to pay this sum, the Mottin Bros. executed a mortgage on their stock and fixtures to Van De Mark Bros. to secure the payment of it. At the time they executed this mortgage the Mottins were apprehensive that all their creditors might insist on immediate payment or security, and, not being able to pay or secure all in full, were desirous to pay or secure each in proportion to his claim, and so at the time informed said Van De Mark, and requested him to advise and assist them in so doing. Van De Mark, though an attorney at law and previously in practice, was not at that time in active practice, and so informed the Mottins, and advised them to employ an attorney in active practice, and recommended Mr. Laing. The Mottins, not being personally acquainted with attorneys other than Van De Mark, authorized him to employ Mr. Laing for them. Thereupon Van De Mark saw Laing, and made known to him the condition of the Mottins, and their desire to employ him as their attorney; and after learning the terms on which he would accept such employment, and communicating the same to the Mottins, Laing was employed for a stipulated fee of \$500, for which the Van De Mark Bros. became liable to Laing; and the Mottin Bros. on the 22d of March, in the forenoon, executed and delivered to Van De Mark Bros. a chattel mortgage for \$500 on their stock and fixtures to secure them against loss by reason of their liability to Laing. After consultation with Laing, and in pursuance of his advice, Mottin Bros. executed a deed of assignment to the plaintiff of their property, real and personal, not exempt from execution, and all real estate owned by either of said parties, in trust for the benefit of all their creditors, to be sold and disposed of as provided by law. The deed of assignment was prepared by Mr. Laing at his office. In Concordia, on the afternoon of March 22d, and was executed by the Mottins about midnight that night, and delivered to Van De Mark, who recorded it the next morning between 8 and 9 o'clock. The chattel mortgages before mentioned were filed with the register of deeds about 6 o'clock on the afternoon of the 22d. Van De Mark took possession of the goods on the 23d as such assignee, as well as mortgagee by virtue of said chattel mortgages, and so held them until they were taken from him by the defendant

as sheriff. On the same day Ferd Mottin moved into the Lusadder House, in Clyde, which had been traded for by F. J. Mottin in exchange for one of his farms, and which was incumbered to about its value, though at that time believed to be worth about \$1,000 in excess of the mortgage, and he claimed the same as a homestead. On the same day F. J. Mottin moved out of the Lusadder House, with his family, to a 240-acre farm covered by a \$2,000 mortgage, and believed to be worth \$3,500, intending to hold 160 acres of it as a homestead. The farm was afterwards sold under foreclosure of the mortgage, and failed to bring enough to pay the debt. There was also a delivery team, worth about \$100, which F. J. Mottin claimed as exempt. After the deed of assignment was recorded, C. W. Van De Mark was duly chosen permanent assignee by the creditors, gave bond, took the requisite oath, and filed an inventory of the property, which was appraised at \$12,000. The stock of goods and fixtures were taken from the plaintiff by the sheriff under divers writs of attachment, and afterwards sold by him for the sum of \$6,025. The court found the property at the time it was taken to have been reasonably worth \$6,500. Claims amounting to \$5,291.50 were duly proven against the estate by parties other than the attaching creditors. Conclusions of law were stated at some length, on which a judgment was rendered in favor of the plaintiff for the value of the goods and interest. The defendants bring the case here for review.

Pulsifer & Alexander, for plaintiffs in error. Theodore Laing, for defendant in error.

ALLEN, J. It is strenuously insisted for the plaintiffs in error that the two chattel mortgages executed by Mottin Bros. to Van De Mark Bros. were fraudulent, that there was also a fraudulent retention of property under claims of exemption from execution, and that these are sufficient to poison, contaminate, and render void the whole assignment. In the suits in which the attachments were issued under which the sheriff seized the goods, a motion was made to discharge the attachments on the ground that the charge made in the affidavit for attachment, of a fraudulent disposition of their property by the Mottins, was not true. The main ground relied on to sustain the attachments in that case was the \$500 mortgage to secure Van De Mark Bros. for their liability for the \$500 attorney fee of Mr. Laing. As this fee was mainly for services not then rendered, this court held in the case of Shellaharger v. Mottin, 47 Kan. 451, 28 Pac. 199, that the mortgage was an unlawful withdrawal of that which justly belonged to the bona fide creditors of the debtor, and operated to delay and defraud them, and that it was sufficient proof of fraud to sustain the attachments. It is now insisted that this mortgage was executed at substantially the same time as the deed of

assignment, that the two were really parts of the same transaction, and that the fraud in the chattel mortgage also attaches to the deed of assignment, and renders it void. Many authorities are cited to the effect that attempted preferences by chattel mortgages executed at the same time, or the retention of a part of the estate of the assignor for his own benefit, operate to defeat the assignment and render it void as to creditors. The authorities cited strongly support this position in jurisdictions where the assignee is regarded as the personal representative of the assignor, and denied the right to assert any claims to the assigned property which he himself would be estopped from asserting; but this court has taken a different view of our statute governing assignments for the benefit of creditors since the passage of the act of 1876, providing for the election of an assignee by the creditors. Even if we construe the findings of fact as counsel for plaintiff in error asks us, and hold that the mortgages and the deed of assignment constitute but one transaction, it is settled by prior decisions that, though the mortgages are void as attempted preferences, the deed of assignment is valid, and conveys the whole property in trust for all the creditors equally. *Bank v. Sands*, 47 Kan. 591, 28 Pac. 618; *Brigham v. Jones*, 48 Kan. 162, 30 Pac. 113. In *Chapin v. Jenkins*, 50 Kan. 385, 31 Pac. 1084, it was held that "where an assignment is made by such mortgagor the assignee is the representative of all the creditors, and, for their benefit, may contest the validity of such a mortgage in an action brought thereon by the mortgagee to recover the possession of the mortgaged property." The same doctrine is reiterated in the cases of *Jones v. Kellogg*, 51 Kan. 263, 33 Pac. 997; *Walton v. Eby*, 53 Kan. 257, 36 Pac. 332; and *Goodman v. Kendall*, 56 Kan. 439, 43 Pac. 687. Does the fact that in this case the \$500 mortgage was void not merely as an attempted preference, but as an attempt to pay for services not yet rendered, out of the assigned estate, to all of which existing creditors were justly entitled, present a case differing in principle from those cited? It may be said that this was an attempt by the assignors to secure a benefit to themselves out of the assigned estate. But the deed of assignment is general in its terms, and sufficient to convey the entire estate to the assignee. The mortgage is void. Being void, it is inoperative, and we must hold that it does not affect the validity of the deed of assignment. The circumstance that these chattel mortgages were given to the firm of Van De Mark Bros., of which the assignee was a member, is commented on as showing a participation by the assignee in an attempted fraud by the assignor. Doubtless a case might be presented of a collusive attempt by the parties to the deed of assignment to actually withdraw the assigned estate from the reach of the process of the court, and deprive the creditors of the benefit of it, which would warrant the court in holding the whole transaction void. But in this case there is nothing showing re-

removal or concealment of any property by the parties to the assignment. And the attempted payment of attorney's fees out of the assigned estate, for services thereafter to be performed, though fraudulent in law as to creditors, does not impress us as such a fraud as ought to be held to vitiate the assignment. The substance of the whole transaction is that the deed of assignment passed the whole of the assignor's estate to Van De Mark as a temporary trustee for the benefit of all the creditors of Motlin Bros. The creditors themselves, thereafter, under the statute, chose whom they pleased to act as permanent assignee. In this case they chose the same person that was named in the deed of assignment. The title of the assignee to the property is only that of a trustee. It is the creditors who are the real parties beneficially interested by the assignment. Unless it is apparent that they are to be defrauded, the assignment should be upheld. The policy of our law is to discourage attacks on assignments made for the benefit of creditors which fairly transfer all the assignor's property to be disposed of in the manner the statute points out. Even if the creditors make a mistake in the selection of an assignee, or if the assignee prove unfaithful, the beneficiaries of the estate are not without remedy. Where good cause is shown the court may remove the assignee from his trust and appoint another in his stead. *Caldwell v. Matthewson*, 57 Kan. —, 45 Pac. 614. In jurisdictions where the assignee is not permitted to allege the fraud of his assignor for the purpose of recovering property fraudulently conveyed or otherwise disposed of by the assignor, the necessity for holding an assignment tainted with fraud void, in order to protect the rights of creditors, is apparent; but where the assignee, as in this state, is permitted to recover all property fraudulently transferred, and to defend against fraudulent mortgages, the necessity ceases, and with it the rule of law based upon it.

The claims made by the assignors to certain property as exempt clearly cannot affect the validity of the assignment. Nor does the failure of the assignee to recover property retained by the assignors, the title to which actually passed by the deed of assignment, alter the case in any degree. The creditors have ample remedy for any neglect on his part.

The rulings on the introduction of testimony, complained of, are quite unimportant, and do not furnish ground for a reversal. The judgment is affirmed. All the justices concurring.

ATCHISON, T. & S. F. R. CO. v. ELDER.
(Supreme Court of Kansas. Oct. 10, 1896.)

INJURY TO PASSENGER—EVIDENCE—SUBMISSION OF QUESTIONS OF FACT.

1. In an action by an administrator to recover damages for injuries resulting in the death of his intestate, by the negligent derailment of a railroad train on which he was a passenger, where the appointment of the administrator is admitted by the pleadings, it devolves upon the

plaintiff in the first instance only to prove the derailment, the injury of the passenger thereby, that death occurred from the injury, and that the deceased left a widow or kindred surviving him; and it then becomes incumbent upon the railroad company, in order to escape liability, to show that the derailment resulted from inevitable accident, or something against which no human prudence or foresight on the part of the company could provide.

2. The evidence examined, and held sufficient to uphold the verdict and the judgment, and that there was no material error in the rulings of the court thereon, nor in the refusal to submit certain particular questions of fact, nor otherwise.

Johnston, J., dissenting.
(Syllabus by the Court.)

Error from district court, Osage county; William Thomson, Judge.

Action by E. P. Elder, administrator of the estate of M. H. Fuller, against the Atchison, Topeka & Santa Fe Railroad Company. Judgment for plaintiff. Defendant brings error. Affirmed.

On October 24, 1890, at about 1:42 p. m., the west-bound passenger train of the plaintiff in error was derailed and wrecked a short distance before reaching the depot at Wakarusa, in Shawnee county; the road at that point running nearly north and south. The train left Topeka about 10 minutes late, but it had made up very little if any of the time before the disaster, yet it was running, on a down grade, at least 45 miles per hour at the time of the derailment. As to this train, Wakarusa was not a stopping point. A short distance north of that place the train passed over a 3-degree curve, a tangent about 200 or 300 feet in length, and over the greater part of a 5-degree curve, where the derailment occurred. The train consisted of the engine and tender, the engine remaining on the track, and standing upright with the tender trucks, or part of the same; a mail car derailed and turned on its side; a baggage car and an express car turned bottom-side up, and on different sides of the track; a smoking coach, which remained upright, but across the track; a day coach turned partially on its side, to the right; a chair car turned on its side, to the right; a sleeper and a transit sleeper turned on their sides, to the right. These last four remained coupled, but the couplings of the others were broken, and the baggage and express cars and the day coach were quite a distance from the engine and the mail car. The body of the tender, although heavily laden with coal and water, was thrown to the left a distance of 20 to 40 feet from the track, and turned bottom-side up, and was found opposite the sleeper. The distance from the first wheel marks on the ties to the pilot of the engine was 1,263 feet. The road-bed was ballasted with rock, but the evidence for the plaintiff tends to show that there were a good many unsound ties, and that the inner side of the outside rail on the five-degree curve was much worn, so as to be considerably lighter than the inside rail. The evidence is conflicting as to the elevation of the outside above the inside rail on the curve. The track was

badly torn up by the wreck, and many of the ties were broken and split. About 35 of the passengers were injured more or less. E. E. Fuller was a passenger, and occupied a seat on the left or east side of the aisle of the day coach. He was not thrown from it, nor apparently injured by the derailment. The south-west corner of the coach fell the lowest. A colored man was thrown down in the aisle and slightly injured, but no other person was apparently hurt in that coach. Rev. Bernard Kelly was in it, and he and Fuller got out of windows on the right-hand or west side. They helped some other passengers out, and then went to the chair car, but, finding the door closed, Fuller kicked it open, and Kelly assisted the passengers over the door to the platform. Fuller helped them to alight from the platform to the ground. Both worked with their coats off, the day being pleasant. This work occupied from 10 to 30 minutes, after which Fuller sat down, and reclined against an apple tree near by. While in that position, N. Frankhouser, an acquaintance passing, asked as to his condition; and he said he was hurt, and he reached around to his back or side to indicate the place of injury. He was sweating freely. Late in the afternoon a relief train took the passengers, including Fuller, back to Topeka, where he remained over night at the National Hotel. During the forenoon of the next day he called on Dr. Wasson, a dentist, who was an old acquaintance, and told him that he had escaped unhurt. Later in the day he went to Emporia, and thence to Quenemo, in Osage county, his place of business, where he boarded with his sister, Clara M. Crawford. He complained to her about his back hurting him, and she gave him arnica and hot water to take to his room. She testified that he was in good health before the wreck, but afterwards he stooped and limped, although she admitted that he suffered from hemorrhoids before the wreck. He complained to others of a pain in his side and back. Remaining several days at Quenemo, he went thence to his home, at Kansas City, Missouri, where he arrived about 10 days after the wreck. Mrs. Fuller testified that when he came home he was very pale and nervous, and was suffering; that she examined the small of his back, and found a black and blue spot across there, about the size of her finger, and noticed a great discoloration, and she treated the ailment with hot water and arnica. Much evidence was given tending to show Fuller's changed condition after the wreck, his lameness, and other indications of failing health. He had been an active business man, and continued at work much of the time until a month before his death, which occurred April 27, 1891. It appeared, however, that Fuller had been greatly afflicted with hemorrhoids at times, the same having become chronic, and during his last illness a rectal abscess formed. Indeed, he seemed to have a complication of disorders. Several physicians treated him, and inquired as to the history of his case, but he never mentioned the wreck to

them, and his principal attending physician in his last sickness did not know of it until his death. He made no complaint to the railroad company, and did not prefer any claim against it. His last sickness was of about four weeks' duration. He was unconscious during the latter part of his illness, and died in a comatose condition. The testimony of the medical witnesses is conflicting as to whether the symptoms (described at much length in the evidence) did or did not indicate a spinal injury. Fuller left surviving him his widow and two children. P. P. Elder, his father-in-law, was duly appointed as administrator; and on September 12, 1891, he commenced his action in the district court of Osage county, alleging that Fuller was injured by reason of the negligence of the railroad company, that he died from the effects of such injury, and claiming the sum of \$10,000 as damages resulting from his death. The case was twice tried, the second trial resulting in a judgment in favor of the plaintiff below, June 28, 1892, for \$3,000 and costs of suit, and this proceeding in error is instituted to reverse said judgment. Other facts appear in the opinion.

A. A. Hurd, O. J. Wood, and W. Littlefield, for plaintiff in error. Pleasant & Pleasant and J. W. Deford, for defendant in error.

MARTIN, C. J. (after stating the facts). 1. Some of the allegations of negligence find no support in the evidence, but it was alleged that the tender was not sufficiently and properly secured and fastened to its trucks; that the track was in bad order and condition, and unsafe for trains running at the excessive speed at which the train in question was propelled on a sharp curve; that the ties were decayed, the rails worn and too light, and the outer rail on the curve was nearly level with the inner rail, whereas it should have been considerably higher. There is no evidence of the insufficient fastening of the body of the tender to the trucks, except the circumstance that it left them, turned upside down, and was thrown 20 to 40 feet to the left of the track. There is some evidence, however, as to the defective condition of the track in some of the particulars above named, and we are not clear that this condition had no agency in producing the disaster to the train. The witnesses for the company did not account for the derailment, but said it was a mystery. Under the pleadings, and the allegations of negligence contained in the petition, it devolved upon the plaintiff below, in the first instance, only to prove the derailment, the injury of the passenger thereby, that death occurred from the injury, and that the deceased left a widow or kindred surviving him; and it then became incumbent upon the company, in order to escape liability, to show that the derailment resulted from inevitable accident, or something against which no human prudence or foresight on the part of the company could provide. *Railway Co.*

v. Walsh, 45 Kan. 653, 659, 26 Pac. 45, and cases cited; Railway Co. v. Johnson, 55 Kan. 344, 345, 40 Pac. 641. A prima facie case of negligence was made out by the plaintiff below, and we cannot say, in face of the general verdict, that it was overthrown by the evidence introduced on the part of the railroad company.

2. The plaintiff in error contends that there is no evidence that Fuller was injured in the wreck, nor that his death was attributable thereto. The conduct of Fuller seems difficult to comprehend. In the excitement attending such a calamity, it is not strange that a person might be injured without knowing it for a considerable time thereafter. But Fuller told Dr. Wasson the next day that he escaped unhurt. He never made any claim against the railroad company, and did not mention the wreck to his physicians, although he complained of a pain in the side or back to Frankhouser shortly after the wreck, to his sister upon his arrival at Quenemo, and to his wife shortly afterwards, in Kansas City. Nothing in the nature of narrative from him was admissible in evidence as to the cause of the pain in his back or side, as to his lameness, or other symptoms indicating a spinal injury or other ailment; but from the complication of disorders to which he was subject, and which seemed to be greatly aggravated in the closing months of his life, it seems probable that he did not himself consider the railroad wreck, but la grippe, as the cause of his increased suffering. Yet it may have been a spinal injury, and his symptoms were perhaps better evidence than his own opinion respecting his ailment. The general verdict is equivalent to finding that Fuller was injured in the wreck, and that death resulted therefrom; and we cannot affirm that this theory is entirely unsupported by the evidence, especially after the approval of the verdict by the trial court. Many questions are raised upon the competency of evidence, the form of the hypothetical questions, and the nature of the expert testimony. We have examined all of them, but do not think that any substantial and material error was committed by the court in the admission or rejection of testimony. The court refused to submit certain of the particular questions of fact requested by the defendant below. We think some of them might have been submitted with propriety, but they were not controlling in character, and, if all had been answered in the manner most favorable to the plaintiff in error, the general verdict would not have been affected, nor the trial court nor this court further enlightened thereby. Upon the whole we find no material error in the record, and the judgment must be affirmed.

ALLEN, J., concurs.

JOHNSTON, J. (dissenting). Any one who reads the evidence in the record must enter-

tain the gravest doubts that Fuller was injured in the wreck or that his death was caused by it. For several years previous to the wreck, he had suffered from hemorrhoids, and from diseases of the stomach, bowels, and kidneys. During this time he had been treated by various physicians for his ailments, and before and after the wreck had been seriously affected with la grippe. These diseases became more aggravated as time passed, and, although he was treated by several physicians, they were unable to arrest the progress of the diseases, and he suffered with them until he died. There is no direct evidence that he was injured in the wreck. He was not thrown from his seat by the derailment, and nothing said or done by him at the time indicated that he had suffered any injury. It is true that after breaking in the door of one of the coaches, and assisting to lift passengers out of coaches that were overturned, he complained of his back; but within a few days thereafter, at different times, and in the presence and hearing of several persons, he described the wreck, and repeatedly said that he had escaped unhurt. Afterwards he consulted his family physician in regard to the disorders from which he was suffering, and was treated by him; but he never mentioned the fact that he was in the railroad wreck, or that he was suffering from any hurt which he had received. The physician who attended him in his last illness interrogated him as to accidents or injuries, but he said nothing about being injured in a railroad wreck, nor that he had been in one. He was seriously sick, and was endeavoring to obtain relief. The physicians who attended him from time to time during the six months between the accident and his death were trying, by inquiry and personal examination, to ascertain the cause and extent of his illness. If Fuller was injured in the wreck, it is strange indeed that he did not mention it to his physicians. At the time of the wreck the agents of the company personally interviewed the passengers for the purpose of ascertaining the names of those who had been injured, but no claim was made by Fuller at that time that he had sustained any injuries by reason of the wreck, nor did he ever suggest that he had a claim against the company. Assuming that there was some testimony tending to support the verdict, all must concede that it is very slight and unsatisfactory. In view of this state of the case, some of the rulings of the trial court which are clearly erroneous are prejudicial, and seem to me to require a reversal.

The plaintiff below undertook to show that the death of Fuller resulted from the accident and injury, by expert testimony. A hypothetical question embracing some of the facts respecting the accident which the plaintiff undertook to prove was submitted to a medical witness, who was asked whether or not, in his judgment, the injury caused the death of Fuller. He answered that in

his judgment he died from the injury, but an inquiry developed that his opinion was not based upon the facts stated in the hypothetical question, but upon statements made to him by Mrs. Fuller about the time of her husband's death. It does not appear that the statements were made in the presence of Mr. Fuller, nor that he had any knowledge of them. The cause of his death was the important question in the trial; and the opinion of this witness was permitted to go to the jury, over objection, based, not upon the facts stated in the hypothetical question, but upon hearsay testimony. Within the rule of *Railroad Co. v. Frazier*, 27 Kan. 463, an opinion resting upon such a basis was inadmissible, and its reception material error. See, also, *Rog. Exp. Test.* §§ 46, 47.

The railroad company called witness Meade, who had special knowledge and skill with reference to railroad tracks, and interrogated him with reference to the cause of the accident. The plaintiff below then introduced a witness named Titus, and inquired if he had heard the testimony of the witness Meade; and upon his testimony Titus was asked what, in his opinion, caused the derailment and wreck of the train, and over objection he answered that "it was caused by the oscillation of the train through the high velocity passing over the line as defined by Mr. Meade." The witness Meade had testified as to what he saw at the place of the wreck, and had given his inferences and conclusions from what he saw, but in the end admitted that the cause of the wreck was a mystery to him. An expert may give an opinion upon facts assumed to be established, and upon possible or probable facts in the case, but no rule of evidence will permit a witness to give an opinion upon the inferences and conclusions of another expert. The testimony thus obtained was not so material to the case as that respecting the cause of death, but it should have been excluded from the jury.

The trial court refused to submit to the jury a special question as to whether Fuller had not, on the day following the accident, admitted to Dr. Wasson that he was not injured in the wreck. One of the principal questions in controversy was whether Fuller had suffered an injury in the wreck, and a subsequent admission of that character bore directly upon the question in controversy, and was a material fact in the case. There was abundant evidence tending to show that such an admission was made, and the question should have been submitted to the jury.

The court also refused to submit questions to the jury as to whether Fuller had not called at the general offices of the company subsequent to the accident, but had never presented a claim or demand against the company for injuries suffered. These questions were pertinent to the issues, and should have been submitted. The fact that

answers to them most favorable to the company might not have been sufficient to overthrow the verdict does not determine the sufficiency of the questions, nor prevent their submission. In general it is error to refuse to submit questions material to the case, and based upon competent testimony. For these reasons the judgment of the court below should be reversed.

SCULLY v. PORTER.

(Supreme Court of Kansas. Oct. 10, 1896.)

LANDLORD'S LIEN ON CROPS—PRIORITY.

1. The statutory lien given a landlord upon the crops grown or made upon a rented farm exists independently of a seizure upon attachment or other process.

2. No writing is required to give force to a landlord's lien, nor is the filing or recording of the contract of lease a prerequisite to the creation of such lien.

3. Where a landlord's lien upon a crop has not been waived, relinquished, lost, or otherwise divested, it is paramount to the claim of one who purchases the same while it is in the possession of the tenant upon the leased premises.

(Syllabus by the Court.)

Error from court of appeals, Southern department, Central division.

Action by J. H. Porter against William Scully. Judgment for plaintiff. Defendant appealed to the court of appeals, where the judgment was affirmed (43 Pac. 824), and he brings error. Reversed.

R. H. Hazlett and C. L. Harris, for plaintiff in error. Redden & Schumacher, for defendant in error.

JOHNSTON, J. William Scully owned a farm in Butler county, which he leased in 1887, to J. N. Bledsoe, who remained in the possession of the same under the lease until 1890. During the season of 1889, Bledsoe raised a large crop of corn, which was cribbed upon the leased land. The stipulated rental for that year was \$310, together with any taxes levied upon the premises, no part of which had been paid when the present controversy arose. While the corn was yet cribbed upon the premises, and about January 20, 1890, J. H. Porter attempted to purchase the corn from Bledsoe, and a few days later paid the greater part of the purchase price. On January 31, 1890, Porter took from Bledsoe a chattel mortgage on the corn to secure the payment of the money advanced on the purchase. On February 4, 1890, Scully brought an action against Bledsoe to recover the rent due, and to enforce the lien he caused an attachment to be levied on the corn in the cribs on the leased premises. On February 7, 1890, Porter, claiming to be the owner of the corn, brought this action in replevin, and obtained possession of the same from the attaching officer. William Scully was substituted for the officer, and made a party defendant in the action, and the trial subsequently had resulted in a judgment

against him, which was affirmed by the court of appeals.

There is little dispute about the material facts in the case, and practically the only important question arising upon them is whether a person can purchase from the tenant a crop grown and yet remaining upon the leased premises, free from the lien of the landlord, where the rental for the year in which the crops were grown is still due and unpaid. That the relation of landlord and tenant existed between Scully and Bledsoe is beyond dispute, and there can be no question that the rent for the year 1889, when the crop was grown, was due and unpaid. The crop was still upon the leased land, and the value of the same did not exceed the amount of rent due for the year 1889. Under these circumstances, Scully had a lien upon the corn, which continued until the rent was paid, or until the lien was waived, relinquished, lost, or otherwise divested. In section 24 of the act relating to landlords and tenants, it is provided that: "Any rent due for farming land shall be a lien on the crop growing or made on the premises. Such lien may be enforced by action and attachment therein as hereinafter provided." Gen. St. 1889, par. 3633. In section 28 of the same act, provision is made for the enforcement of a lien on crops for rent of farming lands by attachment proceedings. The lien, however, exists by force of the statute, independently of the levy of an attachment, and so long as the crops remain upon the premises the lien will prevail over the claim of a purchaser. No writing is required, to give force to the lien, nor is the filing or recording of the contract of lease a prerequisite to the creation of a lien. Many of the leases, being for a term of one year or less, and not in writing, cannot be filed or recorded in a public office, and this indicates plainly enough that the legislature did not regard record notice to be essential to the existence of a landlord's lien. No statutory provision with reference to notice is made except in section 26, which authorizes an action for conversion against the purchaser of a crop to the extent of the rent due, and damages as well. This is a somewhat severe remedy, and hence it can only be employed where the purchaser had some notice of the lien. The action of Scully was brought to enforce the lien against the property upon the leased premises, and not to charge the purchaser for its conversion. That provision, however, does not apply where the property is in the possession of the tenant of the leased premises. Where the property is removed by the tenant and sold on the market, other and different questions would arise with respect to notice than we have here. So long as the property remains upon the leased premises, it affords notice to all who deal with the tenant, and there is little risk of the loss of the lien. This appears to have been the view of the legislature, for, in section 27 of the act, provision is made that where the crop is being

removed, or there is an intention to remove it, from the leased premises, the landlord may cause it to be seized upon attachment, whether the rent be then due or not, if it be due within one year thereafter. It is the policy of the law to protect and facilitate bona fide sales of personal property in the open market, where they are made without notice of liens, but a person who purchases a crop which is in the possession of the tenant of the leased premises can hardly be called a bona fide purchaser. Porter knew, or should have known, that the land was rented; and, as he is presumed to know the law, he is charged with knowledge that the landlord has a lien upon the crops for the unpaid rent. Aside from the notice afforded by the record, that Scully owned the land, he appears to have had actual knowledge; for in the chattel mortgage taken by him from Bledsoe the corn mortgaged is described as "2,600 bushels of corn in the crib on the farm now occupied by J. N. Bledsoe, and known as the 'Scully Land.'" He may not have had actual knowledge that the rent was unpaid, but he had notice sufficient to put him upon inquiry, and an inquiry would have disclosed that the rent for the year 1889 was still due and unpaid. It is generally held that a notice sufficient to put a purchaser upon inquiry binds him to a knowledge of whatever the inquiry would have disclosed. The statutory lien given to the landlord is paramount to the rights of any one who purchases a crop from the tenant which is yet upon the leased premises. The case was tried and submitted to the jury upon a different view of the law, and the judgment must therefore be reversed, and the cause remanded for a new trial in accordance with the views herein expressed. All the justices concurring.

STATE v. PICKERING.

(Supreme Court of Kansas. Oct. 10, 1896.)

ROBBERY—VERDICT.

The defendant was charged with robbery by taking the property of O. from his person by violence, and putting him in fear of immediate injury. Held, that such charge includes larceny, and larceny from the person, as well as robbery, and that under it the defendant may be convicted of either offense; and a verdict finding the defendant guilty as charged is insufficient to support a sentence for robbery in the first degree. (Syllabus by the Court.)

Appeal from district court, Geary county; O. L. Moore, Judge.

Harold Pickering was convicted of robbery, and appeals. Reversed.

Thomas Dever and W. S. Roark, for appellant. F. B. Dawes, Atty. Gen., and John T. Dixon, for the State.

ALLEN, J. The defendant was charged by information with having stolen the property of John E. Osborn, consisting of certain money therein described and a promissory note for \$150, from the person of said Os-

born, by violence to his person, and by putting him in fear of immediate injury, with intent to rob him. The verdict rendered finds the defendant guilty as charged in the information, without specifying any degree of the offense. Objection was made to pronouncing sentence on this verdict, for the reason that it does not specify the degree of the offense of which the jury found him guilty. This objection was well taken. The verdict is insufficient to support a judgment. *State v. Scarlett*, 57 Kan. 252, 45 Pac. 602. As this requires a reversal, we deem it unnecessary to enter into a discussion of the many questions raised by counsel. We will say, however, that the information, in charging robbery, also charges larceny, and larceny from the person, and under it a conviction might be had of either offense. The instructions were to the effect that the jury must either convict of robbery or acquit. This was altogether erroneous, as the defendant might properly be convicted of any offense included within the principal charge of robbery, as stated in the information. The judgment is reversed, and a new trial ordered. All the justices concurring.

**SPRINGFIELD FIRE & MARINE INS. CO.
v. PAYNE et al.**

(Supreme Court of Kansas. Oct. 10, 1896.)
**INSURANCE—AWARD OF APPRAISERS—WORTH OF
PROPERTY DESTROYED—EVIDENCE.**

1. In the absence of fraud or mistake, the written agreement of the assured and several insurers for the appraisement of a fire loss is the best evidence of the intent of the parties in entering into it.

2. For the purpose of testing the validity of an award of appraisers of a fire loss, it is improper to submit to the jury whether the appraisers were in possession of the facts necessary to an intelligent conclusion, or whether they took into consideration all the items of the loss covered by the policy. Such an award is valid and binding if the proceeding is honestly and fairly conducted, but, in the case of destroyed property, which an appraiser had never seen, fairness would require that he be informed by evidence of some sort (not necessarily under oath) as to the character and value of the property; and, unless an opportunity is afforded to impart such information, the award will not be binding.

3. Evidence of the cost of a building is not usually evidence of its value at a particular time; but witnesses who are not architects, builders, or contractors may be allowed to state their opinions as to the worth of a building from a general knowledge of it without being able to estimate the value of any of the materials entering into its construction, such inability affecting the weight, but not the competency, of the testimony.

4. Although a submission to appraisers may not be a condition precedent to the commencement of an action, for the reason that neither party made a written demand therefor, yet, when an appraisement is agreed upon, the parties are bound by the award, unless the same is invalid; and the burden of proof in that respect rests upon the party who challenges it.

(Syllabus by the Court.)

Error from district court, Wyandotte county;
Henry L. Alden, Judge.

Action by Thomas J. Payne and others against the Springfield Fire & Marine Insurance Company. Judgment for plaintiffs. Defendant brings error. Reversed.

In 1887, Thomas J. Payne commenced, and in 1889 completed, the erection of a fine dwelling house at Argentine. On November 8, 1888, the plaintiff in error issued a policy of fire insurance thereon for the sum of \$4,000, to run for three years. Policies were issued by three other companies, aggregating \$15,000. The house was destroyed by fire about 2 o'clock on Sunday morning, May 3, 1891. Within a few days after the fire, the adjusters of the several companies, or some of them, had a conference with Payne and his attorney at the Coates House, in Kansas City, Mo., in relation to the loss, but the evidence is quite conflicting as to what occurred there. The policy of the plaintiff in error contained the following clauses: "The amount of sound value and the loss or damage shall be determined by agreement between the company and the assured. But if at any time differences shall arise touching any loss or damage, every such difference shall, at the written request of either party, be submitted at equal expense of the parties to competent expert and impartial persons (not interested in the loss as creditors or otherwise, nor related to the assured or claimants), one to be chosen by each party, and the two so chosen, in case of their disagreement, shall select a third to act with them; and the award in writing, under oath, of any two of them, shall be binding on the parties as to the amount of such loss or damage, but shall not decide the legal liability of the company under this policy; * * * and, until the * * * award had, the loss shall not be payable;" and "no suit or action against this company for the recovery of any claim by virtue of this policy shall be sustainable in any court of law or chancery until after an award shall have been obtained fixing the amount of such claim in the manner above provided." Payne testified that the adjusters made no claim that his loss was not equal to the amount of the policies, but they represented that it could not be paid until after an appraisal thereof, which was a requisite formality to payment without suit. The testimony of the adjusters was to the effect that they disputed the amount of the loss, and claimed that it was much less than the sum of the policies, and that they proposed the selection of appraisers, as provided by the policies, to fix the amount of the loss. Nothing was then agreed upon, but the attorney for Payne said that he would make proofs of the loss. On or about June 17, 1891, however, Payne and the several agents and adjusters of the insurance companies signed a written agreement for the appointment of P. B. Messenger and S. G. Gribb to appraise the loss, and in case of disagreement the said appraisers to select a third to act with them in matters of difference only; the award of said appraisers, or any two of

them, made in writing, in accordance with the agreement, to be binding upon both parties; it being stated that the appraisal was for the purpose of ascertaining and fixing the amount of said loss and damage, and not to determine, waive, or invalidate any other right or rights of either party, and that in determining the loss and damage the appraisers were to make an estimate of the total cost of replacing or repairing the property, or the actual cash value thereof at or immediately preceding the time of the fire, and in case of depreciation of the property from use, age, condition, location, or otherwise, a proper deduction should be made therefor. Messenger and Gribi were sworn as appraisers on the same day, and on June 20, 1891, they selected J. F. Meyer to act as a third appraiser to settle matters of difference in compliance with the agreement. The evidence tends to show that the only matter of difference was as to a gas machine, and the principal question as to that was whether it was covered by the policies or not. It was conceded on the trial that this machine was not covered by the policies. Meyer was sworn as an appraiser on the day of his appointment, and on the same day he and Gribi signed a written appraisal of the loss at \$11,428.51, but Messenger did not sign it. On June 26, 1891, Payne made written proofs of his loss, giving the items thereof, aggregating \$23,689.90. These proofs of loss were soon returned to Payne, who claims that no reasons were assigned for such return, while the companies claim that they did assign specific reasons therefor, and requested their correction. Payne was permitted to testify, over the objection of the insurance company, that the house cost him about \$25,000, and other witnesses, not architects, builders, or contractors, were allowed to state their opinions as to the value of the house from a general knowledge of it, without estimating the value of any of the materials entering into its construction. The essential parts of instructions 4 and 5 given by the court, and excepted to by the insurance company, read as follows: "If you find from the evidence that said plaintiff made and entered into such an agreement for the purpose of submitting questions of difference which had arisen between said plaintiff and defendant touching said loss or damages sustained by plaintiff to the persons therein mentioned for determination, their award to be final and binding upon said plaintiff and defendant as to such loss and the amount of damages so ascertained, and that said agreement was so entered into by the plaintiff of his own accord, knowing the purpose and effect thereof, and not by reason of false representations and fraud, as alleged by said plaintiff in his reply as hereinbefore set out; and that said appraisers, in making such award thereunder, took into consideration all the items of the loss covered by said policy, and were in possession of the facts necessary for them to arrive at an intelligent conclusion concerning the matters referred to them for

determination,—then I instruct you that said agreement and the award made and signed by the said J. F. Meyer and S. G. Gribi are binding upon said plaintiff, and his recovery herein will be limited to the amount of such award." "If, however, you find from the evidence that said agreement to submit the questions of such loss and the amount of damages sustained by the plaintiff to said persons for determination and arbitration was not made and entered into by said plaintiff of his own accord, knowing the purpose and effect thereof, but that said plaintiff was induced to sign the same by reason of false representations and fraud made to or practiced upon him by said defendant or its agents or representatives, as alleged in said plaintiff's reply as hereinbefore set out, or that said appraisers making such award made and determined the same without being in possession of the facts necessary for them to arrive at an intelligent conclusion concerning the matters referred to them for determination, and without giving an opportunity for such facts to be presented to them, and that said appraisers did not take into consideration all the items of the loss covered by said policy, as in said reply alleged, then I instruct you that said agreement and award are not binding upon said plaintiff, and you will then determine from the evidence the amount of loss or damage to said dwelling house sustained by said plaintiff from said fire, said loss or damage to be estimated according to the actual cash value of the property at the time of said fire." A verdict was returned in favor of Payne April 15, 1892, for \$4,158.66, and answers were made to certain particular questions of fact. As to the execution of the agreement to appraise, the jury found that Payne examined it, took it to his attorneys, returned to the office of the insurance agent, and requested some alterations therein, and that he knew the contents thereof, and its purpose, before it was signed; but in answer to other questions the jury found that he did not understand the nature and character of the agreement, and that false representations and fraudulent statements were made, whereby he was induced to sign the same. The jury further found that the parties did not differ as to the amount of the plaintiff's loss before the agreement was signed; that Gribi was employed by the insurance companies previous to signing the contract; that Gribi and Meyer were incompetent, because they were not in possession of all the facts in determining the loss; that Payne did not have a hearing or any opportunity to be heard before the appraisers; and that Payne refused to accept the amount of the award on June 20, 1891. Other facts appear in the opinion.

Thomas Bates and Reed & Reed, for plaintiff in error. Hale & Fife, for defendants in error.

MARTIN, C. J. (after stating the facts). 1. The question of a difference between the as-

sured and the insurers as to the amount of the loss was scarcely an open one after the execution of the written agreement of June 17, 1891. That the loss was legitimate does not seem to have been disputed at any time, and the only function that appraisers or arbitrators could perform was to ascertain and fix its amount. Payne did not testify that the agents and adjusters ever agreed to pay him the full amount of the policies, to wit, \$19,000, although he says they did not question the amount of the loss. He admits that the subject of the appointment of appraisers was discussed at the Coates House, and this was more than a month before the agreement was signed. According to the findings of the jury, Payne executed the paper advisedly. Upon his own testimony we are unable to discover any fraud practiced upon him by the insurance companies in order to obtain his signature. It was plainly stated in the writing that the appraisal was "for the purpose of ascertaining and fixing the amount of said loss and damage," and that "the award of said appraisers, or any two of them, made in writing," should be binding upon both parties to the agreement. The writing is the best evidence of the intent of the parties in appointing appraisers, and, there being no evidence of fraud or mistake, Payne should not be heard to contradict what is therein so clearly expressed. *Hopkins v. Railway Co.*, 29 Kan. 544, 550; *Smith v. Deere*, 48 Kan. 416, 29 Pac. 603; *Getto v. Binkert*, 55 Kan. 617, 620, 40 Pac. 925, and cases cited.

2. The agreement of June 17, 1891, designated P. B. Messenger and S. G. Gribi as appraisers. Messenger had been named by Payne, and Gribi by the insurance companies. Messenger was a carpenter and builder, who had worked on Payne's house, part of the time as foreman, and he was entirely familiar with the materials and workmanship entering into its construction. Gribi was a contractor and builder residing at Wichita, and had on several previous occasions acted as an appraiser of fire losses by the appointment of insurance companies. The evidence tends to show that Gribi was in Kansas City on business before the agreement was signed, and that he consented to serve as an appraiser. Gribi and Messenger went to Argentine on the day of their appointment, and measured the foundation walls, the superstructure of wood having burned, leaving little else to indicate the size and character of the building. A rain coming up, they went to the place where Payne was residing, and he gave them a photograph of the house. From the measurements and the photograph Messenger and Gribi drew a rough plan or diagram of the house. Gribi testified that Payne then and there gave a very full description of the house, with all its materials and workmanship, but this was fully denied by Payne. It is not claimed that Payne had any hearing after that day, or any notice that evidence would be heard as to the character or the value of the building. The appraisers obtained the bill of the Hopkins Planing Mill Company, which included the

greater part of the mahogany, cherry, bird's eye maple, and butternut finishing lumber, together with doors of like character; and this bill, with the measurements, the photograph, and the plan made therefrom, appear to have been the sources of information upon which Gribi acted, with the knowledge, if any, derived from Payne, for he did not testify that he obtained any data from Messenger. The latter had the same sources of information, and also the previous knowledge of the house, derived from his personal familiarity with it. Meyer, although appointed by the other appraisers, because of their difference as to the gas machine, seems to have gone all over the calculations and estimates, but it does not appear that he obtained any facts from Payne, or from any other source familiar with the building. Messenger died before the trial. His deposition was taken, but neither party offered it in evidence. An appraisal of existing property is usually made upon actual view, and without the aid of other evidence; and in the case of appraisers entirely familiar with property afterwards destroyed they might make an intelligent estimate upon their former knowledge, but this is not so as to appraisers who have never seen the property. In such case the estimate must be as to property which was, but is not, and a knowledge of it must be derived from evidence of some sort, not necessarily under oath. The measurements, the photograph, and the plat made therefrom, together with the planing-mill bill, would, no doubt, greatly aid Gribi in making an estimate; but if he obtained no information from Payne, or any other person, it could hardly be claimed that his estimate would be an intelligent one. Messenger was well informed respecting the building, and was perhaps competent to make an estimate with the aids before indicated; but he did not sign the award. If he agreed to the amount thereof, however, then it may fairly be considered his by reason of the signature of the third appraiser, in the selection of whom he joined, for by the terms of the agreement the award was sufficient if signed by any two of the appraisers. The rule laid down by the court was too strict in allowing the jury to pass upon the question whether or not the appraisers were in possession of the facts necessary for them to arrive at an intelligent conclusion, and in declaring that, if the appraisers did not take into consideration all the items of the loss covered by the policy, then the award was not binding upon Payne. Very few awards could stand the test of so strict a rule. An award is prima facie conclusive between the parties as to all matters submitted to the arbitrators (*Miller v. Brumbaugh*, 7 Kan. 343, 352; *Groat v. Pracht*, 31 Kan. 656, 3 Pac. 274), and it will not be set aside for mere irregularities not affecting substantial rights (*Anderson v. Burchett*, 48 Kan. 153, 29 Pac. 315). In *Underhill v. Van Cortlandt*, 2 Johns. Ch. 339, 361, Chancellor Kent said: "Admitting that there was no corruption or partiality in the arbitrators (and none is pretended), and admitting that there was no mis-

conduct in them during the course of the hearing, nor of fraud in the opposite party (and none is established by proof), then, I say the court cannot inquire into the charge of an over or under valuation, or of the reasonableness or unreasonableness of the award, but it is binding and conclusive. If every award must be made conformable to what would have been the judgment of this court in the case, it would render arbitrations useless and vexatious, and a source of great litigation; for it very rarely happens that both parties are satisfied. The decision by arbitration is the decision of a tribunal of the parties' own choice and election. It is a popular, cheap, convenient, and domestic mode of trial, which the courts have always regarded with liberal indulgence. They have never exacted from these unlettered tribunals—this rusticum forum—the observance of technical rule and formality. They have only looked to see if the proceedings were honestly and fairly conducted, and, if that appeared to be the case, they have uniformly and universally refused to interfere with the judgment of the arbitrators." See, also, *Water-Power Co. v. Gray*, 6 Metc. (Mass.) 181, 165, and *Hall v. Insurance Co.*, 57 Conn. 106, 117, 17 Atl. 356, and authorities cited.

3. The policy required the insurance company to make good unto the assured the amount of loss or damage to be estimated according to the cash value of the property at the time of the loss, not exceeding \$4,000. One method of arriving at such loss is by estimating the cost of replacing the building, less any depreciation from use, age, or otherwise; and the other is by evidence of the value of the building at the time of its destruction, less the value, if any, of the ruins. If witnesses to the worth of the building are shown by cross-examination to have little knowledge upon the subject, this would be proper matter of argument to the jury as affecting the weight of their testimony, but it should not be excluded on that account. Evidence of the cost of a building, however, can hardly be said to be evidence of its value at a particular time. Sometimes, from the necessities of the case, it may be proper to inquire as to the cost of an article as tending to establish its value, but there is no such necessity here, and Payne ought not to have been permitted to testify that the house cost about \$25,000.

4. It does not appear that either party made a written request for submission to appraisers, and therefore an appraisal was not a condition precedent to the commencement of an action (*Insurance Co. v. Wilson*, 45 Kan. 250, 25 Pac. 629; *Insurance Co. v. Wallace*, 48 Kan. 400, 29 Pac. 755); yet, an appraisal having been agreed upon, Payne is bound by the award, unless it is invalid under the principles above stated; and the burden of proof is upon him to show its invalidity. If, however, the award shall not be sustained, then Payne will be entitled to recover from the insurance company the sum of \$4,000, and interest thereon at 6 per cent. per annum from a time 60 days after the proofs of loss were received at Chicago,

or so much thereof as shall not exceed four-nineteenths of the total loss, with interest thereon as aforesaid.

The court did not err in refusing to submit to the jury the particular questions of fact referred to in the brief of plaintiff in error, nor in holding that further proof of loss was waived, nor in any other respect material to the case except as hereinbefore indicated; but for these errors the judgment must be reversed, and the cause remanded for a new trial. All the justices concurring.

DOUGLASS et al. v. WALKER et al.

(Supreme Court of Kansas. Oct. 10, 1896.)

REVIEW ON APPEAL—CONCLUSIONS OF LAW—TAX DEED.

1. Where a case comes before a reviewing court on conclusions of fact and of law only, a conclusion of law properly deducible from conclusions of fact, although general in its nature, ought to be regarded, notwithstanding there are other independent conclusions of law more specific in character.

2. A tax deed including a fee for printing the sale notice is voidable if the printer's affidavit of publication is not transmitted to the county treasurer within 14 days after the last publication, although it was transmitted to and filed in the office of the county clerk within that time. 43 Pac. 1143, 2 Kan. App. 706, reversed.

(Syllabus by the Court.)

Error from court of appeals, Northern department, Eastern division.

Action by A. D. Walker and another against John C. Douglass and another. Judgment for defendants, and plaintiffs appealed to the court of appeals, where it was reversed (43 Pac. 1143, 2 Kan. App. 706), and defendants bring error. Reversed.

John C. Douglass and C. M. Foster, for plaintiffs in error. Hayden & Hayden and J. H. Lowell, for defendants in error.

MARTIN, C. J. This case originated in the district court of Jackson county. It was ejectment, brought by A. D. Walker and James H. Lowell against John C. Douglass and Hattie R. Douglass, to recover an 80-acre tract of land, and damages for its use and occupation. The plaintiffs below relied on two tax deeds covering the same tract; the first being based on the taxes for 1883, and the second on the taxes for 1886, 1887, and 1888. The court made conclusions of fact and of law, but the evidence is not preserved in the record. The conclusions of law were as follows: "First. The tax deed issued upon the sale for the taxes of 1885 is invalid, because there was included in such taxes a township road tax levied in 1884, under the eighth subdivision of section 22, c. 110, Comp. Laws 1879, and carried over to and added to the taxes of 1885; such road tax being illegal because the said subdivision of section 22 was unconstitutional. Second. The tax deed issued upon the sale for the taxes of 1886 is invalid, because a township road tax, levied in 1885, was not collected as other taxes levied for that year, but was carried over to

1886, and constituted a part of the taxes for which the land was sold in the latter year. Third. There should be a judgment for the defendants that they are the owners of the lands, and for costs." Judgment was rendered accordingly in favor of the defendants below. The court of appeals sustained the view of the court below as to the first tax deed, but reversed the judgment as to the second tax deed, holding that the reason stated in the second conclusion of law was insufficient to avoid it. No mention is made of the third conclusion of law, nor of any of the conclusions of fact except those covered by the first and second conclusions of law. 2 Kan. App. 706, 43 Pac. 1143.

1. It is argued by the defendants in error here that the court of appeals was justified in ignoring the third conclusion of law, and in considering only the specific reasons assigned by the court below for the invalidity of the two tax deeds. This contention cannot be sustained. Each conclusion of law is separate and independent, and the third conclusion was broad enough to cover any of the conclusions of fact by which it was supported. In *Blanchard v. Hatcher*, 40 Kan. 350, 352, 20 Pac. 15, the only conclusion of law was that "the defendant ought to recover his costs," and yet this court reversed the judgment on the ground that this conclusion of law was not justified by the conclusions of fact. Certainly, if a judgment of reversal is proper when the conclusions of fact do not justify such a conclusion of law, a reviewing court should not hesitate to affirm a judgment when such conclusion of law is properly drawn from the conclusions of fact.

2. The eighth conclusion of fact was as follows: "The printer who printed the delinquent tax lists for the taxes of the years 1885 and 1886 did not, within fourteen days after said publications were last made, or at any time thereafter, transmit to the treasurer an affidavit of such publication, but such affidavit of publication was in each instance transmitted directly by the printer to, and filed in the office of, the county clerk of said county within fourteen days after the last publication by said printer, and in each case his fee of twenty-five cents was included in the sum charged against said lands as costs, and for which the land was sold." Upon the construction given by this court to section 106 of the tax law (Gen. St. 1889, par. 6957), both the tax deeds were voidable. *Fox v. Cross*, 39 Kan. 350, 18 Pac. 300; *Blanchard v. Hatcher*, supra; *Jackson v. Challiss*, 41 Kan. 247, 257, 21 Pac. 87. The transmission of the affidavit of publication to the county clerk within the time required by law to transmit it to the county treasurer was not a compliance with said section 106, and did not justify the treasurer in selling the land for a price including the 25 cents charged for the fee of the printer. In proceedings for the enforcement of tax liens upon real estate nothing can be considered an irregularity cured by section 139 of the tax law (Gen. St. 1889, par. 6966) which sub-

stantially and intentionally increases the charge for which the land is sold. *Genthner v. Lewis*, 24 Kan. 809; *Hagood v. Morten*, 28 Kan. 704, 767; *Harris v. Curran*, 32 Kan. 581, 588, 4 Pac. 1044; *Ireland v. George*, 41 Kan. 751, 755, 21 Pac. 770. The fact that under section 121 of the tax law (Gen. St. 1889, par. 6970) the county clerk is the ultimate custodian of the affidavit of publication, together with all affidavits, notices, and papers referring to the tax sale, does not dispense with the requirement of section 106, for, unless the printer's affidavit be transmitted to the county treasurer within the time required by law, he is not authorized to include the advertising fee in the tax sale. The amount of the charge upon the land is not affected by the filing of the treasurer's affidavit with the clerk, and the omission to file it may therefore be treated as an irregularity only, under section 139. *Stout v. Coates*, 35 Kan. 382, 385, 11 Pac. 151. The failure of the printer, however, to transmit his affidavit to the proper officer in due time, materially affects the legal charge upon the land, and therefore cannot be treated as a mere irregularity. The judgment of the court of appeals must therefore be reversed, and the judgment of the district court in all things affirmed. All the justices concurring.

ACME HARVESTER CO. v. MADDEN.

(Court of Appeals of Kansas, Northern Department, W. D. Oct. 9, 1896.)

APPEAL—REVIEW OF EVIDENCE—BREACH OF CONTRACT—EVIDENCE OF DAMAGES—DECLARATIONS OF AGENT.

1. When the findings of the jury upon material facts are not sustained by the evidence, they should be set aside, upon proper application being made therefor.

2. Before an agent, who was selling on commission certain harvesting machines, can recover damages for the failure of his principal to fill his orders for certain machines, he must show that the orders were for sales made to persons to whom, by the contract of agency, he was authorized to sell.

3. The declarations of an agent are not admissible against his principal when they merely relate to a past transaction.

(Syllabus by the Court.)

Error from district court, Ellis county.

Action by the Acme Harvester Company against Ed F. Madden. Judgment for defendant. Plaintiff brings error. Reversed.

H. G. Laing, for plaintiff in error. A. J. Bryant, for defendant in error.

GARVER, J. The defendant in error, Ed F. Madden, was the agent for the plaintiff in error for the sale of the Hodge steel header in certain territory in this state for the years 1891 and 1892. Written contracts between the Acme Harvester Company, as party of the first part, and Madden, as party of the second part, defined the terms of the agreement, fixed the prices at which the machines should be sold, the commission to be received by the agent on the sales made by

him, and specified the conditions under which sales might be made. Among other things, said contracts contained the following: "And the said party of the first part hereby agrees to furnish the machines and extras herein named to the said party of the second part as fast as they are ordered, to the extent of their ability to do so: provided, however, if from any cause whatever they are unable to furnish the machines ordered, or any extras thereto, they shall not be liable for any damages whatever. And the party of the first part agrees to pay a commission of 20 per cent. of the list price of machines herein named, at which machines are to be sold. * * * The party of the first part reserves the right to select such notes as they see fit out of the time sales, and turn them over to the party of the second part, at time of settlement, or any time before that, as they may elect, for all commissions due the second party on such sales." "(4) To grant credit to such persons only as are of well-known responsibility and of good reputation as to the payment of their debts, and against whom, after allowing for homestead and all lawful exemptions, collection of the amount can be made by judgment and execution; and all notes to bear truthful property statements, showing the party to be worthy of credit given; or to take chattel mortgage on machine, and additional property valued at double the amount of indebtedness." "(7) The party of the second part, waiving demand, protest, and notice of protest, hereby guarantees the payment of all notes which may be taken for Acme Harvester Company's goods not in accordance with the provisions and conditions of this contract; and, if taken not in accordance therewith as to financial ability, further agrees to sign Acme Harvester Co.'s printed form of guaranty on the back of said notes when requested so to do." "(9) The party of the second part agrees to be accountable to the party of the first part for any loss or expense resulting from any deviation from this agreement; * * * and further agrees that the acceptance of any note by the party of the first part, under the provisions of this contract, not made in compliance with it, shall not be deemed as a waiver by the party of the first part of any of its rights under this contract." During said years the defendant in error sold certain machines, for which the notes of the several purchasers were taken, and transmitted to the company. This action was commenced January 20, 1894, by said company against Madden, to recover, on his guaranty of payment, the amount of certain of said notes, alleging that they had been taken in payment for headers purchased by the makers, respectively, from said Madden; that the makers thereof were not persons of well-known responsibility and good reputation as to the payment of their debts; that they were not persons against whom, after allowing for homestead and all

lawful exemptions, collection of said notes could have been made at the time said notes were taken, or since; that said notes did not bear truthful property statements showing the respective makers to be worthy of the credit given them. The defendant answered, joining issue upon the allegations of the plaintiff's petition, and also asking affirmative relief by alleging certain matters on which he claimed to be entitled to recover against the plaintiff. One of these matters was that the plaintiff did not furnish machines ordered by the defendant to the extent of its ability to do so, in said years, but failed and refused, without legal excuse, to fill his orders therefor, to his damage in a large amount. On a trial had by a jury, judgment was rendered in favor of the defendant for \$134.50.

The main contention on the part of the plaintiff in error is that the verdict of the jury is not sustained by the evidence. Numerous objections are made to the ruling of the court in admitting and refusing evidence, and in the giving and refusing of instructions to the jury. A proper consideration of some of the questions thus raised requires the careful examination of a typewritten record of over 400 pages. The labor thus involved might have been greatly lessened had the rules of this court been complied with in the preparation of the brief for plaintiff in error. As the instructions and evidence concerning which objections are made have not been briefed as the rule requires, we shall not attempt their full consideration. We have, however, carefully read the evidence contained in the record, and are clearly of the opinion that it does not authorize the judgment rendered. The notes, copies of which were attached to the petition, all purported to contain property statements of their respective makers. The plaintiff claims that these statements were untrue, and that the makers were not persons of the class to which the defendant was authorized to grant credit. No chattel mortgage security was taken securing either of the notes. The special findings show that the plaintiff was allowed for four of the notes sued upon, but as to the others the jury found in favor of the defendant. As to most of the notes, the evidence was conflicting, and the verdict of the jury is now conclusive. As to some, however, the testimony of the makers of the notes was the only evidence introduced, and clearly shows that their property statements were not true. It is claimed by the defendant in error that the petition presented no issue as to the truthfulness of the property statements; that it, at most, alleged that no property statement was, in fact, made in connection with either of said notes. The language of the petition is: "Nor did each or any of said notes bear a truthful property statement showing the maker to be worthy of credit so given by the said defendant." This, counsel contends, must be construed

as a denial of the fact that said notes bore any property statements whatever, and should not be taken as equivalent to an allegation that property statements were made which were not true. While we think the petition is open to the objection made by counsel, yet it seems to have been treated by the court, and evidence was introduced by both parties, the same as if the allegation had been made that certain property statements had been made, but that they were untrue. The record shows that the defendant made a general objection to the introduction of the statements in evidence, but it does not definitely appear that this particular ground of objection was brought to the attention of the trial court. In this particular, we think, the petition should be amended on a retrial of the case.

Stronger grounds for reversal exist upon the counterclaim of the defendant. There is nothing in the evidence tending to show that the company did not act in entire good faith in the filling of defendant's orders. On the contrary, the evidence shows that there was, during the years in question, an unusual demand for headers, which exceeded the ability of the company to supply. It was proper, under such circumstances, that the company should treat all its agents with equal fairness, and that unreasonable discriminations should not be made in the filling of their orders. The contract expressly provided that the company was bound to fill orders only "to the extent of their ability to do so," and "if, from any cause whatever, they are unable to furnish the machines, or any extras thereto, they shall not be liable for any damages whatever." No cause for the failure of the company to supply the defendant with all the machines ordered is apparent, other than such unusual demand. This alone, under the evidence, would create no liability. Again, before the defendant could recover because of the failure of the plaintiff to fill any order, he must show that such order was for a machine sold to a person to whom he was authorized to sell by the terms of the contract; that is, that the proposed purchaser was a person of well-known responsibility, and of good reputation as to the payment of his debts, and against whom, after allowing for homestead and for all lawful exemptions, collection of the amount could have been made by judgment and execution. Such showing was not made. On the contrary, the defendant was unable to state, upon the trial, with a few exceptions, who the proposed purchasers were. There was no evidence tending to show either who they were, where they lived, or what their financial condition was. The only evidence introduced on the subject was the testimony of the defendant, who, speaking in a general way of the 100 unfilled orders, said that they were given by persons of good reputation for the payment of their debts, and who were financially able to pay for the

machines. This testimony was objected to, and should not have been admitted in this wholesale manner. The error is especially prejudicial in view of the fact that no information was given of the names of more than a small part of the persons who gave the orders, and no opportunity was afforded the plaintiff to controvert the evidence of the defendant.

Complaint is also made of the rulings of the court in admitting evidence of the statements of other agents of the plaintiff with reference to past transactions, or transactions with which they were not shown to have been personally connected. The declarations of an agent, within the scope of his authority, are admissible when made in connection with a transaction for his principal as a part thereof. But his declarations with reference to a past transaction are not admissible against the principal. *Swenson v. Aultman*, 14 Kan. 273. We perceive no substantial error in the instructions of the court. We think they very fully and fairly presented to the jury the issues, and the rules of law applicable to the case. The judgment will be reversed, and the case remanded for new trial.

DEWEY et al. v. BURTON.

(Court of Appeals of Kansas, Northern Department, W. D. Oct. 9, 1896.)

REVIEW ON APPEAL—CONFLICTING EVIDENCE—ADMISSIONS—FAILURE TO VERIFY ANSWER.

1. Findings of fact made by a trial court upon conflicting evidence will not be disturbed in an appellate court, when there is competent evidence sustaining them.

2. The correctness of the plaintiff's account is not admitted by the defendant's failure to deny it under oath, when the petition contains no allegation of its correctness, notwithstanding a verified account may be attached to the petition.

(Syllabus by the Court.)

Error from district court, Rawlins county.

Action by C. P. Dewey and others against John M. Burton. Judgment for defendant. Plaintiffs bring error. Affirmed.

S. W. McElroy, for plaintiffs in error. W. B. Ingersoll, D. Scott, A. H. Ellis, and F. T. Burnham, for defendant in error.

GARVER, J. The plaintiffs in error commenced this action in the district court of Rawlins county, alleging that the defendant was indebted to them for certain interest moneys collected by the defendant on certain mortgage loans in said county, belonging to the plaintiffs, and not remitted. In his answer the defendant admitted the collection of the sum claimed, and alleged that the same was fully accounted for and settled by the payment to plaintiffs by the defendant of certain moneys which he had advanced to them in connection with certain other interest coupons which were in his hands for collection. Upon the trial the principal conten-

tion between the parties was as to the right of the defendant to have credit, as against the plaintiffs, for the several sums which he advanced to them on uncollected interest coupons. The defendant was a banker doing business at Atwood, Rawlins county, and made the advancements, as claimed by him, under the mistaken belief that it was the understanding and arrangement that such advancements were to be made on interest coupons in his hands for collection, when they were not promptly paid at maturity by the makers. The plaintiffs contended that there was no such understanding or agreement, that the moneys so paid were received by them without any notice or information that they had not been paid by the makers of the several interest coupons in the hands of the defendant, and that, being voluntarily made by the defendant, he had no legal right to claim credit therefor, or to recover back the same from the plaintiffs. The defendant offered evidence tending to show that, after the misunderstanding had arisen between him and the plaintiffs, an arrangement was made between them, according to which the defendant was to be reimbursed for his advancements, and that pursuant to such arrangement the defendant surrendered to the plaintiffs, or to their attorneys, the several interest coupons remaining unpaid in his hands, upon which he had advanced the interest; that some of such coupons were afterwards included in suits of foreclosure brought by plaintiffs upon the real-estate mortgages in connection with which the coupons were executed, and judgments obtained thereon in favor of the plaintiffs; also that in some cases the plaintiff took title to the mortgaged lands by voluntary conveyances from the mortgagors. The case was tried by the court without a jury, and a general finding made in favor of the defendant, no special findings being requested or made.

The plaintiffs in error contend that the finding of the court is not sustained by the evidence, and claim that there is no proof on behalf of the defendant showing that any advancements were made under a mistake of fact, or that there was any understanding or agreement on the part of the plaintiffs to reimburse him therefor. There is much force in this contention, and we might be inclined to agree therewith, were it presented to us as a trial court authorized to weigh the evidence, and to pass upon disputed questions of fact. But this is not a case of an entire want of evidence to sustain the finding of the court. It is a case of conflicting evidence, in which the various facts and circumstances surrounding the several transactions of the parties must be considered. The trial court had better opportunities of making correct deductions and conclusions from the evidence than are afforded to us as an appellate court. Under the well-settled rules of practice in this state, the judgment cannot be reversed on this ground alone.

It is further claimed that the court erred in overruling the objection of the plaintiffs to the introduction of testimony by the defendant. This objection is based on the ground that the answer of the defendant was not verified. The correctness of the plaintiffs' account against the defendant for moneys collected was not disputed. The only issue presented for trial, and the only one upon which the decision of the court was based, was raised by the answer of the defendant. This needed no verification. But, even though the defendant had sought to dispute the correctness of plaintiffs' account, we think he could do so under an unverified general denial. The plaintiffs set out their account in detail in their petition, and attached thereto an affidavit of their attorney that the statements therein contained were true as he verily believed. But the petition itself contained no allegation of the correctness of the account. The correctness of the plaintiffs' account is not admitted by the defendant's failure to deny it under oath, when the petition contains no allegation of its correctness. Failing to find any reversible error in the record, the judgment is affirmed.

TREAT v. WILSON.

(Court of Appeals of Kansas, Northern Department, W. D. Oct. 8, 1896.)

ENJOINING EXECUTION—ADEQUATE REMEDY AT LAW.

1. The district court has control of all process issued for the execution of its judgments, and may, after judgment, exercise such control in order to prevent injustice.

2. Injunction will not lie when there is an adequate remedy at law to secure necessary relief.

(Syllabus by the Court.)

Error from district court, Ellis county.

Suit by M. J. R. Treat against Hill P. Wilson to stay the execution of a judgment. From an order dissolving a temporary injunction, plaintiff brings error. Affirmed.

C. A. Hiller, for plaintiff in error. F. J. Harris, for defendant in error.

GARVER, J. The plaintiff in error complains of the ruling of the judge of the district court of Ellis county in making an order dissolving a temporary injunction which had been previously granted, without notice, by the probate judge of said county, to stay the execution of a judgment theretofore rendered by said court in an action in which Hill P. Wilson was plaintiff, and M. J. R. Treat was defendant, until said defendant, Treat, against whom the judgment was given, could prepare his case, and file a petition in error in the supreme court for a review thereof. We think no error was committed in dissolving the injunction. The judgment sought to be enjoined was, so far as disclosed, regularly obtained, and in all respects was valid and binding. No

stay having been asked for or allowed when the judgment was rendered, the plaintiff had a right to have an execution issue forthwith. If the defendant therein desired to take the case to the supreme court, the district court would, proper application having been made, doubtless have given such reasonable stay of proceedings as might have been necessary. And even after judgment the court still had control of any process that might be issued, and could have made any order that was proper and necessary to fully protect the legal rights of the unsuccessful party. It is the duty of courts to see that no injustice is done by the use or abuse of their process, and to this end the execution thereof may be stayed at any time by the court out of which it issued. *Church v. Goodin*, 22 Kan. 527; *Dunmeyer v. Railway Co.*, 29 Kan. 185; *Bogle v. Bloom*, 36 Kan. 512, 13 Pac. 798. Injunction is an extraordinary equitable remedy, not to be resorted to when there is an adequate remedy at law. An adequate legal remedy existed in this case. The judgment will be affirmed.

CLARK, J., concurs. GILKESON, P. J., having been of counsel, did not sit in the case.

SIMPSON et al. v. DUVALL.

(Court of Appeals of Kansas, Northern Department, W. D. Oct. 9, 1896.)

JURISDICTION ON APPEAL.

To give this court or the supreme court jurisdiction to review a judgment of a district court, it must affirmatively appear that the amount or value in controversy exceeds \$100, or that the case belongs to the excepted class.

(Syllabus by the Court.)

Error from district court, Norton county.

Action by Mahilda A. Duvall against William Simpson and others. Judgment for plaintiff. Defendants bring error. Dismissed.

J. R. Hamilton, for plaintiffs in error. L. H. Thompson, for defendant in error.

GARVER, J. This is an action to reform a deed of conveyance of real estate so as to make the same conform to the agreement of the parties. It is claimed that the plaintiffs in error sold and agreed to convey to the defendant in error a tract of one-half an acre of land, to be measured out of a larger tract owned by the plaintiff in error, in Norton county; and that, when the deed was executed, by mutual mistake said tract of land was described by such metes and bounds as actually embraced only one-half the quantity purchased and intended to be conveyed. The district court found in favor of the defendant in error, the plaintiff below, and decreed the reformation of the deed of conveyance as prayed for. Of this judgment and decree the plaintiffs in error complain. This case has been heretofore in the supreme court for the review of a decision of the district court made

upon the pleadings. *Duvall v. Simpson*, 53 Kan. 291, 36 Pac. 330. There is nothing in the record now before us to show that the value of the land over which these parties are having so much controversy exceeds \$100. The only thing bearing upon value is the fact that when the purchase was made the price agreed upon for the one-half acre was \$85. We cannot presume that half the quantity of land is worth more than the original purchase. It is well settled that this court has no jurisdiction to review the judgment of a district court unless the amount or value in controversy, exclusive of costs, shall exceed \$100, or unless the case belongs to certain excepted classes. There is no certificate attached to the record in this case showing that it belongs to an excepted class. Jurisdiction must be affirmatively shown; otherwise this court has no authority to review the judgment of the district court. *Packard v. Packard*, 50 Kan. 132, 42 Pac. 335. Because of want of jurisdiction, this case will be dismissed.

CARNAHAN v. LLOYD.

(Court of Appeals of Kansas, Northern Department, W. D. Oct. 9, 1896.)

DEMURRER TO EVIDENCE—AMENDMENT OF PLEADING—BURDEN OF PROOF—EVIDENCE OF OWNERSHIP—ASSUMPTION OF MORTGAGE DEBT.

1. When there is competent evidence fairly tending to prove the allegations of the plaintiff's petition, and the petition states a cause of action, it is error to sustain a demurrer to the plaintiff's evidence on the ground that no cause of action is proven.

2. A technical variance between the evidence and the pleadings, which could not mislead, nor prejudice the rights of the opposite party, should be cured by amendment; and, when such amendment has not been made, it will, in furtherance of justice, be considered as made in this court.

3. An unverified general denial puts the burden of proof of an allegation of ownership upon the plaintiff, in an action upon a note payable to order, but not transferred by a commercial indorsement.

4. Possession by the plaintiff of a note which is the subject-matter of the action is prima facie evidence of ownership.

5. When the grantee of mortgaged premises assumes and agrees to pay the mortgage debt, as a part of the purchase price, without specifying any time for payment, no cause of action accrues against him until the debt assumed becomes due and payable according to the contract of the original parties.

(Syllabus by the Court.)

Error from district court, Sheridan county.

Action by W. H. Carnahan against Walter Lloyd. Judgment for defendant. Plaintiff brings error. Reversed.

M. A. Chambers, for plaintiff in error. Bond & Osborne and M. E. Thorp, for defendant in error.

GARVER, J. April 25, 1889, the defendant, Walter Lloyd, purchased a tract of land from one James Rominger, the deed of conveyance therefor reciting that it "was subject to a mortgage of \$350 now on said land, which said mortgage said grantee as-

sumes and agrees to pay." This action was commenced against Lloyd, on said agreement, October 25, 1894. The note and mortgage, evidencing the debt alleged to have been assumed, were executed March 1, 1888, by James Rominger, in favor of W. H. Lichty, and called for the payment of said sum of \$350, with interest, in five years thereafter. In the petition, the plaintiff alleged the execution of the note and mortgage, the non-payment thereof, their transfer and delivery to the plaintiff by W. H. Lichty, and the plaintiff's present ownership. The trial court sustained a demurrer to the plaintiff's evidence, which ruling is now here for review.

In support of the ruling of the court, several matters are urged as showing that the plaintiff failed to introduce evidence tending to prove his right to recover. It is contended that the evidence does not show that the mortgage debt referred to in the deed of conveyance from Lichty to Lloyd, was the same debt as that evidenced by the note and mortgage referred to in the petition; that there was no evidence tending to prove the plaintiff's alleged ownership; and that the plaintiff's cause of action was barred by the five-years statute of limitations. We think the evidence of the plaintiff showed, without much room for question, that the mortgage indebtedness referred to in the deed from Rominger to Lloyd was the identical debt sued for in this action. While there was a second mortgage upon the same premises, the evidence shows that it was to secure the sum of \$70, and was probably a commission mortgage, executed between the same parties, at the same time, and regarded as a part of the \$350 loan. The maker of the mortgage (the grantor in the deed to Lloyd) testified that this was the only mortgage on the land at the time of said conveyance. We are unable to see how, under this evidence, it can be reasonably said that the agreement of the defendant did not relate to this particular mortgage indebtedness.

The petition described the note, by giving the date, the names of the maker and payee, and its amount. There were also attached, to the petition, copies of the note and mortgage, with the indorsements thereon of the several written assignments through which the title became vested in the plaintiff. These written assignments, on their face, purported to transfer the mortgage debt to the plaintiff. The note introduced in evidence (being the one shown to have been secured by the mortgage referred to in the Rominger deed) is the original of the copy attached to the petition, and is the identical note of which the plaintiff alleged himself to be the owner. The objection that the petition alleged that the note was transferred and delivered by Lichty (the original payee) to the plaintiff, instead of alleging also the several intermediate transfers, we think, is

too technical to justify in itself the ruling of the court. If an amendment in this respect was necessary, this court, in furtherance of justice, will consider such an amendment made, for it is evident that no one has been misled to his prejudice. As the note was not transferred to the plaintiff by a commercial indorsement, his allegation of ownership was put in issue by the general denial of the defendant; and it devolved upon the plaintiff to prove this allegation of his petition by competent evidence. *Washington v. Hobart*, 17 Kan. 275. But possession of the note is prima facie evidence of ownership. *Eggen v. Briggs*, 23 Kan. 710; *O'Keeffe v. Bank*, 49 Kan. 347, 30 Pac. 473. The record shows that the plaintiff had possession of both note and mortgage upon the trial, and that they were introduced in evidence by him. This made out a prima facie case, and was sufficient, in the absence of other evidence, on which to base a recovery.

Was the plaintiff's action barred by the statute of limitations? The debt which the defendant assumed did not, by its terms, mature prior to March 1, 1893. It is true, the mortgage provided that in default of payment of interest, as it matured semiannually, the holder of the mortgage, at his option, might declare the whole sum due and payable. But it does not appear that such option was exercised prior to January 17, 1893, when an action to foreclose the mortgage was commenced. The statute of limitations would not run in favor of the defendant prior to the time when the debt which he had agreed to pay became due and payable. It is contended that the holder of the mortgage could have maintained an action against Lloyd at any time after April 25, 1889, the date of his assumption and agreement. We think otherwise. The case of *Schmucker v. Sibert*, 18 Kan. 104, on which counsel for defendant rely, does not support such a proposition. In that case the mortgaged premises had been conveyed after the maturity of the mortgage debt which the grantee had assumed, and the court simply held that the statute of limitations began to run, as to the grantee, from the time when his agreement was made, and not from the time when the original debt matured. It is plain that the holder of the note and mortgage could not maintain an action thereon prior to the time when, by their terms, they were payable. The agreement of the grantee, Lloyd, was to discharge that debt; and, in the absence of evidence to the contrary, it will be conclusively presumed that he assumed no greater or different obligation than that originally contracted by his grantor. The contract as to time of payment remained unchanged. The plaintiff, as holder, had no cause of action against either the maker of the note or against the grantee upon his assumption of payment, until there was a default in making payment according to the terms of the

contract under which the debt matured. An agreement to pay a debt, no time being specified, is an agreement to pay it when due, or, if already due, then forthwith. *Braman v. Dowse*, 12 Oush. 227; *Furnas v. Durgin*, 119 Mass. 500. The liability which Lloyd incurred was a payment to be made in the future, and, until that time, no cause of action existed against which any statute of limitations could run. 1 Wood, Lim. § 165.

For the foregoing reasons, the judgment will be reversed, and the case remanded for a new trial.

BURTON et al. v. DEWEY et al.

(Court of Appeals of Kansas, Northern Department, W. D. Oct. 9, 1896.)

GUARANTY—CONSTRUCTION.

A cause of action does not accrue on a guaranty of indemnity against loss, as the result of the nonpayment of a debt, until it is shown that the debt is not, by reasonable effort, collectible from the principal debtor.

(Syllabus by the Court.)

Error from district court, Rawlins county.

Action by C. P. and A. B. Dewey against Michael Flaherty. John M. Burton and one Hendricks were joined as defendants. Judgment for plaintiffs, and defendants Burton and Hendricks bring error. Reversed.

Dempster Scott, R. S. Hendricks, A. H. Ellis, and F. T. Burnham, for plaintiffs in error. S. W. McElroy, for defendants in error.

GARVER, J. May 1, 1891, C. P. and A. B. Dewey, as plaintiffs, commenced this action in the district court of Rawlins county against Michael Flaherty and others on a note and mortgage executed by the said Michael Flaherty in favor of plaintiffs for \$500. The plaintiffs in error, Burton and Hendricks, were joined as defendants; a personal judgment being asked against them for the amount of the note and interest, on the following guaranty: "Atwood, Kansas, April 26, 1887. For a valuable consideration, we hereby guaranty C. P. and A. B. Dewey, of Chicago, Illinois, against any loss by reason of a loan of five hundred dollars negotiated by us as agents for said C. P. and A. B. Dewey; said loan being secured by mortgage on the west half of the northwest quarter and the west half of the southwest quarter of section twenty-two (22), township one (1) south, range thirty-six (36) west, in Rawlins county, state of Kansas. Said notes and mortgage have been executed by Michael Flaherty. Burton and Hendricks." Trial was thereafter had by the court and a jury upon the issues joined between the plaintiffs and Burton and Hendricks,—the other defendants being in default,—and a judgment was rendered upon the verdict of the jury, adjudging the amount due on the note and mortgage, to wit, \$803.85, to be a first lien upon the mortgaged premises, and directing, in case of the failure of

the defendants to pay said sum within six months from the date of judgment, that an order of sale issue for the sale of the mortgaged premises without appraisalment, and that the proceeds thereof should be applied to the payment of the costs, taxes, and said judgment debt. Personal judgment was also rendered at the same time against said Burton and Hendricks for the amount found to be due on said note, and directing that, "after sale of said lands and application of proceeds, let execution issue on demand against the property of defendants John M. Burton and R. S. Hendricks." At the time said action was commenced, Michael Flaherty was dead. His legal heirs were made parties to the suit, but his executor or administrator, if there was one, was not brought into court. Burton and Hendricks now complain of this judgment, contending that they had assumed no such obligation as that put upon them by the judgment of the court. Both in the petition of the plaintiffs and upon the trial of the case, the guaranty of the defendants Burton and Hendricks was treated as a guaranty of payment of the Flaherty debt. This was clearly an erroneous view of the matter. The language of the writing is not ambiguous, and plainly expresses the nature and extent of the obligation. It is familiar law that the liability of a surety or guarantor is not to be extended beyond the precise terms of his contract. When the language of the contract is plain, it must control. *Kepley v. Carter*, 49 Kan. 72, 30 Pac. 182; *Kingsbury v. Westfall*, 61 N. Y. 356. There is a well-understood difference between a guaranty of payment, and a contract of indemnity against loss, as the result of the nonpayment of a debt. In the first case the liability of the guarantor is fixed by the failure of the principal debtor to pay at maturity, or at the time when payment was guaranteed. In the second the contract partakes of the nature of a guaranty of collection, no liability being incurred until after, by the use of due and reasonable diligence, the guarantee has become unable to collect the debt from the principal debtor. A guaranty of collection, or a guaranty against loss as the result of the failure to collect a debt, places upon the one for whose benefit the guaranty is made the duty of making a reasonable effort to collect the debt from the principal debtor; and a cause of action does not accrue thereon until after such effort has been made, and proved unavailing. There is no right of action upon such contingent liability immediately upon the failure of the principal to perform. In the case under consideration, how can it be said that the plaintiffs have sustained, or will sustain, a loss on account of the Flaherty loan, without any evidence that the mortgaged premises are not sufficient to satisfy the debt, and without any claim that the Flaherty estate is insolvent? The petition consequently fails to state a cause of action against Burton and Hendricks. To make

out a case against them, the petition should allege and the evidence should prove the actual loss sustained on account of said loan. This was not attempted to be done in this case, and necessarily could not be done, as the property of the principal had not been exhausted. *Abeles v. Cohen*, 8 Kan. 180; *McNall v. Burrow*, 33 Kan. 495, 6 Pac. 897; *Dana v. Conant*, 30 Vt. 246; *Gilbert v. Wilman*, 1 N. Y. 550; *Kohler v. Matlage*, 72 N. Y. 259; *Jeffers v. Johnson*, 21 N. J. Law, 73; *Thompson v. Taylor*, 30 Wis. 68. It follows, therefore, that this action, as to Burton and Hendricks, was prematurely commenced, and the objection to the introduction of evidence should have been sustained.

Other matters are presented in the briefs of counsel, but, in the view we take of the principal question involved, their consideration is unnecessary. The judgment against Burton and Hendricks will be reversed, and the case remanded, with directions to enter judgment upon the pleadings, in their favor, for costs.

BURTON v. RANDALL.

(Court of Appeals of Kansas, Northern Department, W. D. Oct. 11, 1896.)

CONVERSION BY MORTGAGEE—TENDER OF DEBT—MEASURES OF DAMAGES—REVIEW OF EVIDENCE.

1. If a mortgagee in possession of mortgaged personal property disposes of the same in denial of the title and interest of the mortgagor, or in any way which is inconsistent with his rights, the mortgagor may treat such disposal as a conversion.

2. When a mortgagee wrongfully converts mortgaged personal property to his own use, and the value of the property converted exceeds the amount of the debt secured thereby, it is not necessary for the mortgagor to pay or tender payment of the debt before he commences an action for such conversion.

3. In such case the measure of the plaintiff's recovery is the reasonable value of the property, less the amount of the debt secured thereby.

4. The evidence examined, and found not sufficient to sustain the verdict.

(Syllabus by the Court.)

Error from district court, Rawlins county.

Action by A. E. Randall against John M. Burton. Judgment for plaintiff. Defendant brings error. Reversed.

J. C. Cole, D. Scott, W. B. Ingersoll, A. H. Ellis, and F. T. Burnham, for plaintiff in error. Bertram & McElroy and R. S. Hendricks, for defendant in error.

GARVER, J. This was an action brought by Mrs. A. E. Randall against John M. Burton to recover the value of a stock of goods and merchandise alleged to have been wrongfully converted by the defendant to his own use. The property was of the alleged value of \$2,700. The material facts are: On April 23, 1891, Mrs. Randall executed a chattel mortgage on the goods in question in favor of Burton to secure the payment of the sum of \$200 and interest, borrowed from the lat-

ter on that date. The goods consisted of a stock which had been a short time previously purchased from one S. T. Smith, at Republican City, Neb., and shipped to Atwood, in this state, where they were stored, packed in boxes, at the time the mortgage was given. Some time in May, 1891, S. T. Smith, claiming ownership, commenced an action of replevin in Rawlins county against John M. Burton, and, by a writ of replevin issued therein, secured possession of the goods. On May 26, 1891, the replevin action was dismissed by agreement of the parties thereto, Smith retaining possession of the goods, and removing them to Nebraska. Before consenting to the dismissal of the action and the retention of the goods by Smith, Burton received from the former the amount of the Randall loan, and assigned to Smith his mortgage on the goods, but retained the note which was given for the \$200 and interest. At this time Mrs. Randall was absent in Arkansas. It does not appear that Mrs. Randall was given an opportunity to defend her right to the goods against the claim of Smith in the replevin action; neither does it appear in this case what, if any, rights, as against her, Smith had. It is contended on the part of the defendant in error that when Burton took possession of the goods in question under his mortgage he was bound to hold them with a recognition of the mortgagor as owner; that he could only dispose of them so far as might be necessary for the payment of the debt secured thereby; and that the disposition made of them constituted a conversion. This contention is, apparently, not seriously disputed by counsel for plaintiff in error, their defense being based upon other grounds. A mortgagee in possession of mortgaged property has well-defined rights. The property is in his possession for a specific purpose, and its use or disposition must be with particular reference to the purpose for which it is held. Hence any sale or disposal of mortgaged property in denial of the title or interest of the mortgagor therein, or inconsistent with his rights, may be regarded as a conversion. The mortgagee in this case could not, without laying himself liable as for a conversion, voluntarily surrender possession to one not entitled thereto as against his mortgagor. Hence the proceedings instituted by Smith, whereby he obtained possession, and to which Burton voluntarily submitted, are no defense in this case, unless it is made to appear that his claimed ownership was well founded, and that he was, in fact, the real owner, and entitled to the possession of the property. *Greenwalt v. Wilson*, 52 Kan. 106, 34 Pac. 403; *Storage Co. v. Rogers*, 35 Neb. 61, 52 N. W. 826; *Hicks v. Lyle*, 46 Mich. 488, 9 N. W. 529; *Gibbons v. Farwell*, 63 Mich. 344, 29 N. W. 855; *Ashmead v. Kellogg*, 23 Conn. 70; *Ripley v. Dolbler*, 18 Me. 382; *Norton v. Kidder*, 54 Me. 189; *White v. Phelps*, 12 N. H. 332.

It is urged by counsel for plaintiff in error that this action cannot be maintained with-

out proof of a previous tender of payment of the mortgage debt. With this contention we do not agree. Where the property is, as conceded in this case, greatly in excess of the amount of the debt secured by the mortgage thereon, no tender of payment of the debt is necessary before the commencement of an action to recover the value of the goods converted. A tender, under such circumstances, would be a vain and useless thing when the mortgagee has already, in law, received full satisfaction of the debt out of the property of the debtor. A tender always presumes the right of the one to whom the tender is made to accept and retain it. Certainly no such right can exist under the facts alleged in this case. *Wygat v. Bigelow*, 42 Kan. 477, 22 Pac. 612; *Stearns v. Marsh*, 4 Denlo, 227; *Manufacturing Co. v. Gray*, 19 Colo. 149, 34 Pac. 1000; *Iler v. Baker*, 82 Mich. 226, 46 N. W. 377. The amount of the debt, however, is a proper subject for consideration in determining the amount of damages to be recovered, the measure of recovery in such case being the reasonable value of the property, less the amount of the debt secured thereby. *Wygat v. Bigelow*, 42 Kan. 477, 22 Pac. 612; *Belden v. Perkins*, 78 Ill. 449; *Bank v. Boyce*, 78 Ky. 42; *Cushing v. Seymour, Sabin & Co.*, 30 Minn. 301, 15 N. W. 249; *Russell v. Butterfield*, 21 Wend. 300. To entitle the plaintiff in this case to recover substantial damages, it is necessary that competent evidence be introduced to prove the value of the property converted. The jury returned a verdict in favor of the plaintiff for \$2,768.46. On the hearing of the motion for a new trial, at the suggestion of the court, the plaintiff remitted all over \$1,500, for which amount judgment was rendered. An examination of the record discloses an entire absence of evidence to prove value. The only thing having any bearing whatever on that subject is the statement of S. T. Smith that an invoice of the goods, which he had made in Nebraska, showed \$3,000. There is nothing to indicate the character of the invoice, nor when it was made. On the hearing of the motion for a new trial, evidence was introduced tending very strongly to show that Burton did not have possession of the entire stock of goods which had been invoiced by Smith, and that those alleged to have been converted were of an actual value not exceeding \$800. These matters evidently influenced the court to require the verdict to be reduced to \$1,500. But this sum, we think, is equally without support from the evidence. There is no competent evidence to justify the judgment rendered, and we cannot avoid the conviction that upon the facts of the case, as they were more fully shown upon the hearing of the motion for a new trial, great injustice would be done by the affirmance of the judgment.

Objection is made by counsel for defendant in error that the case made does not purport to contain all of the evidence introduced upon the trial. This objection is not well taken,

for we find in the record an express statement that it does "contain a true and correct copy of all the testimony, of every nature whatsoever, introduced on the trial of said cause by either plaintiff or defendant." This certainly is sufficient. So far as disclosed by the pleadings and the evidence, the action of the plaintiff below was not barred by the statute of limitations. The conversion was alleged as of May 23, 1891, and the action was commenced May 18, 1893. The evidence does not show any earlier date when the property may have been converted. The judgment will be reversed, and the case remanded for a new trial.

D. M. OSBORNE & CO. v. CONNOR et al.
(Court of Appeals of Kansas, Northern Department, W. D. Oct. 16, 1896.)

SALE—RETENTION OF TITLE—RIGHT TO POSSESSION ON DEFAULT.

1. Where O., in payment of the purchase price of a binder, executed and delivered to O. several promissory notes, each containing the provision that the title, ownership, and right of possession of said binder should not pass from O. until said notes should be paid in full; that the payee might take possession of said machine at any time he might deem himself insecure, without rescinding the contract of sale for which they were given, and sell the same at public or private sale, and apply the proceeds thereof to whatever sum might then be due on the purchase price; and that the maker of said notes should pay the deficiency if said proceeds should fail to satisfy the debt: *Held*, that such notes evidence an absolute sale of the binder to C., with a retention by O. of the title and right of possession only by way of security for the payment of the purchase price.

2. Where a debt which is evidenced by promissory notes is reduced to judgment, the creditor has the same right to take possession of property pledged to secure the payment of such indebtedness that he had before the change in its form.

(Syllabus by the Court.)

Error from district court, Rawlins county.

Action by D. M. Osborne & Co. against Josiah Connor and Josh. Holmes. Judgment for defendants, and plaintiff brings error. Reversed.

R. S. Hendricks, for plaintiff in error. J. O. Cole, for defendants in error.

CLARK, J. This is an action of replevin brought by the plaintiff in error against the defendants in error to recover the possession of one D. M. Osborne & Co. binder, of the alleged value of \$150. The plaintiff is a corporation, and alleges in its petition that it has a special ownership in said property, and is entitled to the immediate possession thereof, by virtue of two chattel mortgages, copies of which are thereto attached as exhibits, and made a part thereof. The following is a copy of one of these exhibits, and differs from the other only in the date of its maturity: "\$50.00. Bird City, Kansas, July 1st, 1889. For value received, on the first day of October, 1894, I or we, or either of us, promise to pay to the order of D. M. Osborne & Co., a corporation organ-

ized under the laws of the state of New York, the sum of fifty dollars, at the F. & M. Bank, in Bird City, with interest at eight per cent. per annum from date until paid, waiving appraisal and valuation. The express condition of the sale and purchase of the new Osborne No. 5,695, for which this note is given, is such that the title, ownership, or right of possession does not pass from the said D. M. Osborne & Co. until this note and interest, and all other notes given for same purchase, are paid in full; that the said machine is now on the farm owned or leased by the undersigned, or either of them, located in township Rotate, county of Rawlins, state of Kansas. Said D. M. Osborne & Co. have full power to declare this note due, and take possession of said machine, at any time they may deem themselves insecure, even before the maturity of the note, without rescinding the contract of the sale for which the same was given, and may sell the said machine at private sale or public auction, as they may deem more advantageous, without any notice thereof to the parties hereto; the proceeds of said sale, after deducting all expenses, to be applied to whatever sum may then be due on purchase price of said machine, and I hereby agree to pay the deficiency, if said proceeds shall fail to satisfy said debt. The indorsers, signers, sureties, and guarantors severally waive presentment for payment, protest and notice of protest, and notice of nonpayment, of this note, and diligence in bringing suit against any party to this note, and agree that time of payment may be extended without notice or other consent, and without affecting their liability. Josiah Connor. Josh. Holmes." The answer was a general denial. The record shows that upon the trial the defendants admitted the execution of these notes (which are in the petition denominated "chattel mortgages"); that the value of the property in controversy was \$150; that due demand had been made for the possession, and delivery thereof refused by the defendants. The record further shows that the plaintiff had, a short time prior to the commencement of this action, recovered a personal judgment against the defendants upon these notes for \$118.50, the amount then due thereon. The findings and judgment in this action were in favor of the defendants. A motion for a new trial was duly filed and overruled, and these proceedings in error were accordingly instituted by the plaintiff below.

No brief has been filed in this court by the defendants in error, and an examination of the record fails to disclose upon what theory the trial court held that the plaintiff was not entitled to recover possession of the property in controversy. Counsel for plaintiff in error claims that the contention of the defendants was that the plaintiff could not recover the full amount of the purchase price of the binder, and at the same time insist that the title did not pass to the defendants; that they could not treat the transaction both as a conditional and as an absolute sale; and that as the plain-

tiff had, prior to the commencement of this action, recovered a personal judgment against the defendants for the purchase price of the binder, it had by that act elected to treat the transaction as an absolute sale, and was therefore estopped from asserting that the title thereto had not passed to the defendants,—and that, in support of such contention, reliance was placed upon the decision of our supreme court in *Machine Co. v. Lewis*, 52 Kan. 358, 35 Pac. 12. We think, however, that decision is not applicable to the facts in this case. That was an action brought to recover upon a promissory note given by Lewis for a binder. The note contained a stipulation that the title should not pass until the note and interest were paid in full. After the execution of the note, Lewis mortgaged the binder and other property of the machine company. The supreme court held that the stipulation in the note reserving the title in the company evinced an intention by both parties to treat the sale as conditional, rather than absolute, and that, if nothing more appeared, it would necessarily be held that a conditional sale was intended, and that the ownership of the property had never passed from the company, but when Lewis mortgaged the machine to the company he assumed to have title to it, and the company, in applying for and accepting the mortgage, recognized such title, and that under such view the company was entitled to recover all that remained unpaid upon the note, after allowing proper credit for the proceeds of the mortgaged property. While the clause set out in the notes, with reference to the retention of title, the ownership, and right of possession of the property in the payee until full payment of the purchase price had been made, would indicate that a conditional sale was intended, we think the other provisions of the notes evidence an absolute sale of the binder, with a retention of the title and right of possession only by way of security for the payment of the purchase price, and that the agreement for such retention was, in effect, a short form of chattel mortgage. As will be seen, it was stipulated that if the payee should at any time deem itself insecure, even before the date upon which the notes by their terms matured, it might declare the notes due, "without rescinding the contract of the sale for which the same were given," and sell the property, and apply the proceeds of such sale "to the payment of whatever sum may then be due on purchase price of said machine," and the makers of the notes agreed to pay the deficiency if such proceeds should fail to satisfy the debt. "This giving of property as a security for the payment of a debt is the very essence of a mortgage, which has no existence in the case of a conditional sale." *Heryford v. Davis*, 102 U. S. 235; *Chicago Ry. Equipment Co. v. Merchants' Bank*, 136 U. S. 268, 10 Sup. Ct. 999. Of course, it has been shown that if the purchase price had been paid in full the plaintiff would not have been entitled to the possession of the property. The binder having been

pledged as security for the payment of the purchase price, the plaintiff, upon taking possession, would be required to account to the defendants for the value thereof. It is not, in this action, claiming to be the absolute owner of the binder, but bases its right to a recovery upon the stipulation set out in the notes,—that it might take possession of the machine, and sell it, in order to obtain satisfaction of the balance due upon the debt. The recovery of a personal judgment against the defendant for the purchase price did not amount to a satisfaction of the debt, nor did it destroy the plaintiff's lien on the property, which it held by virtue of the stipulation contained in the notes. *Frost v. Shaw*, 3 Ohio St. 270; *Arendale v. Morgan*, 5 Sneed, 716; *Thomason v. Lewis* (Ala.) 15 South. 830. It follows from what has been said herein that the judgment must be reversed, and a new trial awarded.

BALDWIN et al. v. HILL et al.

(Court of Appeals of Kansas, Northern Department, E. D. Oct. 15, 1896.)

CONDITIONAL SALE—FAILURE TO RECORD—BONA FIDE PURCHASER.

A conditional sale of a piano was made in the state of Indiana by B. to A. under a contract providing that the title thereto should be retained by B. until the same was fully paid for. By the laws of Indiana such a contract was legal and valid, and no record thereof was required in order to protect the holder. Subsequently the purchaser, in violation of the terms of the contract, and without the knowledge of the seller, removed the piano to this state, and sold and delivered it to H., who purchased in good faith, without notice of the retention of title by A. Upon discovery by B. of the whereabouts of the piano, this action was commenced against H., the purchaser, to recover its possession. *Held*, that B. was entitled to recover, notwithstanding such contract was not deposited with the register of deeds of the county in this state to which the piano was wrongfully removed by A.

(Syllabus by the Court.)

Error from district court, Brown county; J. F. Thompson, Judge.

Action by D. H. Baldwin and others against Fred T. Hill and others. Judgment for defendants. Plaintiffs bring error. Reversed.

Ryan & Buckles, for plaintiffs in error. S. F. Newlen and C. W. Johnson, for defendants in error.

CLARK, J. This is an action to recover the possession of a certain piano. The findings and judgment were in favor of the defendants. The material facts connected with the transaction out of which this controversy arose, as disclosed by the record, are as follows: April 19, 1890, the plaintiffs sold and delivered to one J. B. Albaugh, at New Albany, Ind., the piano in controversy, under a conditional sale whereby the plaintiffs retained the title until the purchase price therefor should be fully paid. Some time thereafter, and prior to October 19th of

that year, Albaugh, without the knowledge or consent of the plaintiffs, left the state of Indiana, taking the piano with him, and located at the city of Hiawatha, in this state, where, on November 2d thereafter, he sold it to the defendant Fred T. Hill for the sum of \$200, the latter paying \$100 in cash and giving Albaugh his note for \$100, payable six months thereafter. The plaintiffs were ignorant of the fact that Albaugh had removed from the state of Indiana until after he had sold the piano to Hill, and they had no knowledge that the piano had been moved to Kansas until July 27, 1891. At the time of the sale to Hill there was due from Albaugh to the plaintiffs on the contract of purchase about \$250, all of which remained unpaid on September 18, 1891, the date of the commencement of this action. Under the laws of the state of Indiana a conditional sale of personal property wherein title is retained by the seller is valid, not only between the parties thereto, but as to innocent purchasers as well; and the laws of that state at the time this contract was made did not require that the contract itself, or a copy thereof, should be recorded in any of the public offices of that state; and such continued to be the law of Indiana up to the date of the commencement of this action. The defense interposed by Fred T. Hill was that, as neither the contract nor a copy thereof was deposited in the office of the register of deeds in and for Brown county, Kan., after the removal of the property to that county, and as he purchased the property in good faith, without knowledge of plaintiffs' claim, that he acquired a good title thereto. Chapter 255 of the Laws of 1889 is relied upon as sustaining those views. Section 1 of that act reads as follows: "Any and all instruments in writing or promissory notes now in existence or hereafter executed under the conditional sale of personal property, and that retains the title to the same in the vendor until the purchase price is paid in full, shall be void as against any such purchasers or the creditors of the vendee, unless the original instrument or a true copy thereof shall have been deposited in the office of the register of deeds in and for the county wherein the property shall be kept, and when so deposited, shall be subject to the law applicable to the filing of chattel mortgages, and any conditional verbal sale of personal property reserving to the vendor any title in the property sold, shall be void as to creditors and innocent purchasers for value." It is contended by the plaintiffs in error that this law does not apply to a contract entered into, and to be wholly performed, in another state, and which relates to property which at the date of the contract is located in such other state; and that, even though it should be held to apply to such a contract, it should not be held to apply in this particular case. As the plaintiffs had no notice, until after Hill pur-

chased the piano from Albaugh, that the property had been removed to Kansas, and that, as the object in view of such statute was to give notice to creditors or persons contemplating a purchase of the property that the one in possession was not in fact the owner, as this sale from Albaugh to Hill was made prior to the date that the plaintiffs first learned that the piano was in Kansas, a subsequent depositing of the contract with the register of deeds would have been no protection to Hill, and that for this reason the plaintiffs were excused from complying with the terms of that statute. The contention of the plaintiffs in error must be sustained. The laws of a particular state have no extraterritorial force. This original contract of sale was entered into in Indiana between the plaintiffs in error and Albaugh. Under this contract the title to the piano remained in Baldwin & Co. until full payment of the purchase price thereof. The property which was the subject of the contract was at that time in Indiana, and was to remain there until paid for in full, unless written consent for its removal should be given by Baldwin & Co. The notes evidencing the purchase price were made payable at the First National Bank of New Albany, Ind. Under the laws of Indiana, until the purchase price was fully paid, Albaugh had no valid title to the piano which he could convey. Without the knowledge or consent of the owners of the property, he removed it to Kansas, and, before they learned of such removal, he sold it to Hill. Chapter 255 of the Laws of 1889 has no application to such a state of facts as is presented by this record. Baldwin & Co. would not be required to file either the original contract or a copy thereof with the register of deeds of Brown county at a time when they had no knowledge or information that Albaugh had removed the property to Kansas, nor would they be required, in order to protect their rights as against a purchaser from Albaugh, to file the same immediately after learning that the property had been so removed, if prior to such time it had been sold to one who had no notice of their claim of ownership. We think that under the facts as disclosed by the record the title to this piano was no more affected by the attempted sale to Hill than would have resulted had Albaugh's title thereto been based wholly upon a felonious possession of the property. The court erred in directing a verdict in favor of the defendants, and the judgment will be reversed, and the cause remanded for a new trial. All the judges concurring.

MALBON v. GROW et al.

(Supreme Court of Washington. Sept. 30, 1896.)

MORTGAGES—RECORD—INDEX—SUFFICIENCY.

The index of a mortgage giving the name of the mortgagor and mortgagee, together with

a description of the land, but defective for failure to show whether the figures of the description refer to section and township, or block and lot, is yet sufficient to render the record constructive notice to subsequent purchasers.

Appeal from superior court, Walla Walla county; William H. Upton, Judge.

Action by John C. Malbon against James A. Grow and others. There was a judgment for plaintiff, and the First National Bank of Colfax, defendant, appeals. Affirmed.

Eugene K. Hanna, Thos. H. Brents, and Wellington Clark, for appellant. Geo. T. Thompson, for respondent.

DUNBAR, J. Respondent, Malbon, brought this suit to foreclose a mortgage executed by Grow and wife to him in 1891, on real estate in Walla Walla county, making Rogers, Buff and wife, and the First National Bank of Colfax parties to the action, by reason of their claiming some interest in the same. After the execution and filing of the mortgage from Grow to Malbon, appellant and defendant Rogers obtained mortgages to the same land, and had the same placed of record in Walla Walla county. It is admitted that the respondent's mortgage had been transcribed in the proper public record before the execution of appellant's mortgage; but it is claimed by appellant that the respondent's mortgage had not been indexed as required by law, in order to constitute the record of it constructive notice to the appellant of its existence: The index, so far as the description of the land is concerned, was as follows:

Description.	Sec. Lot.	Twp. Block.	R.
Land.	35.	7	35

Appellant and defendant Rogers answered, setting up the execution and recording of their mortgages, pleading the lack of constructive notice of respondent's mortgage by reason of the want of a proper index to the same, and asking that their mortgages be declared a first lien on the land. The court found that the law had been complied with so far as the index was concerned, and that the appellant and defendant Rogers were not innocent purchasers, and gave judgment of foreclosure, decreeing respondent's mortgage to be a first lien upon the land.

It is admitted that the index contained the name of the mortgagor and mortgagee, and the contention of the appellant is that under the rule announced by this court in *Kitchie v. Griffiths*, 1 Wash. St. 429, 25 Pac. 341, the mortgage of the appellant should have been decreed to have taken preference over respondent's mortgage, and been declared a first lien. We do not think this contention can be sustained. It is true that, in the case above referred to, it was held that the deposit of a deed for record in the office of the county auditor does not operate as constructive notice to the public. In that case the deed had not been

indexed at all, and the court was of the opinion that, where one of two innocent persons must suffer a hardship, the misfortune must rest on the person in whose business and under whose control it happened, and who had it in his power to avert it. Applying the same rule to this case, the misfortune, if any, should rest upon the appellant, for there was sufficient in the index to put it upon notice, and to place it within its power to avert the misfortune by a more careful examination of the record. It is true that this description is not technically correct. There is really nothing to indicate whether the figures "35" refer to section or lot, or whether the figure "7" refers to township or block; it might refer to either. But, if one desired to purchase lot 35 in block 7, he would find the description of that lot and block in this index; or, if he desired to purchase section 35 in township 7, he would also find the description in this index,—sufficient to cause a reasonable man to examine the record, and ascertain whether the figures in the index referred to a lot or a section, a township or block. In *Ritchie v. Griffiths*, supra, the court cited *Jones on Mortgages*, where that author says: "Registry laws are intended to furnish the best and most easily accessible evidence of the title to real estate, to the end that those designing to purchase may be fully informed of instruments of prior date affecting the subject of their contemplated purchase, and also that, having availed themselves of this means of knowledge, they may rest there, and purchase in absolute security; provided they do so without knowledge, information, or such suggestion from other facts as would be gross negligence to ignore, of some antecedent conveyance or equitable claim." Certainly, we think that the index in this case furnished information, or, at least, a suggestion, of the fact of the record of the mortgage, which the appellant could not ignore without the grossest kind of negligence. If it should be construed to be township and section, then the index of the sale of the whole of section 35 in township 7 must be construed to give notice of the same or any portion of such section or township, under the rule that the greater includes the less. In *Barney v. Little*, 15 Iowa, 527, which was cited approvingly by the court in *Ritchie v. Griffiths*, supra, the court said: "While the index, which serves so to speak as a finger-board to direct the inquirer, must not mislead him by giving a totally wrong description of lands, yet it is not necessarily and essentially a prerequisite to a valid registration that the index should contain a description of the lands conveyed. It is sufficient if it points to the record with reasonable certainty. If the grantors' and grantees' names are given in the index, with the book and page where the instrument is recorded, and if the instrument is there really recorded, we believe that this, so far as the object of the recording act is concerned, is a substantial, though it may not be in all respects, as to the index book, a literal, compliance with the law." The case at bar goes beyond this, so far as the requisites of the in-

dex are concerned, for here we have not only the names of the grantor and the grantee, and the book in which the instrument is recorded, but we also have a description, though imperfect, of the land itself, sufficient to challenge the attention of the searcher of the record; and one who purchases after such challenge is not an innocent incumbrancer or purchaser without notice, for, even though the constructive notice was not technically given, certainly the record furnished a sufficient notice, in fact, to place the subsequent purchaser upon his inquiry. We are satisfied with the rule announced in *Ritchie v. Griffiths*, but we do not think it should be extended. The judgment will therefore be affirmed.

SCOTT and GORDON, JJ., concur.

STATE ex rel. NIGGLE v. KIRKWOOD.
(Supreme Court of Washington. Sept. 30, 1896.)

QUO WARRANTO—WHEN LIES—REMOVAL FROM CITY OFFICE—REVIEW OF PROCEEDINGS.

1. The proper remedy of one removed from a city office by the mayor is by quo warranto proceedings against the incumbent appointed as his successor, and in such proceedings the court may inquire into the sufficiency of the charges and findings upon which the removal was made. *State v. Van Brocklin*, 38 Pac. 495, 8 Wash. 557, followed.

2. After a city officer has gone to trial upon charges preferred against him by the mayor, without objection to their sufficiency, and the issues have been found against him, resulting in his removal from office, he cannot, by quo warranto proceedings, raise the objection that the charges were not sufficiently specific.

Appeal from superior court, King county; R. Osborn, Judge.

Proceeding by quo warranto on relation of John G. Niggle against William W. Kirkwood. Judgment for relator, and respondent appeals. Reversed.

W. T. Scott and Frank A. Steele, for appellant.

DUNBAR, J. The respondent was removed from the office of police commissioner by the mayor of the city of Seattle, and appellant Kirkwood was appointed to fill the vacancy caused by the removal. Subsequently the respondent, as relator, commenced an action by information in the nature of a quo warranto against the appellant to oust him from the office and reinstate himself. The court refused to hear evidence to impeach the findings of the mayor, took the case from the jury, and found for the relator on the pleadings, upon the ground that the charges and findings were insufficient to support the removal of the relator. The appellant answered the information, denied the intrusion and ouster, and alleged affirmatively the procedure by which the respondent was removed from office and the appointment of the appellant to fill the vacancy.

The first proposition argued by the appel-

lant is that the court had no jurisdiction to determine the sufficiency of the charges or findings, or to inquire into the materiality of the grounds for respondent's removal, upon information in the nature of a quo warranto, because it is a collateral attack upon the judgment of a tribunal invested by law with exclusive original jurisdiction to hear and determine that particular matter. The appellant admits that his objection falls under the ban of the decision of this court in *State v. Van Brocklin*, 8 Wash. 557, 36 Pac. 495, but vigorously attacks the grounds of that decision. We have re-examined that case. It was presented by able counsel, and carefully considered by the court; and, without again entering into a discussion of the questions involved, we are satisfied with the decision therein rendered, and the rule announced that the proper remedy of the relator was by quo warranto instead of certiorari.

The second contention of appellant, however, viz. that the charges were sufficient to support the removal of relator, we think must be sustained. These charges may have been somewhat indefinite, but no motion was made to make them more definite or certain. No objection was made to them in any way. The appellant went to trial upon the complaint as it was, and the issues were found against him, and we think it is too late for him now to raise the objection that the complaint was indefinite, or not specific. We think that there is sufficient in the charges preferred by the mayor and the findings made to sustain the verdict. It is charged that the relator was interested and part owner in certain buildings which were occupied for immoral purposes; that their only value arose from such occupation; that under the direction of the mayor of the city the police, in the enforcement of the law against such immoral practices, were proceeding to abate the nuisance by driving out these objectionable occupants; that the relator from time to time attempted to interfere with and change the administration of the police department as to the aforesaid matter, and sought to influence the chief of police to permit the occupation of these premises for these practices, and to cease interference with the practices carried on there; that he attempted to remove the chief of police, for the reason that he had been unable to influence the chief to permit such practices; and many other charges of like character. The complaint is too long for review at length, and, as we have before said, is somewhat discursive and indefinite; but we think sufficient can be gathered from the complaint to place the relator upon trial for acts which were inconsistent with the duties of a public officer. For this reason the judgment will be reversed, and the cause remanded, with instructions to proceed in accordance with this opinion.

HOYT, C. J., and SCOTT and GORDON, JJ., concur.

HANSEN et al., Dike Com'rs, v. HAMMER, County Auditor.

(Supreme Court of Washington. Sept. 30, 1896.)

CONSTITUTIONAL LAW—ESTABLISHMENT OF DIKING DISTRICTS—SPECIAL ASSESSMENTS—CONDEMNATION PROCEEDINGS—COMPENSATION TO OWNER—WHAT IS A PUBLIC PURPOSE.

1. Const. art. 7, § 9, authorizing the legislature to vest the "corporate authorities of cities, towns and villages with power to make local improvements by special assessment, or by special taxation of property benefited," does not, by implication, prohibit the granting of such power to other corporations, so as to invalidate Laws 1895, p. 304, authorizing a portion of a county to form a diking district, and to establish a system of dikes by special assessment on the property benefited.

2. The second clause of Const. art. 7, § 9, providing that, "for all corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes," which shall be uniform in respect to persons and property within the jurisdiction of the body levying the same, refers to general corporate purposes affecting all the people, but does not prohibit the levying of assessments on property benefited for the purpose of constructing an improvement which may benefit a portion of the corporation only.

3. Laws 1895, p. 304, authorizing a portion of a county to form a diking district, and to take land for the purpose of building a system of dikes, levying a special assessment thereon on the property benefited, does not violate Const. art. 1, § 16, prohibiting the taking of private property without full compensation therefor being first made in money, or ascertained and paid into court for the owner; since all the preliminaries, including condemnation proceedings to ascertain the cost of the work (as a basis for the assessment), can be completed before it is necessary to take the land, and the decree of condemnation can provide for payment before the owner is dispossessed, and for a forfeiture of the right if not made within a reasonable time.

4. Laws 1895, p. 304, authorizing a portion of a county to form a diking district, and to take private property for the purpose of establishing a system of dikes, is not invalid, as permitting private property to be taken for other than a public use.

5. Laws 1895, p. 304, authorizing a portion of a county to form a diking district, and to take private property for the purpose of establishing dikes, is not unconstitutional, as granting power to take private property without due process of law, merely because it does not provide for personal service of the notice of the petition to organize the district on every person residing therein.

Hoyt, C. J., dissenting.

Appeal from superior court, Skagit county; Henry McBride, Judge.

Application by O. C. Hansen and another, as dike commissioners of diking district No. 3, of Skagit county, for a writ of mandamus to compel Hiram Hammer, as county auditor of said county, to file and index a notice of his pends in an action in which petitioners were plaintiffs, and J. H. Allen and others were defendants, which action was brought for the purpose of condemning a right of way, and establishing a system of dikes in said district. From an order granting the writ, defendant appeals. Affirmed.

George A. Joiner, for appellant. Million & Houser, for respondents.

SCOTT, J. This case involves the constitutionality of the act providing for the establishment of diking districts (Laws 1895, p. 304).¹ The lower court sustained the act, and this appeal was taken.

It is first contended that the act is in violation of section 9 of article 7 of the constitution, which reads as follows: "The legislature may vest the corporate authorities of cities, towns, and villages with power to make local improvements by special assessment, or by special taxation of property benefited. For all corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes, and such taxes shall be uniform in respect to persons and property within the jurisdiction of the body levying the same." It is urged with much force that, as the constitution authorizes the legislature to vest the corporate authorities of cities, towns, and villages with power to make local improvements by special assessment or taxation of property benefited, it, in effect, prohibits the granting of such power to any other corporation. As the effect of sustaining this contention would be to prohibit all similar legislation, and to prevent the construction of such improvements by assessments upon the property benefited, except in cities, towns, and villages, without an amendment to the constitution, it will be seen that the question presented is a most important one. Counsel have called our attention to two decisions construing somewhat similar constitutional provisions in other states. One of these is *Updike v. Wright*, 81 Ill. 49, where it was held that such a provision in relation to cities, towns, and villages prohibited the granting such power to any other corporation. The other case is that of *State v. Board of Com'rs of Dodge Co.*, 8 Neb. 124, where the supreme court of Nebraska took the contrary view, and held that such a provision only prescribed the rule of apportionment of such special taxes, and did not prohibit the legislature from conferring power to make local improvements, by special assessment or taxation upon property benefited, upon other municipal corporations. In both of these constitutions the second clause of the provision reads "for all other corporate purposes," instead of "for all corporate purposes," as ours reads; and the clause could not be construed here as providing a rule of apportionment in constructing such improvements merely, for we have held that cities, etc., could construct them, and pay therefor by a general tax, and it would seem that the first clause of the provision would be deprived of any force if it has not a prohibitive one as to the exercise of the power by other corporations. Several cases upon which this provision would have a direct bearing have heretofore been decided by this court,

but in none of them was it called to our attention. These cases are *Board v. Peterson*, 4 Wash. 147, 29 Pac. 995, where the court held that an irrigation district, formed under the act there in question, was not a municipal corporation, within the meaning of section 6 of article 8 of the constitution; *Seano v. Board*, 13 Wash. 48, 42 Pac. 552, where, in considering the act relating to an improved system of roads, etc., the court also held that an assessment levied upon the property benefited was not a tax, within the meaning of section 12 of article 11 of the constitution; and *Cass v. Dicks* (Wash.) 44 Pac. 113, which was an injunction suit to restrain the building of a dike under the present law. Legislation involving the same principle was sustained in the two former cases, and the constitutionality of this act was not questioned in the decision of the last case. It will thus be seen that this case comes to us complicated by those decisions, for, if said provision is held to prohibit legislation of the kind involved here, a different decision should have been rendered in each of those cases. While the effect of holding that it is not a prohibition may be to give little or no effect to the first clause in the provision, and while the general rule is that a constitution should be interpreted, if possible, to give effect to all parts of it, yet considering the fact that this provision in our constitution is more like the one in the Nebraska constitution than any other to which our attention has been called, and that, at the time our constitution was adopted, the supreme court of Nebraska had construed the same in the case cited, and, furthermore, in view of the possible effect upon prior legislation and constructed improvements above mentioned, we are somewhat compelled to the conclusion that it should not at this time be held to be a prohibition; and especially as we doubt whether the strictness of the rule of construction, as applied to constitutions, rather than acts of the legislature, so as to give full effect to every expressed part of it, should obtain in as great a degree at this time as formerly, owing to the modern tendency to legislate in constitutions, as the real spirit and intent of it might thereby be defeated.

The respondent practically concedes that the provision in question would amount to a prohibition on the legislature to confer like powers upon other municipal corporations than cities, towns, and villages, and that it would apply to counties, they being municipal corporations under our constitution. But it is contended that under the holding of this court in *Board v. Peterson*, *supra*, a corporation of this kind would not be a municipal corporation. But we regard that question, for the purposes of this case, as unimportant, for we would not be disposed to construe the provision as preventing the legislature from conferring, upon the corporate authorities of the county, similar powers, and at the same time hold that the legislature might carve a district out of a portion of a county, and create another set of of-

¹ Act 1895, c. 117, authorizes a portion of a county to organize into a diking district, to establish a system of dikes by special assessment on the property benefited, and to take land for such purpose by condemnation proceedings.

ficers, with authority to construct such improvements; for, if so, the legislature could make an entire county a district, and thus, by merely providing for other officers to carry on the work, evade the force of the provision. We are of the opinion that the legislature could have conferred the power upon counties directly. The second clause in the provision, which provides that, "for all corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes," etc., must mean general corporate purposes, affecting all the people in the county, and for that reason such taxes should be uniform; but it would not prohibit the levying of an assessment upon property benefited for the purpose of constructing an improvement which might benefit a portion of the county only.

It is next urged that the act is in derogation of section 16 of article 1 of the constitution, in that it permits the taking of private property for the right of way without full compensation therefor being first made in money, or ascertained and paid into court for the owner. But no such taking is complained of in this case, and, from the examination we have given the act, we do not think that it would necessarily result, and, as the case is presented, we are not disposed to hold the act unconstitutional at this time on that ground. While the cost is to be paid for by an assessment upon the property benefited, authority can be given by the legislature, if it is not now contained in the act, to collect the assessments in advance of the commencement of actual construction. Furthermore, the act provides for the issuance of bonds under certain contingencies to obtain money for the construction of the improvement. While the owners of land to be taken for a right of way have a right to compensation before they are dispossessed, whether by a municipal or any other corporation (*Lewis v. City of Seattle*, 5 Wash. 741, 32 Pac. 794), and the money therefor must be provided in some manner for all such owners not waiving advanced payment, still all the preliminaries, including condemnation proceedings, to ascertain the cost and everything in advance of the commencement of actual construction, can be carried on and completed before it is necessary to take the land, and the decree of condemnation can provide for payment before the owner is dispossessed, and for a forfeiture of the right if not made within a reasonable time. No basis of assessment can be laid until the cost of the improvement is ascertained, and it is necessary to know the cost of the right of way. This law provides that, in case the cost of the improvements exceed the benefits, the whole scheme is to be abandoned.

The next objection is answered by saying that the taking is for a public purpose. It is further contended that the act is unconstitutional, because it permits the taking of private property without due process of law; but, as to the objections urged in this respect, we do not think it is necessary that there should be personal service on every person within the

district of notice of the petition to organize the district. And, when it comes to obtaining the right of way, ample provision for service upon owners of land to be taken seems to have been made. At least, there is no question presented in this case which would authorize us to hold that a good and valid service could not be made under the act. Affirmed.

DUNBAR, ANDERS, and GORDON, JJ., concur. HOYT, C. J., dissents.

McDONOUGH v. GREAT NORTHERN RY. CO. et al.¹

(Supreme Court of Washington. Sept. 18, 1896.)

PLEADING—PETITION—AMENDMENT—DAMAGES—
REMITTITUR—FELLOW SERVANT—TRIAL
—EXCEPTIONS—SUFFICIENCY.

1. In an action for personal injuries, it is not error to permit plaintiff, after the close of his testimony, to file an amended complaint, where it does not materially change the cause of action, or occasion surprise, or place opposing counsel at a disadvantage.

2. Where the trial court finds that a portion of the damages assessed by a jury in a personal injury case is excessive, it may direct a remission of a portion of the verdict, instead of granting a new trial because of such excess.

3. The foreman of a gang of men employed by a railroad company, and engaged in quarrying rock, and transporting it over the company's road for its use, who has full power to carry out the work, and to employ, discharge, and control such men, is not a fellow servant of such employes, though such foreman is under the direction of the road master of the division of the road on which such men are employed.

4. Where, in a personal injury case, an instruction stated three distinct phases of the case relating to the measure of plaintiff's recovery, an exception that the charge "does not properly state the measure of plaintiff's damages or recovery, under the allegations of the complaint," is insufficient, for indefiniteness, under Act March 8, 1893 (Laws 1893, p. 112) § 4, providing that exceptions to a charge may be taken by specifying, by numbers of paragraphs or otherwise, the parts of the charge excepted to.

Appeal from superior court, Spokane county; Wallace Mount, Judge.

Action by Coleman McDonough against the Great Northern Railway Company and the St. Paul, Minneapolis & Manitoba Railway Company for personal injuries caused by defendants' negligence. From a judgment in favor of plaintiff against the Great Northern Railway Company, the latter appeals. Affirmed.

O. Wellington, Jay H. Adams, and M. D. Grover, for appellant. Graves, Wolf & Graves, for respondent.

GORDON, J. The appellant is a railway corporation owning and operating a line of railway in this state. The respondent brought this action in the superior court of Spokane county to recover damages for an injury to his person, which damages he alleges were sustained by reason of appel-

¹ Rehearing pending.

lant's negligence. The complaint, among other things, alleges that in the month of January, 1893, the appellant company was engaged in blasting rock near its track, and transporting the same on flat cars to Mason creek, a distance of about three miles, to be used in riprapping; that one Nolan was at said time and place in control and charge of said work, and of the men engaged thereon, including the plaintiff, and that one Ryan was also foreman, and as such had direction of said work, in connection with Nolan; that on the 8th day of said month, while plaintiff was engaged drilling a hole into a certain large rock lying by the side of said railway, "the said rock was exploded, by reason of the concealed load of giant powder therein; * * * that said Nolan, at all times after said charge of powder was placed in said rock, well knew that said charge of powder was concealed therein, and negligently and carelessly permitted same to remain therein, and without giving notice thereof, and negligently and carelessly permitted plaintiff to drill the said hole therein, well knowing the danger incident thereto; that at the time of drilling said hole, and at all the times before and up to the time of receiving injury hereinafter mentioned, plaintiff was ignorant that said powder or other explosive was concealed in said rock, and wholly ignorant that there was any danger in and about doing said work." As the result of said explosion, plaintiff sustained severe bruises and wounds in and about the face, head, neck, and left eye, as a result of which he was obliged to have his eye removed. Continuing, the complaint alleges "that said injuries to plaintiff have continued ever since the time of receiving said hurts to the present time, and are permanent, and will continue for the whole of his natural life; that, by the reason of the loss of said eye, plaintiff is deformed, and his face has become and is ugly and repulsive, and will so continue for the whole period of his natural life; that, by reason of said injury, plaintiff was prevented for a period of six months from following his ordinary avocation and business; that plaintiff's business was at the time of such injury, and for a long time before had been, and yet is, that of a common laborer, and that he was used to earn in and about his said business two dollars per day, and that by reason of his injuries, and loss of time for said period of six months, he has been damaged in the sum of four hundred dollars; that, in consequence of said injuries, plaintiff has suffered great pain and anguish, and will suffer great pain and anguish for the whole of his natural life; that, by reason of the premises, plaintiff has been damaged in the sum of forty thousand dollars." The court overruled a demurrer to the complaint, and appellant answered, denying all the material allegations of the complaint, and alleging affirmatively that whatever injury respondent

sustained was sustained by reason of his own want of care, and resulted from one of the risks of the employment, which he voluntarily assumed. The trial resulted in a verdict in favor of respondent in the sum of \$7,500. Upon motion for a new trial the lower court found that said verdict was excessive to the extent of \$2,500, and ordered that that amount of the verdict should be remitted by respondent; and, respondent having consented thereto, judgment was entered against appellant for the sum of \$5,000, from which it has appealed.

From the evidence it appears that the respondent was one of a gang of laborers, comprising some 60 or more, all of whom were under the control of one Nolan, who had absolute charge of this particular work, with authority to hire and discharge laborers, and direct when and where they should work, and what labor they should perform. He also had a construction train under his charge and control for the purpose of transporting the rock from the place where it was taken out to the point on said creek where it was to be used. Plaintiff was a common laborer, and had been in the employ of the appellant for about two months prior to the injury, but had been working at the place where the accident occurred for about two weeks only. More or less blasting was done in breaking up and removing the rock. It seems that the usual method pursued was to load a number of blasts or charges, then retire the men to a place of safety and fire the blasts; that a set of blasts was so fired on the afternoon of the 7th of January, 1893. The evidence clearly shows that at that time the respondent was not at the quarry or place where the blasts were fired, but was engaged in unloading rock from the cars at the creek, some three or four miles distant; that on the following day he was at work in the quarry, and, as we think the evidence sufficiently showed, was engaged in performing such labor as was required of him, and while assisting in the drilling of a hole in a rock (the respondent holding the drill while another workman used the hammer) an explosion occurred, resulting in the injuries to the respondent hereinbefore referred to. The evidence shows that the rock which respondent was engaged in drilling at the time of the explosion had the appearance of having come down the hillside to the place at which it was lying when the work of drilling began; that it was partially covered with dirt and snow, and there was nothing "to indicate any appearance of a blast being in there." John McDonough, a witness for the plaintiff, testified that on the day before the accident occurred, and just after a set of blasts had been fired, and the men had returned to the quarry, he saw Nolan (the foreman) walk up to the rock in question, and take hold of the fuse, and "pulled it up, and threw it over his shoulder." "Q. What rock was it he pulled the fuse out of? A.

The one next the track. The one the men was drilling when he was blowed up. Q. This was about four o'clock the day before he got hurt? A. Yes, sir; on the 7th." On cross-examination he further testified: "Q. You know you saw him [Nolan] right there? A. Yes, sir. Q. Walk and pick up the fuse? A. Yes, sir. Q. And pulled it out of the rock, and threw it over his shoulder? A. Yes, sir." Numerous errors have been assigned in the able brief of appellant's counsel, but those mainly urged, and the only ones which we think are of sufficient importance to require special mention, are as follows:

1. It is urged that the court erred in permitting the respondent, after the close of his testimony, to file an amended complaint. We do not think that the amendment was of such a character as to materially change the cause of action, or such as to occasion surprise, or place opposing counsel at a disadvantage; and the ruling of the lower court in this respect falls within the holding of this court in *Hulbert v. Brackett*, 8 Wash. 438, 36 Pac. 264.

2. It is urged that the lower court, having found that a portion of the damages assessed by the jury was in fact excessive, should have granted a new trial, and not have directed a remission of a portion of the verdict. But this court has, in numerous cases, sanctioned the course pursued by the trial court. *Winter v. Shoudy*, 9 Wash. 52, 36 Pac. 1049; *Kohler v. Railway Co.*, 8 Wash. 452, 36 Pac. 253, 681; *Rigney v. Water Co.*, 9 Wash. 245, 37 Pac. 297.

3. The following instructions were requested by the appellant, and the refusal of the court to give them to the jury was excepted to: "(1) If you should find from the evidence that the injuries sustained by the plaintiff, if any such he did sustain, were received by him through the omission of the foreman, Nolan, to notify the plaintiff of the existence of an unexploded blast on the rock whereon the plaintiff was working, then I instruct you that such omission on the part of Nolan was the act of a fellow servant, and the plaintiff is not entitled to recover." "(3) If you find from the evidence that William Nolan had charge and control of the plaintiff and his co-laborers at the time of the happening of the injury to the plaintiff, and had the power to employ and discharge such laborers, and with authority to direct such laborers in the performance of their work, yet if you should further find that said Nolan was under the control, supervision, and oversight of the road master or assistant road master of the defendant, and that the work being done by the said Nolan and his gang of laborers was under the control, supervision, and oversight of such road master or assistant road master, then I instruct you that, in the matter of the details of the work being done by Nolan and his gang of laborers, Nolan was a fellow servant with the plaintiff, and for

the omission of the said Nolan in removing the unexploded blast, or for his omission to notify the plaintiff of the particular danger which resulted in the injuries complained of, the defendant is not liable, because such act or omission is the act of a fellow servant of the plaintiff and for whose negligence the defendant is not chargeable, and you should find for the defendant." Upon the question whether Nolan was the fellow servant of plaintiff, and appellant liable for his negligence, the court charged as follows: "If the said foreman was a fellow servant with the plaintiff, then he cannot recover for any negligence of the said foreman. A fellow servant of the plaintiff, in law, is one working with him in the same common employment, and for the same master. No difference in the position, wages, and station of the two servants claimed to be fellow servants can affect this relation. So long as they are both working for a common master about a common business, they are fellow servants, and one may not recover against the common master for an injury received from the negligence of the other. But if one servant is placed in the position of control, authority, and direction over the whole work of the master, or over some general, separate, or distinct branch thereof, and is empowered by the master to exercise the master's authority, control, and direction over said work, and over the other servants engaged in and about said work, and is vested with authority to direct where, when, how, and in what manner such work shall be done, and such other servants shall do said work, then such controlling employé is not a fellow servant with one working under him, and thus subject to his direction and control. Such directing servant becomes, for such work, and towards such servants, the vice principal of the master." It is urged that the giving of the instruction above set out, and the failure to give those requested by appellant upon the subject, constitute reversible error. An examination discloses a very great want of harmony among the authorities upon this subject, and we will not enter upon an extended analysis of them. This court, in *Zintek v. Mill Co.*, 6 Wash. 178, 32 Pac. 997, and 33 Pac. 1055, held that "a yard boss of a lumber yard, who has entire control of the yard, with power to hire and discharge workmen, and to employ them under his orders, is a vice principal, and not a fellow servant of the men who work under his control and superintendence." And upon a second appeal in the same case, in 9 Wash. 395, 37 Pac. 340, this proposition was reaffirmed. It is true, as urged by appellant, that Nolan was under the direction of the road master of that division of the road upon which the plaintiff was employed at the time of the accident. The headquarters of the said division were at the city of Spokane, a considerable distance from the place of the accident. It was the duty of Nolan to receive orders from the road master, to whom he was also

required to report; but it is also true, as already noticed, that Nolan had charge and control of the workmen at the place where this injury occurred, with authority to direct them in the performance of their work, and that he was the sole representative of the company at that place, or within miles thereof. Not only did he have the right to direct them when and where they should perform services, but he had authority to discharge them and employ others. He also had control of the train employed in moving the rock. In the case of *Chicago, M. & St. P. Ry. Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. 184, 192, that court held that "a conductor of a railroad train, who has the right to command the movements of a train, and to control the persons employed upon it, represents the company, while performing those duties, and does not bear the relation of fellow servant to the engineer and other employees of the corporation on the train." The court say: "He is in fact, and should be treated as, the personal representative of the corporation, for whose negligence it is responsible to subordinate servants. * * * If such a conductor does not represent the company, then the train is operated without any representative of its owner." We think that the principle there declared is applicable to the facts under consideration in this case. Here was a large and important piece of work undertaken by the appellant, requiring for its discharge the employment of a great number of men, considerable machinery, and dangerous explosives. The managing officer or officers of the appellant had invested Nolan with full power to carry out the work, and control the employees under him, and we think that in the discharge of these duties he became the representative of the company. In *Brabbitts v. Railway Co.*, 38 Wis. 289, the court say: "The functions of a railway company must be performed by numerous servants or employees, and among these there must necessarily be a gradation of authority, arranged with reference to the business of the company." We think that in reason, and upon the authority of the better-considered cases, it must be held that it is a positive duty which the master owes to an employee, not only to provide him with a reasonably safe place in which to work,—so far as the nature of the work undertaken, and the exigencies of the case, will permit the same to be made reasonably safe,—but also to observe such care as will not expose the employee to perils and dangers which may be guarded against by reasonable care and diligence; and, where the performance of this positive duty is by the master intrusted to another, his failure to perform is the failure of the master. The discharge of this duty was, in the case at bar, intrusted by appellant to its foreman, Nolan. He was the superintending officer at the place where the work was being performed, with full power and control over the plaintiff, and all others connected in the active discharge of the work. Under the circumstances, we

think it follows that his negligence was the negligence of the company. In *Railroad Co. v. Baugh*, 149 U. S., at page 368, 13 Sup. Ct. 914, 921, the court say: "Again, a master employing a servant impliedly engages with him that the place in which he is to work, and the tools or machinery with which he is to work, or by which he is to be surrounded, shall be reasonably safe. It is the master who is to provide the place and the tools and the machinery; and when he employs one to enter into his service, he impliedly says to him that there is no other danger in the place, the tools, and the machinery than such as is obvious and necessary. Of course, some places of work, and some kinds of machinery, are more dangerous than others; but that is something which inheres in the thing itself, which is a matter of necessity, and cannot be obviated. But within such limits the master who provides the place, the tools, and the machinery owes a positive duty to his employee in respect thereto. That positive duty does not go to the extent of a guaranty of safety, but it does require that reasonable precautions be taken to secure safety; and it matters not to the employee by whom that safety is secured, or the reasonable precautions therefor taken. He has a right to look to the master for the discharge of that duty, and if the master, instead of discharging it himself, sees fit to have it attended to by others, that does not change the measure of obligation to the employee, or the latter's right to insist that reasonable precaution shall be taken to secure safety in these respects."

4. Appellant excepted to the giving of the following instruction: "(15) If you should find for the plaintiff under the instructions of the court, you will then proceed to assess his damages; and in respect thereto I instruct you that plaintiff is entitled to recover, if at all, for all time which he may have lost for the period of six months after receiving such injury, as a direct consequence of said injury, as the same may appear by the evidence to be fairly and reasonably worth,—not exceeding, however, the sum of \$400. He is also entitled to recover, if you find for him, for any and all pain and suffering which he may have endured up to the present time in consequence of such injury. In estimating pain and suffering the law fixes no exact measure of damages. It is left to the sound judgment of the jury to determine what will compensate therefor. The jury should not be governed by passion or prejudice, or by whim and fancy, in fixing an amount therefor, but should exercise a sound, reasonable, and prudent judgment thereon. The plaintiff is also entitled to recover in this action, if you find for him, fair and reasonable compensation for any deformity resulting to him as a consequence, direct and proximate, of his injury, if any. And, in determining what amount he should recover therefor, the jury may consider all the facts and circumstances in the case, and whether such injury is or will be permanent,

and, if not permanent, how long it will continue. And plaintiff is also entitled to recover, if you find for him, such a sum as will fairly and reasonably compensate him for any loss of power or ability to earn money in and about his occupation and business for such a time subsequent to the period of six months after the date of receiving any injury which he may have received as the same will probably continue. The limit of plaintiff's recovery in any event is \$40,000." The objection urged in the brief, as well as in the oral argument, goes only to the latter part of the instruction; and it is insisted that, under the allegations of the complaint, plaintiff is not entitled to recover anything by reason of his earning ability being impaired as a result of the accident, and that inasmuch as the complaint avers that the respondent was prevented from following his usual business for the period of six months by reason of the injury sustained, and in consequence thereof was damaged in the sum of \$400, "it must be presumed that the earning power of the respondent had been restored at the expiration of the period of six months." We do not think that appellant is entitled to urge this objection. The exception to the charge below was, "Because the same does not properly state the measure of plaintiff's damages or recovery under the allegations of the complaint." The exception, as taken, goes to the entire instruction above set out. It is manifest that the greater portion of the instruction is unobjectionable, and it is not complained of. It correctly stated the measure of plaintiff's recovery upon the question of plaintiff's loss of time for the period of six months after receiving the injury. It also laid down the proper rule for the assessment of damages by reason of pain and suffering which plaintiff may have endured. It also correctly informed the jury as to what compensation might be allowed to him because of any deformity resulting to him in consequence of the injury. In other words, there were four distinct phases of the case relating to the measure of plaintiff's recovery which are covered by the instruction, and we think it was the duty of appellant to indicate by its exception the particular portion of the instruction of which it complained. Section 4 of the act of March 8, 1893 (Laws 1893, p. 112), provides: "Exceptions to a charge to a jury * * * may be taken by any party by stating to the court * * * that such party excepts to the same, specifying by numbers of paragraphs or otherwise the parts of the charge excepted to. * * *" It is the general rule that "exceptions, to be of any avail, must present distinctly and specifically the ruling objected to." *Insurance Co. v. Sea*, 21 Wall. 158. And this, we think, is as applicable to exceptions to a charge as to any other ruling. The exception, in the form here taken, was not calculated to direct the attention of the court to the particular portion of the charge complained of; and it does not

"specify the part of the charge excepted to," within the meaning of section 4, *supra*. See also, *Meeker v. Gardella*, 1 Wash. St. 139, 23 Pac. 837; *Maling v. Crummey*, 5 Wash. 222, 31 Pac. 600. No reversible error appearing of record, the judgment and order appealed from are affirmed.

ANDERS, SCOTT, and DUNBAR, JJ., concur.

COMPTON v. SCHWABACHER BROS. & CO. et al.¹

(Supreme Court of Washington. Sept. 30, 1898.)

RECEIVERS—INSOLVENT CORPORATION—ATTACHMENT BY CREDITOR—RIGHT TO OBTAIN PREFERENCE—COSTS.

1. A complaint in an action commenced by the receiver of a corporation, in his own name as receiver, need not allege that the action is brought by leave of court.

2. In an action by a receiver for a corporation to set aside a judgment against it by confession, on the ground that the corporation was then insolvent, and the judgment was entered for the purpose of preferring defendant as a creditor, it was shown that, on the same day the judgment was entered, a receiver was appointed for the corporation, who was subsequently discharged on a report showing that all debts excepting defendant's judgment had been paid, which report was untrue, and that a portion of the debts had been compromised and paid with money borrowed from defendant, which was afterwards secured on property of the corporation. *Held*, that the evidence sustained a finding for the plaintiff.

3. The fact that a receiver for a corporation, after his appointment, caused a motion to be made in behalf of the corporation for the discharge of an attachment issued against it, under the statute (2 Hill's Code, § 818) authorizing a defendant to make such motion on the ground that the attachment was improperly or irregularly issued, which motion was denied, does not constitute an adjudication of the validity of the attachment which will bar the receiver from maintaining an action to set it aside on the ground of the insolvency of the defendant corporation.

4. The assets of an insolvent corporation being a trust fund for the benefit of all its creditors, a creditor cannot obtain a preference by attachment of the property of a corporation, knowing it to be actually insolvent, though no proceedings to wind up its affairs have been commenced when the levy is made; and such attachment will be set aside at the suit of a receiver subsequently appointed.

5. An attaching creditor of an insolvent corporation, who refuses on demand to deliver the property attached to a receiver subsequently appointed for the corporation, and resists the receiver's action to recover it in an attempt to enforce his preference, will not, on recovery by the receiver, be allowed the costs of the attachment and care of the property.

Appeal from superior court, King county; J. W. Langley, Judge.

Action by Wesley Compton, receiver of the Abrahams Grocery Company, against Schwabacher Bros. & Co., incorporated, the Crown Distilleries Company, and others. Judgment for plaintiff, and defendant Schwabacher Bros. & Co. appeals. Affirmed.

¹ Rehearing pending.

Donworth & Howe, for appellant. Winsor, Bush & Morris, Royd J. Taffman, and Allen & Powell, for respondent.

GORDON, J. Respondent is the receiver of the Abrahams Grocery Company. He was appointed and qualified as receiver on the 27th of November, 1894, and subsequently instituted this action for the purpose of restraining the sale of a stock of merchandise belonging to such corporation, which had been levied upon by the sheriff under an execution issued upon a judgment confessed by the corporation in favor of appellant, Schwabacher Bros. & Co. (a corporation), on the 15th of November, 1893; also, to set aside such judgment, and require the sheriff to turn the property levied upon over to the respondent. The ground upon which the relief is sought is that the judgment entered upon confession was made by the Abrahams Grocery Company at a time when the corporation was insolvent, and known by the appellant to be insolvent, and was entered with the intention of creating an unlawful preference over the other creditors of such insolvent corporation, and was accepted for the purpose of hindering, delaying, and defrauding the other creditors, and that the property levied upon is all of the property of said corporation. There are other allegations of the complaint attacking the validity of the judgment upon various grounds, not necessary to be here considered. The answer denied the allegations of the complaint as to the insolvency of the Abrahams Grocery Company; denied that the confession of judgment was executed for the purpose of giving the appellant a preference; denied the various allegations of irregularity and insufficiency; and set up two affirmative defenses, the second of which is that, in addition to the lien created by the levy of an execution based on said judgment of confession upon the property in question, it also had an attachment lien by virtue of a writ of attachment issued on the 27th day of November, 1894, in an action on that day commenced against the Abrahams Grocery Company. The lower court, proceeding without a jury to determine the issues, made its findings and conclusions, upon which a decree was entered in favor of the respondent, and the cause was appealed.

1. The first contention is that the court erred in not granting appellant's motion for a nonsuit, upon the ground that a receiver cannot bring a suit without first obtaining leave from the court which appointed him. Since the filing of the briefs in this case, that question has been determined by this court adversely to the appellant's contention. *Hardin v. Sweeney* (Wash.) 44 Pac. 188.

2. It is next contended that the court erred in holding the confession of judgment void. The lower court found as a fact that at the date of said confession the corporation making it was indebted to various parties in amounts greatly exceeding the amount of its assets; that it was unable to pay its creditors and continue in business, and was insolvent;

and that on that day its president, for the purpose of securing the appellant, and paying it out of the assets of the corporation in preference to other creditors, caused said confession of judgment to be made. It is contended that the evidence is insufficient to justify this finding, but we are satisfied that it is sufficiently supported. Upon the trial it was shown that a receiver had been appointed for the said Abrahams Grocery Company on the 15th of November, 1893, upon the petition of Richard Winsor, secretary of said corporation; that said receiver qualified and entered upon the discharge of his duties; that the creditors of the corporation attacked the validity of appellant's judgment, and an issue was thereon framed in said insolvency proceedings; that, while said issue was pending, the corporation, at the instance of the appellant, compromised with the contesting creditors, and thereafter the receiver filed a report, representing, among other things, that all of the debts of the corporation had been fully paid, excepting a balance upon appellant's judgment. In this petition he asked permission to turn over to the Abrahams Grocery Company, subject to the lien of appellant's judgment, the goods and chattels remaining in his hands, and that he might be discharged from further custody and control of the same, and released and discharged as receiver. Accompanying this petition was the stipulation of appellant agreeing to the discharge of the receiver, and consenting that the property should be turned over to the corporation, subject to appellant's judgment. Thereupon an order was made approving the report of the receiver as to the receipts and disbursements reported by him, and relieving him from further duty. It was shown by the evidence that a large portion of the indebtedness of the insolvent corporation had not in fact been paid by the receiver, but that the officers of said corporation had obtained from certain of its creditors extensions of time for payment, and in some instances had given renewal notes. It was further made to appear that the appellant had advanced to the Abrahams Grocery Company the sum of \$1,000, for the purpose of enabling it to make settlement with its creditors, and that claims against said corporation were compromised for sums less than the amount of its actual indebtedness; that after the receiver had, pursuant to the order of the court, turned back to it the goods and personal effects, it executed a mortgage in favor of the appellant securing said sum of \$1,000, advanced for the purposes hereinbefore mentioned; and thereafter the corporation, the Abrahams Grocery Company, resumed business, and continued therein until the 27th of November, 1894, upon which day the attachment already referred to was levied, and on the same day the respondent was appointed receiver.

We think that the lower court correctly found that the Abrahams Grocery Company was insolvent at the time when the judgment upon confession was entered, and also at the

time that the attachment was levied. We also think that the evidence is sufficient to show that the insolvent condition of said corporation at both of said dates was known to the appellant. We do not think that the respondent, who is the representative of all the creditors of such insolvent corporation, should be estopped from assailing the confession of judgment as fraudulent, by reason of the matters occurring in the former receivership proceedings, already noticed. The order discharging the former receiver cannot be held to bar the present action. It simply approved of the accounts of the receiver, and of the turning over of the property on hand to the corporation, and beyond that determined nothing. It is clear from the evidence that the receiver, in his report, attempted to impose upon the court, and that his representations that the debts of the corporation were in fact paid were false. It is also clear that the falsity of the report in this respect was known to the appellant, and we are unable to avoid the conclusion that said receiver was acting under the direction and at the instigation of the appellant. But, however that may be, the evidence was sufficient, we think, to justify the court's conclusion that the judgment by confession was for the purpose of giving the appellant a preference over all other creditors of the then insolvent corporation, and that appellant accepted it for the like purpose. *Conover v. Hull*, 10 Wash. 673, 39 Pac. 166.

3. It appears from the record that after his qualification the respondent moved the court to set aside and dissolve the attachment of November 27, 1894. This motion was made under section 318, 2 Hill's Code, and was based upon affidavits. The lower court denied said motion, and this court affirmed the order upon appeal. 44 Pac. 257. It is urged by appellant that this established the validity of its attachment, and that the lower court was without jurisdiction in this cause to interfere therewith. We are unable to agree with this claim. Section 318, *supra*, provides that "the defendant may at any time after he has appeared in the action * * * apply, on motion * * * to the court in which the action is brought, * * * that the writ of attachment be discharged, on the ground that the same was improperly or irregularly issued." It clearly appears that the question of the insolvency of the defendant in attachment was not made a ground for dissolution in the motion already referred to. Upon that point this court said, in disposing of the appeal: "We are unable to discover from the record that the appellant corporation is insolvent. * * * It therefore becomes unimportant to determine whether an attachment may be had in this state against the property of an insolvent corporation." Under the statute already referred to, the only parties before the court are the parties to the attachment proceedings. It is the "defendant" who may make the motion, and the court has no

jurisdiction therein to determine the rights of other creditors. Plaintiff, as against the defendant, might be entitled to an attachment, but an order sustaining it cannot be held to bar other creditors from asserting its invalidity in a proper proceeding. The creditors of this insolvent corporation, whose representative the respondent is, are entitled to their day in court on the question of the validity of this attachment; and the statute referred to does not contemplate that they may be heard in the proceedings upon motion to discharge. We therefore conclude that the order denying the motion to dissolve the attachment cannot be invoked by appellant for the purpose of defeating the jurisdiction of the court in the present proceeding.

4. Our conclusion upon this phase of the case makes it necessary to determine whether an attachment levied upon the property of a corporation which is, in fact, insolvent at the time of the levy, can be set aside where insolvency proceedings had not been instituted prior to the attachment. Whatever rule may prevail elsewhere, it is now well settled in this state that the assets of an insolvent corporation constitute a trust fund for the benefit of all of its creditors. *Thompson v. Lumber Co.*, 4 Wash. 600, 30 Pac. 741, and 31 Pac. 25; *Conover v. Hull*, *supra*; *McKay v. Elwood*, 12 Wash. 579, 41 Pac. 919. And we think it must be held that no preference can be maintained based upon any action or proceeding of a creditor taken with knowledge of the insolvent condition of such corporation. It is wholly inconsistent with the trust-fund theory to permit a race of vigilance to be instituted between the creditors of an insolvent corporation. As between them, "equality is equity." *Ford v. Bank* (Wis.) 58 N. W. 766; *Tompson v. Lumber Co.*, 5 Wash. 527, 32 Pac. 536; *Conover v. Hull*, 10 Wash. 673, 39 Pac. 166.

5. Nor do we think that appellant is entitled to recover costs paid to the sheriff for the care and custody of the property levied upon under the attachment, including the rent of the premises where the property was kept. The record discloses that, immediately upon qualifying, the respondent demanded possession of the property, which was refused, and thereafter was obliged to institute proceedings for its recovery. In withholding the property from the receiver, appellant took its chances. It had an opportunity, without incurring such expense, to come in and share ratably with the other creditors of the insolvent corporation. Instead of voluntarily doing so, it saw fit to resist, and sought to enforce its claim to a preference. It did so at its peril, and must abide the consequences.

The conclusion which we have reached upon the questions already considered makes it unnecessary to determine some minor questions discussed in the briefs of counsel. The decree will be affirmed.

SCOTT and ANDERS, JJ., concur.

ASPLUND v. MATTSON.

(Supreme Court of Washington. Oct 1, 1896.)

APPEAL—WAIVER OF OBJECTION—CONTRACT—
BURDEN OF PROOF.

1. A defendant who goes to trial without objection to the plaintiff's reply waives the right to object to its sufficiency on appeal.

2. A suspension of work under a contract for a length of time prohibited by its terms, when rendered excusable by act of God, is not a breach of the contract, and the other party is not thereby justified in terminating it.

Appeal from superior court, Skagit county; Henry McBride, Judge.

Action by Gabriel Asplund against Charles Mattson. Judgment for plaintiff, and defendant appeals. Affirmed.

Frank Quinby, for appellant. Million & Houser, for respondent.

GORDON, J. Respondent brought this action to recover damages for breach of a contract in writing entered into between the parties, by the terms of which the respondent undertook and agreed to clear ready for plowing 60 acres of land on the homestead of the appellant, and to commence work by July 1, 1892, "and continue until finished, which shall not be later than October 1, 1893, and, if discontinued for more than thirty days, said Mattson shall have sufficient cause for nullifying this contract." The answer of the defendant was a general denial, coupled with an affirmative defense and counterclaim. There was a verdict and judgment thereon for respondent, and the defendant in the action appealed.

1. It is urged in this court that the reply of the respondent constitutes no defense to the affirmative defense contained in the answer, and it is further contended that the reply was a departure from the cause of action set out in the complaint. We have become satisfied, from an examination of the pleadings, that these objections are not well taken; but, in any event, we think that they come too late, and that by proceeding to trial without objection the appellant has waived his right to urge them.

2. It is next complained that the court erred in instructing the jury. It is conceded that the respondent had commenced the work, and cleared a considerable portion of the land, and that the appellant had, from time to time, advanced as part payment of the contract price the sum of \$615. It also appears that the respondent had discontinued work during the spring and summer months of 1893, pleading as an excuse for so doing that he was prevented from prosecuting the work by reason of the excess of rainfall, flooding the land to an extent not contemplated by the parties at the time of the execution of the contract, and such as to hinder and make it impossible for him to continue the work; and that his failure to go ahead was by reason of an act of God, whereby he was excused. It further appeared that on the 10th of August, 1893, and before the time fixed by the contract for the completion of the work, the appellant entered upon the

premises, took possession thereof, and completed the work. The instruction complained of in this regard is as follows: "If, gentlemen of the jury, you believe from the evidence that the plaintiff was prevented from continuing the work in clearing said land for the reason that there had been excessive rainfall in the spring and summer of 1893, thereby flooding the land of defendant to such an extent, and the same not being contemplated by the parties at the time of the execution of the contract, and so as to hinder and make it absolutely impossible for plaintiff to continue the work at that time, and without allowing thirty days to elapse without performing said work, or any part thereof,—that is, that he was prevented from going ahead with the work by an act of God,—that is a legal excuse for the plaintiff discontinuing the work. And it having been conceded that the defendant was upon the lands on or about the 10th day of August, 1893, and began to complete the work which plaintiff was to perform under the terms of the contract, then, and because of that act, the burden of proof is shifted upon the defendant to prove that plaintiff was not ready and willing to continue in the performance of said work, and refused to go upon the land as soon as it was in condition to have work done upon it; and, should you find that the defendant has not, by a fair preponderance of the evidence, proved such refusal, and should you further find that plaintiff was prevented from so completing such work by reason of the acts of the defendant in going upon said premises and performing the work himself, then you should find for the plaintiff, and fix his damages at the amount of what you may believe from the evidence would have been the fair profits of the entire contract had he been allowed to finish the same."

It is contended that the burden of proof did not shift upon the defendant to prove that the plaintiff was not ready and willing to continue the work. But we think counsel is mistaken in assuming that the discontinuance of the work upon the part of respondent constituted a breach. And in the light of the evidence and the verdict rendered, the jury evidently considered respondent's failure to prosecute the work during the spring and summer months excusable. Under the circumstances, there was no breach of contract upon his part. The work was simply suspended, and, the appellant having entered and dispossessed respondent prior to the period fixed by the contract for completing the work, he assumed the burden of proof as charged in the instruction complained of. Blah. Cont. §§ 608, 609; 3 Am. & Eng. Enc. Law, p. 899; 2 Pars. Cont. (6th Ed.) 672.

3. The next error complained of relates to the giving of another instruction. But, when the instruction is considered in the light of the admitted fact that the appellant took possession of the premises, and the further fact that the jury have by their verdict determined that there was no breach of the contract upon the respondent's part, we think that the giving of

the instruction was not error; and, in any event, it was not prejudicial error.

4. The remaining objection is that the verdict and judgment is not supported by the evidence, and it is urged upon the theory that the jury based the amount of the recovery given upon the assumption that the plaintiff was entitled to recover the total amount of what he would have made had he been allowed to complete the contract. We have examined the evidence and the charge of the court bearing upon this feature of the case, and do not feel warranted in disturbing the verdict. Affirmed.

DUNBAR and ANDERS, JJ., concur.

STATE ex rel. MEEKER et al. v. SUPERIOR COURT OF KING COUNTY et al.

(Supreme Court of Washington. Feb. 5, 1896.)

For majority opinion, see 43 Pac. 887.

GORDON, J. (concurring). I concur in all that is said in the foregoing opinion, and, while I seriously question the jurisdiction of this court to entertain applications of this character, believing that the relator has an ample remedy by appeal, nevertheless jurisdiction has been so often asserted by a majority, and become so generally recognized by the profession, that I am unwilling to dissent upon that ground. In this connection I fully appreciate the force of the reasoning of Mr. Justice Dunbar, specially concurring in *State v. Superior Court of King Co.*, 7 Wash. 307, 34 Pac. 1103.

AGUILAR v. TERRITORY.

(Supreme Court of New Mexico. Sept. 1, 1896.)

MURDER—NECESSARY INSTRUCTIONS—APPEAL—DUTY OF CLERK TO SEND UP TRANSCRIPT.

Under Comp. Laws, § 2476, providing that when an appeal shall be taken, which operates as a stay of proceedings, it shall be the duty of the clerk of the district court to make out a transcript of the record, "and return the same to the office of the clerk of the supreme court without delay," on appeal by defendant in a homicide case, which by section 2483 operates as a supersedeas, the clerk must send up the transcript, without regard to payment of fees therefor by defendant.

On the Merits.

Deliberation and premeditation being essentials of murder in the first degree, and they being presumed only where the killing is perpetrated by means of poison, lying in wait, torture, or in an attempt to commit a felony, or by an act greatly dangerous to the lives of others, indicating a depraved mind regardless of human life, it is error to charge only on murder in the first degree where it appears that decedents were found dead in their wagons, their heads and faces badly cut and beaten, an ax belonging to one of them being found in one of the wagons, with blood on it, and some sacks of flour being missing from one of the wagons; it not being shown how, or under what circumstances, the killing occurred. Laughlin, J., dissenting.

Error to district court, San Miguel county; before Chief Justice Thomas Smith.

Scipio Aguilar was convicted of murder, and brings error. Reversed.

M. Salazar, for plaintiff in error. John P. Victory, Sol. Gen., for the Territory.

BANTZ, J. On motion of the defendant in this court an order was made directing the clerk of the Fourth district to send up the transcript of the record and proceedings in this case, or show cause why the same should not be done. The clerk has made a return, and that portion which is material to the decision of this matter sets out, in substance, that the fees allowed for the preparation of the transcript have not been paid or tendered by the defendant. The defendant was convicted of murder in the first degree at the trial in the district court from which the appeal was taken. Under the statute of the territory an appeal in such case operates as a supersedeas. Section 2483, Comp. Laws. By section 2476, Comp. Laws 1884, it is provided, "When an appeal shall be taken which operates as a stay of proceedings, it shall be the duty of the clerk of the district court to make out a transcript of the record in the cause and certify and return the same to the office of the clerk of the supreme court without delay." In section 2477 it is provided, "When an appeal does not operate as a stay of proceedings, such transcript shall be made out, ratified [certified] and returned on the application of the appellant." In these two sections a clear distinction is taken between those causes in which there is a stay of execution, and those in which there is not. In the former the clerk of the district court is required to make out and return the transcript into the clerk's office of this court without delay, but in the latter it is to be made out and returned on the application of the appellant. If there has been a stay of execution, the territory becomes interested in a speedy determination of the appeal, and there is no way in which that appeal can be determined without a transcript before this court. If there has been no supersedeas, the judgment of the court below is carried into execution against the defendant, notwithstanding the appeal. The same question, under like statutory provisions, was passed upon in *State v. Dally*, 45 Mo. 154, and Judge Bliss, speaking for the court, says: "In civil cases if the appellant fails to see that his transcript is filed, the respondent may produce one and take judgment; but in criminal cases, if it is not sent by the clerk upon supersedeas, according to the requirements of section 16, or not produced by the appellant when there is no supersedeas, according to section 17, I know not how the case will get here, or how the sentence is to be executed. If the clerk's duty is limited by the ability or willingness of the accused to pay him for the transcript, he need only to procure the allowance of the supersedeas, and then postpone indefinitely, or defeat altogether, the execution of the sentence. There is a marked distinction in appeals where there is a supersedeas, and

where there is none." "The duty, then, of sending up a proper transcript upon supersedeas in a criminal prosecution is imperative, and is not personal to the clerk, without the application of the accused. It becomes essential to the further prosecution of the case, and the execution of the judgment, in which the accused may have no interest." The mandamus to the clerk was made peremptory. In *Territory v. Hicks* (N. M.) 30 Pac. 872, this court pointed out the distinction to be observed in criminal cases on appeal, between those with and those without supersedeas. Our conclusion therefore is that, this being an appeal where the execution of the judgment of the court below is stayed, it is the duty of the clerk to make out and return the transcript into the clerk's office of this court without delay, and that the failure or refusal of the appellant to pay for such transcript cannot be averred by an excuse for the failure so to do. Though it may have been the long-standing practice for appellants in criminal cases to pay for such transcript, we are satisfied that the legislature has so provided as to excuse those who have obtained a stay of execution. As to what may be the right of the clerk in relation to costs in other respects, it is not necessary to decide. The rule heretofore granted is made absolute.

SMITH, C. J., and LAUGHLIN and HAMILTON, JJ., concur.

HAMILTON, J. Scipio Aguilar, the plaintiff in error, was indicted in the district court for the Fourth judicial district, in the county of San Miguel, on the 29th of September, 1894, for the murder of one Hilario Martinez and Juan James. At the April term, 1895, he was tried in said court for the killing of Juan James, and was discharged by the court. At the April term, 1896, he was tried under the other indictment for the killing of Hilario Martinez, and was found guilty of murder in the first degree. After unsuccessful motions for a new trial and in arrest of judgment, he brings the case here by appeal.

It appears from the record in the case that the defendant on or about the 18th of September, 1894, was traveling from a place called "Oochiti," in New Mexico, to his home, in San Miguel county; that while so traveling he came up with Hilario Martinez and Juan James, who were freighters going in the same direction. He traveled with these parties during the remainder of the 18th, camped with them during the night, and traveled with them until late in the afternoon of the 19th, when they all stopped for dinner. After dinner they separated, the defendant going in the direction of his home, which he reached that night or the next day. Some four days after this the bodies of the two freighters were found dead in their wagons, some miles from the place where the defendant left them, and about 400 yards from the road. He was never seen with them af-

ter leaving them on the evening of the 18th. They were never seen after that time until their dead bodies were found. The defendant was arrested, indicted, tried, and convicted, as above stated. It will be seen from this statement of facts that there was no eyewitness of the murder, and that there were no facts whatever developed upon the trial showing the circumstances under which the crime was committed. The killing was established, and the condition in which the bodies were found showed that death was produced by a dangerous weapon; but how, or under what circumstances, or what was done or said by the deceased or the slayer at the time of the homicide, does not appear. At the close of the evidence the court instructed the jury as to murder in the first degree only, and did not charge as to murder in the second or third degrees. In this failure of the court to instruct the jury as to murder in the second and third degrees, it is insisted by the plaintiff, there was error.

Under section 2054 of the Compiled Laws of New Mexico, it is made the duty of the court in all cases, whether civil or criminal, to instruct the jury on the law of the case, and its failure or refusal so to do shall be sufficient ground for a reversal of the judgment. It has been held by this court that it is the duty of the district court properly and fully to instruct the jury as to the law in all criminal cases, whether requested so to do or not. Failure on the part of the court so to instruct is a ground of error. *Territory v. Friday* (N. M.) 42 Pac. 62. Was it the duty of the district court, under the facts developed in this case, to charge the jury upon any other degree of murder than the first? "Murder" is defined by our statute to be the unlawful killing of a human being, with malice aforethought, either express or implied. Express malice is a deliberate intention unlawfully to take away human life. Malice is implied when no considerable provocation appears, or when all the circumstances of the killing show a wicked and malignant heart. Under our statute, murder is divided into three degrees: First, all murder which shall be perpetrated by means of poison, or lying in wait, torture, or by any kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, any felony, or perpetrated from a deliberate and premeditated design unlawfully and maliciously to effect the death of any human being, or perpetrated by any act greatly dangerous to the lives of others, and indicating a depraved mind regardless of human life, is murder in the first degree; second, all murder which shall be perpetrated, without a design to effect death, by a person while engaged in the commission of a misdemeanor, or which shall be perpetrated in the heat of passion, without a design to effect death, but in a cruel or unusual

manner, or by means of a dangerous weapon, unless it is committed under such circumstances as constitute excusable or justifiable homicide, or which shall be perpetrated unnecessarily, either while resisting an attempt by the person killed to commit any offense against the person or property, or after such attempt shall have failed, shall be deemed murder in the second degree; third, every killing of a human being by the act, procurement, or culpable negligence of another, which is not murder in the first or second degree, is murder in the third degree. Every unlawful killing of a human being, with malice aforethought, is murder, either in the first or second degree. Under the facts in this case, it is only necessary to consider murder in the first and second degrees. The distinctive features which separate murder in the first from murder in the second degree are deliberation and premeditation, which are present in the first, and absent in the second. In both these degrees the killing must be unlawful, and in both it must be done with malice aforethought; but the two essential elements which constitute murder in the first degree, and which are not present in the second, are that premeditation and deliberation upon the acts done in the commission of a crime, which aggravate the offense, and remove all ideas of excuse or justification, and elevate the crime from one of murder in the second to one of murder in the first degree. If the murder is perpetrated by means of poison, lying in wait, torture, or in any attempt to commit a felony, or by an act greatly dangerous to the lives of others, indicating a depraved mind regardless of human life, the law presumes that the acts by which the murder has been thus committed have been done with that premeditation and deliberation which constitute the crime murder in the first degree. Where a person has taken the life of another by either of these methods, the law has said that the very act of taking life in that form contains in itself the mental requirements of premeditation and deliberation, making it murder in the first degree without the proof of any other facts. In a trial for murder committed by one of these methods, the inquiry is as to whether the killing was committed by a method thus inhibited by the statute, and if it was so committed the court and jury may find from such killing that it was done with deliberation and premeditation. If, however, it is shown that the murder was committed in any other manner, then there is no presumption of law or fact, against the defendant, that the killing was done with deliberation and premeditation. "But a mere killing with such weapon, with nothing more, is not murder in the first degree. And where the statute requires a more distinct premeditation, or more intense malice, the verdict can only be for the second degree." 2 Bish. New Cr. Proc. § 602. While the

death, and the weapons or means used to produce death, may, in and of themselves, be sufficient to show murder, yet alone they raise no presumption as to the degree of the murder. If any presumption as to the degree is to be raised from these facts, it is the second degree; and, if the territory would lift the crime from this to the higher degree, it can do so only by the proof of such additional facts and circumstances in relation to the crime as will permit the court to charge, and the jury to determine, that it was done with that deliberation and premeditation which will make it murder in the first degree. If no such facts and circumstances are shown, it will be the duty of the court to so instruct, and the jury to find a verdict in the second, or, it may be, in a lower, degree. Kerr, *Hom.* p. 99, in discussing this subject, says: "While the presumptions of malice are necessarily presumptions of murder, because all killing is murder, yet a presumption of malice, either from the act of killing, the weapon or means used, raises no presumption as to the degree of murder, and consequently no presumption that the homicide is more than the lowest degree of malicious killing, which is usually murder in the second degree. A higher degree of guilt can be established only by additional proof of previous deliberation, premeditation, or reflection." While the rule thus laid down by Mr. Kerr is no doubt true in respect to the necessity of proof of deliberation and premeditation to raise the murder from the second to the first degree, and that malice is a necessary element of murder, we cannot agree that malice is to be regarded simply as a presumption of law. It is an element to be found from the facts by the jury. Malice is not a presumption of law arising from the fact of the killing, though the killing may be sufficient to justify the jury in finding malice. *Territory v. Lucero* (decided at this term) 46 Pac. 18; *Stokes v. People*, 53 N. Y. 164; *Milton v. State*, 6 Neb. 136; *People v. Belencia*, 21 Cal. 544; *State v. Turner, Wright*, 26; *Com. v. Drum*, 58 Pa. St. 9; *Dains v. State*, 2 Humph. 439; *Hamby v. State*, 36 Tex. 523; *Territory v. Romine*, 2 N. M. 114. The burden of proof to establish the guilt of the defendant to the satisfaction of the jury, beyond a reasonable doubt, never shifts from the territory to the defendant, but remains with the territory throughout the trial; and, if the territory would convict the defendant of the highest grade of homicide, it can do so only by showing either that it was committed by that means from which the law presumes deliberation and premeditation, as if done by poisoning, lying in wait, etc., or by showing that the crime was committed under such circumstances that the jury, under a proper charge from the court, may find as a fact that it was done with deliberation and premeditation. *Coffin v. U. S.*, 156 U. S. 432, 452-461, 15 Sup. Ct.

394; Davis v. U. S., 160 U. S. 469, 16 Sup. Ct. 353. In the case of State v. Payne, 10 Wash. 553, 39 Pac. 159, the court, in discussing the presumptions which arise from the proof of killing, say: "The premeditation required to constitute murder in the first degree is a distinct element, having no relation whatever to the fact of the killing; and for that reason all the authorities hold that no presumption of murder in the first degree flows from the proof of the killing; but as to murder in the second degree the reasons which induced the holding at common law still have force." In the case of Stokes v. People, 53 N. Y. 164, after discussing this question of the different degrees of murder, the court use this language: "The intention may be inferred from the act, but this, in principle, is an inference of fact to be drawn by the jury, and not an implication of law to be applied by the court. * * * Under the statute it is obvious that mere proof that one has been deprived of life by the act of another utterly fails to show the class of the homicide, under the statute."

The means by which the killing was effected in the case under consideration were not such as to bring the case within that class where deliberation and premeditation can be gathered. Thus, it was not done by poisoning, lying in wait, etc.; but, as charged in the indictment and shown in the evidence, it was committed under that clause of the statute which makes it necessary to prove deliberation and premeditation. It was therefore incumbent upon the territory to prove, not only the naked fact of killing, and that it was done with a dangerous weapon or instrument, but other facts and circumstances from which deliberation and premeditation could be inferred. If no proof was offered showing facts and circumstances from which such deliberation and premeditation could be inferred, it was the duty of the court to charge as to murder in the second degree. The facts, as disclosed by the record, show that the defendant, on the 18th of September, 1894, was travelling in his wagon, drawn by two horses, from a place called "Cochiti," in New Mexico, to his home, at Alamosita, in San Miguel county. He had no load in his wagon, except his bed, wrapped up in a wagon sheet, a box with provisions, cooking utensils, harness, a rifle, and such other things as he needed on his journey. Some time during the day of the 18th of September, he came up with the deceased and another boy, who were each driving a freight team, having four horses to each wagon. The wagons driven by the deceased were loaded with flour and other articles. The defendant and the two young men traveled along together during the remainder of the day of the 18th, and camped that night, and then traveled together until late in the afternoon of the following day, when they all went into camp near a place called "Ojito de las Conchas" for dinner. After they had gotten dinner and fed their horses, they hitched their teams and

started out. The defendant bade the young men "good day," and drove ahead, in the direction of his home, where he arrived that night, or the next day. He never saw the two young men after that, and was never seen with them. Some four days after this the dead bodies of the two boys were found several miles from the place where they and the defendant had taken dinner and separated on the evening of the 19th. The bodies were found one in each wagon, and were between 300 and 400 yards from the road. The heads and faces were badly cut and beaten up, showing that death had been caused by cuts or blows. They were in such condition at the time they were discovered that it was difficult to tell exactly the nature of the wounds by which death was produced. An ax belonging to one of them was found in one of the wagons, with blood on it. Some of the sacks of flour were gone from one of the wagons. There is no direct evidence that the defendant ever saw the deceased after leaving them on the evening of the 19th. The two boys were not seen from that time until their dead bodies were found, some four days afterwards. The record falls utterly to show how or under what circumstances the killing occurred. The record falls to show any threats, difficulty, or feeling of ill will between the deceased and the defendant, or any of the facts surrounding the commission of the homicide. Under this state of facts, was the court below correct in giving an instruction only of murder in the first degree? We think not. While, from the fact of the killing, and the nature of the instrument used to produce it, it might be found that the killing was unlawfully done, and that it was done with malice aforethought, yet have we the right, from these facts alone, unaccompanied by any other circumstances, to presume that it was done with that deliberation and premeditation which will make it murder in the first degree? If we can indulge in any presumption, we have more right to presume that the killing was done under such circumstances as would make it justifiable homicide, because nothing is presumed against the innocence of the accused. Might we not as well presume that the deceased brought on a difficulty resulting in his death? Or may we not also presume that the deceased attacked the slayer under such circumstances as would make the killing justifiable homicide? How are we to know, in the absence of any proof as to the circumstances of the killing, how it was perpetrated? In the absence of any proof upon the subject, must we assume that it was the highest degree of murder? We do not so understand the law. To presume the guilt of the defendant of murder in the first degree, in the absence of proof to establish it, is in conflict with that presumption of innocence which remains with the defendant until overcome by proof which establishes his guilt beyond a reasonable doubt. From the simple fact of the killing, without any proof as to any of the circumstances un-

der which it was done, we have no more right to assume that it was murder in the first degree than to assume that it was murder in the second degree or justifiable homicide.

Other grounds of error have been assigned by the appellant for reversal, among which is the action of the court in permitting testimony to be offered by the territory as to the contents of a certain letter supposed to have been written by the defendant. While we do not agree with the court below that a foundation was sufficiently laid to permit some of the witnesses to testify as to the contents of this letter, we deem it unnecessary to consider that question in the case. We think the court, under the state of facts presented in the record, should have given an instruction for murder in the second degree, and its failure to do so is error, for which the case must be reversed and remanded, and new trial granted, and it is so ordered.

COLLIER and BANTZ, JJ., concur.
LAUGHLIN, J., dissents.

TERRITORY v. PADILLA.

(Supreme Court of New Mexico. Sept. 1, 1896.)

HOMICIDE—MURDER—EVIDENCE—INSANITY—OPINION EVIDENCE.

1. In a homicide case there was evidence that defendant and deceased, had had business troubles; that defendant, carrying a rifle, followed deceased, who had gone up a prairie trail; that soon after a shot was heard; that defendant was seen returning; that deceased was found dead from a rifle shot; and that the defendant's rifle was found hid in his house. *Held*, that the question as to the degree of murder was for the jury.

2. Where the sanity of a witness in a homicide case is attacked, to affect his credibility, the opinion of a person, that he considered from his demeanor at the coroner's inquest that the witness was stupid and uncertain as to facts, is admissible.

3. A nonexpert cannot testify as to whether a person was insane or not.

4. On the issue as to the sanity of a person, evidence of his general reputation in that regard is inadmissible.

Laughlin, J., dissenting.

Appeal from district court, San Miguel county; before Chief Justice Thomas Smith.

Jose Padilla was convicted of murder, and appeals. Reversed.

L. C. Fort and O. A. Larrazolo, for appellant. John P. Victory, Sol. Gen., for the Territory.

COLLIER, J. The appellant, Jose Padilla, was convicted of murder in the first degree in the district court of the county of San Miguel. Motions for new trial and in arrest of judgment being overruled, appellant was sentenced to death; and from this judgment this case is here on appeal, a bill of exceptions being duly allowed.

The evidence to connect the appellant with the killing of one Juan Garcia y Martinez is

purely circumstantial. There was no eye-witness to the killing itself, and death was shown to be the result of a gunshot wound inflicted upon the left side of the body of deceased. There being no evidence whatever to show that this was murder by poison or torture, and there being no circumstances showing necessarily that it was done by lying in wait, or that it was perpetrated in committing, or attempting to commit, a felony, the case is controlled by that of *Territory v. Aguilar*, 46 Pac. 342, in which the opinion is this day rendered by this court; and it must therefore be reversed, and remanded for a new trial, because of the failure of the court to instruct the jury in other than the first degree. *Territory v. Friday* (N. M.) 42 Pac. 62, and other cases there cited. In this case it was shown that the deceased and defendant were neighbors in a small village; were partners in the ownership of a mill, which had lain idle several months because of disagreements in business; were unfriendly, and scarcely spoke when they met. Their houses were three or four hundred yards apart. A trail led over the hills to the prairie, which was in full view of both houses. Early in the afternoon of the day of his death, deceased went up that trail to the prairie to look for his horses, and about sundown was found dead on the prairie, about eight or nine hundred yards from his house, with a bullet hole in his left side. A witness, by name Ortega, saw the deceased when he went up the trail. Not long afterwards he saw defendant go up the same trail, carrying a gun. He heard a shot, and in a short time defendant came down the trail, still having his gun, and walking in a way as if he wished to escape observation. There was other testimony showing that an empty cartridge shell was found the next morning, with dirt on it, as if it had lain out and been spattered by the rain the night before. This shell was shown to be made for a gun not in very general use, called a "Henry rifle," and defendant had this kind of gun at his house. When it was asked for by the sheriff, two days after the homicide, his wife took it from between mattresses in the inner room. The place where the body was found was in full view of persons on the prairie, but hidden from the little village, which was under the hills. This was, in effect, the entire case of the prosecution, to which the defendant set up and sought to prove an alibi by persons testifying that he remained at the house the entire afternoon of the day. He sought also to prove that the kind of shell found near the body was of a kind kept in stock in Las Vegas, and that it fitted and was used in another class of gun than the Henry rifle. As a reason for keeping the gun between the mattresses, it was testified that there was a small child around the house, and it was safer to keep the gun in that place. Also the credibility of the witness Ortega was sought to be attacked by evidence showing that he was mentally unsound. It should be said

that it was also shown by the prosecution—or, rather, circumstances were put in evidence which the prosecution claimed showed—that the defendant's gun had at the time of the inquest been recently discharged.

By the instruction of murder in the first degree alone, the court must have assumed, which the defendant denied, that there was hostility existing between him and the deceased, that when he left, following on the trail deceased had just taken, he did it from a premeditated design to take the life of deceased; and that, at all events, when the killing actually took place it was not in the heat of passion, or in other ways, so as to make the offense of a lower degree, or even justifiable or excusable homicide. It was for the jury to say whether there was a motive existing in defendant's mind which would make him seek the life of deceased. It was also for the jury to say whether the defendant, in following the trail deceased had taken shortly before, was pursuing deceased with the intention of killing him, or if his doing so was merely a coincidence. If they had disbelieved the testimony as to motive, they might also have reached the conclusion that defendant was not pursuing deceased for the purpose of killing him. It was for the jury to judge of the credibility of the witnesses as to these matters, and then, having done that, to say what weight should be given to the circumstance that defendant had, with a gun in his hand, gone up the same trail which the deceased had taken. Surely, if the jury had discarded the evidence as to motive, it would have been no great step for them to have reached the conclusion that the prosecution had not established beyond a reasonable doubt the ingredients which make a case of murder in the first degree.

We go further, however, and say that, admitting the motive to have been proven; that defendant saw the deceased go up the trail, and follow after him with a gun, with a deliberate and premeditated design unlawfully and maliciously to effect his death,—yet, with no eyewitness of the homicide, it is not necessarily shown that it was so accomplished. It is not the intent of the mind that the law regards as criminal, but it is the overt act flowing from that intent. There is no question but that a verdict of murder in the first degree would be supported by the evidence that defendant was hostile to deceased, that he followed after him with a gun, that a shot was heard, and the deceased was killed from the effect of a bullet in his body, as there would be circumstances tending to show deliberation and premeditation; but, before arriving at such a verdict, it was necessary for the jury to believe beyond a reasonable doubt that no sudden quarrel arose, and that deceased was killed in the heat of passion, without design to effect death, or that defendant did not kill deceased in any other of the ways constituting murder in the second degree, and that it was not done by the culpable

negligence of defendant, and that it was not done under such circumstances as constitute excusable or justifiable homicide, as defined by the first paragraph of section 692 and section 693, Comp. Laws N. M. 1884.

We have said this much as to this homicide, not as desiring again to go over this matter, so exhaustively discussed, as the writer believes, in the opinion of Justice Hamilton in *Territory v. Aguilar*, 46 Pac. 342, supra, but only because this case differs from that, in that the kind of weapon used there, and the way death was effected, precluded the idea of death by culpable negligence, or by accident or misfortune, as described in section 693, supra. The cardinal distinction between all homicides not shown by eyewitnesses, and homicides where the killing is shown by eyewitnesses, is that as to the former class the jury must weigh the circumstances, and determine what degree of murder is proven, while as to the latter the court may instruct the jury as to a single degree, or two degrees, or all the degrees, as, or not, the evidence may be applicable to one or more degrees. If the secret killing were shown to be by poison or torture, or necessarily in the commission of, or attempt to commit, a felony, or by lying in wait, then, also, even in cases of circumstantial evidence, the court may restrict instructions to first degree. If the rule were that every secret homicide presumes murder in the first degree, then the slayer of a man whose body is found pierced by bullets, having in its hand a weapon recently discharged, is placed in the same category as he who has slain unseen a defenseless woman, whose polluted corpse bears evidence of the utmost atrocity. Such a rule is not reconcilable with reason, of which law should be the perfection; and the only escape from it is for the jury, and not the judge, to weigh all the circumstances which may satisfy their minds as to how the secret killing may have been effected, and determine the degree of the slayer's guilt.

As this case goes back for a new trial, we consider it well to notice one or two of the other assignments pressed upon us.

It is complained that the trial judge failed to give a requested instruction as to circumstantial evidence. There was an instruction as to this in the charge of the court, but in our opinion the plaintiff in error was entitled to have had more distinctly stated to the jury, than was done in the court's own instruction, the request made, which is as follows: "In a case of circumstantial evidence, the evidence against the accused must be such as to exclude, beyond a reasonable doubt, every hypothesis or theory other than that he is guilty as charged; and if there remains in the case, all the evidence considered, any reasonable theory, arising out of the evidence, which raises in the mind of the jury a reasonable uncertainty of defendant's guilt, such a state of evidence would justify an acquittal." We

think the court's instruction did not fully advise the jury as to the exclusion of every reasonable theory other than that of guilt, and that its general statement,—while sufficient in the absence of a special request,—while not, in our opinion, reversible error, was not all the plaintiff in error was entitled to.

Another assignment we will notice relates to the failure of the court to instruct, upon special request made, as to the sanity or insanity of the witness Ortega, so that the jury could consider the attack made upon him, in weighing his credibility and the weight to be given his testimony. The testimony of this witness was exceedingly important, and, though the testimony in the attack made appears to have been slight, yet if there was any the court should have instructed in that regard, if specially requested. *Thorwegan v. King*, 111 U. S. 549, 4 Sup. Ct. 529; *Pennock v. Dialogue*, 2 Pet. 1. The decision of this court in holding that, where the general charge substantially covers what is requested, there is no error in refusing to give what is requested, must, by inference, be considered as recognizing this rule. *Territory v. Trujillo* (N. M.) 32 Pac. 157; *U. S. v. De Amador* (N. M.) 27 Pac. 488; *Territory v. O'Donnell*, 4 N. M. 65, 12 Pac. 743. The court admitted in evidence questions tending to show that witness talked irrationally at times, that he "fussed" with women without cause or provocation, and that he acted in a way that caused a witness to think he did not have good sense. It rejected the answer of Judge Wooster when he was asked as to the demeanor of Ortega at the coroner's inquest, as compared to what it was before the jury in the trial in the court below. Judge Wooster answered that the demeanor was similar, as near as he could remember; that he was considered by him there as being a very stupid witness, and uncertain as to facts he stated. The court also rejected direct questions calling for an opinion as to Ortega's sanity or insanity, and what was his reputation as to sanity or insanity. Upon the subject of impairment of the mind, it is stated in *Pease v. Burrows* (Me.) 29 Atl. 1061, that "the adjudged cases on this subject are few, but the doctrine of them seems to be that the condition of the mind, if the witness is capable of appreciating the truth, must go to the credibility of the witness, and be submitted to the jury." In *Reg. v. Hill*, 5 Cox, Cr. Cas. 259, Lord Campbell, in delivering judgment, said, "It is for the judge to say whether the insane person has the sense of religion, and whether he understands the nature and sanction of an oath, and the jury are to decide the credibility and weight of his evidence." This enunciation was expressly approved in *District of Columbia v. Armes*, 107 U. S. 519, 2 Sup. Ct. 840. When it is remembered in this connection that the witness Ortega stated that he did not know the nature of an oath, it would appear that this instruction asked, and which was upon a subject not directly referred to in the court's charge, should have been

given. There is a most interesting discussion upon the subject of what testimony may be given by witnesses, who are not experts, in the way, if not of opinion, at least closely allied to opinion, found in *Com. v. Sturdivant*, 117 Mass. 133, in which the opinion was delivered by Endicott, J., and concurred in, among others, by Gray, C. J., and Devens, J. It does not appear from that opinion that a witness not an expert may directly say whether, in his opinion, another is sane or insane, but he can testify to conclusions, as to which the details enabling him to arrive at the conclusions cannot be presented to the jury. After citing very numerous examples in decisions from various states, the learned judge summarized the matter as follows: "The competency of this kind of evidence rests upon two necessary conditions: First, that the subject-matter to which the testimony relates cannot be reproduced, as described to the jury, precisely as it appeared to the witness at the time; and, second, that the facts upon which the witness is called to express an opinion are such as men in general are capable of comprehending and understanding." As to this, a very apt example appears in the case of *McKee v. Nelson*, 4 Cow. 355, which was a breach of promise case, and the trial court admitted the following question: "Is it your opinion that the plaintiff was sincerely attached to the defendant?" The court say: "We think the judge's decision founded on good sense, and, in the nature of things, we do not see how the various facts upon which an opinion of the plaintiff's attachment must be grounded are capable of specification, so as to leave it, like ordinary facts, as a matter of inference to the jury. It is true that, as a general rule, witnesses are not allowed to give their opinions to a jury; but there are exceptions, and we believe this to be one. There are a thousand nameless things, indicating the existence of the tender passion, which language cannot specify. The opinion of a witness on this subject must be derived from a series of incidents passing under his observation, which yet he could not detail to a jury." In *Com. v. Wilson*, 1 Gray, 337, the court, speaking by Chief Justice Shaw, says "that a witness not an expert can testify as to the appearance and conversation of a person with whom he had interviews, but not what opinion he formed at those interviews of his mental condition." In *Barker v. Comins*, 110 Mass. 487, in which the question was as to the sanity of a testator, Justice Gray, delivering the opinion, said that a witness could not answer whether testator was of sound or unsound mind, but could testify whether there was apparent change in the man's intelligence or understanding, or want of coherence in his remarks, as this was not a matter of opinion, but of fact, as to which any witness who has had an opportunity to observe may testify, in order to put before the jury the acts and conduct from which the degree of mental capacity may be inferred. Under the rule we

have stated, as laid down in *Com. v. Sturivant*, supra, and with which the decisions we have cited seem to be in accord, and which we think the true rule, we hold that such testimony as Wooster gave was competent, that witnesses could be asked as to conduct and appearance, and that this testimony should have been admitted along with what was admitted, but not the questions directly calling for an opinion as to the sanity or insanity of said Ortega, and, of course, not what was his general reputation as to sanity.

It is complained also that the court did not fully advise the jury, by definitions of terms used by the statute, as to what was meant by the degree of murder, to which their attention was confined. As, in the retrial of this case, it will (if defense is made as in the record before us) be necessary to instruct as to all the degrees, and as to justifiable and excusable homicide as well, this error cannot be expected to recur. Wherefore it is considered that this cause be reversed, and remanded for a new trial.

LAUGHLIN, J., dissents.

BANTZ and HAMILTON, JJ. We fully concur in the opinion of Justice COLLIER in this case, except as to that portion which holds that a nonexpert may not state his opinion or conclusion as to the sanity or insanity of a person whose mental soundness or capacity is under consideration. When a nonexpert is shown to be qualified, by reason of opportunity for knowing and observing the person under investigation, he may not only state what he has observed in the conversation or conduct of such person tending to indicate his mental condition, but the nonexpert may also state his conclusion or opinion as to the ultimate fact, founded as it is or may be upon a series of facts more or less symptomatic, and not susceptible of intelligent narration. When a witness testifies that a person appeared to be angry or sick, he states a conclusion or opinion based upon a number of symptomatic facts which could not be adequately detailed so as to photograph to the jury the same impression which they made upon the mind of the observer when they were seen, and the statement of the conclusion can alone describe the facts seen. The case in Massachusetts gives many illustrations of this rule, and it is now well established that the same rule is applicable to a nonexpert, as in the case at bar. Upon this subject Mr. Greenleaf says: "But where the witness has had opportunity for knowing and observing the conversation, conduct, and manner of persons whose sanity is in question, it has been held, upon grave consideration, that the witness may depose, not only to particular facts, but to the opinion or belief as to the sanity of the party, formed from such actual observation;" "that nonexperts, who have had opportunities to observe a person, may give their opinion of his sanity, at the same time stating their reasons, and the

facts observed upon which they based their opinion." 1 Greenl. Ev. (4th Ed.) 532; Whart. Cr. Ev. (9th Ed.) §§ 417, 458, 460.

BORREGO et al. v. TERRITORY.

(Supreme Court of New Mexico. Sept. 1, 1896.)

HOMICIDE—WRIT OF ERROR—SPECIAL TERMS—TRIAL JUDGE—CORRECTING RECORD—NUNC PRO TUNC ORDER—INDICTMENT—EVIDENCE—ALIBI—INSTRUCTION—CONSPIRACY—WITNESS—CROSS-EXAMINATION—DISCRETION OF COURT.

1. Under Rev. St. U. S. § 1869, providing that writs of error, bills of exception, and appeals shall be allowed "in all cases" from the final decisions of the district courts to the supreme court of the territories, under such regulations as may be prescribed by law; and Comp. Laws N. M. 1884, § 2193, providing that "all cases," either in law or equity, may be removed into the supreme court of the territory for review either by appeal or writ of error, a homicide case may be reviewed by writ of error; and it is immaterial that no provision is made for superseas or stay of execution, a writ of error being a superseas by implication.

2. Under Comp. Laws, § 543, directing courts to be held in different counties at the time fixed by law, and authorizing their continuance till adjourned by order of court; and section 552, providing that special terms shall not conflict with regular terms,—proceedings at a special term are not invalid because it is continued beyond the time fixed for the regular terms of other counties of the district.

3. An allegation in an indictment that deceased "instantly" died of said mortal wounds inflicted on him by defendants is sufficient, "instantly" being equivalent to "then and there."

4. An indictment alleging that defendants "unlawfully, feloniously, willfully, purposely, and with express malice aforethought" did shoot and kill, charges murder in the first degree, to the exclusion of a less degree; deliberation and premeditation, elements of murder in the first degree only, being sufficiently expressed by "express malice aforethought"; express malice being defined by statute as "the deliberate intention to unlawfully take away the life of a fellow creature, which is manifested by external circumstances capable of proof."

5. An instruction that it was incumbent on defendants to establish the claim that they were elsewhere at the time of the murder by a preponderance of the evidence, but not beyond a reasonable doubt, and "if, therefore, after consideration of all the evidence in the case, * * * you have a reasonable doubt as to whether the defendants were at the place where the crime was committed, or were in some other locality, * * * you shall give the defendants the benefit of that doubt, and find them not guilty," imposes on the prosecution the obligation to demonstrate beyond a reasonable doubt that defendants were at the place of the killing, and gives them the benefit of their testimony to create in the minds of the jury a reasonable doubt as to their presence at the place.

6. On a trial of B. and others for murder of C., G. testified that he was approached by V. with a proposition to assassinate C.; that the details of the proposed crime were discussed by him and V. and B.; that they informed him others of the defendants were in the agreement; that their object was to remove C. because he was a prominent man, of great strength to his political party, to which they were antagonistic, and which they wished to destroy in that county; that he seemingly acquiesced in their proposition, but on reflection determined to put C. on his guard, and sent him a note, which was found among the papers of C. after his death; that afterwards, to avoid importunities from his accomplices to co-operate with them in killing C.,

and from fear of them as members of a secret political society, if they became cognizant of his betrayal of them, he went away. *Held*, that his testimony and the note were admissible to show the conspiracy.

7. Conviction of an offense which is not more than a misdemeanor either by statute or common law, does not render one incompetent to testify.

8. To show that one convicted of a crime is competent to testify by reason of a pardon, the issuance thereof may be shown by the territorial archives, he having lost the pardon, or not having it with him.

9. Where defendants in a murder case, claiming an alibi, have testified to their whereabouts from 7 o'clock in the evening of the night of the murder, permitting them to be cross-examined as to their whereabouts from the noon preceding up to that time is in the discretion of the court.

10. Refusal to permit defendants, who have testified that they were at a certain time prior to the murder at a certain place, to introduce witnesses to testify that the persons who swore that they saw defendants at another place at that time were not there themselves at that time, is a matter of sound discretion.

11. It is not error to permit defendants in a homicide case to be asked, for the purpose of discrediting them, as to the killing of other persons by them a few days after the homicide in question.

12. Amendment by the trial court of the record in a criminal case to show arraignment and pleas of not guilty by a nunc pro tunc order is warranted by its recollection of the facts, the affidavits of the clerk, sheriff, district attorney, and stenographer, if not alone by the recital in the record that, "issue being joined," the trial was had, and a verdict of guilty was returned.

13. The correction, by a nunc pro tunc order, of an omission or false entry in a record, which Comp. Laws 1884, § 1836, authorizes "whenever the ends of justice may require it," is not limited to the term at which the transaction occurred.

14. The power to correct the record by a nunc pro tunc order extends to criminal cases, including capital cases.

15. The trial court may amend its record after removal of the cause by appeal or writ of error.

16. Act Cong. Sept. 9, 1850, providing that the territory shall be divided into three judicial districts, and a district court shall be held in each by one of the justices of the supreme court, and the judges shall respectively reside in the district which shall be assigned them, does not prevent one of the judges acting in a case in another district than his own, the judge thereof being disqualified.

Error to First judicial district court, Santa Fé county; before Justice H. B. Hamilton.

Francisco Gonzales y Borrego and others were convicted of murder, and bring error. The territory moves to quash the writ. Motion denied. Judgment affirmed.

Catron & Spiess, for plaintiffs in error. John P. Victory, Sol. Gen., H. L. Warren, and J. H. Crist, for the Territory.

SMITH, C. J. This case was brought up to this court from the district court of the county of Santa Fé by writ of error. It is now before us upon motion by the territory, through its solicitor general, to quash the writ of error, and affirm the judgment of the court below for the alleged reason that appeal is the only process by which criminal cases can be brought up from the district courts to this court for review. The or-

ganic act authorizes the review of the judgment by writ of error. This motion presents the question: Are the judgments of the district courts of the territory of New Mexico, in criminal cases, reviewable in the supreme court by writ of error or appeal? The organic act vests the supreme and district courts with common law and chancery jurisdiction (Rev. St. U. S. § 1838), and provides that "writs of error, bills of exceptions and appeals shall be allowed in all cases, from the final decisions of the district courts to the supreme courts of all the territories, respectively, under such regulations as may be prescribed by law" (Id. § 1843). It is elementary that the mode employed at common law for the review of common-law cases is by writ of error, and decisions in chancery by appeal. Hence, the territorial courts being vested with common-law jurisdiction by the organic act, the decisions of the district courts are reviewed in the supreme court, in common-law cases, by writ of error, and in chancery cases by appeal. At common law the review of a judgment in a criminal case could be by writ of error, and in no other way. *Rice v. Rex*, Cro. Jac. 404; *Rex v. Inhabitants of Seton*, 7 Term R. 373; *Rex v. Justices of West Riding of Yorkshire*, Id. 467; *Rex v. Carlile*, 2 Barn. & Adol. 971; *State v. Sheppard*, 37 Wis. 336. Permission from the crown was, however, in criminal cases, always necessary to maintain the writ in England. This permission was granted as of right in misdemeanor; while in treason or felony it was a matter of grace from the sovereign, who could withhold or allow at pleasure, though there was manifest error in the record. The reason assigned for this was that the felon had forfeited all he had to the crown, and the crown could exercise its pleasure whether or not to give it back. *Rex v. Earbery*, Fortes. 37. The method of procuring a review, when this grace was extended, was always by writ of error, and in no other way. In the United States, forfeitures not being one of the penalties visited upon the felon, the writ is awarded by the courts as of course, wherever it would have been granted in England by fiat of the crown. 1 Bish. New Cr. Proc. § 1362. Congress, in preserving to litigants the right of review by writ of error, undoubtedly must have had in mind the writ of error as the same was employed by common law, because it conferred common-law jurisdiction upon the courts wherein it was to be made use of, and left it to our legislature to regulate the manner of taking and allowing the same. This our legislature has done by the enactment of section 2194, Comp. Laws, which provides: "The clerk of the supreme court shall issue a writ of error to bring into the supreme court any cause finally adjudged or determined in any of the district courts, upon a præcipe therefor * * * at any time within one year from the date of such judgment

* * * and section 2199: "Hereafter no writ of error shall be allowed by the supreme court of this territory, except within one year after the rendition of the judgment on which said writ of error is based; and that said supreme court shall make rules for the government of the practice in writs of error in common-law cases, which said rules shall not conflict with any of the laws in force in this territory." The terms "writs of error" and "appeals," as they appear in the organic act, have a technical significance well known to the law. It is then provided that they "shall be allowed in all cases," and are guaranteed parties in all cases. Something having definiteness and substance is secured to the court and to the parties before it by this language; and it is put beyond the power of the territorial legislature to deny, alter, or curtail. The jurisdiction is fixed by the organic act; the power to regulate the procedure is reposed in the legislature. It cannot be contended that congress has, in one and the same form of expression, secured to the supreme court a certain jurisdiction, and to the parties certain rights, and given to the territorial legislature the power to make that jurisdiction nugatory, and these rights unavailing. This provision, with its imperative phraseology, intends nothing short of assuring to the appellant, not whatever the territorial legislature may be pleased to call an appeal, but an appeal known to chancery, and assuring to the plaintiff in error the writ of error with all the benefits growing out of and incident to such writ. What congress has given it has not authorized the territorial legislature to take away by regulations. The allowance of the writ of error may be regulated by the legislature, as has been done; but these regulations must not derogate from the nature and substance of the thing given it to regulate. Whatever the territorial legislation on this subject is or may have intended, it cannot have taken from the supreme court jurisdiction to review cases cognizable at common law by writ of error. The power given by the organic act to the legislature to regulate writs of error and appeals is not operative to enable the legislature to limit or to regulate what is fixed and assured by the same organic act. The power to regulate does not confer power to abrogate. Our legislature has not, however, made any attempt to interfere with or deny the jurisdiction conferred upon the supreme court by the organic act, but, on the contrary, has regulated such jurisdiction by sections 2193, 2194, Comp. Laws. In providing for appeals from final judgments in criminal cases, it has merely given a concurrent remedy. In *U. S. v. Gilson*, 1 Idaho, 304, the court reached the conclusion that a common-law action could not be re-examined on appeal, but must be brought up by writ of error, in the following opinion: "The courts of this territory are created by the organic act, and

their jurisdiction and powers must be ascertained by the provisions of said act and the laws of the territory passed in pursuance thereof. Both the district and supreme courts are, by the express terms of the act, clothed with chancery and common-law jurisdiction; and the legislature has no authority to abridge such jurisdiction, nor has the legislative assembly made any attempt so to do. * * * How shall this appellate jurisdiction be exercised? The organic act, in very plain and positive language, declares that writs of error, bills of exceptions, and appeals shall be allowed in all cases from the final decisions of the district courts to the supreme court, under such regulations as may be prescribed by law. Congress, therefore, has not delegated the power to the legislature to say in what cases writs of error and appeals may be allowed, but have emphatically declared in language that is plain that they shall be allowed in all cases. The act, however, does not prescribe the mode in which they shall be allowed, but expressly provides that they shall be allowed under such regulations as may be prescribed by law, thus giving to the legislature the power to prescribe the regulations as to the manner in which they may be taken and allowed. The declaration of the act is that writs of error, bills of exceptions, and appeals shall be allowed. These words have a technical and well-understood meaning. 'Writs of error' are known to common-law proceedings, but an appeal is not; but writs of error and appeals are the modes pointed out by congress whereby common law, equity, and admiralty causes may be reviewed and re-examined in the supreme court; and when congress used these words in the organic act it must be considered that they used them in accordance with the sense and meaning that had been given them by the supreme court of the United States. There is no doubt but that they were so used and intended to be understood, in the same section, in providing for writs of error and appeals from this court to the supreme court of the United States. If this be the sense in which these words were used, it follows that the true interpretation of that clause of the organic act is this: that writs of error and bills of exceptions shall, in suits at common law, be allowed and taken, and appeals in equity and admiralty cases shall be allowed, from the district to the supreme court; and that the power is conferred upon the legislature to regulate the manner and prescribe the rules of practice in taking and allowing them."

2. Remedy by writ of error is concurrent with remedy by appeal. In criminal cases the common law, as recognized by the United States and the several states of the Union, shall be the rule of practice and decision. Comp. Laws, § 2484. Under the common law, as we have already seen, the writ of error was the method by which a judgment in

a criminal cause could be reviewed. By providing that the common law, as recognized by the United States and the several states of the Union, should be the rule of practice and decision in the territory, the legislature has vested the supreme court with jurisdiction to review judgments in criminal cases by writ of error. In *Barnett v. State*, 36 Me. 198, the court say: "Although the remedy by appeal in civil cases takes away the remedy by writ of error by implication, as a general rule, yet in criminal cases the reason for the rule ceases, and there it does not apply. * * * His remedy by appeal would often be more onerous than that by writ of error to reverse an erroneous judgment, and therefore it is that his right to proceed by error is not taken away or impaired by giving him the right of appeal,"—citing *Cooke*, Petitioner, 15 Pick. 239; *Thayer v. Com.*, 12 Metc. (Mass.) 9; *Co. Litt.* 288; 3 Bl. Comm. 407. In *U. S. v. Plumer*, 3 Cliff. 1, at page 58, Fed. Cas. No. 16,055, Judge Clifford said: "At common law the writ of error would lie in criminal as well as in civil cases, and that the rule was just as applicable to misdemeanors as the case at bar [murder], which was declared by act of congress to be a felony." In *Sanders v. State*, 85 Ind. 318, at page 327, the court say: "It is held in well-considered cases that, although there is a statute governing proceedings in criminal cases, the writ is not abolished unless the statute specially or by implication abrogates it. This is so held with respect to writs *coram nobis*, by Marshall, C. J., in *Strode v. Stafford Justices*, 1 Brock. 162, Fed. Cas. No. 13,537. In speaking of the claim that the writ *coram nobis* cannot exist under the statute, Cowen, J., said, in *Smith v. Kingsley*, 19 Wend. 620: 'There is no statute expressly and in terms repealing its power, nor any which does so by necessary implication. Mere silence or omission to regulate proceedings upon such a writ will not operate as a repeal. The power therefore remains as at common law, except as to the mere form *coram nobis* resident, because the fiction of the record, remaining before the king himself, is gone. We therefore have lost the name of the writ, but nothing more.' " In many of the states the common-law writ of error is recognized as forming part of the law. *Holford v. Alexander*, 12 Ala. 280; *Adler v. State*, 35 Ark. 517; *McKinney v. Stage Co.*, 4 Iowa, 420; *Hawkins v. Bowie*, 9 Gill. & J. 428; *Fellows v. Griffing*, 9 Smedes & M. 362; *Calloway v. Nifong*, 1 Mo. 223; *Reid's Adm'r v. Strider's Adm'r*, 7 Grat. 76; *Dows v. Harper*, 6 Ohio, 518; *Wood's Ex'r v. Colwell*, 34 Pa. St. 92.

3. Our statute amply provides for a review of the judgment by writ of error. Kearney's Code, promulgated by Gen. Kearney in 1846, and which was, by the legislature of 1850, adopted, contains the only provision for appeals from final judgments in criminal cases. These provisions were incorporated into the Compiled Laws of 1884 as sections

2468-2473. By section 2469 appeals are allowed from final judgments rendered upon any indictment to the supreme court, if applied for during the term at which the judgment was rendered. Appeals only lie from such final judgments if allowed during the term at which the judgment was rendered. After the term has expired, no appeal can be taken. In 1880 the legislature passed a comprehensive act, regulating the mode of taking appeals and suing out writs of error. This act is compiled in sections 2193 and 2194 of the Compiled Laws of 1884, and is in conformity with the organic act which gives the legislature power to regulate the writ of error and appeal. By that act it was provided that all causes, either in law or equity, finally adjudged or determined in the district court, may be removed into the supreme court of the territory for review either by appeal or writ of error. Comp. Laws 1884, § 2193. The next section (2194) regulates the practice on appeal and writ of error, and provides that the writ of error may be sued out within one year from the date of the judgment brought into the supreme court. How could the language of section 2193 be made plainer for the purpose of providing for the review of judgments in criminal cases by writ of error? All causes, either in law or in equity, may be removed into the supreme court for review, either by appeal or writ of error. Criminal cases are causes at law, as distinguished from causes in equity, and, as all causes at law may be removed into the supreme court by writ of error, it follows that criminal cases can be so reviewed. The legislature of 1884 recognized the fact that judgments in criminal cases could be reviewed either by appeal or writ of error, under the laws as they then existed in the territory, and enacted what is compiled as section 2201 of the Compiled Laws of 1884, viz.: "Appellants and plaintiffs in error in criminal cases, removed into the supreme court of the territory for review, shall not be required to print the record, nor any part thereof," etc. See *Kidder v. Bennett*, 2 N. M. 37. In *Missouri* (2 Wag. St. p. 1114, § 13) there is a provision "that the state in any criminal prosecution shall be allowed an appeal only in the cases and under the circumstances mentioned in the next succeeding sections." Notwithstanding this provision, it was held in *State v. Cunningham*, 51 Mo. 479, that "when a motion to quash an indictment is sustained in the lower court, the state can bring the case to this court by writ of error or appeal." The solicitor general, in his brief, at page 8, seems to argue that section 2193 of the Compiled Laws does not apply to criminal cases, because no provision for supersedeas or stay of execution is therein contained. This contention is wholly without merit. At common law, a writ of error is not a supersedeas so as to discharge from custody, but in capital cases it operates to stay execution. Whart. Or. Pl. & Prac. §

783. A writ of error is a supersedeas by implication. If the record of the judgment is removed by writ of error, it is necessarily a supersedeas, for, the record being removed, it is impossible for the justices of the court in which it was to award execution. 9 Bac. Abr. "Supersedeas," p. 284. In Bishop of Ossory's Case, 3 Cro. Jac. 534, it was held that "a writ of error is a supersedeas, although the record itself is not removed to the court where errors are brought, but a transcript only." The right of appeal in a capital case is necessarily coincident with that of a stay of execution until that appeal can be heard. *State v. Pagels*, 92 Mo. 300, 4 S. W. 931. In *Kitchen v. Randolph*, 93 U. S. 86, the court say: "At common law a writ of error was supersedeas by implication." Under the statutes and the authorities it is plain that the judgment in this cause may be reviewed by writ of error. The motion to quash the writ of error is therefore overruled.

COLLIER and BANTZ, JJ., concur.

SMITH, C. J. At the June term, A. D. 1894, of the district court for the county of Santa Fé, Francisco Gonzales y Borrego, Antonio Gonzales y Borrego, Lauriano Alarid, and Patricio Valencia were indicted for shooting and killing one Francisco Chavez, on the 29th day of May, 1892, in the county of Santa Fé, and territory of New Mexico. On March 18, 1895, a special term of the said district court was duly called by the Honorable N. B. Laughlin, associate justice of the supreme court, and judge of the First judicial district of New Mexico. Judge Laughlin, deeming himself disqualified to preside at the trial of the said defendants, called in to sit for him Hon. H. B. Hamilton, associate justice of the supreme court, and judge of the Fifth judicial district of the territory of New Mexico, and thereupon Judge Hamilton, during the said special term, commenced the trial of the said parties, to wit, on the 23d of April, 1895, and continued the same until the 29th day of May of the same year, when the jury returned a verdict finding the accused guilty as charged in the indictment. A motion was thereupon made for a new trial and an arrest of judgment, which said motions were duly argued, and, after full consideration, were overruled, and the defendants were thereupon sentenced by the court to be executed on the 10th day of July, 1895. An appeal was thereupon taken by the accused to this court by writ of error from the district court, and the case is now before us for review and determination upon numerous points of error alleged to have been committed during the progress of the trial.

In the first place, it is contended that the special term of the court at which the appellants in error were tried expired by operation of law on the 16th day of April, 1895, and could not legally have been prolonged by the action of the presiding judge. It appears that

a regular term for a district court in the county of San Juan was fixed by territorial statute to commence on the third Monday of April, 1895, and it is insisted that a limitation was thus imposed upon the duration of the special term commenced in Santa Fé on March 18, 1895; that the terms of court for one county cannot encroach by extension upon the courts of other counties of the district; that in theory of law a term of court begins on the day designated by statute for its commencement, and *ex vi termini* other courts in the district at the same time are prohibited. Such construction might obtain in this territory if statutes did not exclude it. Section 543 of the Compiled Laws directs courts to be held in the different counties at the times fixed by law, and authorizes their continuance until adjourned by order of court. It is manifest that it was intended by this provision to impose a duty and to confer a discretion, and it would seem that, if the exercise of the one should render impracticable the discharge of the other, the discretion should prevail. The interest of the public is the consideration that has induced many courts to the adoption of the doctrine that a term in progress in one county must be arrested by the arrival of the time fixed for a court in another county in the same district, and a judge animated by due regard for public weal, and in his opinion legally possessing absolute power as to the duration of the terms of his courts, might in sound judgment continue one and abandon another. The special term in question commenced March 18, 1895, and it can easily be conceived by this tribunal that the trial judge, in the exercise of his discretion, wisely regarded it more judicious to conclude the case, that had consumed weeks, at the cost of thousands of dollars, than to abandon it for a term in a county of limited population and proportionate litigation. Absence of provision for such an emergent contingency would be a grave *casus omissus*.

It is further urged that, as the statute (Comp. Laws, § 552) provides that special terms shall not conflict with regular terms, the special term at Santa Fé was necessarily terminated by the regular term constructively existing in San Juan on the third Monday of April, 1895. But said section merely declares against a conflict, and does not declare the cessation or illegality of the proceedings of the seemingly conflicting special term, and it cannot, in any view, be legitimately maintained that the legislature by such direction intended a mandate, and the violation of all proceedings in disregard of it. By section 543, special terms are, as to their length, as absolutely in the control of the presiding judge as are regular terms; and section 552 authorizes special terms, not only in the discretion of the judge in the furtherance of justice, but without any condition or restriction as to duration. It may, therefore, be logically concluded that the authority to continue terms until adjourned by order of court was deliberately de-

signed in the interest of the public to prolong the regular term, if needed, and to afford special terms without limitation in lieu of regular terms lapsed, and in furtherance of justice. It must also be presumed rationally that the legislature, in attaching by section 352 a condition to the authority to hold special terms, contemplated an actual, and not a constructive, conflict, and did not design that a term being held should be annulled by one that could not be held. Section 2, c. 61, of the Statutes of 1893, required the respective counties to provide for the expenses of their district courts, and practically inhibits terms in counties in which there are no funds. It is experience that a frequent consequence of this system has been the impossibility to hold courts in some of the counties at the time fixed by statute, and, as it is a rule of law that public officers are presumed to perform their official duties, and no court was held in San Juan on the 3d of April, 1895, it can be legitimately concluded that there were no funds for a term there, and that the judge of the district, with knowledge of this deficiency, appointed a special term in Santa Fé, with the intention and expectation that it would be continued as long as required in the furtherance of justice. It is not conceivable that a court allowed by law and in session could be terminated by a term not only not in esse, but that could not exist; the one was a court in fact, the other a court by construction only, and between them there could not be a practical conflict. It seems, therefore, that the territorial statute sustained the judge in convening the special term, and in continuing it beyond the times fixed for the regular terms for the counties of San Juan, Rio Arriba, and Taos for the spring of the year 1895.

Next is the impeachment of the indictment as not containing the essential averments to confer jurisdiction upon the trial court. It is contended that the allegation that Francisco Chavez instantly died of the mortal wounds inflicted upon him by the plaintiffs in error does not with sufficient distinctness specify the time and place of his death to charge that he died in the county of Santa Fé within a year and a day from the date of the killing. It is difficult to conceive that an instant consequence of an act does not exclude conception of delay in its occurrence, and does not constrain the conclusion that it was effected on the spot, at the place where it was caused. If a deed produces results the moment it is done, they must happen where it was done. Fire applied to powder produces instantaneous explosion, and no doubt of the time and place of the event is possible. There being no intervention of time between the cause and the effect, there can be no question as to the place where the latter ensued from the former.

That the accused were apprised that they were on trial for the murder of Francisco Chavez on the night of the 29th of May, 1892, in the county of Santa Fé; that it was proved that Francisco Chavez was killed then and

there; that the accused admitted that they were then in the county of Santa Fé; that they defended themselves against the charge of having murdered Francisco Chavez on the night of the 29th of May, 1892, by their alibi, claiming that they were not at the place of the killing on said 29th of May, 1892; and that their acquittal would have protected them against a second prosecution for the same crime (see Comp. Laws, § 675),—are facts that cannot be controverted, and effectually dispose of the pretension that the phraseology of the instrument upon which they were arraigned and tried was not sufficiently specific to indicate the venue of the alleged offense. Many authorities have been submitted to sustain the contention that venue and time are not legally laid by the averment of instant death; that it does not exclude the possibility of the death a year and a day out of the jurisdiction, where and after the wounds were given, but, with due respect for the tribunals that have so adjudicated, we can but regard their conclusions as tending to contract the natural import of language, and strain it from its substantial signification. While courts should abstain from the encouragement of departure from the phraseology of forms almost sacred from protracted adherence to them, they should not pursue such conservatism to the excess of servility. Synonyms should be duly regarded, and words so interpreted that their natural meaning should not be destroyed. Innovations may be unwise, but the antagonism to them that will preclude the use of equivalent expressions would be even more pernicious. In recognition of these principles, less narrowness is obtaining in the construction of pleadings, and, while certainty in their allegations is required, strict conformity to wonted verbiage is not exacted. "Instantly," say lexicographers,—those who define it etymologically, and those who give its legal meaning,—implies "without any intervention of time," "allows not a particle of delay," "marks an interval too small to be appreciated"; and that Francisco Chavez, in dying "with an interval too small to be appreciated" between the shots he received and his death, died at the place where he was shot, seems an irresistible conclusion. That an event that transpires instantly can be remote from its cause seems a contradiction not entitled to any consideration. That there can be, between an occurrence and its creation, no intervention of time, not a particle of delay, not an appreciable interval, and yet be doubt about the place of its accomplishment, seems an impossible conjecture. An injunction to do instantly is partially obeyed by the act to forthwith proceed to do it, though it may never be done; but, if accomplished without intervention of time, without a particle of delay, the interval between the order and its execution being not appreciable, it is done instantly.

In *Hardin v. State*, 4 Tex. App. 371, the indictment which charged that "Charles Webl

of mortal wounds so given as aforesaid, instantly did die," was pronounced sufficiently certain of the time and place of his death. The court regarded the words "so given" as suggestive, and we may with equal propriety attach consequence to the description, "said mortal wounds," contained in the indictment under consideration, as they can refer only to wounds recited as having been inflicted upon Francisco Chavez on the night of the 29th of May, 1892, and of which he "instantly died."

In *Turpin v. State*, 30 Ind. 148, an indictment that contains in the allegation as to death neither the words "instantly" nor "then and there," is sustained, as the venue and time were once stated. This opinion is based upon statute, but the court declared that the equivalent of "then and there" would, in any contingency, be sufficient.

In *State v. Huff*, 11 Nev. 21, the court, in considering the objection that the indictment did not contain sufficient certainty as to the place of the crime and the day of its commission, say: "It may be said, with reference to this particular case,—and it will be a sufficient answer to appellant's objection, if there were none other,—that the indictment does show, by fair and reasonable intendment, that O'Reilly was stabbed and died on the same day. It says the defendant stabbed him on that day, and killed him on that day. Therefore he must have died on that day. The evidence, we believe, shows that he did not die until the next day, but this was an unimportant variance, and the question is as to the sufficiency of the indictment, not as to the conformity of the proof." It was further decided in this case that failure to demur to the indictment for the defect that it did not declare that the death occurred within a year and a day from the perpetration of the act which produced it was a waiver by the defendant.

In *Com. v. Bugbee*, 4 Gray, 206, in an indictment for an assault, the allegation that the assault was then and there made was sufficient without the repetition of "then and there" before the charge, "did actually strike." "There might have been, with the words 'then and there,'" said Chief Justice Ewing, in a similar case, "greater deference to tautology, but not thereby a more explicit or intelligible averment." Says Metcalf, J.: "Objections like that now before us were never held valid in prosecutions for misdemeanor, but only in *favorem vite* in indictments and appeals of death." 3 Hale, P. C. 178; 2 Hawk. P. C. c. 23, § 28; 7 Dane, Abr. 272. "Even in capital cases," continues Judge Metcalf, "they have been deemed by the most eminent English judges as among 'the unseemly niceties' by which the law is blemished and reproached." 2 Hale, P. C. 193; 2 Gabb. Cr. Law, 198, 199. "And this court," further declares Judge Metcalf, "in the case of *Com. v. Barker*, 12 Cush. 186, 187, decided that an indictment for murder was sufficient

which alleged that the defendant, at Worcester, in the county of Worcester, on the 26th of January, 1838, with a certain axe, feloniously did strike M. B., giving unto the said M. B., then and there, with the axe aforesaid, feloniously, willfully, and with malice aforethought, one mortal wound;" that the words "then and there" needed not to be repeated before the allegation of the mortal wounds, because, notwithstanding the English decision to the contrary, it was deemed most clear that no one upon reading the indictment could fail to understand that the mortal wound was alleged to have been given on the day named in the indictment in Worcester. Says the judge further: "We are of the opinion that a charge expressed in a plain, intelligent, and explicit manner, and in the accustomed legal phraseology, is sufficient to warrant a judgment against the party thus charged, whether that charge be a capital offense or a misdemeanor." See, also, *Com. v. Doherty*, 10 Cush. 52.

In *Ball v. U. S.*, 140 U. S. 186, 11 Sup. Ct. 767, it is declared that "all the essential ingredients of the offense charged must be stated in the indictment, embracing with reasonable certainty the particulars of time and place, that the accused may be enabled to prepare his defense, and avail himself of his acquittal or conviction against further prosecution for the same case." The indictment in this case was sustained as to time, though it contained no averments upon that point, upon the ground that it was observed from the indictment that it was returned before the lapse of a year and a day from the time it was alleged in the indictment the party was assaulted; but no place of death was averred, and there were no data to supply the omission, and the indictment was accordingly remanded, with directions that it should be quashed.

Satisfied that the time and place are stated with sufficient particularity and exactness in the indictment under consideration "to advise the appellants in error of the nature and cause of the accusation against them" (to use the words of section 673, Comp. Laws), and for which they were arraigned and tried, we will consider the degree of the crime specified. The indictment alleges that the accused unlawfully, feloniously, willfully, purposely, and with express malice aforethought did shoot and kill Francisco Chavez, and it is urged that such charge neither expressly nor by implication is an accusation of murder. The killing is admitted, but that the allegation of the crime charged is of greater degree than assault is gravely denied. The indictment charges that Francisco Chavez was killed as above recited, but the accused claim this is not an accusation that he was murdered. That he died instantly is the statement of the indictment, and yet the pretension is that the accused were arraigned, not for the crime of killing him, but for making an assault upon him. We do not appreciate any such representation, as the

indictment, in our conception, embodies in its terms all the elements that constitute murder, and is so distinct and comprehensive that it excludes lesser crime than the most flagrant,—that of murder in the first degree. Murder is defined by our statute as the unlawful killing of a human being with malice aforethought, express or implied; and express malice is described as “the deliberate intention unlawfully to take away the life of a fellow creature which is manifested by external circumstances capable of proof.” Murder in the first degree is classified by statute, and in the enumeration is included a killing perpetrated from a deliberate and premeditated design unlawfully and maliciously to effect the death of any human being. The offense for which the accused were tried is that they unlawfully, feloniously, willfully, purposely, and with express malice aforethought did kill and murder Francisco Chavez, and yet it is insisted that there is the omission of the elements of deliberation and premeditation in this accusation, essential to constitute a charge of murder in the first degree. We might attribute to willfulness that malicious intent, to purpose that positive design, that would involve a contemplation with mature deliberation; but we will not resort to construction when the statute is so emphatic as to render it superfluous. Express malice is defined to be “that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof.” Let us then substitute for the adverbs employed in the indictment their equivalents according to the lexicographers of legal phraseology, and for the words “express malice aforethought” the definition as given by our statute. “Willfully,” in its most moderate signification, is “intentionally”; “purposely” is “designedly”; and “express malice” is, by the statute, “the deliberate intention to take away the life of a fellow creature”; and if for these adverbs there were inserted in the indictment their synonyms and the statutory definition for the phrase “express malice,” the charge would then run that the accused unlawfully, feloniously, intentionally, and designedly shot Francisco Chavez with a deliberate intention to take away his life. If such legitimate paraphrasing does not demonstrate that the charge made in the indictment is that of murder in the first degree, it would be difficult to use phraseology to constitute such an accusation. A deliberate intention unlawfully, feloniously, willfully, purposely to take away life includes all the elements of the crime of murder in the first degree, and by its terms excludes all conception of lesser crime as their signification. There cannot be the absence of design to effect death, nor the heat of passion in the perpetration of the crime, where deliberate intention exists; and we can, therefore, but conclude that the indictment exclusively

charges murder in the first degree, and no lower crime. It follows, therefore, that the verdict of the jury that the accused are “guilty as charged in the indictment” is responsive to the indictment, and is a finding that they, in killing Francisco Chavez, committed murder in the first degree.

In *People v. Enoch*, 13 Wend. 159, it was charged that the defendant feloniously and of malice aforethought killed his wife, the words “with premeditated design” being left out, and a general verdict of guilty was returned, and judgment upon the same for the execution of the accused was sustained.

We will now address ourselves to the defense presented by the accused. They deny that they were guilty of the killing of Francisco Chavez, and undertook to prove that three were at the house of Seferino Alarid, and the fourth at his home, at the time of the shooting; and the court instructed the jury that it was incumbent upon them to establish this claim by a preponderance of the evidence, but not beyond a reasonable doubt, and added: “If, therefore, after consideration of all the evidence in the case, as well that in relation to the alibi offered by the defendants as that offered by the territory, you have a reasonable doubt as to whether the defendants were at the place where the crime was committed, or were in some other locality, away from the place of the homicide, you should give the defendants the benefit of that doubt, and find them not guilty.” This instruction is objected to as erroneous, in that it announces that the obligation to establish the alibi is upon the defendants. Many respectable authorities have regarded alibi as an affirmative defense, but we do not feel called upon to pass upon this view in this case, as the instruction given by the court distinctly announced to the jury that if they entertained any reasonable doubt, after considering all the evidence of the defendants in relation to the alibi, offered by them, whether they were at the place of the homicide, they should give the benefit of that doubt to the defendants, and find them not guilty. This imposes upon the prosecution the obligation to demonstrate beyond a reasonable doubt that the accused were at the place where Francisco Chavez was killed, and gives them the benefit of their testimony to create in the minds of the jury a reasonable doubt as to their presence then and there. The accused are relieved by this instruction from any responsibility to establish by a preponderance of evidence that they were at the house of Seferino Alarid, or elsewhere, at the time of the perpetration of the crime, as the direction to acquit them if any reasonable doubt had been established by their evidence, or all the evidence in the case, as to their whereabouts at the time of the killing, is peremptory. *Leonardo v. Territory*, 1 N. M. 291.

We will now consider the objection to the court's action in the admission and rejection

tion of testimony. One Juan Gallegos, by his own admission an accomplice in the conspiracy to take the life of Francisco Chavez, represented that he was approached by one Hipolito Vigil with a proposition to assassinate the said Chavez; that the details of the projected crime were discussed between him, the said Vigil, and one of the accused, Francisco Gonzales y Borrego; that they informed him that Antonio Gonzales y Borrego and Patricio Valencia, two of the defendants, were in the agreement; that their object was to remove Francisco Chavez because he was a prominent man, of great strength with his party, to which they were antagonistic, and which they wished to destroy in the county of Santa Fé. He, seemingly to them, acquiesced in their proposition, but, upon reflection, having no reason to murder said Chavez, he determined to put him upon his guard, and accordingly sent him a short note on January 16, 1891 (which said note it was proved was found among the papers of Francisco Chavez after his death, and was identified by the said Juan Gallegos on the stand); that afterwards, to avoid importunity from his accomplices to co-operate with them in the assassination of Francisco Chavez, and from fear of them as members of the "Button Society," underapprehension that they would become cognizant of his betrayal of them, he went to Colorado, where he was residing when he heard of the death of Chavez. The elements of truth in this statement are manifest. One of the counsel of the accused stated the existence of the secret "Button Society" for political purposes, and declared himself a member of it, and that Francisco Chavez was assassinated by the parties who petitioned the witness to unite with them in the perpetration has been declared by the jury's verdict and the court's judgment. It cannot be seriously contended that the declarations of the accused were not properly admitted against them, whether Francisco Chavez was killed in pursuance of the conspiracy revealed by the witness or not. The note was no less a declaration of Juan Gallegos than the oral statements, and the supreme court of Illinois in *Lander v. People*, 104 Ill. 248, has declared "that acts and declarations so intimately connected with the principal event which they characterize as to be a part of the transaction itself, and which clearly negative any premeditation or purpose to manufacture testimony are admissible." But there seems no reason to deny a continued conspiracy between this clan, and, in such event, the declarations of one of them in connection with its object or its purpose will be recognized as the declaration of all. "A conspiracy is not destroyed by connection at a subsequent time of new parties therewith, as a new party, agreeing to the plans of the conspirators, and coming in and assisting them, becomes one of them." *Wright, Cr. Consp.* (Carson's Ed.) 129, citing *U. S. v. Nunnemacher*, 7 Bliss. 111, Fed. Cas. No. 15,902; *People v. Mather*, 4

Wend. 229. The note was the act of one of the conspirators during the existence of the conspiracy. It was a declaration of the existence of the conspiracy by one of the co-conspirators, and was properly submitted to the jury in connection with all the evidence on the subject. Judge Morrow, in *U. S. v. Cassidy*, 67 Fed. 703, announces that: "Any declaration made by one of the parties during the pendency of the illegal enterprise is not only evidence against himself, but is evidence against the other parties. This rule, you will understand, applies to the declaration of a co-conspirator, although he may not be under prosecution, his declarations being equally admissible with those of one under indictment and prosecution." *Blish. New Cr. Proc.* § 1248, cl. 2, says that: "On its being shown that one or more persons were acting in concert with the defendant about the thing in question, all with a common object, declarations during its progress by any one or the other, whether present or absent, may be given in evidence against the defendant." It was in the sound discretion of the judge of the trial court to admit this note as an accompanying act in connection with the combination shown, and the exercise of his authority is not reversible on appeal. *Wiborg v. U. S.*, 163 U. S. 632, 16 Sup. Ct. 1127. Says the supreme court of the United States: "That much discretion is left to the trial court in the admission of such evidence, and its ruling will be sustained if the testimony which is admitted tends even remotely to establish the ultimate fact." *Clune v. U. S.*, 159 U. S. 590, 16 Sup. Ct. 126.

We do not deem it necessary to consider seriously the objection to the competency of Ike Nowell and Porfirio Trujillo as witnesses. The former was convicted of a crime expressly designated as a misdemeanor by the United States statutes, and subjected to punishment in the penitentiary. Hard labor was not authorized by the statute, and, unless such penalty be attached to the commission of a crime under the federal laws, it is not an infamous offense. Again, adultery is not an infamous offense in this territory, as there is no statute so characterizing it, and its degree is here as at common law, under which it was only a misdemeanor. Porfirio Trujillo was restored to the privileges of citizenship by competent authority, according to his own sworn declaration, and the official records of the executive department sustained him. Having lost one of the pardons, and not having the other with him, it was altogether legitimate to show by the territorial archives that they had been issued to him.

Another contention is that the court erred in permitting the inquiry of the defendants as to whether they were on the streets of the city of Santa Fé, west of the Cathedral, between noon and 7 o'clock of the 29th day of May, 1892, as it is claimed that their presence during that interval was not material. The defendants replied that they were not west of the Cathedral

in the city of Santa Fé at any time of the afternoon of the 29th day of May, 1892. It is a well-settled rule that a witness can not be cross-examined as to any facts which are irrelevant or collateral to the issue merely to contradict him, but Starkie on evidence declares that "this rule does not exclude the contradiction of a witness as to any facts immediately connected with the inquiry." The defendants created the connection and the materiality of their whereabouts immediately before 7 o'clock by selecting that as the hour from which to account for themselves during the night, as the probability that they were not strictly accurate must be recognized as absolutely rational. It might have been significantly important to have located these defendants between the hours indicated, as it is easily conceivable that, had it appeared that they were seeking weapons, or cleaning them, it would have, in view of all the circumstances of this case, suggested that they were preparing for a shooting. In *Boyle v. State*, 105 Ind. 469, 5 N. E. 207, the court say: "In this instance the accused, when on the witness stand, had given an account of his movements upon a day named, and it was proper to go fully into the subject upon cross-examination, and the state was not confined to the particular period of time designated in the questions asked on direct examination." In *Thomas v. State*, 103 Ind. 419, 2 N. E. 820, the court say: "Where a party voluntarily takes the witness stand, and makes a broad denial of the offense charged, whether that denial be in general or specific terms, much latitude should be allowed in the cross-examination. Here appellant's denial put in issue all of the testimony adduced in support of the state's case. If his testimony was true, all that in favor of the state was either ignorantly or willfully false." But, in any contingency, it was in the discretion of the trial court to pass upon the admissibility of such testimony, and we will not review its action. Say the court in *Disque v. State*, 49 N. J. Law, 249, 8 Atl. 232: "The extent of the cross-examination of a witness into pertinent facts, not touched by the direct examination, is a matter resting entirely in the discretion of the trial court. Since the passage of the statutes capacitating parties as witnesses, it has been the general practice, both with respect to civil and criminal procedure, to permit such testifying party to be cross-examined as to the whole case; and such judicial action, being founded in discretion, is not a matter for which error can be assigned." Say the court in the case of *People v. Clark* (N. Y. App.) 8 N. E. 38: "The extent to which he may be cross-examined on matters irrelevant and collateral to the main issue, with a view to impeaching his credibility, necessarily rests in the sound discretion of the trial court." See, also, *State v. Pfefferle* (Kan. Sup.) 12 Pac. 406. The jury has found that the defendants were, beyond a reasonable doubt, at the bridge where Francisco Chavez was shot and murdered; and doubt whether they were at any point on San Francisco street

during that day, before the killing, may have existed in the minds of the jury without affecting the final conclusion that they were at the place of the homicide.

The sixth assignment of error by the court, it is alleged, was the admission of testimony tending to show that the defendants were at the saloon of J. V. Conway, in Santa Fé, on the evening of the killing of Francisco Chavez, and the exclusion of evidence by the defendants to the effect that the witnesses who swore they saw the defendants in said saloon were not there themselves during the said evening. It was admitted in the argument that the evidence objected to was admissible if it tended to show that the defendants were at the said saloon at 7 o'clock, or later, that night, before the killing of Francisco Chavez; and it appears from the record that the hour when they claimed they saw said defendants was not specified, but was stated to have been at sundown, which at that season of the year occurred after 7 o'clock. Such evidence, as rebuttal of the defense of the accused, it would have been error to have excluded from the jury, and, as the accused had already had the opportunity to testify in chief that they were at 7 o'clock in the house of Seferino Alarid, it would have been needlessly cumulative to have permitted them to repeat themselves. These defendants had located themselves from 7 o'clock until after the killing of Chavez. Other witnesses gave statements conflicting with theirs, and, if still others were allowed to contradict the last, an interminable counter cumulation would have resulted; and we do not believe it either the duty or the policy of courts to permit such prolixity in their proceedings. But, in any event, the trial judge must be allowed a sound discretion in such matters, and as we do not perceive any abuse of its exercise in this instance, we do not deem it incumbent upon us, or legitimate for us, to reverse his action. Our concluding remarks in the paragraph immediately before that next preceding we here repeat.

The eighteenth assignment is that the court erred in permitting the territory, on cross-examination of the defendants Francisco Gonzales y Borrego and Antonio Gonzales y Borrego, to interrogate said witnesses as to how they had killed Juan Pablo Dominguez a few days after the death of Francisco Chavez, and as to the killing of Silvestre Gallegos by Francisco, and his indictment therefor. It cannot be pretended that the evidence of the defendants contributed to the conclusion reached by the jury that the said defendants were at the killing of Francisco Chavez, as the jury, having been instructed to give them the benefit of any reasonable doubt as to their participation in the homicide, and acquit them, must have ascertained their verdict upon testimony in contravention of that of the accused. It is immaterial whether Francisco Gonzales y Borrego and Antonio Gonzales y Borrego killed one Juan Pablo

Dominguez after the death of Francisco Chavez, or at all, or whether Silvestre Gallegos was killed by Francisco Gonzales y Borrero. They might have been shown guilty of such crimes, and yet not have imperiled their defense of alibi, if they had been able to excite by the many witnesses other than themselves, whom they introduced to support them, a reasonable doubt as to their presence at the killing of Francisco Chavez; and, if it was error to admit such inquiries, it was not such a mistake of discretion as to require review, for "the asking of incriminating or disgracing questions is a matter largely in the discretion of the court, and, where no material injury is thereby done to either party, the refusal of the court to order such questions stricken out will not be reversible error." Section 2087 of the Compiled Laws authorizes the impeachment of the credit of a witness by evidence of his bad moral character, and the present tendency is to regard all facts as relevant which will enable the jurors to decide to what extent the testimony of the witness can be relied on. Accordingly a witness may be asked with a view to show his character for truthfulness as to specific facts, not too remote in time, which may tend to disgrace him, and counsel will be bound by his answers. Underh. Ev. p. 517. Say the court in *Territory v. O'Hare* (N. D.) 44 N. W. 1008: "We held that the right of cross-examination as to outside matters of fact, which affect the general character of the witness, and tend to degrade him and affect his credibility, is, within the limits of sound judicial discretion, a salutary rule." In *Roberts v. Com.* (Ky., 1802) 20 S. W. 267, it was announced proper, in a prosecution for murder, in order to discredit a witness for the state, to ask him if he had not been indicted for robbery and confessed the crime, as it was designed to affect his credibility. For the same reason it was declared in *State v. Miller* (Mo. Sup.) 13 S. W. 832, that it was not error to ask a witness whether he had been in the penitentiary two or three years. In *People v. Casey*, 72 N. Y. 398, the prisoner was a witness in his own behalf, upon the charges of assault, and the counsel for the people, upon cross-examination, put questions to him as to other altercations in which he had been engaged, and other assaults committed by him, and it was held that there was no error in such ruling. In *Carroll v. State* (Tex. Cr. App.) 24 S. W. 100, it was decided that, for the purpose of impeaching a witness, he may be asked if he is not under indictment for theft. We might multiply citations to the same effect, but will conclude with the announcement that in the case before cited (*People v. Casey*, 72 N. Y. 393) it was declared that the extent to which such an examination may go to test the witness' credibility is largely in the discretion of the trial court, and, as we do not perceive that the judge of the court below committed any impropriety in his elec-

tion in this instance, we will forbear further consideration of the subject.

It will be sufficient to say in reference to the alleged errors of permitting Ike Nowell to detail an alleged conversation with Thomas B. Catron, one of counsel for the defendants, in reference to the testimony of said Nowell in this case, and in allowing Luiz Gonzales to do the same as to an interview between him and Charles A. Spleas, another attorney for the accused, that we recognize that counsel occupy such relation to their clients as to justify a disclosure of their action in the interest of such clients and for their benefit at their trial.

Many other errors are alleged which we do not deem it necessary to consider, and it may be remarked that in the multitude of assignments there appears almost a lack of confidence in the substantial merits of the appeal, which impression is not diminished by the technical character of the complaints mainly relied on in the oral argument. Says the supreme court of the United States, in *Grayson v. Lynch*, 163 U. S. 468, 16 Sup. Ct. 1071: "It is to be regretted that defendants found it necessary to multiply their assignments to such an extent, as there is always a possibility, in the very abundance of alleged errors, that a substantial one may be lost sight of." This is a comment which courts have frequent occasion to make, and one which is too frequently disregarded by the profession. Having reached the conclusion that none of the errors alleged by the accused to have been committed by the trial court were material, and being impressed that the instructions given are a fair, clear and comprehensive enunciation of the principles by which the jury should have been guided in their consideration of the evidence, we do not discover any ground for reversal of the action of the lower court.

The evidence in the record is abundant to establish that the accused, in pursuance of a diabolical conspiracy of long standing, unlawfully, feloniously, willfully, and purposely shot Francisco Chavez with a deliberate intention to take his life; and the judges of the facts wisely found that there should not be, by their default, any escape for the perpetrators from the penalty for the unprovoked and cold-blooded assassination.

This case may, as to this territory, be pronounced a cause célèbre from the prominence of the deceased, from the notoriety of the criminals, from the complication and mystery of the circumstances, from the delay in procuring a jury, from the time (nearly six weeks) and the money (amounting to thousands of dollars) consumed in the trial, from the extent and the intensity of the public interest, and from the exceptional skill and zeal displayed by counsel in its management; and it would be extraordinary if such litigation, under such circumstances, did not develop difficulties formidable even to a court of large experience. We are much pleased to say that the presiding judge, though but recently elevated to the

bench at the date of this trial, with admirable discrimination and commendable firmness held the scales of justice. In conclusion, we hereby affirm the judgment of the lower court in this case.

BANTZ, J., concurs.

COLLIER, J. (concurring). In concurring in the result of affirmance in this case, I desire to submit some views upon the indictment, which has been so strenuously attacked by the counsel for plaintiffs in error, and with equal ability defended by counsel for the territory. The attacking counsel have supported their contention with common-law authority, and it must be conceded that, if we are to adhere to what the chief justice shows were denominated the "unseemly niceties which are to the law a blemish and a reproach," the attempt on the part of the counsel for the territory in the trial court to employ equivalents of accustomed legal phrases would meet with disaster. This decision in no sense blazes the way of departure in this court from strict common-law technicality, even if we did not think that the spirit of our statute had already pointed the road. As early as the case of *Territory v. Maxwell*, 2 N. M. 250, we find this court announcing, upon the principle of "*Cessante ratione cessat lex*," that the courts of this territory should not follow the common law in prosecutions for embezzlement, as to do so would be to proclaim them powerless to punish in this day and age such an offense. The Missouri courts take a different view, and, while deprecating that they must, yet fear that in capital cases, at least, innovations even as to form should not be allowed, as one would know not where they would stop. It is admitted by those courts that the popular acceptance of the word "instantly" makes it the equivalent of "then and there," but they reject the indictment because they know not to what point a departure will extend. *State v. Reakey*, 1 Mo. App. 3; *State v. Lakey*, 65 Mo. 217. With due respect for those courts, it appears to me they mention what might be taken as a most excellent limit to the "innovation," and they say they will not go to it. The rule I see no danger in is that stated by the court, to which this court looks for binding authority, where we find that in an indictment it is sufficient if time and place is stated "with reasonable certainty." *Ball v. U. S.*, 140 U. S. 119, 11 Sup. Ct. 761. Can it be doubted that both the court of appeals and the supreme court of Missouri, if they considered that the popular acceptance of the word "instantly" was "then and there," would not have held indictments bad for its being used for "then and there," if they had recognized the rule of "reasonable certainty"? It is unnecessary to pursue this subject further as to the word "instantly," in view of its thorough discussion in the main opinion in this case, but I have thought there should not have been all omission in reference to the Missouri cases called to our attention,

of which, however, it may be said that the latter ones seemed to proceed upon the theory that they must lie on the Procrustean bed which Judge Napton, in *Lester v. State*, 9 Mo. 666, set up in Missouri jurisprudence.

The indictment is also claimed to be bad and the verdict unintelligible, or at least not intelligible, for murder in the first degree, because murder in that degree is not exclusively charged. Again, we are remitted to the doctrine of equivalents. While a proper charge of murder in the first degree, as the pleader must have intended to charge this, would be that the defendants did unlawfully, willfully, deliberately, and premeditatedly and with malice aforethought, kill, etc., he employs the words "unlawfully, feloniously, willfully, purposely, and with express malice aforethought, did," etc. Inasmuch as we ascertain that the statutory definition of express malice is a deliberate intention unlawfully to take away the life of a fellow creature, we may make another arrangement of words by equivalents; not equivalents, if objection may be made, that are so held by popular meaning, but equivalents as the statute says. Instead of the words in the indictment, we say, "did unlawfully, willfully, feloniously, purposely, and with the deliberate intention aforethought to take away the life of one Francisco Chavez, then and there a fellow creature," and thus we have every word in the statute except "premeditated," and in its place "aforethought." To ascertain whether "premeditated" is strictly necessary to define murder in the first degree, may perhaps be best done by seeing if the words we have could possibly define murder in the second degree, or a killing, which is statutorily called murder in the third degree. We will use our statutory substitution for the words of the indictment in an attempt to join with them words descriptive of murder in the second degree, to wit, "did unlawfully, feloniously, willfully, purposely, and with the deliberate intention aforethought then and there to take away the life of one Francisco Chavez, and without design to effect the death of said Francisco Chavez, while he, the said (defendant), was then and there engaged in the commission of a misdemeanor" (specifying the same), and so through with the different allegations which constitute murder in the second degree in its different phases. This collocation of words plainly expresses a contradiction creating an absurdity. Test these words by joining them with the words descriptive of murder in the third degree, and the contradiction in terms becomes equally palpable. It is evident, however, and admitted on the argument by the able counsel for plaintiffs in error, that murder is charged in some degree, if the words "instantly died" may stand. I think it not an unfair method of ascertaining whether or not murder in the first degree is charged to show that it is impossible for these words to fit in the description of any other degree known to our law. Of course, it does not follow that because a lower degree is not described a higher

degree must be, but it is legitimate to argue that equivalents in description, and especially if they are statutory equivalents, can by no stretch of construction apply elsewhere. As already said, we have, by substitution of the statutory definition for express malice, every word in this indictment that the statute calls for, except "premeditated." Instead of "deliberately and premeditated," we have "with the deliberate intention aforethought to take," etc. I think the indictment clearly sufficient after verdict, and that it charges murder in so exclusive a way, under our statute, as to make the verdict plainly intelligible. The record in this case I consider free from reversible error.

PER CURIAM. The record in this case, as it was originally brought into this court, did not show that the defendants had been arraigned and had pleaded to the indictment. While the cause was here, an application was made to the district court where the defendants had been tried and convicted, in which it was averred that in truth and in fact the defendants had been arraigned and had pleaded not guilty before the trial below, and that the arraignment and pleas were omitted from the record by the inadvertence of the clerk. The district court was asked to order the correction of the record in these particulars by an entry nunc pro tunc. The application was presented in the presence of the defendants and their counsel, after due notice; and, after considering it, and the proofs submitted on both sides, the district court granted the motion. The solicitor general then appeared in this court, suggested the diminution of the record here, and on his motion a certiorari was issued to the clerk of the court below, who thereupon sent up the record as amended, in which the arraignment and pleas of not guilty appeared as entered therein nunc pro tunc. A bill of exceptions was also prepared by the defendants covering the transactions which occurred on the proceedings to amend the record. The bill of exceptions was duly approved by the court, and has been brought here also on the certiorari by agreement of the parties. We have treated the matters of alleged error in this bill of exceptions assigned in the defendants' objection and protest as though it were a part of the principal case, and not as an independent proceeding. 1 Elliott, Gen. Prac. § 192. The district court, in the nunc pro tunc proceeding, acted with entire regularity, and its conclusion is abundantly supported by the proofs adduced, and no error is disclosed therein. The only question is as to whether the district court had any power to amend the record at all. This power is denied by counsel for defendants upon the following grounds: (1) That the amendments can be made in only those cases where there are some written memoranda on file in the cause on which the amendments may be based; (2) that, after the term has expired, inaccu-

racies in the record cannot be corrected or omissions supplied by nunc pro tunc entries; (3) that they cannot be made in criminal cases; (4) that they cannot be made by an inferior court while the cause is pending in a superior court on writ of error; and (5) that Judge Hamilton, who presided at the trial of the defendants, and made the nunc pro tunc order, was not clothed with judicial power to act in the premises.

1. The first of these grounds does not really relate to the jurisdiction or power of the court, but merely to the proofs which should be required, and in that aspect we considered this question in examining the bill of exceptions just mentioned, but we will express our opinion more fully upon this point at this place. The authorities are not harmonious as to the character of the proofs required to support nunc pro tunc entries. In *Waldo v. Beckwith*, 1 N. M. 103, and *Secou v. Leroux*, Id. 390, we held that the facts upon which the discretion of courts to amend records now as of then may be exercised should be "confined to their own records and to the officers in immediate connection with the courts." The rule of practice which has obtained in this territory since 1854 does not, therefore, require any written memoranda, if the facts warranting the amendment can be gathered from the officers in immediate connection with the court. Though the rule may be more restricted in some jurisdictions, we think *Waldo v. Beckwith* and *Secou v. Leroux* are supported by the weight of authority, and we see no reason for departing from it now, so far as it is applicable to this case. In a recent case the supreme court of the United States held that the circuit court could amend a record in a criminal case by an order nunc pro tunc, based upon a recollection of the facts by the judge. The court in that case, per Justice Miller, say the first impression was that the power of the court over its own record to make such amendments after the expiration of the term was limited to those cases in which there remained some written memoranda in the case among the files of the court, by which the record could be amended if erroneous, or the proper entry could be supplied if omitted; "but," say the court, "we are satisfied, however, upon an examination of the authorities, that this restriction upon the power of the court does not exist." In *re Wight*, 134 U. S. 137, 10 Sup. Ct. 489. In *Kelly v. U. S.*, 27 Fed. 616, it was held that the record could be corrected on the recollection of the judge after the term had expired. In the case at bar the facts of arraignment and pleas of not guilty were shown by the affidavits of the clerk, the sheriff, and district attorney, and the stenographer of the court, whose notes and a verified transcript thereof were also produced. The order sets forth that upon such evidence, and upon the recollection of the judge of the fact of such arraignment and

pleas of not guilty before the commencement of the trial, the record was corrected according to the facts. The order is supported by the oaths of officers in immediate connection with the court, the stenographic notes of a sworn officer, which belong to the files of the court, and the recollection of the facts by the presiding judge. Moreover, this conclusion is supported by the recital in the record that, "issue being joined," the trial was had, and a verdict of guilty was returned. This was sufficient alone, in our opinion, to justify the amendment since made, as the only issue which could have been joined upon which the verdict of not guilty would be responsive would be upon a plea of not guilty after arraignment.

2. There is diversity of opinion as to the source of the power to make *nunc pro tunc* entries, but there is none as to the existence of the power to make the records now as of then conform to and speak the actual truth of past transactions, where, by the neglect or inadvertence of the clerk, an omission has occurred, or a false entry has been made. Mr. Elliott is of the opinion that the power did not arise from the statute of Henry VI., but is inherent. 1 Elliott, Gen. Prac. § 192. Other authorities, we think correctly, take the same ground. *Balch v. Shaw*, 7 Cush. 284; *Fuller v. Stebbins*, 49 Iowa, 376; *Crim v. Kessing*, 89 Cal. 478, 26 Pac. 1074; *Works, Courts*, p. 171. Our statute, however, allows *nunc pro tunc* entries, to be made "whenever the ends of justice may require it." Comp. Laws 1884, § 1836. This statute is not confined to civil cases. The period in which this power could be successfully invoked is not limited to the term at which the transaction occurred. In one instance it was employed after the lapse of 23 years. *Freem. Judgm.* § 56. In a series of cases the supreme court of the United States has allowed such corrections years after the expiration of a term. The power thus possessed to at any time make the record speak the truth is, of course, not to be confounded with the correction of an erroneous or deficient order or judgment, truthfully entered, which must, of course, be made during the term. In the time of Edward I., Chief Justice Hengham and his fellow judges were heavily fined for so altering the records to speak falsely, and a tradition prevailed that a clock house was built at Westminster Hall from these fines. Lord Coke says that in the time of Elizabeth "Sir Robert Catlyn, chief justice of England, would have had Justice Southcote (one of his companions, justice of the king's bench) to have altered a record, which the justice denied to do, and said openly in court 'that he meant not to build a clock house.'" 1 Camp. Ch. Just. 112. Blackstone says the severity of the proceedings against Hengham and his companions seems to have alarmed the succeeding judges that through fear of doing wrong they hesitated at doing that which was right, and, because Britton had forbidden alterations to make the

records speak a falsity, "they conceived that they might not judicially and publicly amend it to make it agreeable to the truth;" so that "the legislature hath therefore been forced to interpose by no less than twelve statutes to remedy these opprobrious niceties. Its endeavors have been of late so well seconded by judges of a more liberal cast that this unseemly degree of strictness is almost entirely eradicated, and will probably, in a few years, be no more remembered," etc. 3 Bl. Comm. 409. We think it quite clear that the power is not one evolved by modern cases, as counsel for defendants has insisted in his argument and brief. If the power was derived from the common law, then, even though it had not been authoritatively declared by judicial decision until recent times, it would be none the less operative in this territory. The decisions of the courts are merely evidence of what is common law. 1 Bl. Comm. 70, 71. Our statute, which makes the common law the rule of practice and decision, has not provided for a rigid body of laws found only in statutes enacted and decisions rendered prior to the Revolution, incapable of expansion, and inflexible, like a code. The law concerning corporations, libel, and indeed upon every subject, has been greatly modified or extended and improved since then by the gradual process of judicial decision, and it is one of the greatest virtues of the common law that it can be so molded to meet the needs of social development.

3. It is also urged that, whatever the power may be in civil cases, it does not extend to those criminal. This point was expressly ruled against in 124 U. S. 137, 10 Sup. Ct. 487. In *Bilansky v. State*, 3 Minn. 427 (Gil 313), the court say: "The fact that the case is a capital one is in no way an absolute bar to its exercise, but it should be served to inspire the court with so anxious a solicitude to be right as to insure certainty. We can see no good reason why the court should not have made the amendments that it did in this case." In *Benedict v. State*, 44 Ohio St. 679, 11 N. E. 125, it was also held "this power may be exercised in criminal prosecutions as well as in civil cases." Elliott says, "Rectals omitted by mistake in criminal cases may be supplied by entries now for then." 1 Elliott, Gen. Prac. § 192. The same rule was laid down in *Ex parte Jones*, 61 Ala. 399, and was fully recognized to apply to criminal cases in 1 Bish. Cr. Proc. § 1343; *Kelly v. U. S.*, 27 Fed. 616; *State v. Farrar*, 104 N. C. 702, 10 S. E. 159; *Freel v. State*, 21 Ark. 226; *State v. Primm*, 61 Mo. 166.

4. It is also said that, as the cause was pending in the supreme court on writ of error, the district court could not amend the record. There is no reason why any distinction should be taken in this respect between appeals and writs of error. Perhaps it might be more regular to remit the record to the court below for correction, but it has been quite generally held that the removal of the cause by writ of

error does not deprive the court below of the power to amend its record so as to make it conform to the truth. *Freel v. State*, 21 Ark. 226; *Stebbins v. Anthony*, 5 Colo. 342; *Stephens v. Bradley* (Fla.) 2 South. 667; *Pleyte v. Pleyte* (Colo. Sup.) 24 Pac. 579; *Ross v. Steel Works*, 34 Ill. App. 323; *U. S. v. Vigil*, 10 Wall. 424. And in *Kelly v. U. S.*, 27 Fed. 616, it was allowed after the cause had been transferred from the circuit to the district court.

5. It is also objected that Justice Hamilton was not clothed with judicial power in the premises. Upon this point it is contended that under the organic law of the territory Justice Laughlin was the only judge having power to act in the First judicial district court, and that Judge Hamilton, although an associate justice of the supreme court, could not act, even though Judge Laughlin was disqualified by reason of his relation as counsel for the prosecution before his appointment to the bench; and the courts may thus become powerless to perform their duties. The whole of the judicial power of the territory is vested in the supreme, district, and probate courts and justices of the peace. Act Sept. 9, 1850, § 10. The jurisdiction, original and appellate, shall be as limited by law. The supreme and district courts shall possess chancery and common-law jurisdiction. Under the same act (1850) it was also provided that the territory shall be divided into three judicial districts, and a district court shall be held in each of said districts by one of the justices of the supreme court, at such time and place as may be prescribed by law; and the said judges shall, after their appointments, respectively reside in the district which shall be assigned them. It will be noted that the judicial power which is thus vested in plenary terms in the district courts is to be exercised in each district "by one of the justices of the supreme court." It does not require that it shall be exercised by any particular one of the justices; and while, for the convenience of the public, a judge is to be assigned to each district, who is required to reside therein, there is no express or implied prohibition upon any judge against exercising power in any district not the one to which he has been assigned. There is nothing in the language of that clause requiring such a construction as will confine the exercise of the power to the particular justice assigned to the district, when that person is otherwise incapacitated. We have been cited to *Stanley v. U. S.*, 1 Okl. 342, 33 Pac. 1025, as an authority holding a different opinion. We entirely agree with the court in that case that the district courts are creations of the federal congress, and derive their powers and authority from the laws of the United States; but we also recognize that congress has said that the judicial power of the district courts is to be exercised "by one of the justices of the supreme court," and we cannot agree that the requirement that a justice shall be assigned to and reside in a district—a provision de-

signed merely for convenience—is sufficient, it may be, to paralyze the administration of justice, or, on the other hand, force a judge to preside who is unfitted by reason of his interest in the cause, or his previous employment as an attorney in the case. Moreover, the records of this court show that no assignment has ever been made of any judge to any particular district. In the year 1858 it became desirable to hold court at more than one place in each district, and congress granted authority for the holding of court in each county. There is nothing in this act (June 10, 1858) amounting to the prohibition contended for, and the maxim, "Expressio unius exclusio alterius," has no application whatever. It is idle to contend that such language is sufficient to block the wheels of criminal justice.

SCHMURR v. STATE INS. CO.

(Supreme Court of Oregon. Oct. 12, 1896.)

FIRE INSURANCE—PROOF OF LOSS—SUFFICIENCY—WAIVER OF CONDITION.

1. A policy of fire insurance provided that, as part of the proofs of loss, the insured should furnish a certificate of a notary as to the circumstances of the fire, and, if the claim be for a building, a certificate of a builder showing the value of the building before the fire. The insured, after loss, sent a proof of loss, but without the certificates referred to. The proofs were returned as defective, in that the value of the building was not stated, except by the insured himself. The attorney of the insured attached his certificate as notary, stating the facts required, and sent the proofs a second time, with a request to be informed in what particular, if any, they were defective. *Held*, that a subsequent return of the proofs by the company, with the information merely that they were "declined and objected to," was insufficient, estopping the company from pleading in avoidance of its liability that no builder's certificate was attached to the proofs.

2. Nor can the company object to the notary's certificate on the ground that the facts show that the officer making it was not the notary nearest the fire.

3. A policy of fire insurance provided that in the case of the erection of adjoining buildings, without notification to the company and its consent in writing, the policy should be void, and also that any notice given to or representation by any solicitor or agent of the company as to the property, title, etc., insured under the policy, should not be binding on the company. The insured, after issue of the policy, and when the premium was paid, notified the agent of the erection of a building within the prohibited distance, and asked what the extra premium would be. The agent wrote to the company to ascertain the fact, and informed the plaintiff of the result. Plaintiff declined to pay the extra amount demanded, but the policy was not canceled. *Held*, that the acceptance of the premium and the failure to cancel the policy operated as a waiver of the condition binding the company.

4. A waiver of the conditions of a policy of insurance by parol will bind the company, even though the policy provides that no such waiver or modification will bind the company unless indorsed in writing on the policy.

Appeal from circuit court, Multnomah county; E. D. Shattuck, Judge.

Action upon a policy of fire insurance, brought by John Schmurr against the State

Insurance Company. There was judgment for plaintiff, and defendant appeals. Affirmed.

W. T. Slater and E. B. Williams, for appellant. N. D. Simon, for respondent.

BEAN, J. This is an action upon a fire insurance policy which provides that, as a part of the proof of loss, the assured "shall produce a certificate under the hand and seal of a magistrate or notary public (nearest to the place of the fire, not concerned in the loss as a creditor or otherwise, nor related to the assured), stating that he has examined the circumstances attending the loss, knows the character and circumstances of the assured, and verily believes that the assured has, without fraud, sustained loss on the property insured to the amount which such magistrate or notary public shall certify," and, if the claim be for a building, "the duly-verified certificate of some reliable and responsible builder as to the actual cash value of it immediately before said fire;" and, also, that "any notice given to, representation made to or by, or knowledge of, any solicitor or agent representing this company, of any fact, change, act, or thing relating to the property, title, occupancy, incumbrances, or otherwise, insured under this policy subsequent to the issuing of the same, shall not in any wise be binding on, or be regarded as notice to, or knowledge of, this company, but, in order to be binding on the company, must be indorsed in writing hereon, as provided in the terms and conditions of this policy"; and "that in case of * * * the erection of adjoining buildings * * * without being immediately notified to this company, and its consent thereto obtained in writing, * * * this policy shall thereafter cease and be null and void."

The action is defended upon the grounds (1) that no proof of loss was made as provided in the policy; and (2) that the contract of insurance became null and void by the erection of an adjoining building within the prohibited limits without the written consent of defendant. The plaintiff claims, however, that he furnished sufficient proof of loss, and that the stipulation of the policy in reference to the effect of the erection of adjoining buildings was waived by the company. The insurance was effected through Irie, a soliciting agent of defendant, with authority to receive and forward applications to the home office, countersign and deliver policies when issued by that office, and to collect the premiums thereon. After the delivery of the policy, but before all the premiums had been paid, an electric car barn was built within eight or nine feet of the building insured; and, when plaintiff came to make the deferred payment, he notified Irie of that fact, and inquired as to the amount of additional premium required on account thereof. With this knowledge of the increase in the risk, Irie accepted the balance due on the premium, and wrote to the company to ascertain the additional amount required on

account of the erection of the car barn, and, upon receipt of its answer, notified plaintiff of the amount; but it was never paid, nor the policy canceled. Within a short time after the fire, the plaintiff, through his attorney, made out and forwarded to the home office of the company proof of loss regular in all respects, except that it had neither a certificate of the magistrate or notary public nearest the fire, nor a builder's certificate as required by the policy. Upon its receipt by the company, it was promptly returned, with the objection that "it does not show whether the conditions of the policy have been violated or not, furnishes no proof as to the value of the house except the man's mere statement that it is worth so much, and in fact does not comply with the terms and conditions of the policy." Thereupon one of the attorneys of the plaintiff immediately affixed his certificate as a notary public in the form and to the effect required by the policy, and again forwarded it to the company, with a letter calling attention to the certificate, and saying: "We do not know in what other respect the proof of loss is defective, as it follows strictly the proofs of loss which are used by your company. If in any other respect it is defective, will you kindly inform us?" A few days afterwards the defendant returned the proof, saying that it "is returned herewith, declined, and objected to."

Upon this record, the two questions presented are: (1) Does the proof of loss furnished by the plaintiff sustain the allegation of the complaint that proof of loss had been regularly made? And (2) did the company waive the provision of the policy in reference to the effect of the erection of adjoining buildings? Both of these questions must be answered in the affirmative.

1. The law is settled that where the assured, in attempting in good faith to comply with the provisions of a policy, furnishes to the insuring company, within the time stipulated, what purports and is intended to be proof of loss, the company must point out particularly any defects therein if it intends to rely upon them. If it fails to do so, objection cannot thereafter be made to its sufficiency. *May, Ins. §§ 468, 469; Wood, Ins. § 452; Insurance Co. v. Tucker, 92 Ill. 64; Insurance Co. v. Block, 109 Pa. St. 535, 1 Atl. 523; Myers v. Insurance Co., 72 Iowa, 176, 33 N. W. 453; Insurance Co. v. Holthaus, 43 Mich. 423, 5 N. W. 642; Assurance Co. v. Samuels (Tex. Civ. App.) 33 S. W. 239.* Now, in this case the defendant failed to point out any particular objection to the proof as furnished, except that the value of the building was shown only by the statement of the assured. The objections that the proof did not show whether the conditions of the policy had been violated or not, and that it did not comply with the terms and conditions of the policy, are altogether too general. *Insurance Co. v. Block, supra; Myers v. Insurance Co., 72 Iowa, 176, 33 N. W. 453.* It is the duty of an insurance company, pending the ad-

justment of a loss, under its policy, to act towards the claimant in good faith; and, if it is dissatisfied in any way with the proof furnished, it ought to make known to the assured the specific nature of its objections, so that he may have an opportunity to make the necessary correction before it is too late. Good faith and common honesty demand as much, and the law is not satisfied with anything less. Hence we dismiss without further comment any objections to the sufficiency of the proof as made, other than that it "furnishes no proof as to the value of the house except the man's mere statement that it is worth so much." This objection is quite indefinite in its meaning, as the policy provides that the value shall be shown both by the certificate of a magistrate or notary public and of a builder; and whether it was intended to be understood that the proof was defective because it did not have the notary's or the builder's certificate is not made clear. The plaintiff, however, evidently in good faith, understood it to refer to the certificate of the notary, and immediately supplied what he supposed to be the defect pointed out, and so advised the company. It thereafter made no objection on that account, but returned the proof with the simple statement that it was "declined and objected to." Under these circumstances it cannot be heard to say now that the proof is defective because it did not have a builder's certificate as to the value of the property. If it desired to object on that account, it should have said so, and not used language calculated to mislead and confuse.

But it is said that the notary's certificate as actually furnished is insufficient because the facts show that the officer making it was not the notary nearest to the fire. But this objection also comes too late. It should have been made at the time the proof was returned, and plaintiff thus given an opportunity to procure the certificate of the proper officer, if that was insisted upon by the defendant company. In our opinion, the objection to the proof of loss that the certificate of the nearest notary and of a builder did not accompany it is not available to the defendant at this time, and the proof as made must be held and deemed a sufficient compliance with the policy in that respect. This being so, any error of the court either in the admission of evidence or in instructing the jury upon the matter of the waiver of a proof of loss becomes entirely immaterial, and need not be further considered.

2. Upon the other question it is admitted that, unless the stipulation in the policy in regard to the effect of the erection of adjoining buildings was waived by the defendant, the construction of the car barn rendered the policy void, and the plaintiff cannot recover. The question of waiver must be determined from the testimony of the plaintiff and the agent Irlie. The plaintiff testified that, when he paid the last installment of the premium,

he told Irlie that the car barn had been built, and asked him how much it would add to the cost of his insurance; that Irlie said \$17, but afterwards said it would be about \$22, and at another time \$35; that he told Irlie he wanted to find out about it, but did not have the money to pay just at that time, and Irlie replied, "All right, I will let you know," but the witness never heard of the matter again. Irlie says that he saw the plaintiff in September, and had a conversation with him about the car barn, during which the plaintiff asked him if it would make any difference in his insurance; that he told him it would increase the cost of the insurance, as well as the hazard, but he could not tell how much, but would write to the company and find out; that he did write to the company for information in regard to the matter, and, upon receiving its answer, wrote to the plaintiff to come to his office, and he would tell him what the additional cost would be. In response to this notice, plaintiff came to the office, and was informed by witness of the amount of the increased rate on account of the barn, but thought it too much, and for that reason did not pay it at the time, but said he would see about it, however. In a week or so afterwards, the witness again met the plaintiff on the street, and told him he had not paid the additional premium, and that it must be paid or he had no insurance, and plaintiff said that other agents had told him that a policy, when once written, remained in force until it expired, and that he would let it go that way. Upon cross-examination the witness said that he did not cancel the policy for failure to pay the additional premium, as he ought to have done, because he wanted to keep the insurance, and wanted plaintiff to pay the amount due. From this testimony it appears that Irlie not only had notice himself of the existence of the car barn before he received and accepted the full premium on the policy in suit, but that he also notified the company at the home office of that fact, and obtained from it a statement of the amount of additional premium made necessary by such structure. When the company, with knowledge of the violation of the provisions of the policy as thus communicated by Irlie, retained the premium, and allowed the policy to remain uncanceled, it estopped itself from claiming a forfeiture on account of the barn, although its consent for its erection was not given in writing. The condition of the policy in this regard could be waived or modified by the defendant, and such waiver or modification could be made by parol, although the policy itself provided that it should be in writing. *Miner v. Insurance Co.*, 27 Wis. 693; *Webster v. Insurance Co.*, 38 Wis. 67; *Viele v. Insurance Co.*, 26 Iowa, 9. So that whether Irlie's knowledge of the erection of the car barn would be binding upon the defendant or not is immaterial, because the company itself, after being advised of the

breach, retained the premium, and took no steps whatever towards the cancellation of the policy, and therefore waived the forfeiture. *Insurance Co. v. Malevinsky*, 6 Tex. Civ. App. 81, 24 S. W. 804; *Insurance Co. v. Splers*, 87 Ky. 285, 8 S. W. 453. Finding no error in the record, the judgment of the court below is affirmed.

LONG CREEK BLDG. ASS'N v. STATE INS. CO.

(Supreme Court of Oregon. Oct. 19, 1896.)

FIRE INSURANCE—PLEADING AND PROOF—WAIVER—PAYMENT OF PREMIUM—AUTHORITY OF AGENT—BURDEN OF PROOF—APPEAL—SERVICE OF NOTICE.

1. In an action on a fire insurance policy, where the plaintiff pleaded that he had furnished the proofs of loss required, it was error to permit him to prove facts showing a waiver of proof by the company.

2. In an action on a policy of fire insurance, where it was in issue whether the agent to whom the insured paid the premium note had authority to receive payment thereof, an instruction that, if the agent was the authorized agent of the company, the jury "must find in the same way whether the transaction had with him by the plaintiff was within the scope of his authority, and, if it was, then it has the same force as it would have had if the plaintiff had dealt with the company itself," was improperly given, in that it left to the jury to determine both the question of fact as to the existence of the agency and the question of law as to the extent of his authority.

3. Where a note given for the premium due upon a policy of insurance is made payable at the home office of the company, the insured, on making payment to an agent not in possession of the note, assumes the burden of proof that such agent had authority, express or implied, to receive the money.

4. The mere authority of the agent of an insurance company to solicit applications for insurance, to countersign and deliver policies, and to receive and transmit premiums, does not carry with it authority to receive payment upon a premium note which, by its terms, is payable at the home office of the company, and of which the agent had not at the time the possession.

5. Where the issue was whether the payment by the insured of a premium note to an agent who had not possession thereof was payment to the company, it appeared that the note, by its terms, was payable at the home office; that, before the note came due, the company notified plaintiff of the fact, and that no agent or other person had authority to collect it, or receive payment thereof, unless he had the note in his possession at the time. *Held*, that it was error to charge the jury that such notice was not binding on the plaintiff, unless the company showed that its terms had been accepted by the plaintiff.

6. Under Hill's Ann. Laws, § 531, providing that service of notice of appeal may be made on the attorney if he resides in the county where the action is pending, it is not necessary that such service should be made within the county in which such attorney resides.

Appeal from circuit court, Grant county; M. D. Clifford, Judge.

Action by the Long Creek Building Association upon a policy of fire insurance issued by the State Insurance Company. There was judgment for plaintiff, and defendant appeals. Reversed.

W. T. Slater, for appellant. James A. Fee, for respondent.

BEAN, J. This is an action on an insurance policy issued by the defendant company in October, 1894, for the premium of which the plaintiff gave its promissory note, payable on or before January 1, 1895, at the home office of the defendant company in the city of Salem. Both the note and policy contained a provision that, in case the note was not paid at maturity, the policy should be null and void, and the company relieved from liability for any loss happening during such default of payment. The policy also contained the stipulation usual in such instruments that no action could be maintained thereon until proof of loss in the form prescribed should be furnished the company by the assured. The plaintiff, in its complaint, alleged the issuance of the policy; the loss, on January 4, 1895, of the building covered thereby, and its value; and that "on the 1st day of February, 1895, thereafter plaintiff furnished defendant with proof of said loss and interest, and otherwise and at all times duly performed all the conditions of the policy on its part, including the payment of the premium note according to the tenor thereof." The defendant denied that proof of loss was furnished as alleged, or at all, and for a defense averred that the plaintiff failed and neglected to pay the premium note at maturity, and by reason thereof the policy was null and void at the time of the fire. The reply put in issue the new matter set up in the answer, and alleged that the amount due on the premium note was paid December 29, 1894, to one Orin L. Patterson, the local agent of the defendant at the place where the insured property was situated, and that he was duly authorized and empowered to receive the same, or, if not so authorized, the defendant afterwards, with knowledge of the facts, ratified and approved of his action in so doing. Upon the issues thus joined a trial was had, resulting in a judgment in favor of plaintiff, and defendant appeals.

The action was commenced and tried in Grant county, and the notice of appeal served in an adjoining county upon an attorney of defendant who resided in the county in which the trial was had. The plaintiff moves to dismiss the appeal on the ground that service of a notice of appeal upon an attorney must be made in the county where he resides. But we do not so read the statute. Section 531, Hills' Ann. Laws, as construed by this court, authorizes the service of notices of appeal upon either the party or his attorney, if the latter resides in the county where the action was tried; but it would be a strange construction of the statute to hold that service upon an attorney could only be made in the county in which he resides. The requirements of the statute are, in our opinion, satisfied, if the service is made upon the

resident attorney, whether made in or out of his home county. The motion to dismiss is therefore denied.

The next question we are called upon to consider is one of pleading and practice. The complaint avers that plaintiff furnished proof of loss as required by the policy, but, instead of attempting to sustain this allegation at the trial, it offered, and was permitted, over defendant's objection, to give in evidence facts which it claimed, and the court ruled, tended to show a waiver of such performance by defendant. This was error. The furnishing of proof of loss is made by the policy a condition precedent to plaintiff's right of recovery. It was, therefore, essential to the sufficiency of the complaint that it should affirmatively show either a performance of such condition or that it had been waived. It averred performance, and, this being denied, the proof should have been confined to the issue thus made. The rule is well settled that a plaintiff cannot plead performance of a condition precedent and recover under proof of a waiver of such performance. See 4 Enc. Pl. & Prac. 631, for authorities. It is true that in some jurisdictions an exception to this rule seems to have been made in actions on insurance policies (*McCulloch v. Insurance Co.*, 113 Mo. 606, 21 S. W. 207); but it does not commend itself to us as founded upon either reason or authority (2 *Wood, Ins.* 1134; *Insurance Co. v. Duke*, 43 Ind. 421; *Insurance Co. v. Capehart*, 108 Ind. 270, 8 N. E. 285; *Fayerweather v. Insurance Co.*, 118 N. Y. 324, 23 N. E. 192; *Insurance Co. v. Thorp*, 48 Kan. 239, 28 Pac. 991; *McCormack v. Insurance Co.*, 78 Cal. 468, 21 Pac. 14; *Edgerly v. Insurance Co.*, 43 Iowa, 587). A condition which qualifies or defeats the plaintiff's claim, being a condition subsequent, may be safely ignored by him in his complaint, because it is a matter of defense, and waived, unless pleaded by the defendant; but he is required to show affirmatively either a substantial performance of a condition precedent to his right of action, or that such performance has been waived, and, before he can do either, he must plead it. Under our statute it is not necessary to state the facts showing performance as at common law, but a plaintiff may plead generally that he has duly performed all the conditions on his part (section 87); but this statute in no way changes the rules of evidence, or permits a plaintiff to plead performance and recover by showing a waiver. It is elementary law that the proof must correspond to the allegations, and there is no reason why this rule, found by long experience to be necessary to the orderly administration of justice, should not apply in actions on insurance policies, as in all other cases. It imposes no hardship upon the plaintiff, and is but even-handed justice to the defendant. A waiver of a mere defect in a proof of loss as furnished may, however, be shown without pleading it, because an omission to

notify the assured of such defect promptly and specifically estops the company from claiming that the proof furnished does not comply with the provisions of the policy, and it is therefore deemed to be due proof of loss, and sustains an allegation of performance. But where no attempt whatever is made to comply with the provisions of the policy in that regard, but reliance is had entirely upon a waiver of performance, the waiver must be pleaded before it can be proved.

The principal question of fact on the trial was whether the promissory note had been paid before the fire. It is admitted that prior to that time the plaintiff paid the amount thereof to a clerk of the local agent or solicitor through whom the insurance was effected, but who was not in possession of the note; and the contention for the defendant is that the agent had no authority to receive such payment, and this was the important question for the determination of the court and jury. Upon this issue the court charged the jury that: "Insurance agents act mainly in soliciting insurance, receiving and forwarding the application of the insured, delivering the policy to him, and receiving the premiums. Where the agent can take premiums, he can use his discretion as to the mode. He can take a check; and notice to the agent of a material fact is notice to the principal, whether communicated or not. In short, the agent represents his principal, and his acts and transactions had with him are the acts of the company and transactions had with the company, provided said acts and transactions be within the scope of his authority. So that you must find first whether Patterson was the authorized agent of the company, and you must find it like any other fact, from the evidence and under the same rules; and if you find he was, then you must find in the same way, if the transactions had with him by plaintiff were within the scope of his authority; and, if they were, then it has the same force as they would have had plaintiff dealt with the company itself; otherwise not." By this instruction, as well as throughout the entire charge of the court, it was left to the jury to determine both the fact of Patterson's agency and whether by virtue thereof he was authorized to receive payment of the promissory note. This was manifest error. While the existence of an agency is always a question of fact, what may be lawfully done thereunder is a question of law. *Gleim v. Savage*, 14 Or. 587, 13 Pac. 412. Where the fact of the appointment and authority of an agent is not in controversy, it is the duty of the court to declare, as a matter of law, whether or not it empowers him to perform the particular act in question; but where there is a dispute as to the appointment or authority conferred upon an agent by his principal, the jury must find the facts, but, when they have done so, they must take the law from the court as to whether a given act comes within the scope of the agent's authority. In this case, however, the court erroneously sub-

mitted both the facts and the law to the jury.

We were urgently requested at the argument to decide whether Patterson had authority to receive payment of the note in question, as that seems to be the principal matter of controversy between the parties to this litigation. But we are precluded from doing so, because no such question was raised or passed upon by the court below; nor could we, if it had been, because the bill of exceptions does not contain, or purport to contain, all the evidence bearing upon his authority. The fact that the note, by its terms, is payable at the home office of the company, did not preclude it from receiving payment elsewhere through an authorized agent; but, the plaintiff having made such payment to an agent not in possession of the note, the burden of proof is upon it to show that he had authority, either express or implied, from the company to receive the same (*Paris v. Moe*, 60 Ga. 90); and a mere authority to receive applications for insurance, countersign and deliver policies, and receive and transmit premiums, is insufficient for that purpose (*Bouton v. Insurance Co.*, 25 Conn. 542; *Critchett v. Insurance Co.*, 53 Iowa, 404, 5 N. W. 543). When such an agent delivers the policy, receives and forwards the premium note to the home office, his power of molding or changing the terms of the contract or receiving payment of the premium ceases, unless authority to do so is expressly delegated or sanctioned by known or permitted usage. May, Ins. § 138. If, therefore, Patterson had no authority from the company, either express or implied, except "to solicit and receive applications for insurance on such property in such amounts and at such rates as are permitted by the rules and instructions furnished by said company, and not otherwise, to receive and transmit the premiums therefor," we think it clear that the payment of the premium note to him was not a payment to the company, unless the act was afterwards ratified and approved by it. Whether he had any further authority, or whether his acts were ratified and approved by the company, are questions to be hereafter determined.

The defendant gave evidence on the trial tending to show that about a month before the premium note became due it notified the plaintiff in writing of the date when the same would become due, and that no agent or other person had authority to collect or receive payment thereof unless he had the note in his possession at the time, and that any payment made to such agent or person would not be recognized by the company. But the court charged the jury that plaintiff was not bound by this notice, unless the defendant proved to their satisfaction that its terms had been accepted and acquiesced in by the plaintiff. Upon what theory this instruction can be sustained or was given we are at a loss to understand. The notice in no way affected the terms of the contract between the plaintiff and defendant. There was no stipulation therein that plaintiff should be permitted to pay the note to some agent of the company who did not have it in

his possession, but, on the contrary, it was expressly agreed that it should be paid at the home office. This being so, it would be strange, indeed, if the defendant could not warn the plaintiff against the consequences of paying it to some agent who did not have it in his possession; or that it could not, by notice to the maker, revoke any authority, real or apparent, it had previously given to the agent to receive such payment. If the notice in question was received by the plaintiff prior to the payment to Patterson, it is clear that the payment was not binding on the company, whatever authority Patterson may have had prior to that time. It is admitted he did not have the note in his possession, and therefore, according to the terms of the notice, had no authority to receive payment thereon. The rule does not prevail that once an agent always an agent, as seems to have been the impression of the trial court, as indicated by the instruction referred to. Whether Patterson had authority to receive payment of the promissory note we do not undertake to decide at this time, but we have no hesitancy in saying that, if he ever had such authority, the receipt by plaintiff of the notice referred to would certainly be, in effect, a revocation thereof. The judgment is reversed, and a new trial ordered.

STATE v. SKINNER.

(Supreme Court of Oregon. Oct. 19, 1896.)

LARCENY BY BAILEE—EVIDENCE OF TRUST RELATION.

In a prosecution for larceny by bailee, there was evidence that defendant, the agent of a building and loan association, represented to plaintiff, in negotiations for a loan, that the association required each applicant for a loan to advance 1 per cent. of the amount of the loan, \$10 of which was to be used in examining the title of the land offered by the applicant as security, the balance to be credited on the loan if made. Defendant converted to his own use the money advanced by prosecutor, and the loan was refused by the association. *Held*, that the evidence was sufficient to show that prosecutor only parted with the title to the money advanced in case a loan was made, and therefore warranted a conviction.

Appeal from circuit court, Douglas county; J. C. Fullerton, Judge.

F. H. Skinner was convicted of larceny, and appeals. Affirmed.

W. W. Cardwell, for appellant. Geo. G. Bingham, for the State.

MOORE, C. J. The defendant was indicted, tried, and convicted of the crime of larceny by bailee, and, having been sentenced to the penitentiary for the term of two years, he appeals, assigning as error the refusal of the court to instruct the jury to return a verdict of not guilty. The defendant's counsel contends that the evidence produced at the trial was insufficient to establish the existence of any trust relation between the defendant and the person alleged

to have been defrauded by him, and having moved the court, after the state had introduced its evidence and rested, to direct the acquittal of the defendant, he could not be convicted of the crime of larceny by bailee. "Within the meaning of the criminal law, a bailment," says Mr. Bishop, in his work on Criminal Law (volume 2, § 857), "is where one has personal property intrusted to him, to be returned or delivered to another in specie when the object of the trust is accomplished"; and the offense consists in the unlawful and felonious conversion of the property or money by the bailee to his own use. Hill's Ann. Laws Or. § 1771; State v. Lucas, 24 Or. 168, 33 Pac. 538. In Welsh v. People, 17 Ill. 339, Caton, J., in distinguishing between simple larceny and larceny by bailee, says: "Where * * * the alleged larceny is perpetrated by obtaining the possession of the goods by the voluntary act of the owner, under the influence of false pretenses and fraud, * * * there is no real difficulty in deducing the correct rule by which to determine whether the act was a larceny, and felonious, or a mere cheat and swindle. The rule is plainly this: If the owner of the goods alleged to have been stolen parts with both the possession and the title to the goods to the alleged thief, then neither the taking nor the conversion is felonious. It can but amount to a fraud. It is obtaining goods under false pretenses. If, however, the owner parts with the possession voluntarily, but does not part with the title expecting and intending that the same thing shall be returned to him, or that it shall be disposed of on his account, or in a particular way, as directed or agreed upon, for his benefit, then the goods may be feloniously converted by the bailee, so as to relate back and make the taking and conversion a larceny. The pointed inquiry in such a case must always arise: Did the owner part with the title to the thing, and was the legal title vested in the prisoner? If so, he was not guilty of larceny."

Examining the evidence in the light of the definition and rule above given, it tends to show that the defendant was the agent of the Washington National Building, Loan & Investment Association, of Seattle, Wash., a corporation of that state, organized to loan money, arising from the sale of its capital stock, to its stockholders, taking as security therefor mortgages on real property in cities or villages only; that, as such agent, he was authorized to sell the stock of the association, for which he was to receive a commission, but he had no authority to accept or receive any money on account of loans made by the association; that on August 19, 1905, the defendant represented to one R. B. Dixon that the association of which he was agent was prepared to loan money on farm property at 6 per cent. interest, but, as a condition and guaranty of good faith, each applicant for a loan was required to advance

1 per cent. of the amount applied for, \$10 of which was to be paid for procuring an abstract of the title to real property offered as security, the remainder to be credited on the evidence of the indebtedness if the loan was made, but, if the application for the loan was rejected, the money so advanced was to be returned to the applicant. Dixon, being in need of money, thereupon made a written application to the said association for a loan of \$10,000 "on building loan association plan," offering as security therefor a first mortgage on his farm of 1,650 acres in Douglas county, and, complying with the condition imposed by the defendant, gave him a check on the Douglas County Bank, at Roseburg, for \$100, taking the following receipt therefor: "Roseburg, Douglas county, Oregon, Aug. 19, 1895. Received from R. B. Dixon one hundred dollars on account B. & L. Loan. \$100. F. H. Skinner, Special Traveling Agent." The defendant got the check cashed at the bank, and converted the money to his own use. On August 29th of that year, Joseph H. Hawley, the general agent of said association at Portland, Or., received by mail, from the defendant, Dixon's application for the loan, together with what purported to be the latter's application for the purchase of 100 shares of the capital stock of the said association, of the value of \$10,000. There is nothing in the application for the loan to indicate that Dixon desired to subscribe for any stock of the association, except a recital as follows: "My certificate of stock in the association is numbered —, calling for 100 shares, and is dated —, 18—." Dixon, in speaking of the disposition to be made by the defendant of the money so advanced, says: "I understood at the time, if the loan went through, \$10 was to go for the abstract, also examining the abstract in Portland; and, in case the loan did not go through, I was to get \$90 of the money back." And on cross-examination he further says: "I advanced \$100, as I understood, to go to the company. It was to be forwarded on down there; and if the loan was made, why, all right, I was to get it back, and, if it was not made, I was to get it back." The witness, referring to the representations made by the defendant in relation to the disposition of the money, also says: "He claimed that it had to be forwarded on down to the company to secure the loan." From this testimony the jury might have found that Dixon never intended to part with the title to the money so advanced, unless his application was approved and the loan made, and that the defendant obtained it under an agreement that he would forward it to the general manager of the association at Portland, and, if the loan was not made, it would be returned to Dixon. This would be equivalent to a finding that a trust was thereby established, and that the defendant was the bailee of the money, which, upon a demand therefor, he

neglected to return, thereby converting it to his own use. It is true, the board of directors of the association never rejected the application for a loan; but the testimony of Hawley, its general manager, tends to show that, under its by-laws, no loans could be made on farm property; and, this being so, the refusal to entertain the application was equivalent to a rejection.

The defendant's counsel, in his brief and argument, seeks to show that the money was paid by Dixon to the defendant under an agreement to purchase stock in the association. If this be true, Dixon parted with the title to the money, and no trust attached to it in the hands of the defendant, but Dixon testifies that he never signed the application to purchase stock, and that the signature thereto is a forgery. This testimony materially affected the question of the guilt or innocence of the accused, and renders it necessary for the jury to pass upon it, and, having found the defendant guilty, they must have found that Dixon never signed the agreement to purchase stock. There was, in our judgment, sufficient evidence produced at the trial from which the jury might have found that a trust existed between Dixon and the defendant, which the latter betrayed, and hence there was no error in the court's refusal to give the instruction requested. The judgment must therefore be affirmed, and it is so ordered.

WIELAND v. POTTER.

(Court of Appeals of Colorado. April Term, 1895.)

APPEAL—ABSTRACT—BILL OF EXCEPTIONS—REVIEW.

1. To entitle a plaintiff in error to a consideration of his case, he must comply with the rules of the court regarding the preparation of abstracts.

2. A bill of exceptions must be authenticated by the trial judge, and, where the only certificate to what purports to be such bill is signed by a person styling himself "official stenographer," it cannot be considered.

3. Questions of fact, to be determined from the evidence in a case, cannot be reviewed without a bill of exceptions.

Error to district court, Otero county.

Action between one Wieland and one Potter. From the judgment Wieland brings error. Dismissed.

J. Hoffmire and T. K. Hoffmire, for plaintiff in error.

PER CURIAM. We must again call the attention of the bar to the necessity of abstracting cases in accordance with the rules of court. In this case the abstract is not a decently full index. From it it is impossible to get an understanding as to the character and nature of the case. To inform the court at what folios of the record something can be found, although it may be of some assistance, does not comply with the rules. In this

case there is another, and more serious, difficulty. There is no bill of exceptions. The only certificate of what purports to be a bill of exceptions is that of some person who styles himself "official stenographer." It is needless to say that such a certificate is worthless, and cannot be substituted for that of the judge. The only question involved was as to the ownership of personal property, and that was entirely dependent upon the evidence. Without a bill of exceptions, there is no basis for a review of the judgment. The writ of error will be dismissed. Dismissed.

STATE ex rel. WOODY v. ROTWITT, Secretary of State.

(Supreme Court of Montana. Oct. 12, 1896.)

ELECTIONS—NOMINATION OF CANDIDATES FOR OFFICE—DESIGNATION OF NOMINEE BY PETITION—RIGHTS OF POLITICAL PARTIES.

1. A party convention of a single county, which is one of two or more counties composing a judicial district, has no authority to place in nomination a candidate for the office of district judge, that being a state office, a legal nomination to which can only be made by a convention representing all the voters of the party in the several counties in the district.

2. The statute (Pol. Code, §§ 1810-1812) having recognized the right of political parties, through conventions or primary meetings, to nominate candidates for office, they have an equal right to refrain from making nominations, and no person not so nominated has the right to have his name placed on the official ballot as the candidate of a party, and a candidate placed in nomination by petition, as authorized by section 1813, is the nominee of the petitioners only, and cannot be designated on the ballot as the candidate of a regularly organized party.

Petition, on relation of Frank H. Woody, for a writ of injunction against Louis Rotwitt, as secretary of state. Writ granted.

The petitioner applies for a writ of injunction commanding the defendant secretary of state to refrain from certifying to the county clerks of Missoula or Ravalli counties the name of George W. Reeves, Esq., as the candidate of the "Silver Republican Party" or of the "Republican Party of the State of Montana" for the office of judge of the Fourth judicial district, state of Montana. It appears by the petition that on September 3, 1896, the petitioner was duly nominated by a convention of delegates who were resident in Missoula and Ravalli counties as the Democratic candidate for the office of judge of the Fourth judicial district, comprising the counties of Missoula and Ravalli; that a convention of the Republican party, consisting of delegates from the counties of Missoula and Ravalli, on the 9th day of September, 1896, duly nominated one E. E. Hershey as the Republican candidate for judge of the district court. It was conceded however, during the argument, that no certificate of Hershey's nomination was ever filed with the secretary of state, as is required by law, and that, even if it were so filed, he is not a candidate, having notified the secretary of state of his dec-

ination of any nomination as district judge. The petitioner next avers that the Silver Republican party has been a regular political organization since September 9, 1896, and has nominated officers, and published the principles it proclaims and advocates; that on September 22, 1896, the Republican party held a county convention in Missoula county to nominate county officers, the delegates to said convention being from Missoula county exclusively, but that the said county convention pretended to nominate George W. Reeves as the Republican candidate for district judge of the Fourth judicial district, and on October 3, 1896, filed with the defendant a certificate, stating, in substance, that at a convention of the Republican party, held on the said last-mentioned date, of Missoula county, the said George W. Reeves was by the said convention nominated for judge of said Fourth judicial district. It then appears that immediately upon the conclusion of the proceedings of the Republican county convention, a portion of the delegates to the same assembled as a Silver Republican convention, and among other proceedings of said convention so assembled the delegates nominated the said Reeves for the office of district judge, and on October 3, 1896, filed a certificate with the defendant, reciting, in substance, that the said Reeves had been nominated by such convention as the candidate of the Silver Republican party. It is averred that the nominations just referred to are void, because they were not made by any convention in which the county of Ravalli was represented, or was invited to be represented, or had an opportunity to be represented. The petitioner then sets forth that on October 3, 1896, there were filed with the secretary of state four lists of names whereby certain qualified electors of Missoula county nominated George W. Reeves as candidate of the Silver Republican party for district judge of the Fourth judicial district. The petitioner alleges that these petitions are defective by reason of electors in certain instances omitting to sign their places of residence and occupations as required by law. It is next averred that on October 3, 1896, certain other petitions were filed with the secretary of state, wherein certain electors attempt to nominate the said George W. Reeves as the candidate of the "Republican Party of the State of Montana." But the petitioner alleges that these petitions are defective by the omissions in certain cases to add to the names of the electors their places of residence, etc. It is also averred that there are not enough names upon the petitions referred to to nominate the said George W. Reeves according to law.

The secretary of state, by answer, denies that Hershey was ever duly nominated, and alleges that at a regular Republican state convention, composed of electors from all the counties in the state, the delegates attending such convention from Ravalli and Missoula counties without right or authority assembled and pretended to nominate Hershey, but never

filed any certificate of nomination, and that said Hershey was regularly nominated by the Republican county convention of Missoula county as county attorney for said county. The defendant denies "on information and belief that the Silver Republican party has been at all times since the 9th day of September, 1896, a regularly organized and existing political party in the said Fourth judicial district of the state of Montana"; alleges that the Missoula Republican county convention nominated said Reeves as a candidate for judge, and filed with the defendant, on October 3, 1896, a certificate in due form; admits that after the Republican county convention had adjourned sine die a part of the delegates attending such convention assembled as a Silver Republican convention, and alleges that, after assembling and duly organizing as a convention representing the Silver Republican party, they nominated said Reeves as a candidate for judge, and in due form filed a certificate of nomination with the defendant. The defendant alleges on information and belief that neither the Republican party nor the Silver Republican party in Ravalli county have ever held a convention for the purpose of nominating a candidate for the office of judge of the Fourth judicial district, but have acquiesced in the nomination of the said Reeves for said office. The answer admits the filing of the petitions referred to by the allegations of plaintiff's petition, but denies the defects alleged in the petitions. It is unnecessary to mention the particular defects in the denials more specifically, as they are not material to the decision of the case. To this answer the petitioner filed a demurrer.

T. J. Walsh, for relator. Thomas Marshall, H. J. Haskell, and M. S. Gunm, for respondent.

HUNT, J. (after stating the facts). The attempted nomination of Mr. Hershey as Republican candidate for district judge by the delegates to the state convention on September 9, 1896, from Ravalli and Missoula counties, is not important, because, whether the method pursued was legal or not is immaterial, inasmuch as Mr. Hershey expressly declined to be a candidate by a written declination, on file with the secretary of state; so that, if the judicial district was properly represented by the assembling of the delegates to the Republican state convention from the several counties of the district in a district convention, and if such district convention properly exercised its powers by selecting a candidate, still their work as a district convention has become ineffective, both by the declination of Mr. Hershey and by the failure of any subsequent concerted action by such district convention, or by any committee delegated by such convention to substitute another candidate in place of Hershey. The fact is, therefore, that there is no Republican candidate for district judge who was

nominated by any convention of delegates chosen from Ravalli and Missoula counties. So far the case is perfectly simple. But in the current of political conventions on September 22, 1896, the Republican party in and for Missoula county held a county convention to nominate candidates for county offices in Missoula county. This convention, it appears by the pleadings, was essentially a county convention for the county of Missoula. It is admitted that its delegates were exclusively from Missoula county, and its functions were evidently intended to be limited to the single purpose of making nominations usually and appropriately to be made by a county convention. No invitation was ever extended to the Republicans of Ravalli county to send delegates to the convention, no opportunity was given to Ravalli county to participate in the convention, and there was in fact no representation at all of Ravalli county. This county convention, however, went beyond its evident primary purposes, and nominated a candidate for a state office,—judge of the district court for the Fourth judicial district,—an official in whose election Ravalli as well as Missoula county is deeply interested, and for whose election each is authorized to vote under the constitution and laws of the state. We are irresistibly led to the conclusion that the elector who may vote for the election of a judge of a judicial district should have every fair and usual opportunity to participate jointly in the convention nomination of a candidate for that office, and should jointly participate, or decline to do so. The letter of our constitution is, "The state shall be divided into judicial districts in each of which there shall be elected by the electors thereof one judge of the district court," etc. Thus is the right preserved to the electors to choose their own judicial officers, and it is strictly in accord with the spirit of popular elections in our land that, where the official is to be elected by the joint vote of several counties, the nomination of a candidate to represent any political organization should be by representatives of such party from all such several counties acting jointly. The statutes (sections 1310–1312, Pol. Code) recognize systems of conventions and primary meetings held to nominate candidates for public office. Such conventions are, however, in our judgment, meant to be organized assemblages of electors or delegates fairly representing the entire body of electors of the political party which may lawfully vote for the candidates of any such convention. In a similar case (*State v. Weir* [Wash.] 31 Pac. 417) the supreme court of Washington said: " * * * The plain intent of said section, when examined in the light of all the other sections upon the subject, makes it perfectly clear that the primary meeting or convention must be by or on behalf of the entire body of voters of the respective party who are to be allowed to vote at the election of the officers therein nomi-

nated." We therefore think the Missoula county Republican convention did not represent the Republican party of the Fourth judicial district, and its action in nominating a candidate for judge was, under the pleadings of this case, a nullity.

These observations are equally pertinent to the certificates purporting to be the nomination papers of George W. Reeves by the convention of the Silver Republican party of Missoula county. The Silver Republican party,—it being conceded by the pleadings on both sides that such an organization existed in Missoula county on September 22, 1896,—in its convention, ignored the rights of Ravalli county, as did the Republican convention. Their action, therefore, is to be judged in the same manner, and our conclusion must be that no benefit can accrue to Mr. Reeves as a convention nominee of that organization for the office of district judge. No Republican or Silver Republican convention having lawfully nominated a candidate for district judge, we will now briefly consider the certificates of nomination filed by the electors of Missoula and Ravalli counties, and determine what, if any, standing they give to Mr. Reeves. These petitions may be regarded, for the purposes of this decision, as subscribed by the required number of electors, and as otherwise regular under section 1313 of the Political Code, except as hereinafter discussed. This section provides in part that "candidates for public office may be nominated otherwise than by convention or primary meeting in the manner following: A certificate of nomination, containing the name of a candidate for the office to be filled, with such information as is required to be given in certificates provided for in section 1311 of this chapter, must be signed by electors residing within the state and district or political division in and for which the officer or officers are to be elected, in the following required numbers." Now, still assuming that these certificates were regular in form, as above noted, we find that they are attempts to nominate George W. Reeves, Esq., as the candidate of regularly organized parties, namely, the Silver Republican party and the Republican party of Missoula and Ravalli counties. The question, therefore, resolves itself into this: No effective nomination for district judge having been made by any convention or primary meeting held for the purpose of making a district nomination (although a convention, purporting to be a district convention, was held, and took initiatory steps towards nominating another candidate), under such circumstances can a person get his name on the ticket of a regular party as a regular party nominee solely by petition of voters who nominate him as the candidate of such regularly organized party? We do not think he can. The petitions in this case constitute an attempt on the part of the electors who signed them to make George W. Reeves, Esq., the candidate of an organized party by petition. What the reasons were which moved the electors to secure these petitions is not material. Perhaps the invalidity of the nomina-

tion of a candidate for judge by the Missoula county conventions became apparent, and to overcome this difficulty it was thought proper to make party nominations by petition of electors residing within the entire election district. But, whatever the object of the double systems employed may have been, it is plain that Mr. Reeves was simply intended to be nominated as the candidate of the Republican and Silver Republican parties. His counsel throughout argument have contended and expressly reiterated time and again that he is not an electors' candidate, but is the regular candidate of those two political organizations; thus candidly conceding that, unless the nomination is good as the candidate of the parties above named, it is altogether void. We think this position of counsel, under the facts of this case, is but honest and correct, and we agree that, unless Mr. Reeves is a regularly nominated party candidate, his name should not go onto the ballot at all. The certificates and petitions, by their phraseology, asked that G. W. Reeves, Esq., be made a party candidate, and the electors who signed those petitions must have acted under the belief that he might become a candidate of the political parties named in the petitions. We may, therefore, invoke the doctrine of the *Stackpole Case*, 16 Mont. 40, 40 Pac. 80, in this inquiry, by limiting ourselves to the consideration of the case brought before the court in the manner and under the circumstances and in connection with the facts as they appear by the record and by the oft-repeated legal attitude conforming to those facts that the counsel frankly assumed before the court. We are therefore spared entering into any discussion of the question whether Judge Reeves' certificates and petitions, purporting to nominate him as the Republican party candidate and the candidate of the Silver Republican party, are good as independent nominations of an independent or electors' candidate. We will not now decide that under section 1313, Pol. Code, a certificate of nomination by electors, to be valid, must contain the designation of a party or principle. We are disposed to regard that section of the Code as contemplating simply the candidacy of one not a nominee of a party, —an independent or electors' candidate. When the statutes are read with relation to the different conditions contemplated, we are not prepared to say that the information referred to in section 1313 necessarily extends to more than the name, residence, business address, and the office for which the candidate is nominated. The question is one proper to be reserved until directly before us. But, returning to the direct point to be passed upon, we are obliged to hold that Judge Reeves, by the petitions, cannot have his name placed on the ticket of a regular party in existence.

The law contemplates nominations by conventions, by primary meetings held to make nominations, or by petition by a certain number of electors resident within the district or political division in which the officer is to be elected. Conventions or primary

meeting nominations, under the law, are made by organized assemblages of electors or delegates representing a political party or principle, and only candidates so nominated are the nominees of political parties, and only such are entitled to be placed as regular party nominees upon the official ballots. A candidate certified as nominated by electors is not nominated by a political party. He is simply a candidate of those individual electors who have joined in nominating him, and he is only entitled to be placed upon the ballot as such a candidate. There is no positive obligation upon a political convention to make a nomination for a political office. Considerations of expediency may, and sometimes do, make it wise in the judgment of a convention not to place any nominee of the party upon their ticket, and this right of a political convention should be guarded. If it were otherwise, peculiar conditions of political affairs might arise. For instance, a state convention of a party might see fit to make no nomination for a member of congress. Their action in thus refusing to nominate would be that of an organized assemblage of delegates representing a political party and its principles. But, if any number of electors may by petition certify to the secretary of state a candidate for congress, and make him the candidate of that political organization which in convention had declined to nominate a candidate, the law would countenance the frittering away of all rights commonly accorded to political conventions as representing political parties, and any name might be placed upon a ticket. Again, the secretary of state, by section 1317, is obliged to certify to the county clerk the name and description of each person nominated, as specified in the certificates of nomination filed in his office. It is by means of this certification of the secretary of state that the county clerk is informed how to prepare the official ballot for electors. The certificate to the secretary of state emanating from a convention or primary meeting must be signed by the officials of the convention. The certificate of nomination by electors must be signed by the electors only. The certificate emanating from the officers of a convention clearly must designate the principle or party represented by the convention. By means of this designation in the convention certificate the secretary of state specifies the description of the person nominated, including his party designation. But the law, except, perhaps, in cases presenting unusual conditions, does not authorize electors who may make a nomination by petition to make their nominees the nominees of an organized political party whose name they may select, provided such party is authorized to make a nomination by convention or primary meeting held for the purpose of making nominations. The secretary of state, therefore, cannot certify a candidate so nominated by electors as the candidate of

a political party, for clearly he is not such a candidate, and has no place in a group of candidates certified as nominated by a regular political party convention or organization, under the name of the party making such nominations. We find authority for these views in the cases of *Atkeson v. Lay* (Mo. Sup.) 22 S. W. 481; *Phillips v. Curtis* (Idaho) 38 Pac. 405. We conclude, under the facts of this case, that the Republican conventions of the district have not nominated Judge Reeves as their candidate, and, it being our opinion that the attempts to make him the candidate of such parties by petition are invalid, and as the court is not requested to regard him as an independent or electors' candidate, it necessarily follows that the writ of injunction prayed for will be made permanent; and it is so ordered.

PEMBERTON, C. J., and DE WITT, J.,
concur.

WRIGHT v. SOUTHERN PAC. CO.

(Supreme Court of Utah. Sept. 23, 1896.)

PERSONAL INJURY—NONSUIT—CONTRIBUTORY NEGLIGENCE—EVIDENCE—FELLOW SERVANT—EXCESSIVE DAMAGES.

1. The plaintiff received the injury complained of while in the employ of defendant, and while acting in the capacity of switchman in defendant's yards. The engine used in moving the cars was operated without a fireman, the engineer performing the duties of fireman himself. This fact was known to the plaintiff, who continued to work without making any complaint to defendant or to any of its agents. The engine was defective, and required more attention because thereof. Defendant had rules which required switchmen to give signals to the engineer, and to see that the signals were observed and obeyed before going between the cars, and to abstain from going between them while in motion, for the purpose of coupling or uncoupling them. But these rules were constantly violated, not only by the plaintiff, but also by the yardmaster, as well as the other switchmen. On the occasion of the accident, the plaintiff gave the engineer the signal to stop, which was obeyed, and then went between the cars to pull the pin; but, being unable to do so, he stepped out, and gave the "slow back up" signal, and, without waiting to see if the signal was obeyed, went between the cars to uncouple them while in motion. The engineer, by a quick movement, bumped the forward cars against the back one. The plaintiff's foot was caught under the brakebeam. He then gave the signal to stop, which not being observed, he was dragged a distance of two or three car lengths until he fell, when several trucks passed over and crushed his leg below the knee, causing the injury complained of. When the last signal was given, the engineer was in the act of replenishing the fire, and therefore failed to observe and obey it. Plaintiff's leg was amputated above the knee, and he has been unable to wear an artificial leg. Evidence was introduced tending to show that the accident would not have occurred had there been a fireman on the engine at the time of the accident. *Held*, that the nonsuit was properly denied; that plaintiff's knowledge of the fact that defendant operated its engine without a fireman was not of itself sufficient to preclude a recovery; that such a result would not follow unless the want of a fireman caused the operation of the engine to be so ob-

viously dangerous that a man of ordinary care and reasonable prudence would refuse to act as switchman. The plaintiff had the right to rely, at least to some extent, upon the judgment of the defendant's agents, who deemed it safe for the engineer to perform the work of a fireman.

2. An employé, as switchman, assumes the perils and risks ordinarily incident to such employment, including the hazards which observation would bring to his knowledge; but he does not assume the perils occasioned through the negligence of his employer, nor is he bound to anticipate and comprehend all the perils to which he might possibly be exposed because of a want of a sufficient number of employés to perform the service in safety.

3. The employer has the right to adopt rules for the conduct of business and safety of the employés; but, in order that such rules may avail the employer in a suit for damages for injuries resulting from a breach thereof, they must not only have been known to the employé, but also their observance must not have been waived by the employer.

4. Where a certain rule of the employer, though established for the safety of the employé, has been habitually disobeyed since its inception, or for a long period of time, in the presence or to the knowledge of the employer, without an attempt to enforce it, or has been disregarded in such manner and for such length of time as to raise the presumption that it was done with his knowledge and approval, the rule will be regarded as abrogated or waived.

5. The question whether, under all the circumstances surrounding the accident, the employé was guilty of negligence which was the proximate cause of the injury, was one of fact for the jury, and not one of law for the court.

6. Whether the employé, at the precise time of the accident, was exercising such care as a reasonable and prudent man, having due regard for his own safety, would have exercised under similar circumstances, or whether he was guilty of contributory negligence in violating a rule of the employer, were questions of fact for the jury to determine.

7. Evidence of a customary disregard of the rule of a railroad company by its employés, with the knowledge and approval of the agents of the company, is competent as tending to show that the rule was abrogated or waived.

8. Where the negligence of the employer and that of a fellow servant combine to produce an injury to a servant, the employer will be liable in damages to the injured servant.

9. Where it is clear, almost beyond reasonable controversy, that the instructions of the court to the jury respecting the question of damages have been disregarded, the supreme court may order a new trial. The same influences which caused the jury to disregard the instructions of the court may have misled them in passing upon other questions in the case.

(Syllabus by the Court.)

Appeal from district court, Weber county; H. W. Smith, Judge.

Action by James A. Wright against the Southern Pacific Company. Judgment for plaintiff. Defendant appeals. Reversed.

Marshall & Royle, for appellant. Richards & Macmillan, for respondent.

BARTCH, J. This action was brought to recover damages for personal injuries which the plaintiff claims he received through the negligence of the defendant. The trial of the case resulted in a verdict in the sum of \$20,000, against the defendant. Upon the hearing of the motion for a new trial, the court reduced

that sum to \$15,000, and, on plaintiff consenting to the reduction, overruled the motion, and entered judgment accordingly. This appeal was taken from the judgment, and from the order overruling the motion for a new trial.

It appears from the evidence, substantially, that the plaintiff received the injuries complained of on the 11th day of August, 1892, while acting in the capacity of switchman, under the employment of the defendant, in its yards at Carlin, Nev.; that at the time of the accident he was 28 years old, strong, active, and earning \$80 per month; that he had been so employed for about a year, and all the time had worked with the same switch engine which occasioned the accident; that the engine was operated without a fireman, the engineer performing the duties of fireman himself during the entire time of plaintiff's employment, which fact was known to the plaintiff, who continued to work without making any complaint to the defendant or any of its agents because the engine was thus being operated; that the engine was defective and at one time during plaintiff's employment was sent to the shop for repairs, but after its return it was still defective in its cylinder, and its flues were leaking, in consequence of which the engineer was required to give the fire and steam more attention than would have been necessary if the engine had not been defective, but such condition of the engine, and the fact that it required more attention because thereof, were unknown to the plaintiff; that the plaintiff knew the defendant had rules which required him to give signals to the engineer, and to see that such signals were observed and obeyed, before going between the cars, and to abstain from going between them while in motion for the purpose of coupling or uncoupling them; that these rules were constantly violated by the switchmen in the presence of the officers of the defendant, and were not obeyed, it having been the custom and practice to couple and uncouple the cars while in motion, on account of the grade in the yard, which would tighten the links and pins, and render it necessary to get the slack by moving the cars; that the plaintiff was in the habit of coupling and uncoupling the cars while in motion, and likewise other switchmen and the yardmaster did the same thing; that on the occasion of the accident the plaintiff gave the engineer a signal to stop, which was obeyed, and he went between the cars to pull the pin, but, being unable to do so, he stepped out, and gave the "slow back up" signal, and again went in between the cars to uncouple them, when the engineer, by a quick movement, bumped the forward cars against the back one; that thereby the plaintiff's foot was caught under the brake-beam, and, holding onto the rung of the ladder, he gave the signal to stop, which not being observed, he was dragged a distance of two or three car lengths until he fell, when several trucks passed over and crushed his leg below the knee, causing the injury complained of; and that, when the last signal was given,

the engineer was in the act of replenishing the fire, and therefore did not observe or obey the signal. It further appears from the evidence that the plaintiff's leg was amputated about seven inches above the knee; that he has been unable to wear an artificial leg; and that he has suffered much, physically and mentally. There is also evidence which tends to show that the accident would have been averted if a fireman had been on the engine. The complaint contained two causes of action, and, when the plaintiff rested his case, counsel for the defendant interposed a motion for a nonsuit, which motion was sustained as to the second cause of action, and denied as to the first. The evidence above set forth relates to the first cause of action.

The first question on this appeal is raised on the motion for a nonsuit. Counsel for the appellant contend that there was no question of fact which ought to have been submitted to the jury, and that, therefore, the court erred in refusing to sustain their motion as to the first cause of action. They further insist that it is immaterial whether or not it would have been a reasonable precaution for the defendant to have provided a separate fireman for the engine, because the plaintiff knew that there was no such fireman, and accepted the employment as switchman with full knowledge of the manner in which the business in that yard was conducted, without making any objection to the engineer's performing the duties of a fireman. We do not think the plaintiff's knowledge of the fact that the defendant operated its engine without a fireman was of itself sufficient to preclude a recovery. Such a result would not follow unless the want of a fireman caused the operation of the engine in the yard in question to be so obviously dangerous that a man of ordinary care and reasonable prudence would refuse to act as switchman. The evidence fails to show that there was any such obvious danger, and it may rightfully be assumed that the agents of the defendant, who had charge of its operations in that yard, deemed it safe for the engineer to perform the work of a fireman, in addition to his duties as engineer; and, under the circumstances of this case, the plaintiff had the right to rely, at least to some degree, upon the judgment of those agents. Under the evidence shown by the record, we would not be warranted to hold that the plaintiff was bound to rely entirely upon his own judgment, and, in opposition to that of the officers of the defendant, determine that it was absolutely unsafe to operate the engine without a fireman, and abandon his employment as switchman. It is true that, when the plaintiff entered into the employment of the defendant as switchman in the yards at Carlin, he assumed the perils and risks ordinarily incident to such employment, including the hazards which observation would bring to his knowledge; but he did not assume the perils occasioned through the negligence of his employer; nor was he bound to

anticipate or comprehend all the perils to which he might possibly be exposed, because of the want of a fireman, or that, on the occasion in question, the engineer would, at the moment of danger, replenish the fire of the engine, and fail to observe the signal to stop. Ordinary care and reasonable prudence on the part of the master or employer require that, for the performance of a particular service, a sufficient number of servants be employed to enable it to be performed in safety; and the employer and employé are both bound to exercise such reasonable care as is commensurate with the danger of the service, and that implies such caution, watchfulness, and foresight as careful, prudent persons, engaged in such business, and doing such service, usually exercise. The duty on the part of the employer of providing a sufficient number of competent and proper persons to perform a particular service in safety, is just as imperative as the providing of reasonably safe places and suitable machinery; and the servant does not assume perils occasioned by the neglect of this duty. In the case of *Railway Co. v. Herbert*, 116 U. S. 642, 6 Sup. Ct. 590, 593, Mr. Justice Field, delivering the opinion of the court, said: "The servant does not undertake to incur the risks arising from the want of sufficient and skillful co-laborers, or from defective machinery or other instruments with which he is to work. His contract implies that in regard to these matters his employer will make adequate provision that no danger shall ensue to him. This doctrine has been so frequently asserted by courts of the highest character that it can hardly be considered as any longer open to serious question." *Shear. & R. Neg.* § 193; *Hough v. Railway Co.*, 100 U. S. 213; *Hawley v. Railway Co.*, 82 N. Y. 870; *Railroad Co. v. Baugh*, 149 U. S. 308, 13 Sup. Ct. 914; *Pidcock v. Railroad Co.*, 5 Utah, 612, 19 Pac. 191; *Harrison v. Railway Co.*, 7 Utah, 523, 27 Pac. 728; *Chapman v. Southern Pac. Co.* (Utah) 41 Pac. 551; *Soeder v. Railway Co.* (Mo. Sup.) 13 S. W. 714; *Paulmier v. Railroad Co.*, 34 N. J. Law, 151. We are of the opinion that whether or not the defendant was negligent in failing to provide a fireman was, under the evidence as shown by the record, a question of fact for the jury to determine, and not one of law for the court, and that the motion for a nonsuit was properly denied as to the first cause of action.

Counsel for the appellant further contend that the plaintiff was guilty of contributory negligence in attempting to uncouple the cars while they were in motion, and that this was done in violation of the rules of the railroad company. The general rule is, doubtless, well settled that, when an employé intentionally and knowingly disregards regulations or rules adopted by the employer for the safety of the employé, the employer is not liable for any injuries which result because of the disobedience of such regulations or rules. This rule, however, admits of some qualifications, as where the employer

requires service to be performed in such a manner as to render the violation of a rule necessary, or where he has knowingly permitted or approved its habitual violation, without attempting to enforce it. In order, therefore, that rules for the conduct of business and safety of employés may avail an employer in a suit for damages for injuries resulting from a breach thereof, they must not only have been known to the employé, but also their observance must not have been waived by the employer, nor the existing conditions at the time of the injury have rendered their enforcement and obedience impracticable to perform the services required by the employer. In such cases, as a general rule, the question whether, under all the circumstances surrounding the accident, the employer was guilty of negligence, which was the proximate cause of the injury, is one of fact to be submitted to the jury, and it cannot be determined as a matter of law by the court; and where a certain rule of the employer, though established for the safety of the employé, has been habitually disobeyed since its inception, or for a long period of time, in the presence or to the knowledge of the employer, without an attempt to enforce it, or has been disregarded in such manner and for such length of time as to raise a presumption that it was done with his knowledge and approval, the rule will be regarded as abrogated or waived. In *Railroad Co. v. Flynn*, 154 Ill. 448, 40 N. E. 332, it was held that the instructions asked by the defendants, that a railroad engineer could not recover for personal injuries resulting from his disregard of a rule that imperfect display or absence of a certain signal should be regarded as a danger signal, were defective and properly refused, because they failed to "submit to the jury the question whether the violation of the defendants' rule had become so habitual as to raise a presumption that the defendants were aware of and approved it, and also whether, under existing circumstances, it was practicable to observe the rule, and at the same time run the defendants' trains in the time and manner required by them"; there having been sufficient evidence to raise these questions. In *Hayes v. Manufacturing Co.*, 41 Hun, 407, it was said: "Ordinarily, disobedience of a rule would be negligence; but if the defendant prosecuted the work in a manner that rendered the violation of the rule necessary or probable, or if it suffered and approved its habitual disregard, the rule was inoperative." And it was held error to dismiss the action on account of the contributory negligence of the plaintiff, and that the question of his negligence should have been submitted to the jury. *Fish v. Railroad Co.* (Iowa) 65 N. W. 995; *Sprong v. Railroad Co.*, 58 N. Y. 56; *Alexander v. Railroad Co.*, 83 Ky. 589; *Railway Co. v. Springsteen*, 41 Kan. 724, 21 Pac. 774; *Barry v. Railway Co.*, 98 Mo. 62, 11 S. W. 308.

In the case at bar the evidence shows that in the yards at Carlin it was the practice of switchmen to couple and uncouple cars while in motion, and it appears that they were so coup-

led and uncoupled in the presence of officers of the defendant, and that the night yardmaster so uncoupled them. Such seems to have been the practice during the entire time of the plaintiff's employment as switchman. There is also evidence which tends to show that there was a grade in the yard which rendered it necessary for the cars to be moved while they were being uncoupled, on account of the links and pins being tightened when they were standing. The defendant had provided a rule which forbade the coupling and uncoupling of cars while in motion, but there is nothing to indicate that there ever was an effort made to enforce it, although it was constantly being violated in the presence of the agents of the defendant. On the occasion in question the cars were moving about three or four miles per hour. Whether, under the circumstances disclosed by the evidence, the plaintiff, at the precise time of the accident, was exercising such care as a reasonable and prudent man, having due regard for his own safety, would have exercised under similar circumstances, or whether he was guilty of contributory negligence in disobeying the rule referred to, and attempting to uncouple the cars while in motion, were questions of fact for the jury to determine. The plaintiff's disobedience of the rule, under the state of facts shown by the record, did not, as matter of law, preclude his recovery. In *Eastman v. Railway Co.*, 101 Mich. 597, 60 N. W. 309, it was said: "Stepping between cars while in motion to uncouple them is not, as a matter of law, negligence, but the question is one for the jury." *Lowe v. Railway Co.*, 89 Iowa, 420, 56 N. W. 519; *Ashman v. Railroad Co.*, 90 Mich. 567, 51 N. W. 645; *Railway Co. v. McMahan* (Tex. Civ. App.) 26 S. W. 159; *Snow v. Railroad Co.*, 8 Allen, 441; *Fay v. Railway Co.*, 30 Minn. 231, 15 N. W. 241.

Nor do we think the court erred in admitting evidence to show that it was the custom of the switchmen, in the yard at Carlin, to couple and uncouple cars while in motion. The defendant denied the right of the plaintiff to recover, because of his own negligence in attempting to so uncouple the cars, in disregard of one of its rules. The evidence in question tended to show a waiver of the rule by the railroad company, and was therefore proper and admissible. The law does not prevent parties to a contract from waiving provisions thereof. Such a rule is reasonable, and, if enforced, will receive the sanction of the courts, as tending to promote the safety of employes. In such event, injuries resulting from a violation thereof, without the permission of the employer, would, ordinarily, be without redress; but it would seem unjust, and not in consonance with a proper administration of the law, to permit an employer to adopt a rule for the safety of the employe, and after tacitly consenting to its constant violation, in case of suit brought by an employe injured in the service while disregarding the rule, refuse to admit evidence tending to show that, in practice, there was

no such rule, or that its violation was necessary to properly perform the service, or that it was abrogated or waived by the employer. We are aware that some cases hold that such evidence is not admissible, but the affirmative of this question appears to be sustained by sound reason and the weight of authority. In *Hunn v. Railway Co.*, 78 Mich. 513, 44 N. W. 502, Mr. Justice Champin, delivering the opinion of the court, said: "We think it was competent to show what was usually and habitually done in the running of trains, because, if the company permitted or had so framed the rules as to require the employe to exercise some discretion in the matter of strict obedience, it ought not to be permitted to hold its employes to the very letter of the rule, in order to shield the company from liability for what it had tacitly permitted." So, in *Railway Co. v. Nickels*, 1 C. C. A. 625, 50 Fed. 718, it is said: "This uniform and constant acquiescence of the defendant to the violation of this rule, if such a rule was really in existence, was a violation of the contract on the part of the defendant that it did not and would not acquiesce in the violation of any of its rules, and relieved plaintiff from further compliance therewith; and if, on the other hand, the rule was not really in force, if it had been waived or abandoned, the utter disregard of the rule, and defendant's acquiescence therein, were competent evidence of the abandonment. In either case the plaintiff had a right to rely on the conduct of the defendant, and to introduce his evidence in this behalf." *Wood, Mast. & Serv.* § 401; *Strong v. Railway Co.* (Iowa) 62 N. W. 799; *White v. Railway Co.*, 72 Miss. 12, 16 South. 248; *Francis v. Railway Co.*, 127 Mo. 658, 28 S. W. 842, and 30 S. W. 129; *Hissong v. Railroad Co.* (Ala.) 8 South. 776; *Bonner v. Bean*, 80 Tex. 152, 15 S. W. 798.

The appellant also insists that the engineer and plaintiff were fellow servants, and that, if the injury was caused by the negligence of the engineer, the defendant was not liable. The jury were so instructed, and they were further instructed that no liability attached unless the "defendant alone was negligent," and "its negligence produced the injury." The instructions on this point were quite favorable to the defendant, and, in order to find a verdict for the plaintiff, the jury must have found that the defendant was negligent in not providing a fireman for the engine, and that such negligence was the proximate cause of the injury. In such event, if it were conceded that the engineer and plaintiff were fellow servants, and that the defendant is not liable for the negligence of the engineer, it cannot defeat the action, even if the engineer was also negligent, because where the negligence of an employer and that of a fellow servant combine, and produce an injury to a servant, the employer will be liable in damages to the injured servant. While the employe who engages to

perform a service assumes the risk of negligence on the part of a fellow servant, which the employer is unable to prevent, he does not assume any risk of negligence on the part of his employer. *Shear. & R. Neg.* § 187; *Railway Co. v. Cummings*, 106 U. S. 700, 1 Sup. Ct. 493; *Coppins v. Railroad Co.* 122 N. Y. 557, 25 N. E. 915; *Railroad Co. v. Young*, 1 C. C. A. 423, 49 Fed. 723.

The only remaining question which we deem it necessary to notice, although there are others raised in the briefs of counsel, is that relating to damages and to the verdict. The appellant contends that the jury were influenced by passion or prejudice, and therefore awarded damages which are grossly excessive. We think there is merit in this contention. It is difficult to see how the jury, under the evidence and in the instructions of the court, as shown by the record, could arrive at the conclusion that \$20,000 was a fair and reasonable compensation for the injury suffered. In its instructions to the jury, the court, after stating the elements which entered into the question of damages, said to them that, if they found the issues for the plaintiff, then, from all the facts and circumstances, they must determine what would be just as matter of damages to him, purely as matter of compensation, and then further instructed them that they could take into consideration neither the wealth nor the poverty of either the plaintiff or the defendant. The rule as to the measure of damages was fairly stated to the jury, and the law will not permit a corporation, any more than an individual, to be mulcted in punitive or vindictive damages, in a case like this. Nor will it permit any other rule to be applied to a corporation than to an individual, and yet it would seem almost impossible to believe that the jury, under all the circumstances of this case, would have returned such a verdict if the defendant had been a private person instead of a corporation. Without attempting to determine how this verdict was arrived at, it is clear—almost beyond reasonable controversy—that the rules of law laid down by the court as to the question of damages, in its instructions, were disregarded; and it is fair to assume that the court below so viewed the action of the jury, because, upon hearing a motion therefor, it ordered a new trial to be granted, unless the plaintiff would remit from the judgment which had been entered on the verdict the sum of \$5,000; and the plaintiff himself must have entertained a similar view, or, at least, must have thought the verdict grossly excessive, when he remitted that sum. In their disregard of the instructions of the court, the jury committed a grave error, resulting in a verdict which is not warranted by the evidence. They were bound by the law as laid down by the court, whether right or wrong, and had no right to consult their own notions as to what the law ought to be. Therefore, when they departed from the instructions, they stepped beyond

the limits of their power, and, in so doing, we must assume that they were influenced by some improper motives, or did it through a misapprehension of the facts and instructions.

Counsel for the respondent maintain that this court cannot disturb the verdict; that it has no power to review questions of fact; and that the amount of damages is a question of fact. They rely on article 8 of section 9 of the constitution of this state, which, in relation to appeals to the supreme court, contains the following provision: "In equity cases the appeal may be on questions of both law and fact. In cases at law the appeal shall be on questions of law alone." We do not think this provision of the constitution is applicable to this case, and therefore expressly refrain from an interpretation thereof. The cause was tried, judgment entered, notice of intention to move for a new trial served, statement on motion for new trial and appeal settled, and motion overruled, by the territorial district court, before the late territory of Utah became a state; and, under the constitution, in order that no inconvenience may arise by reason of a change from a territorial to a state government, all actions are continued the same as if no change had taken place; and, likewise, all laws not repugnant to the constitution are continued in force until they expire by their own limitations, or are altered or repealed. Article 24, §§ 1, 2. Therefore the territorial statutes applicable to the case continue in force on appeal, and hence this court may examine the evidence to ascertain whether or not the verdict and judgment are in excess of what, in justice, the plaintiff is entitled to recover, and then reverse, affirm, or modify the judgment, or direct a proper judgment to be entered. *Comp. Laws Utah 1888, § 8006.* Considering all the evidence and all the circumstances of the case, we conclude that the verdict and judgment are grossly excessive, and, under the facts and circumstances disclosed by the record, we do not regard it proper either to modify or direct what judgment should be entered, and thus substitute our judgment for that of the jury in this case. Where it is clear that in a case of personal tort, where the damages are unliquidated, or there is no legal measure of the same, and no definite amount shown, the jury have entirely misapprehended the facts, and committed substantial error in their application of the law to them, or, against the instructions of the court, have suffered prejudice or passion to mislead them, and thereby perpetrate an injustice by rendering a verdict greatly in excess of just compensation for the injury, a new trial ought to be granted. In the case at bar the jury were called upon to exercise reasonable discretion, obey the instructions of the court, and, upon a candid and fair consideration of all the facts and circumstances proven, render a just verdict. That they failed to do this was practically

admitted by the court below in requiring a remission of, and by the plaintiff in consenting to remit, a large portion of the judgment entered on the verdict. The fact that the plaintiff filed a remittitur at the instance of the court did not render the action of the jury unobjectionable, or cure the verdict, under the circumstances shown by the record. The same influences which resulted in such a verdict may have misled the jury in passing upon other questions of fact. The judgment is reversed, and remanded, with directions to grant a new trial.

ZANE, C. J., and MINER, J., concur.

PEOPLE v. FUGITT. (Cr. 199.)
(Supreme Court of California. Oct. 13, 1896.)

CRIMINAL LAW—NEW TRIAL—APPEAL.

Action of the trial court in granting a new trial in a criminal case on the ground that the verdict was not supported by the evidence, which, though ample, was conflicting, will not be disturbed.

Department 1. Appeal from superior court, Kern county; A. R. Conklin, Judge.

Thomas F. Fugitt was convicted of grand larceny, and from an order granting a new trial the people appeal. Affirmed.

W. F. Fitzgerald, for the People. E. J. Emmons and F. M. Graham, for respondent.

PER CURIAM. Defendant was convicted of grand larceny in stealing a certain described steer. He moved for a new trial upon various grounds, and, among others, he claimed that the verdict of the jury was not supported by the evidence, and also that the court misdirected the jury as to matters of law. The motion for a new trial was granted, and this appeal is by the people from such order. The order of the court granting the new trial is a general order. While we are satisfied there was ample evidence to support the verdict, yet the evidence was directly and substantially conflicting upon the main issues involved, and, such being the fact, we will not disturb the action of the trial court in granting a new trial. For the foregoing reasons, the order appealed from is affirmed.

RITZMAN v. BURNHAM. (L. A. 95.)
(Supreme Court of California. Oct. 12, 1896.)

JUSTICE OF THE PEACE—JUDGMENT—VALIDITY.

The erroneous action of a justice of the peace in denying a motion for a change of venue on affidavit of prejudice on the part of the justice does not render the judgment void, so as to enable the defendant to recover in trover for the sale of his property on execution issued on such judgment.

Department 2. Appeal from superior court, Los Angeles county; Waldo M. York, Judge.

Action by J. W. Ritzman against F. E.

Burnham. There was a judgment for defendant, and plaintiff appeals. Affirmed.

Wm. E. Cox, for appellant. George A. Gibbs, for respondent.

TEMPLE, J. This is an action brought to recover damages for the conversion of certain horses. Defendant recovered judgment, and plaintiff appeals.

Among other reasons given by the respondent why the judgment should not be reversed is the claim that the complaint states no cause of action. As I think the claim must be sustained, it will not be necessary to mention other points. The complaint is not in the usual form for conversion, but proceeds with the narration of certain alleged facts. After an interesting narrative, which does not concern this case, it states that defendant sued plaintiff before a justice of the peace for the conversion of a horse, buggy, and harness; that while that action was pending this plaintiff—defendant in that case—moved the court for a change of venue on an affidavit stating that he believed he could not have a fair trial before the said justice by reason of the interest, prejudice, and bias of the said justice. Thereupon the said justice of the peace overruled the said motion for a change of venue, and, over the objection of the defendant in that case,—plaintiff here,—proceeded to try the cause, and rendered judgment for the plaintiff in that case against this plaintiff for \$195 and costs of suit. It is then averred: "That afterwards, on the — day of November, 1893, a so-called execution was issued by said justice on said void judgment to the constable of said township, directing him to levy on and sell the property of said defendant in that action (plaintiff herein) to satisfy said so-called judgment and costs, and said constable, at the instance and request and direction of the said Burnham, caused a so-called levy and sale of five horses, the property of this plaintiff; that the said Burnham ratified said sale, and received the proceeds thereof, and converted the said horses and the said money received from a sale thereof to his own use, without right or authority of law, and over the objection of this plaintiff." The complaint contains no other averment of any conversion, and manifestly the conversion averred is simply the sale by the constable under execution duly issued upon the judgment recited, and plaintiff claims that it was a conversion, on the ground that the judgment against him was void. It is also obvious that the ground upon which appellant claims that the judgment rendered against him by the justice was void is that the motion for a change of venue ousted the justice of jurisdiction. No authority for any such proposition is cited, and I presume none could be. It may be admitted that the statute is mandatory, and that, if the defendant in that action had remained and contested

the case, he would not thereby have waived his objection, but might have procured a reversal for such error on appeal; but it does not follow that all subsequent proceedings were without jurisdiction. *People v. Hubbard*, 22 Cal. 35, is an authority to the contrary. The proceeding for the transfer of a cause from a state to a federal court is not a proceeding for a change of venue, and the effect of filing the affidavit and bond is declared by the law of congress. Cases under that law have no bearing on this case. The judgment was, therefore, not void, and the complaint states no cause of action.

Another point is that the case was appealed by the plaintiff from the justice court to the superior court, where the appeal was dismissed for some technical defect in the appeal. It is claimed that this dismissal was an affirmance. Had the judgment appealed from been entirely void, I do not suppose such a dismissal would have made it a valid judgment, but, as it was merely erroneous, such dismissal did have the effect of putting it beyond attack for any error which could have been availed of by the appellant on that appeal. For these reasons, the judgment is affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

In re EGGERS' ESTATE. (Sac. 195.)
(Supreme Court of California. Oct. 7, 1896.)
ADMINISTRATOR—WHO ENTITLED TO APPOINTMENT—RELATIVES OF DECEDENT.

Under the provision of Code Civ. Proc. § 1365, that relatives of a decedent shall be entitled to administer only when they are entitled to succeed to his personal estate, or some portion thereof, a second cousin of a decedent, who left surviving him a father and brother residing in Germany, not being entitled under the statute to succeed to any part of the personal estate, is not entitled, as against the public administrator, to appointment as administrator.

Commissioners' decision. Department 1. Appeal from superior court, Glenn county; Frank Moody, Judge.

Several petitions by A. Cartenberg and by J. O. Johnson, public administrator, for appointment as administrator of the estate of Theis Eggers, deceased. From an order denying the petition of Johnson, and appointing Cartenberg, Johnson appeals. Reversed.

Charles L. Donohoe and Geo. D. Dudley, for appellant. Seth Millington and H. B. Sanders, for respondents.

BELCHER, C. Theis Eggers died, intestate, in the county of Glenn, of which he was a resident, on the 7th day of October, 1895, leaving a small estate consisting of personal property. On the 15th of November following, A. Cartenberg filed in the superior court of that county his petition praying that letters of administration on the estate of said

deceased be issued to him. Thereafter, on the 25th of the same month, J. O. Johnson, public administrator of the county, filed opposition to the appointment of Cartenberg as administrator, and his petition praying that letters of administration on the estate be issued to him. The two petitions were heard at the same time, and on December 30, 1895, the court denied the petition of the public administrator, and ordered letters of administration on the estate to be issued to Cartenberg. From that order the public administrator has appealed.

The Code of Civil Procedure (section 1365) provides: "Administration of the estate of a person dying intestate must be granted to some one or more of the persons hereinafter mentioned, the relatives of the deceased being entitled to administer only when they are entitled to succeed to his personal estate, or some portion thereof; and they are, respectively, entitled thereto in the following order: * * * (7) The next of kin entitled to share in the distribution of the estate. (8) The public administrator." And the Civil Code (section 1386, subds. 2, 3) provides that if the decedent leave no issue, nor husband or wife, the estate goes to his father and mother in equal shares; and, if either be dead, then the whole goes to the other; and, if there be neither issue, husband, wife, father, nor mother, then the estate goes in equal shares to the brothers and sisters of the decedent.

It was proved at the hearing that Cartenberg, to whom letters were ordered to be issued, was a second cousin of the deceased; that the deceased had no other relatives in this country; but that his father and a brother were living at Hamburg, in Germany. Under this showing, it is clear that Cartenberg was not entitled to succeed to the personal estate of the deceased, or any portion thereof. He was therefore not entitled, as against the public administrator, to letters of administration on the estate, and the court erred in granting his petition. In *re Carmody*, 88 Cal. 616, 26 Pac. 373; In *re Davis' Estate*, 106 Cal. 453, 39 Pac. 756. The decision in *Anderson v. Potter*, 5 Cal. 64, cited and relied upon by respondent, is based upon a statute the language of which has been materially changed by the Code, and is therefore not in point.

The suggestion in the brief of respondent that, since the appeal in this case was perfected, the appellant has removed from Glenn county, thereby vacating his office as public administrator, cannot be considered on this appeal. The order appealed from should be reversed, and the cause remanded for further proceedings.

We concur: VANCELIEF, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is reversed, and the cause remanded for further proceedings.

McKEANY v. BLACK. (S. F. 500.)
(Supreme Court of California. Oct. 7, 1896.)

APPEAL—NOTICE.

Where, in an action, judgment is taken by default against one of the defendants on appeal, such defendant is not an adverse party, so as to require service of notice of appeal on him.

Department 1. Appeal from superior court, Alameda county; F. B. Ogden, Judge.

Action between McKeaney and Black. From the judgment, McKeaney appeals. Motion to dismiss denied.

George W. Langan and C. C. Hamilton, for appellant. Jesse W. Lillenthal, for respondent.

PER CURIAM. Upon the authority of *Randall v. Hunter*, 69 Cal. 80, 10 Pac. 130, the motion to dismiss the appeal is denied.

FORTAIN v. SMITH et al. (S. F. 327.)
(Supreme Court of California. Oct. 10, 1896.)
CONSTITUTIONAL LAW — SPECIAL PRIVILEGES —
PLEADING—TENANT IN COMMON—RIGHT
TO MAINTAIN ACTION.

1. Pol. Code, § 2853, providing that "no toll bridge or ferry must be established within one mile immediately above or below a regularly established ferry or toll bridge" unless certain facts exist making it necessary for public convenience, is not in contravention of Const. art. 1, § 21, prohibiting the granting of special privileges or immunities which shall not on the same terms be granted to all citizens, nor of article 4, § 25, subds. 19 and 25, prohibiting the passage of local or special laws granting any special or exclusive right, privilege, or immunity, or chartering or licensing bridges or ferries. The statute is general, and its provisions applicable alike to all citizens standing in the same relation thereto.

2. An allegation in a complaint that the plaintiff has acquired the interest of a co-tenant in a ferry franchise, and is the sole and exclusive owner thereof, is a sufficient allegation of ownership. The consent of the board of county commissioners, where necessary to the transfer of such franchise, is a mere probative fact, not necessary to be pleaded.

3. A tenant in common of a ferry, who is in sole possession, may maintain an action to protect the property from injury by enjoining the maintenance of another ferry within the limit prohibited by law.

Department 1. Appeal from superior court, Del Norte county; James E. Murphy, Judge.

Action by Charles Fortain against Julius Smith and others. Plaintiff appeals from an order dissolving a temporary injunction. Reversed.

A. J. Bledsoe, for appellant. Ford & Burnett, for respondents.

VAN FLEET, J. Action to restrain and enjoin defendants from maintaining a ferry. The complaint alleges that the board of supervisors of Del Norte county, in July, 1891, granted to plaintiff and one William T. Bailey a franchise to establish and maintain a public toll ferry at a certain point on Klamath river, in said county, on the line of travel between that

county and the county of Humboldt, said franchise to run for a period of 20 years from the granting thereof; that in accordance with the franchise so granted the ferry was duly established in the year 1891; that thereafter, and prior to the 1st of January, 1895, plaintiff became the sole owner of said ferry and franchise by purchase from Bailey of all the latter's rights and interest therein, and that ever since he has remained such owner, and has maintained, operated, and conducted said ferry, and has expended large sums of money in equipping the same with boats and other apparatus, etc.; that in August, 1895, the defendants wrongfully and without authority established a ferry for the carriage of passengers and freight on said river contiguous to and within one mile of plaintiff's said ferry, and have since, without right or authority, maintained such unauthorized ferry, and have continued to carry freight and passengers across said river, in violation of plaintiff's rights; that these acts of defendants have operated and do operate to draw from plaintiff's ferry a large portion of the custom of the traveling public, and have resulted in greatly diminishing plaintiff's business and the value of his said franchise, and have inflicted upon plaintiff injury which is beyond pecuniary estimation; that the defendants threaten to continue the operation and maintenance of their said ferry; and that such acts, if permitted, will wholly destroy the value of plaintiff's franchise and property, and inflict upon him irreparable injury, for which grievance he has no adequate remedy at law. The prayer was that defendants be restrained from maintaining their ferry at any point on said river within the distance of one mile from plaintiff's ferry. The complaint was verified, and upon it the court granted a temporary injunction. Defendants demurred to the complaint as not stating a cause of action, and upon the same ground moved the vacation of the injunction. The court sustained this motion, and dissolved the injunction, and plaintiff appeals from such order. The notice of appeal also includes an appeal from the order "sustaining defendants' demurrer to plaintiff's complaint"; but, as such order can only be reviewed upon appeal from a final judgment, the effort to have it reviewed in the manner here sought is ineffectual. The only question is whether the complaint states a cause of action, it being tacitly conceded that, if it does, the order vacating the injunction was erroneous.

Section 2853 of the Political Code provides: "No toll-bridge or ferry must be established within one mile immediately above or below a regularly established ferry or toll-bridge, unless the situation of a town or village, the crossing of a public highway or the intersection of some creek or ravine renders it necessary for public convenience." In view of the provisions of this section, we are unable to perceive wherein the complaint is lacking in the statement of any fact material to the relief sought. In fact, the formal sufficiency of the

complaint, with an exception to be hereinafter noted, is not questioned, but it is contended that the provisions of section 2853, above quoted, are unconstitutional and void, because it contemplates and authorizes the granting of special privileges within the prohibition of article 1, § 21, and article 4, § 25, subs. 19 and 25, of the constitution of this state. But the statute contravenes neither of these provisions. The first provides: "No special privileges or immunities shall ever be granted which may not be altered, revoked or repealed by the legislature, nor shall any citizen or class of citizens be granted privileges or immunities which upon the same terms shall not be granted to all citizens." The second provides: "The legislature shall not pass local or special laws in any of the following enumerated cases, that is to say: * * * (19) Granting to any corporation, association or individual any special or exclusive right, privilege or immunity. * * * (25) Chartering or licensing ferries, bridges or roads." The statute in question grants no privileges or immunities which "upon the same terms shall not be granted to all citizens"; nor is it in any sense a special law, but is general, and operates alike upon all standing in the same relation thereto. Nor are the privileges it authorizes in any way obnoxious to the spirit or intent of the constitution or laws, or open to the objection of authorizing monopolies. The granting of such franchises under proper restrictions, such as are found in the Political Code, and in the exclusive enjoyment of which the grantee is to be protected within reasonable limits, is not antagonistic to the provisions of the constitution cited, or any others that have been called to our attention, nor to any rule of public policy of which we are aware. Nor does the enjoyment by the grantee of such right, of the limited immunity from the encroachment of others, which is contemplated under the statute, in any respect lend to the privilege granted the semblance of monopoly. The theory upon which such rights are granted is to promote the public good and convenience, the advancement of commerce, and the more ready intercourse of the people; and a reasonable protection of those who hazard their private means in thus ministering to the public need is in the interest and direction of good government by encouraging enterprise.

It is contended that the complaint is defective in not alleging the consent of the board of supervisors to the alleged acquisition by plaintiff of the interest of Bailey in the franchise; that a franchise is a personal trust, which does not admit of substitution or assignment, without the consent of the granting power. But, if it was necessary to allege and prove this fact, we regard the allegations of the complaint as sufficient—certainly as against the general ground of objection assigned—to admit of such proof. The averment is: "That thereafter, and prior to the 1st day of January, 1895, plaintiff purchased and acquired all the right, title, and interest of the said Bailey in and to the

said franchise and ferry, and ever since has been, and now is, the sole and exclusive owner," etc. The ownership of the franchise is the ultimate fact. The steps by which such ownership was acquired—as, for instance, the consent of the board, if necessary—would constitute mere probative matter not necessary to be alleged. But, in our opinion, the plaintiff can maintain the action without showing sole ownership of the franchise in himself. He is at least a tenant in common in the property, and in the sole possession thereof, and in such capacity has a right to maintain an action to protect such property from injury or destruction. 2 Am. & Eng. Enc. Law, § 1136. The order dissolving the injunction is reversed.

We concur: GAROUTTE, J.; HARRISON, J.

SANTA CRUZ BUTCHERS' UNION v. I X L LIME CO. (S. F. 416.)

(Supreme Court of California. Oct. 10, 1896.)
EVIDENCE—PROOF OF AGENCY—DECLARATIONS OF
ALLEGED AGENT.

Declarations of one that he is agent of another are not admissible to prove the agency, nor to bind the alleged principal, until proof of the agency has first been made.

Department 1. Appeal from superior court, Santa Cruz county; J. H. Logan, Judge.

Action by the Santa Cruz Butchers' Union against the I X L Lime Company. Judgment for plaintiff, and defendant appeals. Reversed.

J. J. Burt, for appellant. Spaulsby & Burke, for respondent.

PER CURIAM. The action was to recover for merchandise alleged to have been sold to defendant, the theory of plaintiff being that the goods were sold and delivered through one B. Cerf, acting as defendant's agent. Without first requiring proof of the agency, the court, against defendant's objection, admitted the testimony of several witnesses as to declarations by Cerf of his authority to represent the defendant, and that they supposed he was defendant's agent, because he was at the time acting as superintendent of the lime works, which defendant had theretofore been conducting. This evidence was wholly hearsay, and clearly inadmissible; and, as it was in great part all the evidence upon which the finding of Cerf's agency was based, its admission was manifestly prejudicial. It was necessary that plaintiff first establish the fact of agency before the declarations of such agent were admissible to bind defendant. Grigsby v. Water Works Co., 40 Cal. 398; Smith v. Insurance Co., 107 Cal. 432, 437, 40 Pac. 540. Neither the statement of M. Cerf that Baruch Cerf was the superintendent, nor the letter from Blochman & Cerf, were shown to emanate from any one authorized to bind the defendant; and were not, therefore, conclusive of defendant's liability. Judgment and order reversed.

PEOPLE ex rel. GESFORD v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO et al. (S. F. 426.)

(Supreme Court of California. Oct. 8, 1896.)

MANDAMUS TO COMPEL ENTRY OF JUDGMENT—JUDICIAL ACTION.

In proceedings, in the nature of quo warranto, for ouster from office for acceptance of a pass from a railroad company, and for the imposition of the statutory fine, the imposition of which is left to the discretion of the trial court, defendant orally pleaded not guilty. *Held*, that the action of the trial court in sustaining such plea as sufficient, on the ground that the case was essentially criminal in its nature, was judicial, and therefore mandamus would not lie to compel the entry of a judgment of ouster as for a default. Harrison, Temple, and Henshaw, JJ., dissenting.

In bank. Petition by the people of the state of California, by the attorney general, on the relation of C. Gesford, against the superior court for the city and county of San Francisco, and Hon. A. A. Sanderson, one of the judges thereof. Denied.

Garrett W. McEnerney, for appellants.
R. B. Carpenter and John M. Wright, for respondents.

McFARLAND, J. This is an original petition filed in this court for a writ of mandamus to compel the respondents to render judgment in favor of petitioners, as plaintiffs, in a certain proceeding pending in the court of respondents, in which the petitioners here were plaintiffs, and one M. R. Higgins defendant, in accordance with the prayer of the complaint in said proceeding. The complaint in said case of *People v. Higgins*, in which said Gesford was relator, contained two counts. In the first count it was charged substantially that the said Higgins had intruded himself upon the office of insurance commissioner, and that, for certain reasons given in said complaint, he had no title to said office. In the second count it was charged substantially that said Higgins had accepted and was using a free pass, issued by a certain railroad company, over the roads operated by it in this state, and that he had therefore forfeited the said office of insurance commissioner. In the prayer of the complaint judgment was asked that said Gesford be declared to be entitled to said office; that said Higgins was not entitled to, but had forfeited, the same; and that he (Higgins) be fined in the sum of \$5,000. Higgins demurred to the complaint. His demurrer was sustained as to the first count, without leave to amend, and the demurrer was sustained as to the second count, with leave to amend; the demurrer to the second count apparently being sustained upon the ground that the averment that Higgins had received said pass was made upon information and belief, whereas it should have been made positively. The plaintiffs afterwards amended the second count by inserting a positive averment of the receipt of said pass.

Thereupon the defendant in said case (Higgins) orally pleaded that he was not guilty of the offense charged, which plea was entered upon the minutes of the court. Notwithstanding said plea, the plaintiffs in said case procured the clerk to enter a default of the defendant; and thereafter the plaintiffs in said action (petitioners here) applied to the respondents (the said court and the judge thereof) for a judgment in accordance with the prayer of their complaint, and the court refused to enter said judgment or any judgment. Thereupon they filed the present petition in this court, asking that said respondents be "commanded, upon said default and the papers and pleading in this cause, to enter a judgment in favor of these petitioners, as plaintiffs in said action, for the relief demanded in the complaint."

It is our opinion that the petition should be denied. It is argued very strenuously by counsel for respondents that, after the demurrer had been sustained to the first count of the complaint in *People v. Higgins*, the case was then simply a proceeding to have defendant's title to an office declared forfeited for certain alleged misconduct, and to have him punished by a fine; that this proceeding was then (whatever its form) essentially criminal in its nature; and that, therefore, the plea of not guilty was sufficient. No doubt, the proceeding was quasi criminal. It is true that the mere acceptance of a pass is not itself a crime; but one who holds an office and a pass at the same time may be subjected, by a proceeding like the one here under review, to a severe criminal punishment. It is, at least, doubtful if he could be compelled to give evidence against himself. See *Thurston v. Clark*, 107 Cal. 235, 40 Pac. 435, and cases there cited. But whether or not his said plea of not guilty was a proper and sufficient plea is a question not here before us. That question was passed upon judicially by the court; and, if it committed an error in deciding that question, such error cannot be reviewed on mandamus. The case is quite similar in principle to that of *People v. Pratt*, 28 Cal. 165. In the latter case the plaintiffs moved the trial court to enter a judgment dismissing the action at their costs, and the defendant opposed the motion upon the ground that he had a counterclaim. The court denied the motion, and plaintiffs applied to this court for a mandate commanding the lower court to enter such judgment. They contended that the alleged counterclaim could not be legally made in the action, and that it had been withdrawn by a certain stipulation. This court, in denying the writ, said: "Both of these propositions were denied by the defendant, and, in deciding them, the court acted judicially, not ministerially; and, having denied them according to the best of his ability, a mandamus does not lie to compel him to reverse his decision and render a different one. [Citing authorities.] This writ

lies to compel a subordinate judicial tribunal to proceed and exercise its functions when it has neglected or refused to do so; but, when the act to be done is judicial or discretionary, the writ cannot direct what decision or judgment shall be rendered, nor can it be granted after the inferior tribunal has acted for the purpose of reviewing its decision. * * * To review errors is not the office of the writ of mandamus." This language merely states a principle well established, and frequently declared by this court. Many of the authorities on the subject are cited in the opinion of the court in *Strong v. Grant*, 99 Cal. 100, 33 Pac. 733, 734, which was a petition for a writ of mandamus commanding the superior court to dismiss a certain criminal action pending therein. The writ was denied, and this court said: "The rule is so well established that it may be said to be universal that the writ of mandamus cannot be used to correct the errors of a court in passing upon questions regularly submitted to it in the course of a judicial proceeding, or to control the exercise of its discretion." The rule there stated applies to the case at bar as clearly as to any of the numerous cases to which it has been applied by this court. By their motion for judgment the petitioners invoked a judicial decision, and such decision cannot be reviewed on mandamus. This is clearly not a case where, upon an undisputed default, the law specially enjoins upon the clerk or the court the ministerial duty of entering a certain specifically defined judgment. All the questions here involved are disputed questions, calling for the exercise of a judicial discretion. What kind of a judgment should or could this court, by writ of mandate, command the respondents to enter? Moreover, under any view, the petitioners had, by appeal, "a plain, speedy, and adequate remedy, in the ordinary course of law," and therefore mandamus does not lie. As was said in *People v. Pratt*, supra: "If the court has committed an error in denying the plaintiff's motion, the same can be reviewed on appeal, which is a speedy and adequate remedy in the ordinary course of law, within the meaning of the four hundred and sixty-eighth section of the practice act." If, when the case of *People v. Higgins* shall have come on for trial, the plaintiffs therein shall elect to submit it on a motion for judgment on the pleadings, and the court shall decide against them, and render judgment for defendant, an appeal will be the natural and regular remedy; and if the defendant therein shall continue to stand upon his present plea, and refuse to ask leave to amend, he must incur the hazard of what this court may finally decide in the premises if the case shall come here regularly on appeal. The issuance of the writ of mandamus would forever preclude any defense upon the merits.

Under the above views, it is unnecessary

to inquire what similarity there is between the proceeding of *People v. Higgins* and the old writ of quo warranto. The prayer of the petition is denied, and the writ dismissed.

We concur: VAN FLEET, J.; GAROUTTE, J.

BEATTY, C. J. I concur in the judgment denying the writ. The action of the clerk in entering a default after the court had accepted the oral plea of not guilty was entirely nugatory. The question whether the defendant was in default or not was a question for the court, and not for the clerk, to decide. The court decided—erroneously, it may be conceded—that the proceeding was criminal, and that an oral plea entered on the minutes was sufficient. The motion for judgment was therefore a motion for judgment on the pleadings, and, it may also be conceded, was erroneously decided; but I do not understand that mandate is the proper remedy in such a case. The proper course for the relator, if he was confident of his position, was to submit the case for decision and final judgment on the pleadings, and, if the judgment went against him, to appeal.

HARRISON, J. (dissenting). The attorney general commenced an action in the superior court in the name of the people of the state, on the relation of Henry C. Gesford, against M. R. Higgins, alleging that he was unlawfully holding and exercising the office of insurance commissioner. In addition to the statement of the cause of action, the complaint also set forth the facts showing the claim of Gesford to the office, and prayed judgment that the defendant be excluded from the office, and Gesford be put in possession thereof. The cause of action was set forth in the complaint in two counts, and the defendant demurred to each of these counts, and also demurred to the complaint as a whole, upon the ground that several causes of action were improperly united. The court sustained the demurrer to the first count without leave to amend, and also sustained the demurrer to the second count, but gave the plaintiff leave to amend the same. Under the leave thus given, the plaintiff filed an amendment to this count, and thereupon the attorney for the defendant appeared in court and tendered the following oral plea: "The defendant pleads that he is not guilty of the offense charged," upon which the following entry was made in the minutes of the court: "In this action the defendant's attorney, Mr. Carpenter, appeared for his client, M. R. Higgins, and pleaded that said Higgins is not guilty of the offense charged." Thereafter, at the request of the plaintiff, the clerk entered the default of the defendant for his failure to appear and answer the complaint as amended; and the plaintiff applied to the court for the relief demanded in the complaint, but the judge thereof denied the said

application, and refused to give any relief whatever, or to recognize the said default as being properly entered, upon the ground that the action herein was a criminal cause, and that a plea of not guilty was proper to the complaint as amended herein. The present application is made by the plaintiff for a writ of mandate commanding the respondent to entertain the application of these petitioners for the relief demanded in the complaint, and to enter a judgment in their favor as therein demanded. The respondent, in his answer, avers that he has already entertained the application of the plaintiff and has denied the same.

The order sustaining the demurrer to the first count of the complaint, without leave to amend, was equivalent to a judgment that the plaintiff was not entitled to any relief based upon that count; and the subsequent amendment to the second count had the effect to make that count as thus amended the only complaint in the action, and the sole basis of the relief sought by the plaintiff. The action was brought under section 803, Code Civ. Proc., which provides: "An action may be brought by the attorney-general, in the name of the people of this state, upon his own information, or upon the complaint of a private party, against any person who usurps, intrudes into, or unlawfully holds or exercises any public office, civil or military, or any franchise within this state." Such an action is a civil action, whether it be regarded as authorized by the above section of the Code, or as a proceeding instituted under the provision in the constitution giving to the superior court jurisdiction to issue writs of quo warranto. In *People v. Perry*, 79 Cal. 105, 21 Pac. 424, the court said of a similar action brought under the above section: "This is a proceeding substantially equivalent to that by quo warranto. It is the same as quo warranto, with something added." See, also, *People v. Bingham*, 82 Cal. 238, 22 Pac. 1039; *People v. Pease*, 30 Barb. 583; *People v. Thacher*, 55 N. Y. 525. Mr. High, in his treatise on Extraordinary Legal Remedies, says (section 710): "The tendency of the courts in modern times being to regard an information in the nature of a quo warranto in the light of a civil remedy invoked for the determination of civil rights, although still retaining its criminal form and some of the incidents of criminal proceedings, the better doctrine now is that pleadings should conform as far as possible to the general principles and rules of pleading which govern in ordinary civil actions." As a civil action authorized by the Code of Civil Procedure, it is subject to the rules of pleading given in that Code, section 421 of which declares: "The forms of pleading in civil actions, and the rules by which the sufficiency of the pleadings is to be determined, are those prescribed in this Code." And, by section 422, the only pleadings allowed on the part of the defendant are the demurrer to the complaint and the answer. The provision in section 446, that

every pleading must be subscribed by the plaintiff or his attorney, and of section 465, that all pleadings subsequent to the complaint must be filed with the clerk, and copies thereof served upon the adverse party or his attorney, render it necessary that all pleadings shall be in writing or printed, and preclude a party from making any oral pleading whatever. There is no ground for considering that the present action is instituted under the provisions of section 772 of the Penal Code, or that it is to be regarded as criminal in its nature. The superior court can act under that section only when it has received an accusation in writing, alleging that the officer has charged and collected illegal fees, or has refused or neglected to perform the official duties pertaining to his office. The only grounds alleged in the complaint herein are the failure to file a sufficient bond, and the subsequent acceptance and use of a free pass granted to him by the Southern Pacific Company, a railroad corporation operated within this state; and of neither of these acts can there be predicated any turpitude or neglect of official duty. The people have prescribed certain conditions under which its officers may exercise the functions of the offices to which they have been elected or appointed, and have declared that in certain cases they shall no longer hold such offices, one of which is the acceptance of a free pass from a railroad or other transportation company. Const. art. 12, § 19. The acceptance of such a pass has no more of the elements of a criminal nature than would the acceptance by an officer of a lucrative office under the United States, or the absence from the state by a judicial officer for more than 60 days, or the voluntary removal from the county for which the officer was elected, either of which acts would be a ground for declaring that he could no longer exercise the office. See *People v. Leonard*, 73 Cal. 230, 14 Pac. 853.

Under a writ of quo warranto, or an information in the nature of a quo warranto, the defendant was required either to disclaim or justify. The state was not required to make any showing, but the onus was upon the defendant to establish his right to a judgment in his favor. He was required either to deny that he was in the exercise of the office, or to allege facts sufficient to show that he had the right to exercise the office. *People v. Crawford*, 28 Mich. 88; *High, Extr. Rem.* § 716. A plea of not guilty was insufficient, and not to be regarded as a defense. *Attorney General v. Foote*, 11 Wis. 14; *Com. v. McWilliams*, 11 Pa. St. 61. Even in Illinois, where the proceedings are required to be in many respects in analogy to criminal proceedings, it is held that "the defendant must either disclaim or justify. If he disclaims, the people are at once entitled to judgment. If he justifies, he must set out his title specially. It is not enough to allege generally that he was duly elected or appointed to the office, but he must state

particularly how he was elected or appointed. He must show on the face of the plea that he has a valid title to the office. The people are not bound to show anything. The information calls upon the defendant to show by what warrant he exercises the functions of the office, and he must exhibit good authority for so doing, or the people will be entitled to judgment of ouster." *Clark v. People*, 15 Ill. 213. And although the complaint under the procedure authorized in this state need not have alleged the facts constituting the usurpation or illegal exercise of the office by the defendant, but would have been sufficient by merely alleging that he is unlawfully exercising the office (*Palmer v. Woodbury*, 14 Cal. 43), leaving his right to such exercise to be pleaded in his defense, yet these allegations in the complaint herein being material and relevant to the issue, and not having been denied, the facts thus alleged must be held to be admitted by him. *People v. Knox*, 38 Hun, 236. If the defendant is in default in answering or pleading to the information, he is regarded as confessing all its allegations, and the court must thereupon proceed to judgment of ouster forthwith. *High, Extr. Rem.* § 739. As, therefore, the defendant herein was in default by reason of his failure to make any answer to the allegations in the complaint, the plaintiff was entitled upon such default to a judgment, and the court should have entertained its application therefor, and rendered judgment in its behalf.

It is unnecessary to determine whether the relator has any right to the office held by the defendant. If the defendant is rightfully in the exercise of the office, the relator can have no right thereto; and, if the defendant has no right to the office, it is immaterial to him whether the office is vacant, or to be held by the relator. *People v. Abbott*, 16 Cal. 358. The attorney general is authorized to bring the action upon the complaint of a private party, and it is not necessary that it appear from his complaint, or be shown to the court, that such relator is entitled to the office (*People v. Bingham*, 82 Cal. 238, 22 Pac. 1039); and, although the court may determine the right of the relator to the office (*Code Civ. Proc.* § 616), it is not required to do so (*People v. Phillips*, 1 Denio, 388; *High, Extr. Rem.* § 757). Nor will a defective averment of the relator's right defeat the right of a state to a judgment of ouster against the defendant. *State v. Palmer*, 24 Wis. 63.

The refusal of the court to grant the application of the plaintiff "upon the ground that the action herein was a criminal cause, and that a plea of not guilty was proper to the complaint as amended herein," was not a judgment in the action or the exercise of any judicial discretion, but was a refusal to recognize the existence of the default, and to proceed in the case in the only mode then remaining for its action. The default of the

defendant in failing to answer the complaint was an admission by him of the truth of the facts alleged in the complaint, and should have been treated with the same effect as if these facts had been found by the court upon competent evidence. The plaintiff thereby acquired the right to a judgment that the defendant was unlawfully exercising the office, and that he be excluded therefrom; and the refusal of the court to recognize this right, and to give this judgment to the plaintiff, was a refusal to perform an act which, from the nature of its functions, it was required to perform. The court had ceased to have any opportunity for the exercise of judicial discretion in the case, but the entry of this judgment had become an absolute duty on its part, which, in case of its refusal, it may be compelled to perform. Where a verdict or finding of facts authorizes a particular judgment, as an inevitable conclusion of law therefrom, and permits no other judgment, there is no place for the exercise of judicial discretion, and the court may be compelled by mandamus to cause such judgment to be entered. *Russell v. Elliott*, 2 Cal. 245; *People v. Sexton*, 24 Cal. 78; *Wood v. Strother*, 76 Cal. 545, 18 Pac. 766; *Johnston v. Superior Court*, 105 Cal. 606, 89 Pac. 36; *Keller v. Hewitt*, 109 Cal. 146, 41 Pac. 871; *Hensley v. Superior Court*, 111 Cal. 541, 44 Pac. 232; *Lloyd v. Brinck*, 85 Tex. 1; *Cortleyon v. Teneyck*, 22 N. J. Law, 45; *State v. Whittet*, 61 Wis. 351, 21 N. W. 245; *Insurance Co. v. Wilson*, 8 Pet. 291; *High, Extr. Rem.* § 235; 2 *Spell. Extr. Relief*, § 1407; *Merrill, Mand.* § 189. Whether, in addition to such judgment, a fine shall be imposed upon the defendant, is by the express terms of section 809, *Code Civ. Proc.*, left to the discretion of the superior court; but the right to exercise its discretion in this particular does not limit or qualify its duty to enter the judgment of ouster; and, although it cannot be controlled in the exercise of this discretion, it may be compelled to proceed to its exercise. The discretion given to the court is not to determine whether it will act, but is limited to the mode in which it will act, and in such cases mandamus will lie to compel a court to act and exercise the discretion given to it. *Jacobs v. Board*, 100 Cal. 121, 34 Pac. 630; 2 *Spell. Extr. Relief*, § 1894; *High, Extr. Rem.* § 24. In my opinion, the application for the writ should be granted.

We concur: **TEMPLE, J.; HENSHAW, J.**

JURGENS v. NEW YORK LIFE INS. CO.
(S. F. 283.)

(Supreme Court of California. Oct. 3, 1896.)
In bank. Petition for rehearing. Denied.
For opinion in division, see 45 Pac. 1054.

PER CURIAM. Rehearing denied.

BEATTY, C. J. I dissent from some of the conclusions of the court in this case, and,

therefore, from the order denying a rehearing before the court in bank. It will be observed that the decision does not go upon the ground that the plaintiff was not in fact defrauded. On the contrary, it assumes that he was defrauded, but holds that he could not rescind by his own act without tendering a release by his wife of her interest in the policy. I think this is probably a sound construction of the statute. Civ. Code, § 1680. But if plaintiff could not effect a rescission by his own act without putting the defendant in statu quo, it does not follow that he could not compel a rescission by an action instituted for that purpose. The present action, it is true, is not in form an action to rescind, and that is not the relief prayed. The complaint proceeds upon the theory that a rescission was effected by the act of the plaintiff, and merely prays judgment for the amount of premium paid. But, assuming, as the opinion does, that the plaintiff was really defrauded, his complaint states facts sufficient to warrant a judgment of rescission,—facts, in other words, sufficient to constitute a cause of action,—though not sufficient to warrant the specific relief sought by the prayer. In this respect, however, the complaint was amendable, and the omission to make Mrs. Jurgens a party was waived by the failure to demur.

As to the rights of Mrs. Jurgens, it made no difference whether she could or could not be compelled to release her interest in the policy. If she could be compelled, in an action to rescind, to release her interest, she was a necessary party to such action only for the protection of the defendant, and the defendant could, by failing to demur to the complaint for nonjoinder, waive the advantage of a decree binding upon her. If she could not be compelled to release her interest, that would not have been a reason for denying a rescission. It is only in cases of mere mistake that rescission cannot be adjudged without putting the party against whom it is adjudged in statu quo. Civ. Code, § 3407. A party who has secured an advantage over another by fraud cannot avoid rescission upon the ground that he has involved himself in obligations to third parties. *Masson v. Bovet*, 1 Denio, 69; *Hammond v. Pennoek*, 61 N. Y. 145.

STATE ex rel. DUSTIN v. RUSK et al.

(Supreme Court of Washington. Oct. 10, 1896.)

STATUTES—REPEAL BY IMPLICATION—TITLE OF ACT
—CONSTITUTIONAL LAW—ACT RELATING
TO SUPERIOR COURTS.

1. Act March 19, 1895 (Laws 1895, p. 176), making general provision for the election of all superior court judges in the districts thereby provided for, repeals, by implication, Act March 2, 1891 (Laws 1891, p. 117), providing for judges and additional judges in certain counties of the state.

2. The title of Act March 19, 1895 ("An act in relation to superior courts and the election of superior court judges"), sufficiently indicates the

subject-matter of the act to authorize any provision therein relating to such courts or the election of such judges.

3. Const. art. 4, § 5, providing that "there shall be in each of the organized counties of this state a superior court, for which at least one judge shall be elected by the qualified electors of the county at the general state election: provided, that until otherwise directed by the legislature, one judge only shall be elected for the counties of * * *" (grouping certain counties together into districts), does not prohibit the legislature from changing the districts therein made, except to set apart a county as a district, but it may also change the grouping of counties which are united with others to form districts, as is done by Act March 19, 1895; and such act is, therefore, not in conflict with the constitutional provision.

Appeal from superior court, Klickitat county; Sol. Smith, Judge.

Proceeding for mandamus, on relation of Hiram Dustin, against Claud Rusk and William Olsen, as chairman and secretary, respectively, of the People's Party convention of Klickitat county, to compel them to certify the nomination of the relator by such convention as candidate for judge of the superior court. By act March 2, 1891, creating additional judges, it was provided that there should be one superior judge in Klickitat county. By Act March 19, 1895, such county was joined with others to form a judicial district. From an order granting a peremptory writ the respondents appeal. Reversed.

George N. Maddock and N. B. Brooks, for appellants. W. B. Presby and H. Dustin, for the State.

HOYT, C. J. To sustain the judgment entered in the superior court, it is necessary to hold that the act of March 19, 1895, entitled "An act in relation to superior courts and the election of superior court judges," is unconstitutional, or that, if constitutional, the act of March 2, 1891, entitled "An act providing for judges and additional judges for the superior court in various counties in the state of Washington and declaring an emergency," was not repealed thereby. As to the latter proposition, it is sufficient to say that the plain intent of the legislature was to provide not for the election of additional judges in certain counties or districts, but to provide for the election of all of the superior court judges of the state by districts provided for in the act. This being the evident object of the act, it must be held to have repealed the act of 1891, notwithstanding the absence of any repealing clause.

The constitutionality of the act is attacked upon two grounds: (1) That the title does not sufficiently indicate the subject-matter contained in the act; and (2) that the act is in contravention of section 5, art. 4, of the constitution of the state.

As to the first question it is sufficient to say that the title sufficiently refers to superior courts and the election of superior court judges to make it competent for the legislature to enact anything relating to such courts or to

the election of such judges. See *Marston v. Humes*, 3 Wash. St. 267, 28 Pac. 520.

The other question is one of more difficulty. A technical construction of the language used in the constitution might warrant the contention that thereunder the legislature had no jurisdiction as to superior court districts or the judges thereof, except to declare when the grouping contained in the proviso to said section should terminate and the general provision therein contained be given force. But, under a more liberal construction of the language, it may well be held that it was the intention to vest in the legislature full discretion as to when each county should be authorized to elect its own judge, and how counties not entitled to elect their own judges should be grouped for judicial purposes; and the real question presented for decision upon this appeal is as to which of these two constructions shall obtain. It may be conceded that the first is best warranted by the language used, unaffected by the circumstances surrounding the adoption of the constitution and by the legislative construction which has obtained from the adoption of the constitution to the present time. But, when examined in the light of such surroundings and such legislative action, we feel warranted in adopting the more liberal construction—First, for the reason that no act of the legislature should be declared unconstitutional unless it is so clearly so as to be beyond reasonable question; second, by reason of the serious consequences which would necessarily result from the technical construction. If such technical construction were to be adopted, the act of 1891 would, in many of its features, be unconstitutional; yet said act has, in all of its features, been acted upon and superior court judges elected jointly by counties grouped for that purpose, some of which would have had no right to participate in such elections except by force of said act. It must follow that, under the technical construction of the constitutional provision, it would be held that the judges so elected were, at most, but de facto officers, and it might require much litigation to determine whether or not they were officers of any kind. The legislature having adopted a liberal construction of the constitutional provision, and the legislation enacted in pursuance of such construction having been acquiesced in and acted upon, must have great weight with the court, and strongly incline it to that construction if the language used will at all justify it. Besides, the technical construction would prevent the legislature from taking steps which the highest considerations of public policy and the economical administration of governmental affairs might require. Thereunder the legislature would be powerless to reduce the number of judges in the state by enlarging any group of counties entitled jointly to elect a judge, however much the business therein might decrease, and however clear it might be that an election by the larger group would subserve the public interests. In our opinion, no great violence is done to the

language of the section of the constitution under consideration when taken as a whole by holding that thereby it was intended to vest in the legislature the discretion to determine as to when each of the counties should elect a judge for itself, and how the counties not entitled to so elect should be grouped for judicial purposes.

It follows from what we have said that the county of Klickitat is not entitled to elect a judge for itself at the coming election, but must act jointly with the counties of Skamania, Clarke, and Cowlitz in the election of a judge for the district composed of those counties and itself. The judgment will be reversed, and the cause remanded, with instructions to the superior court to dismiss the proceeding.

DUNBAR and SCOTT, JJ., concur.

TOWN OF TUMWATER v. PIX.

(Supreme Court of Washington. Oct. 1, 1896.)

MUNICIPAL CORPORATIONS—NOTICE OF STREET ASSESSMENT—SUFFICIENCY OF—PLEADING.

1. Under Laws 1893, c. 95, § 4, requiring a municipal corporation to publish notice of assessments for street improvements, and of the date fixed for the meeting of the council to consider objections thereto, in the official newspaper of such city or town, in the case of a town of the fourth class, not authorized by law to have an official newspaper, personal service of such notice will be deemed equivalent.

2. An allegation in a complaint that notice was given the defendant personally, although not stating the manner of service, is good on demurrer, in the absence of a motion to make the allegation more definite and certain.

Appeal from superior court, Thurston county; T. M. Reed, Jr., Judge.

Action by the town of Tumwater against William Pix. Judgment for defendant, and plaintiff appeals. Reversed.

Milo A. Root, for appellant. Chas. H. Ayer, for respondent.

DUNBAR, J. The town of Tumwater, a municipal corporation of the fourth class, brought this action under the provisions of chapter 95 of the Laws of 1893 to foreclose a lien upon certain real estate of defendant for grading and improving the street in front of such property. The defendant interposed a demurrer to the amended complaint, which demurrer was sustained by the court. The demurrer attacked the complaint for the reason that the same did not state facts sufficient to constitute a cause of action. The appellant addresses itself in its brief to only one objection, viz. the lack of proper notice. The respondent, however, raises three questions, viz. that the complaint fails to state that an assessment has been made, and in lieu of this primary requisite says that the city attempted to levy an assessment; that the notice given was not sufficient; and that, if it was, the service of the notice was not properly pleaded. We think there is nothing

in the first contention worthy of discussion. The law under which the action was brought was to correct attempted assessments. If it had been an assessment under the law, there would have been no occasion for the enactment.

The second objection—that the complaint shows a want of notice—we think is more technical than meritorious. Section 4 of the act provides that, upon receiving the said assessment roll, the clerk of such city or town shall give notice by three successive publications in the official newspaper of such city or town that such assessment roll is on file in his office; the date of filing of same; and said notice shall state a time at which the council will hear and consider objections to said assessment roll by the parties aggrieved by such assessment; and provides for ten days' notice, etc. The complaint in this case, in regard to notice, is as follows: "That December 17, 1894, at one o'clock p. m., was fixed by the Tumwater council as the time for considering and hearing by it any and all objections to assessments and assessment rolls referred to in the foregoing paragraph; that notice of said hearing and of said assessment was given on December 5, 1894, by one publication in the Morning Olympian, a daily and weekly newspaper of general circulation in said town of Tumwater, in Thurston county, and which said newspaper was then, and had been long prior thereto, the newspaper designated by its council as the paper in which all publications for such town should be made, and in which they were made, and which was the official newspaper of said town so far as it was possible for such town to have an official newspaper; that notice of said assessment and of the hearing and considering of objections to said assessment roll was also given to this defendant personally at his home in the town of Tumwater, Washington, on or about the 6th day of December, 1894, and over ten days prior to the 17th day of December, 1894, the date fixed for the hearing and consideration by the council of all objections as aforesaid." The complaint shows that the law in relation to the publication in the official newspaper could not be literally complied with, for it shows that the plaintiff was a municipality of the fourth class, and could have no official newspaper as provided by law. It therefore became impossible to comply with the strict requirements of section 4, so far as the publication of the notice was concerned. This compliance, therefore, being impossible, a notice which was equivalent to statutory notice should be held sufficient. *Darlington v. Com.*, 41 Pa. St. 68. The publication by the official newspaper is only, at best, constructive notice. It may reach the knowledge of the defendant or it may not, but under the policy of the law he is bound to take notice of it, whether he actually sees it or not, if the statutory requirement is strictly followed. But from the standpoint of reason no notice can

be better than actual notice. The only object in requiring publication is to give notice so that the property owner may have an opportunity to appear and protest. This requirement is fully met by actual notice, and notice by publication or constructive notice could not aid him in any way if, as a matter of fact, he had actual notice; for, as is well said by the appellant in its brief: "A literal compliance will not be insisted on where it would kill the very spirit of the statute. The object of the statute in requiring publication of notice was to give property owners a chance to appear and protest. Actual notice accomplishes this object fully. A thousand publications could add nothing to it." But it is urged by the respondent that, even though this be true, the actual notice was not sufficiently pleaded; the complaint should have stated the manner in which the notice was given. We think the allegation of the complaint is as broad as the statute. It points out no particular way and no particular form of notice for publication, and the complaint does not allege any particular manner of giving notice personally. It does, however, allege that notice of said assessment and hearing and consideration of objections to said assessment roll was given to defendant personally, and 10 days prior to the date of hearing the protest. This, it seems to us, is good as against the demurrer. The demurrer must assume, under the allegations of this complaint, that notice was given personally. If the manner of giving the notice was not sufficiently definite, it would have been the office of a motion to make more definite and certain and have corrected the complaint. But we think this complaint was sufficient to put the defendant upon his denial so far as the giving of personal notice was concerned. The judgment will therefore be reversed, and the cause remanded, with instructions to overrule the demurrer; the appellant to obtain its costs in this court.

HOYT, C. J., and SCOTT, ANDERS, and GORDON, JJ., concur.

FAWCETT v. SUPERIOR COURT OF PIERCE COUNTY et al.

(Supreme Court of Washington. Oct. 2, 1896.)

QUO WARRANTO—JUDGMENT OF OUSTER—EFFECT
OF APPEAL—BOND—CONTEMPT.

1. A judgment of ouster against the incumbent of a public office in quo warranto proceedings is self-executing, and by its own force divests the person ousted of all official authority, and such judgment is not suspended by the filing of an appeal bond, the effect of which, under the statute (Hill's Code, § 1408), is to "stay proceedings on the judgment or order appealed from." Hoyt, C. J., dissenting.

2. A proceeding for contempt against a respondent for disregarding a judgment of ouster from a public office is not a "proceeding on the judgment," within the meaning of Hill's Code, § 1408, providing for appeal bonds and their

effect, and is not stayed or affected by the giving of a bond on appeal from the judgment.

Original proceeding. Application by A. V. Fawcett for a writ of prohibition to the superior court of Pierce county and W. H. Pritchard, judge. Writ denied.

Hugh Farley, for relator. Murray & Christian, for respondent.

ANDERS, J. At a municipal election held in the city of Tacoma on the 7th day of April, 1896, the relator herein and one Edward S. Orr were opposing candidates for the office of mayor. Having received and canvassed the returns of the election, the city council determined and declared that Mr. Fawcett had received the highest number of votes cast for the office of mayor, and that he was entitled to the office, and thereupon caused a certificate of election to be issued and delivered to him. He thereupon entered upon the duties of the office, and took possession of the books, papers, and property belonging thereto. Soon thereafter Mr. Orr, claiming to have been elected notwithstanding the determination of the council to the contrary, filed an information in the nature of a quo warranto in the superior court of Pierce county to test the title to said office. Upon the trial of the issues presented by the pleadings in that proceeding it was adjudged that the relator, Orr, was entitled to the office, and a judgment of ouster was entered, and the defendant Fawcett was ordered to deliver over all books, papers, and property belonging to the same. Defendant Fawcett thereupon gave notice of an appeal to this court, and in due time filed his appeal bond, after which he requested the judge of said court to fix the amount of a bond to stay proceedings on the judgment, which request the judge complied with, but distinctly ruled that he would not determine the effect of such bond, and that he would not make any ruling or decision as to the status of the parties or the litigation, in case such bond should be given. Thereafter Mr. Fawcett filed a bond in the sum designated by the court, and conditioned in accordance with the provisions of the statute. Subsequently Mr. Orr demanded possession of the office and of the property belonging thereto. Said demand was refused, and said Fawcett retained the possession of said office and said property, and continued to use and exercise the rights and privileges and to perform the duties appertaining to said office. The making of said demand, and the refusal thereof, was brought to the attention and knowledge of the judge of the superior court by complaint and affidavits, and such proceedings were had thereon that said Fawcett was ordered to show cause why he should not be arrested to answer for contempt for disobedience of the lawful order and judgment of said court. At this stage of the proceedings, said Fawcett caused to be issued out of this court an alternative writ of prohibition directed to said superior court and to W. H. Pritchard, judge thereof, requiring and commanding

it and him to show cause why they should not be prohibited and restrained from further proceeding to punish said Fawcett for said alleged contempt of court.

The position of the relator herein seems to be that the bond which was filed in the quo warranto proceeding not only stays the proceedings, but suspends the judgment of ouster, so that he may, pending the appeal, continue to exercise the functions of the office from which the judgment, by its terms, expressly excluded him. On the other hand, the respondent contends that a bond to stay proceedings, conditioned as required by law, will not stay or suspend a judgment rendered in a proceeding upon an information in the nature of a quo warranto to determine the title to a public office. Which one of these propositions is correct is the first question for our determination. Our statute provides that: "An appeal shall not stay proceedings on the judgment or order appealed from or on any part thereof unless the original or a subsequent appeal bond be further conditioned that the appellant will satisfy and perform the judgment or order appealed from in case it shall be affirmed, and any judgment or order which the supreme court may render or make, or order to be rendered or made by the superior court, and (where such condition is applicable) shall pay all rents of or damages to property accruing during the pendency of the appeal, out of the possession of which any respondent shall be kept by reason of the appeal. * * * Hill's Code, § 1408. This provision is quite general and comprehensive in its application, but it will be observed that it only prescribes what shall be the conditions of bonds which must be filed in order to stay proceedings on judgments and orders appealed from, and does not, either directly or by necessary implication, purport to suspend or destroy the force and effect of such judgments or orders. In fact the only fair and reasonable implication from the language used is that it was the understanding and intention of the legislature that such judgments and orders should remain in force during the pendency of the appeal. The effect, then, of the appeal in the quo warranto case, after the statutory stay bond was filed, was to leave the proceedings in the same situation they were in at the time the appeal bond was filed and the appeal became effectual. *Graves v. Maguire*, 6 Patz, 879; *Clark v. Clark*, 7 Patz, 607; *Barr v. Burr*, 10 Patz, 108; *Hank v. Rogers*, 13 Minn. 407 (Gil. 376). If, therefore, the judgment of ouster deprived Mr. Fawcett of the office of mayor, and if such judgment is, as the respondent claims, self-executing, he was not restored to his former official position by the filing of a bond to stay proceedings.

The question, then, is, what is the effect and nature of a judgment of ouster from a public office? It seems to be the settled rule that such a judgment divests the person ousted of all official authority whatever, and fully and completely excludes him from the office as long

as the judgment remains in force. High, Extr. Rem. (2d Ed.) § 756; Mecham, Pub. Off. § 497. And a judgment in favor of a relator in a proceeding by information to try the title to a public office is, from its very nature, self-executing. By its own force, and without the aid of process or further action of the court, it accomplishes the object sought to be attained. So far, then, as such a judgment is concerned, there is nothing upon which a stay bond can operate, except an execution for costs, where, as in this case, costs are awarded to the relator. As soon as the judgment was rendered in favor of Mr. Orr, he became the mayor of the city of Tacoma, and was entitled, by virtue of section 685 of the Code of Procedure, to proceed to exercise the functions of the office, after qualifying as required by law, unless the judgment was absolutely annulled by the filing of the stay bond; and we are clearly of the opinion, as already intimated, that it was not. The result of permitting such a judgment to be suspended by an appeal and stay bond would, for obvious reasons, in many instances, in effect, completely destroy the relator's remedy. If such a result had been intended or contemplated by the legislature, they would, we think, have so stated, or at least would have required the filing of a bond by the appellant providing for the payment to the respondent of all damages sustained by reason of being deprived of the office during the pendency of the appeal, as they have done in cases where a respondent is kept out of the possession of property. The following authorities are in point on the questions here involved: *People v. Stevenson* (Mich.) 57 N. W. 115; *State v. Woodson* (Mo. Sup.) 31 S. W. 105; *Fylpaa v. Brown Co.* (S. D.) 62 N. W. 962; *Allen v. Robinson*, 17 Minn. 113 (Gil. 90); *Jayne v. Drorbaugh* (Iowa) 17 N. W. 436; *State v. Meeker* (Neb.) 27 N. W. 427; *Walls v. Palmer*, 64 Ind. 493; *Elliot*, App. Proc. §§ 392, 393. In the case last cited the supreme court of Indiana ruled that a judgment suspending an attorney from practice executed itself, except as to costs; and that the granting of a supersedeas only suspended the right to enforce the collection of costs, and did not allow the attorney to practice pending the appeal. That is an interesting and instructive case, and the principle upon which the decision rests is equally applicable to the case at bar. In *Jayne v. Drorbaugh*, supra, which was an action upon a supersedeas bond given in a proceeding to test the title to an office, the court held that the plaintiff, who was the successful party, had, under the statute of Iowa, which is almost identical with ours, the right to the possession of the office, and that the judgment was not suspended by the appeal and stay bond. The conditions of the bond in that case were substantially in the language of the bond now under consideration, and in the course of the opinion the court said: "When it has been determined by the district or circuit court, in a proper proceeding, that a person is entitled to the possession of a civil office to which he

claims to have been elected by the people, an appeal to this court should not have the effect to deprive such person of such office pending the appeal, unless the statute in terms so provides. It is provided by statute that 'an appeal shall not stay proceedings on the judgment,' unless a bond is filed conditioned as provided by law. Code, § 3186. The bond sued on is thus conditioned. * * * We think, if the intent was that the bond and appeal should have the effect to prevent the plaintiff from taking possession of the office, the statute, in fixing the terms and conditions of the appeal bond, would, in clear and distinct terms, contain provisions to that effect. It is obvious, however, it does not do so." This language, in our judgment, is peculiarly applicable to this case. And in *People v. Stevenson*, supra, the same rule was announced, under a statute as to stay bonds in terms fully as general as our own. Nor are the views we have expressed opposed to the decisions of this court in *State v. Sachs*, 3 Wash. St. 96, 27 Pac. 1075, and in *State v. Superior Court of Pierce Co.*, 12 Wash. 677, 42 Pac. 123. In the first of these cases this court held that the party appealing had a right to file such a bond as the statute provided for, and that it was the duty of the judge of the trial court to fix the amount thereof, as required by law. But we expressly refrained from determining the effect of such bond upon the judgment appealed from. The judgment from which the appeal was taken in that case was final, and the appellant was adjudged to pay the costs, and he therefore had an undoubted right to arrest proceedings for costs, at least, and hence to file the only bond provided by law for arresting or staying proceedings; and all that was actually decided in the case in 12 Wash., above mentioned, relating to the effect of bonds to stay proceedings, was that the provision of the statute as to such bonds applied to and stayed proceedings on the order then under consideration. The proceeding for contempt was not instituted for the purpose of enforcing the judgment of ouster, for, as we have seen, that judgment was already executed, but to compel obedience to a lawful order of the superior court. It was an independent proceeding, in which the state was plaintiff (Code Proc. § 783), and, although the judgment appealed from constituted evidence on which the court in part acted in making the order now sought to be prohibited, it was not a proceeding on the judgment, and hence was not stayed or suspended by the bond which was filed in the original cause. *Welch v. Cook*, 7 How. Prac. 282. And, besides, if the relator herein should be found guilty of contempt, as alleged, he can appeal from the judgment of conviction as in other cases, and have the proceeding reviewed by this court upon the merits. From the foregoing considerations it follows that the peremptory writ must be denied, and it is so ordered.

SCOTT, DUNBAR, and GORDON, JJ., concur.

HOYT, C. J. I am unable to concur in the foregoing opinion, for, while I must concede that the conclusions therein seem to be justified by the authorities cited in their support, I cannot free my mind from the opinion which I have long entertained, that it was the intention of the legislature, in providing for appeals from certain judgments and orders, that, except when otherwise expressly provided, the effect of an appeal should be not only to stay any affirmative action by which the judgment appealed from was sought to be enforced, but also to entirely suspend the force of such judgment during the pendency of the appeal. All the legislation upon the subject seems to indicate that such was the intention of the legislature. It has greatly extended the right of appeal, and made it apply to judgments and orders from which no appeal would lie except by virtue of express legislation. In many of these the right of appeal would be of little or no benefit if, during its pendency, the judgment or order appealed from should remain in force. That it has been the object of the legislature to not only thus enlarge the right of appeal, but to provide fully for the protection of appellant's rights during its pendency, is not disputed; but it is claimed that judgments or orders granting injunctions and judgments of ouster in proceedings in the nature of quo warranto are exceptions to the general rule. As to these it is claimed that, notwithstanding an appeal, and the offer by the appellant to give a bond that shall amply protect the rights of the respondent, they will not be suspended, but will remain in full force, so that the appellant will be bound thereby as fully after he has perfected his appeal as before. I can see no sufficient reason for excepting judgments of this kind from the general rule. There would be greater reason for excepting judgments or orders granting injunctions from the general rule than there would for so excepting judgments of ouster; but, if it had been the intention of the legislature that such judgments or orders should be excepted, there would have been little reason in extending the right of appeal to orders granting temporary injunctions. If the effect of an appeal from an order of this kind was not to suspend it so that it would no longer bind the appellant, he could derive no benefit from an appeal therefrom. Before such appeal could be determined, the case would, under ordinary circumstances, have been tried upon its merits, and a final judgment rendered.

But it is said that, if a judgment of this kind could be suspended, the relator would be deprived of any substantial benefit of his proceeding, for the reason that, before the appeal could be prosecuted to a final determination, the term of office over which the contention was being waged would have terminated. But this argument loses sight of the fact that the court would require such a

bond as would amply protect the respondent. Besides, less hardship and uncertainty, not only to the contestants but to the public, would flow from the rule which allows the judgment to be suspended than from the contrary one. If the judgment is not suspended, it may well happen that the person declared elected to the office may go into possession thereof, and in a few weeks be compelled to surrender it by reason of a judgment of ouster in the superior court, and in a few months more be reinstated therein by reason of the reversal of such judgment of ouster. Public policy will be best subserved by such a construction of the legislation as to appeals as will make the rights of appellants in all classes of cases as nearly uniform as circumstances will allow. When a general rule exists, it should be applied to every case possible, and exceptions should only be recognized when they have been expressly provided for, or are absolutely necessary to the protection of the rights of parties.

There is a suggestion in the majority opinion as to the right of the appellant to appeal from any judgment which may be rendered in the contempt proceedings. If by what is said it is intended to intimate that, by reason of the fact that an appeal will lie from the judgment in such contempt proceedings, prohibition against the superior court should not be allowed, even though it was proceeding without jurisdiction, I cannot agree to such intimation. To hold that a defendant must obey a judgment which he is satisfied is of no force against him, or take the chances of being punished by fine and imprisonment for violating it, if it eventuates that he is mistaken, is to establish a rule which may result in great oppression. A sensitive person might prefer to suffer in silence by reason of a judgment which he believed to be void rather than take the risk of being imprisoned for violating it if it should afterwards be held to be in force. Hence the fact that the defendant may appeal from a judgment rendered in a contempt proceeding does not render such an appeal an adequate remedy. Besides, this question has been so often decided by this court adversely to the position intimated in the majority opinion that it should now be treated as *stare decisis*.

PACIFIC LOUNGE & MATTRESS CO. v. RUDEBECK.¹

(Supreme Court of Washington. Oct. 2, 1896.)

SALE—WHEN TITLE PASSES—INTENTION.

The title to property sold will pass to the purchaser at the time of the sale where such is the clear intention of both parties, though the amount to be paid therefor is left to be determined by the price at which it is resold by the purchaser.

Appeal from superior court, Snohomish county; John P. Denney, Judge.

¹ Rehearing denied.

Action by the Pacific Lounge & Mattress Company against Nicholas Rudebeck. Judgment for plaintiff, and defendant appeals. Affirmed.

Black & Edwards, for appellant. James B. Murphy, for respondent.

DUNBAR, J. This was an action in the nature of replevin, brought by the respondent against appellant, to recover the possession of certain furniture and carpets described in the complaint. The complaint alleged that the respondent was the absolute owner of the goods in question, which was denied by the appellant. A verdict was rendered in favor of the respondent, on which judgment was entered, and from which an appeal was taken.

Many errors are alleged by the appellant's brief, but, according to appellant's own theory, they were all involved in the determination of one question, viz. whether the respondent, according to the evidence, is the owner of the goods sued for, or was in fact a mortgagee. It is contended by the appellant that the complaint shows that the respondent only held these goods as security for the payment of a debt due from one C. H. Bakeman. It may be said here that the goods were held under a lease from Bakeman to the appellant, which goods were afterwards sold by Bakeman to the respondent. Demand was made by it upon the appellant for the possession of the goods, and upon refusal this action was brought.

We think the complaint states, in language which cannot be susceptible of two constructions, that the plaintiff is the owner, and not the mortgagee, of this property; and it seems to us that the evidence also conclusively shows an ownership in the respondent. The testimony of J. W. Efan, who was the agent of the respondent, and who did its business for it, was to the effect that respondent had purchased these goods outright from Mr. Bakeman, and that the intention was to convey the entire title of said goods to the respondent company. It seems that another arrangement had been made between the respondent and Bakeman, but the witness says: "After talking the matter over with some of the other members of the company, we decided that the arrangement was unsatisfactory to us; and I saw Mr. Bakeman again, and told him that the company wanted to buy the goods outright, and take the absolute title thereto; and Mr. Bakeman agreed to sell the goods, and I agreed to take them, and I bought them, and closed the deal then and there as agent for the plaintiff." This testimony is undisputed, but it is the contention of the appellant that inasmuch as no credit was given Bakeman by the respondent, Bakeman being indebted to it at the time, and inasmuch as the price which was to be received by Bakeman under the contract was to be the price for which the goods were sold by the respondent, the title to the goods did not pass; that something remained yet to be done before the contract became exe-

cuted. While it is true that in many instances the test of an actual conveyance is the doing of everything which is to be done, yet under the modern authorities, at least, the doctrine of intention prevails; and, where the intention of the contracting parties can be ascertained without doubt, no test is necessary, and the property in the thing vests, whether something else is to be done or not. The rule is thus announced in 21 Am. & Eng. Enc. Law, p. 478: "In determining whether title has or has not passed by the contract, the primary consideration is one of intention. The agreement is what the parties intended to make it. If the intention is manifested clearly and unequivocally, it controls. Thus, although it is a presumption of law that if something remains to be done for the purpose of testing the property, or of fixing the amount to be paid by weighing, measuring, or the like, or of putting the property into condition for final delivery, title does not pass until such act is done, yet this presumption may be overcome, and title will pass if such appears by the contract to have been the intention of the parties." This text is sustained by so many authorities that it is only necessary to refer to them as being cited in support of the text by the author quoted. The testimony in this case so clearly showing the intention of the parties to convey this property, there is no room for the employment of the test spoken of above, and the judgment will therefore be affirmed.

HOYT, C. J., and SCOTT, ANDERS, and GORDON, JJ., concur.

DAVIS v. FORD et al.

(Supreme Court of Washington. Oct. 2, 1896.)

INJUNCTION—DISSOLUTION.

Where a suit to enjoin defendant from cutting timber, defendant claiming the right to do so under a contract of sale, is after several years determined on appeal in favor of defendant, defendant will be allowed, after the remittitur is sent down, the same time, including the same months of the year, to cut and remove the timber as he would have had under the contract if the suit had not been instituted; it appearing that, during the winter months following the remittitur, the cutting of the timber would be impossible, owing to the weather.

Motion to modify judgment.

PER CURIAM. In the opinion heretofore filed in this case (45 Pac. 739, 743) it was said that "the defendants will have as much time after the remittitur is sent down in which to cut and remove the timber to which they are entitled under the terms of sale and the decree as they would have had if this action had not been instituted." And the defendants now move this court to add thereto the following: "That such time to be given during the year 1897, covering the same months of the year, that these defendants would have had during the year 1895 had not this suit

been instituted." This motion is accompanied by affidavits showing that it is impracticable to cut and remove timber at or near Nookachamps creek and Blarney lake during the winter months, owing to excessive rainfall. If this fact had been brought to our attention before the opinion was prepared, the order requested would have been included thereon; and as the request seems reasonable and proper under the circumstances, and as we are unable to perceive how the plaintiff can be in any wise injured by granting it at this time, the motion is hereby granted, and the defendants are given the same time during the year 1897, and including the same months of the year, that they would have had during the year 1895 had not this suit been instituted.

ISENSEE et al. v. AUSTIN et al.¹

(Supreme Court of Washington. Oct. 2, 1896.)

MORTGAGES—SUBROGATION—JUDGMENT—RES JUDICATA.

1. In a contract for the sale of standing timber, the vendee agreed to pay the mortgages on the land, as they fell due, irrespective of whether he was indebted at the time to the vendor. *Held*, that the vendee, on payment of a mortgage by reason of his contracting liability, was not entitled to be subrogated to the rights of the mortgagee.

2. The vendor in a contract for the sale of standing timber sued the assignee of the vendee's interest therein, for specific performance of the contract, and recovered a decree canceling the contract. *Held*, that such decree was res judicata in a subsequent action by the vendee as to his right to be subrogated to the rights of a mortgagee whose mortgage he had paid, as required by the contract.

Appeal from superior court, Whatcom county; John R. Winn, Judge.

Action by Philip M. Isensee and another against Thomas C. Austin and another. There was a judgment for plaintiffs, and defendants appeal. Reversed.

Black & Leaming, for appellants. S. M. Bruce and Brown & Cleveland, for respondents.

DUNBAR, J. This is an action brought to subrogate the respondents to the rights of the mortgagees of a certain mortgage. The defendants (appellants here), and others of the Austin family, the parties of the second part, and who were owners of the timber in question, entered into a contract with John K. Rae and P. M. Isensee, whereby the parties of the first part granted to the parties of the second part the right, privilege, and authority to at all times, for a period of five years from the date of the contract, go upon the land described, and cut thereon and remove therefrom all merchantable timber, excepting that which was adapted to shingle bolts solely, on conditions therein named. The action was brought by the respondents, Philip M. Isensee and Lena Isensee, as successors in interest of the original contract-

ing parties, P. M. Isensee and John K. Rae. At the time this contract was made, the land was covered by certain mortgages, among which was one for the sum of \$2,000, to the Puget Sound Trust & Banking Company, said mortgage having been executed by Henry Austin and wife. Under the terms of the contract material to be noticed here, the parties of the second part agreed to pay in cash, at date of signing contract, \$1,000, which amount was paid; to further pay \$1 a thousand feet for each thousand feet of merchantable timber upon the land, payments to be made each 30 days, for the timber removed during the preceding 30 days. They further agreed to assume the payment of, and did assume the payment of, certain mortgages, among which was the one first above mentioned, together with all interest to come due on said mortgages, and agreed to pay the interest on said mortgages as they fell due, irrespective of whether any money was due from the parties of the second part to the first party at said time or times. The mortgages provided that the maturing of the interest and its nonpayment at time of maturity should mature the principal. The mortgage to the trust company was paid by Rae and Isensee, as per contract agreement. Rae afterwards conveyed his interest in the contract to Lena Isensee. Isensee afterwards became involved, and on September 7, 1893, Isensee and wife conveyed to John H. Stenger their interest in the contract, and in all the logs and logging outfit owned by them. Stenger failed to comply with the provisions of the contract, and on March 12, 1894, the parties of the first part to the contract commenced an action against John H. Stenger for the specific performance of the contract; the allegations being that the logging had been abandoned, that the payments called for by the contract were not being made by the owners of the contract, and the mortgages assumed were in default. The decree entered by the court in that action directed the defendants to within 30 days specifically perform said contract, in so far as the said contract provides for the payment, by the parties of the second part named in said contract, of all moneys due upon the certain mortgages mentioned in said contract. It also further provided that, in the event of the failure to specifically perform as in the decree ordered, the contract should be canceled, and the record thereof discharged. On July 12, 1894, it appearing to the court that the defendant had failed to perform in obedience to the decree of the court, the court entered a final decree canceling the contract. Subsequently Stenger transferred to Isensee and wife the contract in question and all the rights of said Stenger thereunder, and this action is brought by Isensee and wife, who claim that the payments made under the contract exceeded the amount that is represented by the timber cut at the rate of \$1 per thousand feet, and the \$1,000 paid down, and

¹ Rehearing denied.

that, inasmuch as one of the payments so made under the contract consisted of the payment of the \$2,000 mortgage before mentioned, they should be subrogated to the rights of the trust company, and should be entitled to foreclose this mortgage for their benefit to the amount of the claimed overpayment, and enforce the lien foreclosed against the lien covered by the mortgage. The court found that there had been an overpayment, and entered judgment in accordance with the prayer of the complaint, for the amount so found.

Many errors are assigned by the appellants, viz.: (1) Defect of parties defendant; (2) insufficient proofs to establish the fact of overpayment; (3) the termination by a former decree of any rights respondents may have had under the contract; (4) that Isensee could not be subrogated to the benefits of the mortgage by him paid, for the reason that by the contract he assumed the payment of the mortgage in question, and made it his own obligation, and made the payment by reason of his contractual obligation so to do from considerations moving to himself.

From the view we take of the last two propositions, it will not be necessary to discuss the first two. We think the authorities universally sustain the proposition that a person cannot be subrogated when he pays an incumbrance which he has agreed to pay. In fact, this proposition of law is not very stoutly disputed, if disputed at all, by the respondents; but they claim that the court found that the mortgage was paid at the request of Thomas C. Austin. This, indeed, is the finding of the court, but this finding was excepted to, and we are satisfied that the finding is unfounded. The parties of the second part had agreed to pay this mortgage. It was one of the affirmative conditions of their contract, and we are satisfied from the proof that they made the payment by reason of their contractual liability, and for no other reason. But, however this may be, we think the third objection raised by the appellants is absolutely conclusive of this case, viz. that the former decree terminated the rights of the parties to this contract. The general rule is thus stated by Black on Judgments (section 754): "It is a general rule that a valid judgment for the plaintiff definitely and finally negatives every defense that might and should have been raised against the action; and this is true, not only with respect to further or supplementary proceedings in the same cause, but for the purposes of every subsequent suit between the same parties, whether founded upon the same or a different cause of action. A party cannot relitigate matters which he might have interposed, but failed to do, in a prior action between the same parties or their privies in reference to the same subject-matter." This rule has become firmly established in the United States, and applying it to this case, if the parties of the second part to this contract had a right to plead overpayment by reason of their subrogation to the

rights of the trust company, that right existed in the action between the appellants and Stenger, and should have been there adjudicated. In that suit the contract was canceled. If there was any reason why the contract should not be canceled, and if the defense urged here could be substantiated, it should not have been canceled, and that defense should have been urged in the former trial,—and, not having been urged, it is lost.

But it is argued by the respondents that, while the rule above announced may be correct, it has no application to this case, for the reason that the rule is coupled with a provision that the parties to the former action must be the same parties to this action. They are substantially the same parties. The meaning of the law is that they shall be the same parties in interest, not necessarily the same parties in name. In this case the parties in interest were the parties of the first part to the contract and the parties of the second part to the contract or their assignees. The parties appellant here are entitled to all the rights and defenses which Stenger was entitled to, and none other; and, if this plea was not available to Stenger it was not available to his assignees. The case of *Wilkes v. Davies*, 8 Wash. 112, 35 Pac. 611, lays down a rule on the subject of *res adjudicata*, which would be decisive of this case against respondents' contention. In fact, it is not necessary to go nearly so far in this case to hold the former action an estoppel or bar to the present one as the court went in that case. The judgment will therefore be reversed, and the cause dismissed.

HOYT, C. J., and SCOTT and ANDERS, JJ., concur.

STATE ex rel. STOCKMAN v. SUPERIOR COURT OF SPOKANE COUNTY.

(Supreme Court of Washington. Oct. 3, 1896.)

VENUE—PRIVILEGE TO BE SUED IN COUNTY OF RESIDENCE—WAIVER.

The right of a defendant to be sued in the county of his residence is not waived by a failure to appear at the time the ruling is had on his application for a change of venue to such county.

Application, on the relation of Dietrich Stockman, against the superior court of Spokane county (Norman Buck, J.), for writ of prohibition. Granted.

Staser & Holcomb, for relator. W. A. Lewis, for respondent.

PER CURIAM. The relator was sued in the superior court of Spokane county, but was a resident of Adams county, and was served there. He appeared, and filed a demurrer, and also an affidavit of merits, which contained a demand that the case be tried in Adams county, but no ruling was had thereon at the time. A few days later the court denied the application for a transfer, whereupon the relator ap-

plied for this writ, and the court was ordered to transfer the cause to Adams county, or show cause why the same should not be done, and other proceedings were stayed therein meanwhile. Respondent has returned that the application for a change of venue was refused because the defendant had waived his right to a transfer; but it appears that what the court construed to be a waiver was the failure of the defendant to appear at the time the ruling was had. It was not necessary for the defendant to be present at that time. Nor does it appear that he had any notice of the time when the matter would be called up. The statute is explicit. It provides for the filing of an affidavit of merits and a demand for a change of venue when the defendant appears and pleads. This was complied with, and the court had only one duty to perform. That was to grant the change. It is directed that the peremptory writ issue.

JACOBS v. FIRST NAT. BANK OF PUYALLUP.

(Supreme Court of Washington. Oct. 3, 1896.)

PLEADING—VARIANCE—ESTOPPEL MUST BE
PLEADED.

1. In an action by a landlord to recover rent from one alleged to be an assignee of a lease for years, the plaintiff must prove a written agreement, valid under the statute of frauds, and cannot recover on proof of an oral agreement by defendant to pay the rent due from the lessee, though made on a good consideration, such proof being a variance from the cause of action declared on.

2. Under a complaint to recover rent from an alleged assignee of a lease, plaintiff is not entitled to prove facts constituting an estoppel on the part of defendant to deny the assignment, such facts not being pleaded, and being a variance from the cause of action stated.

Dunbar, J., dissenting.

Appeal from superior court, Pierce county; W. H. Pritchard, Judge.

Action by W. E. Jacobs against the First National Bank of Puyallup. Judgment for plaintiff, and defendant appeals. Reversed.

John P. Hartman, Jr., for appellant. L. W. Hill, for respondent.

GORDON, J. This appeal is from a judgment entered upon a verdict in favor of respondent (plaintiff) in the court below. The complaint is as follows: "The plaintiff herein, complaining of the defendants, alleges: (1) That the defendant herein is, and at all times hereinafter mentioned has been, a corporation, duly incorporated and existing under the banking laws of the United States, and doing business at the city of Puyallup, Pierce county, Washington. (2) That the plaintiff herein, on, to wit, the 12th day of December, A. D. 1891, made, executed, and delivered to one J. M. Ogle, then of the city, county, and state aforesaid, a certain lease to certain lands hereinafter described, and a copy of which lease is hereto attached, marked 'Exhibit A,' and made a part of this complaint. (3) That on

or about the 1st day of June, 1893, said J. M. Ogle transferred said lease to the defendant herein, at which time said defendant took possession of said lands described in said lease, assuming the conditions and obligations of the said J. M. Ogle as set forth therein. (4) That, according to the terms of the said lease, the said J. M. Ogle, and by reason of the said assignment to the defendant herein the said defendant, became indebted to the plaintiff herein for the rent stipulated in said lease from the 1st day of March, 1893, to the 1st day of January, 1894, to wit, in the sum of five hundred dollars (\$500.00), and interest from said 1st day of January, 1894, in the sum of five dollars (\$5.00). (5) That the lands herein described as being covered by said lease are as follows: 'Certain lands owned by said plaintiff known as bottom land, and containing the buildings and improvements, and containing twenty-eight acres, more or less, of the northeast quarter of section thirty-five (35) and twenty-six (26), being in township number twenty north, of range four east, W. M., Pierce county, Washington.' (6) That the plaintiff herein consented to the said transfer from the said J. M. Ogle to the defendant herein, and from said date of transfer has looked to the said defendant for the rents as set forth in said lease. (7) That there is now due from the defendant to the plaintiff herein the sum of five hundred and five dollars (\$505.00), which said defendants refuse and neglect to pay, although often requested so to do. Wherefore plaintiff prays that he may have judgment against said defendant, and in his favor, for the sum of five hundred and five dollars, together with his costs and disbursements herein." The lower court having denied a motion to make the complaint more definite, and overruled a general demurrer thereto, the appellant answered, denying each and all of the allegations. Upon the trial which followed it appeared that no written assignment of the lease had been made, and the court, over repeated objections on the part of appellant, permitted evidence to be introduced tending to show that appellant, by its acts, had led the respondent to believe that the lease had been assigned, and that it assumed the obligations of an assignee, and entered into possession, and held the same for several months, during which time it removed the nursery stock thereon belonging to Ogle, and sold the same for the purpose of applying the proceeds upon a debt owing to it by Ogle. A motion for nonsuit was made and overruled, and this ruling having been duly excepted to presents the principal question arising in the case.

It is urged by appellant that the respondent, having by its complaint sought to charge appellant as an assignee of a written lease for a term of years, was required to prove an assignment in writing; that an oral assignment, if proved, would be within the statute of frauds, and void; and that the respondent had failed to prove a sufficient cause for the jury.

We think that the learned counsel for the respondent wholly fails to meet the objections. In his brief he says: "The contract upon which this action was brought was not within the statute of frauds, and was not required to be in writing. It was a promise made by the defendant bank, not for the purpose of becoming a mere surety for Ogle, but for the purpose of advancing its own interest, that they might get possession of the nursery stock. There was a consideration for the promise,—the use of the premises, plaintiff's forbearance to hold the stock for rent, and allowing the defendant to take and remove the same. Such an agreement is not within the statute of frauds, but is an original contract." We think counsel overlooks the fact that his complaint is not based upon any such contract as he here refers to. No offer or attempt was made to amend the complaint, and, as it is elementary that a party must prevail according to the case made by his pleading or not at all, it follows that a nonsuit should have been granted.

Respondent further contends that the acts of the appellant were such as to lead him to believe that an assignment in writing had in fact been executed by Ogle to the appellant, and that the appellant is estopped to deny the assignment. To uphold this contention would be to permit a recovery upon a different case than that made in the pleading, and hold appellant liable for its acts without reference to the complaint. The rule is well settled that to authorize its admission in evidence the matter claimed to operate as an estoppel must be pleaded. *Phillips v. Van Schaick*, 37 Iowa, 229; *Walker v. Baxter*, 6 Wash. 244, 33 Pac. 426, and authorities there cited. The judgment appealed from will be reversed, and the cause remanded, with instructions to the lower court to proceed in accordance with this opinion.

HOYT, C. J., and ANDERS, J., concur.
DUNBAR, J., dissents.

MOSHER et al. v. BRUHN et al.

(Supreme Court of Washington. Oct. 2, 1896.)

PLEADING—SUFFICIENCY OF COMPLAINT—WAIVER OF OBJECTIONS—INTERPLEADER—STATEMENT OF CAUSE OF ACTION.

1. A defendant who demurs to the complaint on the ground that it does not state a cause of action, and then proceeds to trial on the merits without attempting to obtain a ruling on the demurrer, waives the objection raised therein.

2. A complaint, when attacked for the first time on appeal, on the ground that it fails to state a cause of action, will be liberally construed to sustain the judgment.

3. A complaint which shows that one of the defendants has obtained a judgment against plaintiffs in garnishment proceedings, but that the validity of said judgment is assailed by the other defendant, who has since garnished plaintiffs for the same fund, asserting that the other garnishment was void, and alleges that plaintiffs are in danger of having to pay the debt twice, is, as against objections first raised on appeal, a good complaint of interpleader, under 2 Hill's

Code, § 153, providing that any one having in his possession money or property claimed by several persons may commence an action against all such claimants to have their rights adjudicated.

Appeal from superior court, King county; J. W. Langley, Judge.

Action of interpleader by Alfred Mosher and others, co-partners as Mosher & McDonald, against Charles Bruhn and another, co-partners as Bruhn & Henry, and the Seattle Hardware Company. From a judgment for the first-named defendants, said hardware company appeals. Affirmed.

Bronson & Clark, for appellant. Bausman, Kelleher & Emory, for respondents.

GORDON, J. The respondents were on the 18th day of November, 1893, indebted to the firm of Charles H. Baker & Co. in the sum of \$913.79. On that day, the appellant, the Seattle Hardware Company, commenced an action for the recovery of money against said firm, and at the same time sued out a writ of garnishment, and caused the same to be served upon the respondents. Thereafter such proceedings were had that judgment was rendered in said garnishment proceeding against respondents for the sum of \$913.79. Subsequently the firm of Bruhn & Henry caused an execution to be issued on a judgment recovered by said firm against said firm of Baker & Co., and caused a garnishment thereunder to be served upon the respondents, and an order requiring respondents to appear for the purpose of being examined upon supplementary proceedings. Thereupon respondents brought this action of interpleader, under section 153, 2 Hill's Code, which is as follows: "Any one having in his possession, or under his control, any property or money, or being indebted, where more than one person claims to be the owner of, entitled to, interested in, or to have a lien on such property, money or indebtedness, or any part thereof, may commence an action in the superior court against all or any of such persons, and have their rights, claims, interest, or liens adjudged, determined and adjusted in such action." The complaint, in addition to the facts already set forth, alleges that the firm of Bruhn & Henry assert "that the proceedings in garnishment instituted by said Seattle Hardware Company are without jurisdiction and void." The complaint also alleges that the appellant threatened and was about to issue execution upon the judgment recovered against the respondents in such garnishment proceedings; also, that the firm of Bruhn & Henry were pressing their garnishment against respondents; and, continuing, says: "There is danger that judgment will also be rendered in favor of said Bruhn & Henry, and against plaintiffs, and that plaintiffs will be compelled to pay said indebtedness twice; that the amount claimed by each of said firm is equal to the total amount of indebted-

ness due from the plaintiffs to said Baker & Co.; that these plaintiffs are able and willing to pay said sum of \$913.79 to the party entitled thereto, and only desire that the court shall determine to whom said money is entitled, and offer at any time, upon the order of said court, to pay said sum into court for the satisfaction of said indebtedness against them." A demurrer to the complaint was filed by the appellant, and on the same day it answered, setting up affirmatively its judgment recovered in the garnishment proceeding already referred to. Subsequently, the lower court, all the parties being present, granted a temporary injunction, restraining both the appellant and also the firm of Bruhn & Henry from further proceedings in garnishment; and also made an order directing the respondents to pay the money which it was owing Bruhn & Henry into the registry of the court, which the respondents proceeded at once to do. Thereafter an issue was formed between appellant and the firm of Bruhn & Henry, and a judgment and decree entered by the lower court on July 13, 1895, adjudging the garnishment proceeding of the appellant against the respondents void and inoperative, and perpetually enjoining the appellant from enforcing or collecting its judgment rendered therein, or from taking any further proceedings thereon; also, that the defendants Bruhn & Henry were entitled to the fund paid into court. From this judgment and decree the Seattle Hardware Company has appealed.

Prior to the giving of notice of appeal, the court, further proceeding in said cause with all of the parties before it, made a further order and judgment directing the clerk of the court to pay to Bruhn & Henry the sum of \$833 from said fund. No exception was taken or reserved thereto by the appellant. The sole ground relied upon for a reversal is that the complaint fails to state a cause of action. No question of jurisdiction is raised in the case. Counsel for the respondents insist that the appellant cannot be heard to urge this objection, claiming that it waived its demurrer in the lower court by neglecting to bring it on for hearing, and by putting in an answer and proceeding to trial upon the merits. We think this contention must be sustained. The record fails to show that the attention of the lower court was ever called to the demurrer. It does not show that the appellant sought or obtained any ruling from the lower court thereon, but does show that it proceeded to litigate with the respondents and the firm of Bruhn & Henry, upon the merits, in which litigation it was unsuccessful. Appellant insists that the Code (section 193) permits it to raise the point here for the first time. The answer is that it raised it below by demurring, and abandoned the point when it abandoned its demurrer. Aside from this, however, we think the complaint is sufficient, at least as

against an objection to it raised here for the first time. A complaint, when so attacked, is entitled to be most liberally construed, and the judgment sustained if by any reasonable intendment it can be. *Johnson v. Leonhard*, 1 Wash. St. 564, 20 Pac. 591; *Lyon v. Bond*, 3 Wash. T. 407, 19 Pac. 35. While it is true that the complaint shows that appellant had obtained a judgment in garnishment proceedings against respondents, it also showed that the validity of appellant's judgment was assailed by the rival claimant to the fund, who asserted that the judgment was void, and this, as already noticed, is precisely what the lower court found. We think that enough was stated in the complaint to make the case a proper one for interpleader under the statute. Affirmed.

SCOTT and DUNBAR, JJ., concur. ANDERS, J., concurs in the result.

OTTISON v. EDMONDS et al.
(Supreme Court of Washington. Oct. 3, 1896.)
APPEAL—PARTNERSHIP—EVIDENCE—SPECIAL
VERDICT.

On the issue as to whether defendants were partners in working a quarry the jury rendered a special verdict, in which they found that the partnership existed, and that it was entered into at a certain place at a certain time. The only evidence to show that the partnership was then formed was a contract dated at such place and time, by which defendants were granted the right to take stone from the quarry, signed only by the grantor, but which in no way constituted a partnership agreement. There was other conflicting evidence tending to show the formation of a partnership at another place and time. *Held*, that the verdict should be set aside, as based on the misconception that the written agreement created a partnership.

Appeal from superior court, Clarke county; A. L. Miller, Judge.

Action by Louis Ottison against A. G. Edmonds and others. There was a judgment for plaintiff, and defendant Daniel Kern appeals. Reversed.

N. H. Bloomfield, for appellant. W. W. McCredie, for respondent.

GORDON, J. Respondent brought this action against A. G. Edmonds, C. Anderson, and Daniel Kern, as partners under the firm name of Edmonds & Co., to recover for labor alleged to have been performed for said firm of Edmonds & Co. by respondent and his assignors. The appellant, Daniel Kern, answered separately, denying generally all of the allegations of the complaint, and specially denying that he was at any time a partner of the other defendants. From a judgment against the appellant upon the verdict of a jury, and an order denying his motion for a new trial, he has appealed.

Practically the only question involved in the issue submitted to the jury was whether appellant, Kern, was a partner in the firm or

which plaintiff and his assignors worked. The contention of the appellant in this court and in the trial below was that Anderson and Edmonds were partners under the name of Edmonds & Co., engaged in getting out rock in what was known as the "Jenny Creek Quarry," near Lewis River, in Clarke county, and as such partners they entered into a contract with appellant—a street contractor in the city of Portland—to furnish him rock. Upon the trial of the cause appellant and Anderson testified that there was no partnership between the defendants, but that Anderson and Edmonds alone were partners. On behalf of respondent there was the testimony of Edmonds and his wife to the fact of a partnership between all of the defendants, and in support of their respective contentions various circumstances were shown which it was proper for the jury to weigh and consider; but, inasmuch as we have concluded that the cause must be retried, we deem it improper to dwell upon them. It is sufficient to say that upon this main question in the case the evidence was very conflicting.

In addition to the general verdict, the jury, under the direction of the court, returned the following special findings, viz.: "(1) Did the defendant Kern ever enter into a partnership with Edmonds and Anderson, or either of them? If so, when and where was this agreement made? A. Lewis River, Wash., June 3, 1892. (2) Did the defendant Kern ever agree with Edmonds and Anderson, or either of them, to share with them in the profits of the stone quarry business at Lewis River, and, if so, when and where was any such agreement entered into between them, and who was present at the time? A. At Lewis River, June 3, 1892. John Shute, A. G. Edmonds, Daniel Kern, and C. Anderson." There was no evidence submitted at the trial in any wise tending to show that the appellant, Kern, was at Lewis River, Wash., on June 3, 1892, but respondent put in evidence the following paper or memorandum: "Louis River, Wash., June 3rd, 1892. This agreement of lease made and entered this third day of June, 1892, by and between John Shute, of the first part, and A. G. Edmonds and Daniel Kern and C. Anderson, parties of the second part, for and in consideration hereinafter expressed. Parties of the second part shall have the right to enter into party of first part property on Jenny creek, and open quarries, for to get out any and all kinds of stone, for building and paving purposes, and shall have and hold the said quarries and canyon for the term of ten years; and the first year to be free of charge, and thereafter to pay to party of the first part the sum of five dollars per scow load, holding twenty-five thousand paving blocks, and the sum of four dollars per scow load for building stone, the said to be equal in weight to the aforesaid scow load of paving blocks. The party of the second part is to have the right to use all timber necessary for building the tramway or wagon road to said quarry,

and also to build the said road on either side of said creek or canyon, on the first party's property. The party of the first part shall have the right, if the second party fails to work the said quarry for one year, to take the same out of their hands, and claim it as his own property, and the lease of said quarry and canyon to be null and void. [Signed] John Shute." It is apparent, therefore, that the special findings of the jury that the partnership was entered into at the place and time mentioned in their answers were based upon the assumption that the foregoing memorandum constituted a partnership agreement binding upon the appellant. It needs neither argument nor citation of authority to show that this assumption was erroneous, and the jury mistaken. Indeed, the testimony of Edmonds himself was that the partnership was formed on the streets of Portland, at a different date. The finding of the jury must be accepted as it was given, viz. that the partnership was entered into at Lewis River, Wash., on June 3, 1892; and, as such finding is clearly based upon a misconception of the character of the paper signed by Shute, above set out, and the finding wholly without evidence to support it, it follows that the verdict must be set aside, and a new trial awarded. It is no answer to the contention of the appellant to say that there was other evidence upon which the jury might have based their finding that a partnership existed between the defendants. It is sufficient to say that they have not done so, but accepted as sufficient proof for that purpose something which in law is wholly insufficient. It is clear that they attached an importance to the paper which did not belong to it, and gave it weight when it was entitled to none. What their verdict would have been had they not labored under such mistake cannot be told, and, in view of the conflicting evidence, it is forbidden that we should assume to say. Section 376 of the Code provides that, "when a special finding of facts shall be inconsistent with the general verdict, the former shall control the latter, and the court shall give judgment accordingly." It follows that a new trial must be awarded. Reversed.

HOYT, C. J., and ANDERS and DUNBAR, JJ., concur.

STATE ex rel. DAVIS v. SUPERIOR COURT OF PIERCE COUNTY.

(Supreme Court of Washington. Oct. 2, 1896.)

CRIMINAL LAW—WRITS CORAM NOBIS—AFFIDAVIT OF PROSECUTING WITNESS TO IMPEACH HIS OWN TESTIMONY.

The writ coram nobis (if such remedy exists in Washington) cannot be invoked by a convicted criminal upon a mere showing that the prosecuting witness has admitted since the trial that her testimony was materially false, and will make affidavit to that effect.

Application by the state of Washington, on the relation of G. W. H. Davis, for a writ of prohibition to restrain the superior court of Pierce county from further proceedings in a pending case. Writ granted.

G. W. H. Davis, in pro. per.

GORDON, J. Gus Roberts was convicted in the superior court of Pierce county of the crime of rape, and sentenced to 10 years' imprisonment in the penitentiary. Subsequently he filed in said court a petition in the nature of an application for a writ coram nobis, to inquire into certain alleged misstatements made by the prosecuting witness, Ellen Schedin, upon the trial of the cause. His affidavit in support of the petition alleges that, subsequent to his trial and conviction, the prosecuting witness, in the presence of divers persons, stated and admitted that her testimony upon the trial was upon material questions false and mistakenly made; and he seeks to have such person brought before the court, and examined concerning her statements so made. The state demurred to the affidavit and petition in the lower court, and its demurrer was overruled, and the petition set down for hearing. Thereupon the state applied for a writ of prohibition directed to the lower court, restraining it from further proceeding therein, upon the ground that it has no jurisdiction.

Counsel for the state, upon the argument in this court, contended that the courts of this state are not vested with power to grant writs of this character. The record does not require us to determine that question, and as no briefs have been submitted by counsel in this case, in view of the importance of the question, we will not undertake to do so. If satisfied that the writ might issue in a proper case, we would, nevertheless, be constrained to hold the petition in the present case insufficient. It is based upon the claim that the testimony of the complaining witness in the trial of the criminal case "was not in accordance with the facts, but was fraudulent and untrue." We have been unable to find a case where the writ has been granted upon such showing, and, upon principle, we think that it ought not to be regarded as sufficient. The prosecutrix was a witness before the jury, and sworn to testify truly. To receive her subsequent statement for the purpose of discrediting or impeaching the proceedings or judgment would be to open wide the door to fraud, and lead to most baneful results. The law, upon considerations of public policy, will not receive the affidavit of a juror to impeach his verdict, and renders inadmissible the testimony of third persons as to what they heard jurors say in derogation of their verdict. Like considerations constrain us to hold that the remedy cannot be invoked upon a mere showing that the prosecuting witness has subsequently made contradictory statements, or that she

is now willing to swear that her former testimony upon the trial was false. Her latter oath is no more binding than her former one; and, if the remedy sought exists in the jurisprudence of this state,—a question which we do not now decide,—it, nevertheless, must follow that it cannot be claimed upon a showing of the character here made. The peremptory writ will issue.

HOYT, C. J., and DUNBAR, ANDERS, and SCOTT, JJ., concur.

PHELPS v. CITY OF TACOMA.¹

(Supreme Court of Washington. Oct. 6, 1896.)

APPEAL—ASSIGNMENT OF ERROR—MUNICIPAL CORPORATIONS—REFUNDING MONEY PAID ON ILLEGAL TAX SALES—RECOVERY OF TAXES VOLUNTARILY PAID.

1. A court not being required to state the grounds on which a demurrer to a cause of action or ground of defense is overruled, a single assignment of error, charging that the court erred in such ruling, is sufficient.

2. Under power given a city by its charter to regulate the assessment and collection of taxes, it may legally enact by ordinance that, where certificates of purchase are issued on sales of property for municipal taxes which are illegal, the amount paid shall be refunded, with interest; but such power does not extend to cases of sales made prior to the passage of such ordinance, in which the purchasers bought at their own risk as to legality, and a provision authorizing the refunding of money paid on such sales is void.

3. Subsequent taxes voluntarily paid by a purchaser on property bought at tax sale, under the mistaken belief that the sale was valid, cannot be recovered.

4. Money paid to a city on a sale by it of property for municipal taxes, under an ordinance providing that, where such sales were illegal, the money should be refunded, does not become the absolute property of the city; and the fact that its indebtedness exceeds the constitutional limit does not constitute a defense to an action to recover such money where the sale was illegal.

Appeal from superior court, Pierce county; W. H. Pritchard, Judge.

Action by Dwight Phelps against the city of Tacoma. Judgment for defendant, and plaintiff appeals. Reversed.

B. F. Henston and T. W. Hammond, for appellant. John Paul Judson, W. H. H. Kean, and James Wickersham, for respondent.

HOYT, C. J. Plaintiff sought to recover from the defendant upon three causes of action,—two for money paid to the city upon certificates issued upon sales for void taxes, and one for money alleged to have been paid on account of a mistake of fact. Defendant, for answer to each of these causes of action, set up the fact that the city was indebted beyond the constitutional limit, and for that reason could not be held liable to the plaintiff. To these answers a demurrer was interposed by the plaintiff, which was overruled by the court; and, the plaintiff electing to stand upon such demurrer, judg-

¹ Rehearing denied.

ment in favor of the defendant was entered as to each of the causes of action.

Errors are severally assigned upon the ruling of the court in overruling the demurrer to the answers to each of the three causes of action, and the first question presented for our consideration is as to the sufficiency of these assignments of error. Respondent cites many authorities in support of its contention that they are not sufficient, but, in our opinion, none of them are in point; for while it is true that some of them state in general terms that an error alleged generally upon a pleading or other paper, a part of the record, is insufficient, none of them go to the extent of holding that an error which calls in question a single ruling of the court, in making which it was not called upon to assign any reason, is not sufficient. Under our practice, a court, in overruling a demurrer, passes generally upon the sufficiency of the pleading demurred to; but there is nothing which requires it to in any manner disclose to the parties why the demurrer is overruled, and in fact no reason could be given excepting that the pleading contains all the elements required. When the court sustains a demurrer to a pleading, it might be proper for it to disclose in what particular the pleading is insufficient; but even that is not required. On account of these facts, we think that, when it is charged that the court erred in sustaining a demurrer to a particular cause of action, it is sufficiently definite, for the reason that the party may not be advised as to the particular part of the pleading which the court has found to be insufficient. But, whether or not this is so, an assignment of error which questions the correctness of a ruling of the superior court in overruling a demurrer must be held sufficient, for the reason that the effect of such ruling is to assert generally the sufficiency of the pleading; and it is impossible for the party assigning the error to state the reasons which controlled the court in thus holding. The motion to dismiss must be denied.

The right to recover the money paid for the certificates issued upon the void tax sales is founded upon a certain ordinance passed by the city council on January 11, 1893, entitled: "An ordinance for the cancellation of illegal or erroneously issued certificates of sales on unpaid and delinquent municipal taxes, and on street and sewer assessments, and prescribing the manner of refunding the money paid for such certificates and the interest thereon." This ordinance, in terms, applies to certificates theretofore as well as thereafter issued. Under its charter, the city had power to provide for the levy and collection of taxes; and thereunder, we think, it had power to provide that any one who should in the future pay money into the treasury upon a tax sale which was void should be entitled to have the certificates issued upon such sale canceled, and his money

repaid by the treasurer. Such a provision might be necessary to induce purchases at tax sales, and, in the judgment of the common council, it might be a necessary part of the machinery for the assessment and collection of taxes.

One of the causes of action was founded upon a certificate issued after the passage of the ordinance, and as to that, we think, a cause of action against the city was stated. The other certificate was issued upon a sale made before the passage of the ordinance, and fails to state a cause of action if it was beyond the power of the common council to provide relief to purchasers at tax sales made before the passage of the ordinance. We have seen that the authority to pass the ordinance could well be held to be incident to the right to regulate the assessment and collection of taxes, and we are unable to discover any other power conferred by the charter which would authorize the council to pass such an ordinance. We must therefore hold that the ordinance is valid only by reason of the fact that authority to pass it was included in the power to regulate the assessment and collection of taxes. This being so, that portion of the ordinance which attempted to relieve those who had purchased at tax sales before its passage cannot be sustained. Under well-settled rules of law, they had obtained all they purchased, whether the sales were valid or void. When they made their bid, they took their risk as to that. Hence the city received the money upon the sale as its absolute property, and owed no obligation whatever to the purchaser, even if the sale was absolutely void. It must follow that the provision authorizing the cancellation of the certificate issued at the sale, and the repayment of the money received therefor, when applied to past sales, was in no manner connected with the assessment and collection of taxes; hence there was no power in the common council to make such application.

The other cause of action grew out of the fact that the plaintiff, supposing that he had title to the property in question by reason of the tax sales, paid other taxes which appeared upon the books of the city to be a charge thereon, but which were in fact not a legal charge upon the property. It is not intended that the right to recover the money so paid is directly founded upon the ordinance above referred to, but it is claimed that it was money received by the city, which equity required it to return to the plaintiff. There is nothing tending to show that the payment was other than a voluntary one, and we are unable to discover anything in the facts alleged which would make this payment an exception to the general rule that moneys voluntarily paid on account of taxes cannot be recovered; and, since that is the well-settled general rule, we must hold that the facts relating to this payment did not state a cause of action. As to

this cause of action and the one founded upon the sale made before the passage of the ordinance in question, the complaint was insufficient. As to the other cause, it was sufficient; and it is necessary to determine as to the sufficiency of the answer thereto, and, under well-settled rules, it must be held insufficient. The money paid into the treasury upon the sale did not, under the ordinance referred to, become the absolute property of the city, and its repayment was not the incurring of a debt, within the meaning of our constitutional provision. The case of *Richards v. Klickitat Co.*, 13 Wash. 509, 43 Pac. 647, while founded upon a different state of facts, clearly announced this principle.

For the error of the court in overruling the demurrer to the answer to this cause of action, the judgment must be reversed, and the cause remanded for further proceedings.

SCOTT, ANDERS, and GORDON, JJ., concur.

STATE ex rel. MULLEN v. SUPERIOR COURT OF PIERCE COUNTY.

(Supreme Court of Washington. Oct. 6, 1896.)

EFFECT OF APPEAL—QUO WARRANTO—OUSTER—SUSPENSION OF JUDGMENT BY APPEAL.

1. After defendant in quo warranto has perfected his appeal from a judgment under which relator is put in possession of the contested office, the trial court has no power to issue an order requiring relator to surrender the office to defendant, such order not being specially provided for in the act relating to appeals.

2. In quo warranto to try title to an office, a judgment of ouster is not so suspended by an appeal as to entitle defendant to the possession of the office during its pendency. *Fawcett v. Superior Court* (Wash.) 46 Pac. 389, followed.

Application by the state of Washington, on the relation of Robert B. Mullen, for a writ of prohibition, restraining the superior court of Pierce county. John C. Stallcup, judge, from issuing a certain order in proceedings pending before it. Writ granted.

Claypool, Cushman & Cushman and Doolittle & Fogg, for relator. Governor Teats and John P. Judson, for respondent.

PER CURIAM. Relator had obtained judgment in his favor in a proceeding in the nature of quo warranto to test the title to an office, and thereunder had been placed in possession of the office. Thereafter the defendant in the proceeding, having perfected his appeal to this court, sought an order in the superior court requiring the relator to surrender possession of the office, that he might again take possession thereof. To prohibit the superior court from taking such action this proceeding was instituted. The grounds upon which it was alleged that the superior court was about to make the order were: First, that the relator had been wrongfully placed in possession of the office; and, second, that the judgment of ouster against the

defendant had been suspended by the appeal, and his right secured to retain possession of the office during its pendency. When the appeal was perfected, the superior court had no jurisdiction to take any action in the proceeding except those specially provided for in the act relating to appeals, and the making of the threatened order was not included among those there provided for. Hence the superior court was without jurisdiction to make such order; and, if the defendant was entitled to any relief, such relief could only be afforded him in this court, which alone had general jurisdiction of the proceeding after the appeal had been perfected.

The claim that the judgment of ouster was so suspended by the appeal that the defendant was entitled to the possession of the office during its pendency is negatived by the case of *Fawcett v. Superior Court* (just decided) 46 Pac. 389. Besides, if entitled to relief on account of such appeal, it could only be obtained in the superior court by an independent proceeding, for the reason that all jurisdiction as to the original proceeding had been taken from such court by the appeal. The alternative writ must be made permanent.

DE MATTOS v. JORDAN et al.

(Supreme Court of Washington. Oct. 9, 1896.)

PRINCIPAL AND SURETY—BOND OF BUILDING CONTRACTOR—RELEASE OF SURETIES—RANS JUDICATA—INSTRUCTION.

1. The mere fact that, at the time the bond of a building contractor was executed, he had commenced work on the ground, preparatory to the erection of the building, does not render the bond without consideration as to the sureties, where the contract required the execution of the bond, and was not executed until the delivery of the bond.

2. Where a building contract, based on plans and specifications made a part thereof, provided that the contractor should make any alterations or additions required by the owner, the price to be subject to addition or deduction therefor as might be agreed on, the sureties on the contractor's bond cannot defend against liability thereon because the owner, in completing the building after its abandonment by the contractor, as was authorized by the contract, deviated from the specifications, nor because changes were made before the abandonment with the assent of the contractor.

3. The fact that the owner of a building, in course of construction, accepted an order drawn by the contractor in favor of a person furnishing materials, in advance of an estimate of the amount due the contractor, and paid the same from such estimate when made, did not constitute an advance payment to the contractor which would release the sureties on the contractor's bond from liability; nor did a payment for materials needed, with the consent of the contractor, and the amount of which was deducted from the next estimate, have that effect.

4. The deduction by the owner of a building from money due the contractor building it, by agreement with the contractor, of a sum of money due from the contractor to creditors, the claims being in the hands of the owner, who was an attorney, for collection, did not constitute a breach of the contract by the owner which released the sureties on the contractor's bond, even though the contractor was compelled to pay the debts against his will.

5. Where one who was a surety on the bond of a building contractor, after the contractor had absconded, paid money due from the contractor to laborers, and afterwards recovered judgment for the amount against the owner of the building, on the ground that the money was paid for his use and benefit, such judgment does not constitute a bar to an action by the owner against the contractor and his sureties to recover on his bond; the question of liability on the bond not being in issue in the former action, and the other parties to the instrument not being before the court.

6. In an action to recover on the bond of a building contractor for a breach of the contract, which required the completion of the building by a certain time, and provided for the payment of a certain sum as liquidated damages for each day's delay, an instruction that the burden was on the plaintiff to prove the damages sustained by reason of the delay was not erroneous, where no specific request was made for the construction of the provision of the contract as to liquidated damages.

Appeal from superior court, Whatcom county; John R. Winn, Judge.

Action by James P. De Mattos against R. C. Jordan, R. I. Morse, H. A. White, Carmel Dibble, and Chris Semon. Judgment for defendants, and plaintiff appeals. Reversed.

Kerr & McCord and Bruce, Brown & Cleveland, for appellants. Dorr, Hadley & Hadley, Fairchild & Rawson, and Black & Leaming, for respondents.

ANDERS, J. On April 30, 1890, the plaintiff entered into a contract with defendant Jordan whereby the latter agreed to furnish all material and to erect for the former, in the city of New Whatcom, a three-story and basement brick and stone building, in accordance with plans and specifications prepared by one W. A. Ritchie, supervising architect, and which were made a part of the contract. By the terms of the contract, the building was to be completed on or before August 30th, and in default thereof the said contractor agreed to pay the owner \$50 as and for liquidated damages for every day that the work should remain unfinished. The plaintiff agreed to pay to the contractor, Jordan, for the material and labor furnished, and the doing and completing of the work, the sum of \$23,650, good and lawful money of the United States, subject to additions or deductions on account of alterations, modifications, or additions as provided for in the contract, payments to be made upon estimates on the first Tuesday of each month, covering all materials furnished and labor performed on the work during the month preceding, as computed by the architect, less 20 per cent. of the valuation of the work completed, and as certified by the architect, which was to be paid at the expiration of 10 days after the completion and final acceptance of the work and the building. The contract provides that the contractor shall perform any work required in alteration, modification, or addition which the architect and owner shall demand as the work progresses upon receiving written authority from the architect, approved by the owner, specifying the kinds and qualities; and in ev-

ery such case the price for such alterations, modifications, and additions must be agreed upon, and a fair and reasonable valuation of the work shall be added to or be deducted from this contract price; and, should any differences arise between the parties thereto respecting such valuation, the same shall be decided by three experts, etc. And the specifications provide that no bills for extra work shall be allowed unless the same have been authorized by the owner and the architect. It is also stipulated in the contract that, in case the contractor should not complete the building, the owner may do so, and charge the expense to the contractor; and "the expense incurred by the owner as herein provided, either for furnishing materials or for finishing the work, shall be audited and certified by the architect, and his certificate thereof shall be conclusive upon the parties." Another stipulation in the contract was that should the architect, prior to each payment, receive notice from any person or persons that they held a claim against the said building for material or labor chargeable to the contractor, for which, if established, the owner might be made liable, the owner should have the right to retain out of the payment then due, or thereafter to become due, an amount in addition to the 20 per cent. retained sufficient to indemnify him against such claims until the same should be actually satisfied, and receipts in full for the same have been furnished by the contractor. To secure the faithful performance of this contract, the defendant, Jordan, as principal, and the other defendants, as sureties, executed to the plaintiff their joint and several bond in the sum of \$20,000, conditioned to be void "if the said R. C. Jordan shall well and truly perform the said contract, and shall erect and complete the said building in accordance with the said drawings, plans, and specifications and the terms and conditions of that certain contract, and within the time therein mentioned, and shall pay all laborers, mechanics, material men, and persons who shall supply the said contractor with any materials, goods, or labor of any kind, all just debts due or thereafter to become due such persons, incurred in carrying on this work." Jordan entered upon the performance of the contract, but on August 7, 1890, he abandoned the work, and absconded, leaving the building but partially constructed. The sureties having declined to finish the building at the request of the plaintiff, and having notified the plaintiff that they denied and disclaimed all liability upon the bond for damage sustained through the failure of their principal, Jordan, to perform the conditions of his contract, plaintiff himself caused the building to be completed, and subsequently brought this action upon the bond to recover the amount alleged to have been necessarily paid in excess of the contract price in finishing the building and for labor performed and materials furnished on account of the contractor, the amount of mechanics' and laborers' liens established against the building, and the dam-

ages caused by the failure of the contractor to complete the structure within the time limited by the contract. The defendants filed separate answers, and the sureties defended, on the alleged grounds that there was no consideration for the execution of the bond in controversy; that material changes were made and permitted by plaintiff in the building at an additional cost, and in a manner not authorized by the contract, and without their knowledge or consent; that the plaintiff violated the conditions of the contract on his part by making payments in advance, and without the certificate of the architect, and by compelling Jordan to accept as payments his own obligations, whereby he was forced to abandon the work (which latter defense was also interposed by Jordan); and that the questions involved in this action are *res judicata*, especially as to defendant Dibble. The cause was tried to a jury, and a general verdict was returned in favor of the defendants, and the jury also made and returned special findings upon certain questions of fact, which were submitted to them by the court, at the instance of the defendants. A motion for a new trial was made and denied, after which judgment was rendered for the defendants upon the verdict, and the plaintiff appealed.

The facts found by the jury were that, under the plans, specifications, and contract, the piers between the arches on Holly street and on Elk street were to be built of brick, but were constructed of stone; that the inner basement walls were to be of brick, and the first 24 inches were of stone, and the remainder of brick; that the height of the third story as designated on the plans and specifications was 11 feet 10 inches, but as constructed was 12 feet 2 inches; that the third story was completed by appellant; that changes were made in the time, manner, and form of payments, by paying in advance of estimates, and by paying in depreciated paper; and that the change from brick to stone in the construction of piers increased the cost of the building in the sum of \$335. No other special findings of facts were made or requested. The modifications or changes in the construction of the basement walls and of the piers occurred while the work was in charge of the contractor, but the change in the height of the ceiling of the third story was made after the abandonment of the contract by Jordan, and during the time when appellant was in charge of the construction.

Although the bond in question was dated May 1st, it appears from the notarial certificate attached thereto that it was not acknowledged until the 8th of that month, and there is some evidence tending to show that it was not executed until the date last mentioned, and that at that time Jordan had some men upon the premises designated in the contract engaged in work preparatory to the erection of the building. Upon this evidence is based the claim of respondents that there was no consideration for the bond. This position is not tenable. We find nothing in the evidence showing

that Jordan was in possession of the premises by direction or request of appellant, or that the giving of the bond was not an inducement to the signing of the contract on the part of the appellant. On the contrary, it fairly appears from the testimony of appellant which is not contradicted, that it was understood and intended that a bond should be given to secure the performance of the contract, and that, in fact, the contract was executed in duplicate, and the duplicate copy which Jordan received was delivered to him at the time he delivered his bond to appellant. That being so, it cannot be said that the bond was executed without consideration.

There is no evidence tending to prove, and in fact it is not claimed, that there was any alteration of the plans and specifications as originally prepared. The changes which were made were mere deviations from them as the work progressed. Some other changes were made besides those mentioned in the special findings of the jury, while Jordan was directing the work. The height of the first-story ceiling was diminished some two inches. Two mantels were changed from wood to marble, and some other less material changes and modifications were also made. Appellant contends (1) that these changes are, as matter of law, wholly immaterial, and that the court erred in submitting the defense based thereon to the jury; (2) that, if material, the court erred in refusing to instruct the jury, as requested by appellant, that, if any changes were made, it would be their duty to determine from the evidence the cost thereof, and to deduct from or add the cost of the same to the contract price, and render their verdict accordingly; and (3) that these changes were fully provided for by the terms of the contract, and, there being no evidence to the contrary, the presumption of law was that they were made without in any manner affecting the contract price.

We have no doubt that the changes were material, nor that just such changes were contemplated by the contract; and, if they were made in accordance with it, it follows that the instruction requested was right, and should have been given to the jury. Appellant testifies that the changes which were made while Jordan had control of the work were made without his knowledge or consent, and it is claimed on his behalf that Jordan thereby violated his contract, and the sureties, if any one, are responsible therefor. On the other hand, the respondents insist that the supervising architect authorized the contractor to make the changes, and that he and appellant ratified the same; the former by making and certifying his estimates to the contractor, and the latter by paying such estimates. But the mere fact that appellant paid the estimates of the architect would not constitute a ratification of the acts of the architect or contractor, unless at the time he had knowledge of those acts. Ratification always presupposes knowledge of the acts claimed to be ratified. By a provision of the contract, the contractor was obliged,

upon receiving written authority from the architect approved by the owner, to perform any work demanded by the owner and architect in the alteration, modification, or addition; and it would therefore appear that, without the approval of the owner, the architect's authority would not justify the contractor in deviating from the plans and specifications. Moreover, this provision was for the benefit of appellant, and to protect him against unauthorized bills for extra work; and it affected the contractor only in so far that he could collect nothing for additional work not authorized as provided by the agreement.

But it is also claimed that appellant violated the contract by changing the height of the ceiling in the third story, and by omitting base moldings called for by the plans and specifications, and by changing the glass in the inside doors and windows throughout the building from "obscure," or frosted, to clear. But as the contractor, if he had not abandoned his contract, would have been obliged, under its terms, to make these changes at the request of the owner, we see no reason why the owner could not himself do the same thing after he undertook to finish the building in accordance with an express provision of the contract. All of the changes which were made in the progress of the work, and which are here complained of, were mere deviations from the specifications, and, as we have observed, were amply provided for by the contract; and therefore the making of them did not have the effect to discharge the sureties from their obligations on the bond. See *Dorsey v. McGee* (Neb.) 46 N. W. 1018; *Hayden v. Cook* (Neb.) 52 N. W. 165; *McLennan v. Wellington* (Kan. Sup.) 30 Pac. 183; *Howard Co. v. Baker* (Mo. Sup.) 24 S. W. 200; *Ashenbroedel Club v. Finlay*, 53 Mo. App. 256. And, that being so, the instruction of the court to the jury on this branch of the case was, to say the least, misleading. The jury were charged that if such changes were made with the knowledge and consent of De Mattos, and were material changes, and he failed to follow the plans and specifications, so as to make it a different building, and did this contrary to the fifth paragraph of the contract, and had full knowledge of it, then he did not follow the conditions of the contract set up, and he would be held to make a breach of the contract himself; otherwise, he would not. And, also, that "if you should find in this case * * * that the building erected was changed upon an understanding between Jordan and De Mattos, so that it was not the building contemplated by the parties, or the parts therein changed were not as contemplated by the parties under their contract, viewed in the light of the surroundings, then I instruct you that a change would be material and substantial change, and the sureties would be discharged from any responsibility." It was the province of the court, and not of the jury, to construe the contract, and determine what deviations from the plans and specifications were there-

in provided for; and, on the other hand, it was the sole province of the jury to determine what changes or deviations were actually made. But, under the instruction given, the jury might have deemed themselves at liberty to find for the defendants if, in their opinion, material changes were made with the knowledge and consent of plaintiff, or the plaintiff failed to follow the plans and specifications, so as to make a different building from that contemplated by the contracting parties, or the parts changed were not as contemplated by the parties under the contract. It cannot, we think, justly be said that the building erected was different from the one contemplated by the parties to the contract. In size, shape, and internal arrangement, it is in every respect in conformity with the contract and plans; and the fact that the deviations from the specifications were material can have no effect upon the obligations of the sureties, for the reason that material changes were provided for in the contract of their principal. The fact that the cost of alterations, modifications, and additions was to be added to or deducted from the contract price, clearly shows that the changes provided for were not understood to be merely immaterial changes.

It is not claimed by respondents that appellant did not pay the contractor the whole amount due him under the terms of the contract, but they contend that the sureties are discharged for the alleged reason that appellant violated the contract by paying in advance, and by paying in depreciated paper, and not in good and lawful money of the United States. It appears from the evidence that the contractor, Jordan, purchased a lot of brick from the agent of the Elliott Brick Company, during the month of June, which he did not pay for, but gave the seller an order on appellant for the amount due, \$1,672, requesting him to charge the same to the account of the payment falling due on the next succeeding estimate. Appellant accepted the order for \$1,572, payable July 1st, the day on which the estimate was due, and, as he says, to accommodate the brick man, paid him \$100, the balance of the order. The estimate was duly made, and the amount of the order deducted therefrom, and the balance, some \$3,800, was paid to the contractor. Did this transaction amount to making payment in advance of the estimate? Clearly not. It was not an advancement of any sum whatever to Jordan, and was not intended by him to be such, but was simply a request by him to pay the drawee, out of whatever sum might be due from appellant on the next estimate, an amount which he (Jordan) was obligated by his contract to pay for material furnished. See *Bell v. Paul* (Neb.) 52 N. W. 1110.

Appellant, at the request of Jordan, and with the approval of the architect, also paid for some eyebeams which had been ordered from Pennsylvania, and which were in the possession of the railroad company, and without which work could not proceed. But under

the circumstances, and in view of the provisions of the contract, the sureties had no ground of complaint on that account. The amount so paid was applied on an estimate actually made, and neither that nor any other supposed advancement disclosed by the record violated the contract or released the sureties from their obligation. See *Benjamin v. Hillard*, 23 How. 149.

In regard to the claim of respondents that appellant violated the contract in making payment in depreciated paper, the evidence discloses that appellant, who is an attorney, had, before the making of the contract in question, received some claims in the form of promissory notes against Jordan for collection, and upon which he threatened to sue if they were not paid. These claims were finally compromised and paid by Jordan in cash, except the amount of fees which appellant was entitled to deduct therefrom. Appellant's charges, amounting to \$130, were, by an arrangement with Jordan, subsequently paid out of the sums due on estimates of the architect. In addition to the claims above mentioned, appellant received for collection a judgment against Jordan. This claim was also compromised, and Jordan agreed that the amount to be paid (\$300) in full satisfaction thereof might be deducted from the sum that would be due from appellant on the architect's estimate of September 2d following. Before that estimate became due, however, Jordan absconded, and nothing was ever paid by him on the judgment, or charged to his account by appellant. It will be seen from what we have stated that appellant did not pay Jordan in depreciated paper or any other kind of paper. He owned none of these claims against Jordan, and did not pretend to own them. The \$130 paid by Jordan out of the estimates was due to Jordan's own creditors, appellant's clients, and was in fact paid to them. He owed appellant nothing, and paid him nothing.

The question, then, is reduced to this: Are the respondents entitled to be discharged because appellant, as an attorney, was instrumental in causing their principal to pay his debts? We think there can be but one answer to this question, and that is that they are not. In fact, they would not have been discharged even if appellant had owned these notes and obligations, and Jordan had agreed to accept them as payment, instead of money. See *Foster v. Gaston* (Ind. Sup.) 23 N. E. 1092. Moreover, the fact that Jordan was compelled (if he was compelled) to pay these debts constituted no valid excuse for his abandoning his contract, and therefore it was error to instruct the jury that if Jordan was forced against his will to pay off other notes and contracts which he had obligated himself to pay, and was forced against his will to accept such as payments, and that was the cause of his giving up the contract, then that was a breach on the part of appellant, and no recovery could be had against the sureties.

It appears that, after Jordan abandoned the work, Mr. Dibble, one of the defendants and sureties, paid a considerable sum of money to laborers employed by Jordan, and which was due them for labor performed on the building. Mr. Dibble subsequently sued appellant for the recovery of the amount so paid, and alleged in his complaint that the same was made at the request and for the use of appellant. Appellant's answer consisted of a general denial merely, and under it he, of course, had a right to prove any fact or facts which directly controverted any material allegation of the complaint. Upon the trial he did not attempt to disprove payment by Dibble, but undertook to prove that such payment was not made at his request, but voluntarily and because Dibble was a bondsman of Jordan. The trial resulted in a verdict and judgment for Mr. Dibble, and the judgment was affirmed, on appeal, by this court. See *Dibble v. De Mattos*, 8 Wash. 542, 36 Pac. 485. The amount of this judgment, which it is alleged is a lien upon appellant's building, is one of the items of damage sought to be recovered in this action; but the learned counsel for respondents insist, not only that appellant is not entitled to recover the amount of that judgment, or any part thereof, but that he is estopped by the judgment from maintaining this action, for the alleged reason that the identical questions in issue here were involved in the action in which the judgment was rendered, and were decided adversely to appellant. We are unable to assent to this proposition. That Jordan had violated his contract with appellant, and that Dibble was one of the sureties on his bond, were facts which were not disputed or questioned on the trial of that action; and the question whether Dibble was in fact liable to appellant on his bond was not in issue, and was not determined. The only question litigated and determined was whether Dibble paid the money for the recovery of which the action was instituted at the request and for the use of appellant. It is true, that appellant, as corroborative of his own testimony that he did not request Dibble to pay the money for him, and did not promise to repay it, and that Dibble was to be repaid, if at all, out of any money that might be due to the contractor or sureties after the completion of the building, introduced evidence showing that Dibble was one of the contractor's sureties, and that the contractor had failed to perform his contract. But we are not to conclude from that evidence that the jury must have determined that Dibble was not liable on his bond. But there is another reason why the judgment in *Dibble v. De Mattos* ought not to estop appellant from maintaining this action, and that is that the parties to this action are not the same. 1 Freeman. Judgm. (4th Ed.) § 161; 21 Am. & Eng. Enc. Law, 227.

If appellant had himself paid the bills due from Jordan for labor, which Dibble paid,

there is no question but that he could have recovered the amount thereof from the respondents; and, that being so, we perceive no reason why he should not recover the sum paid by Dibble for him after refunding the sum so advanced. The court charged the jury, in substance, that the burden was on the plaintiff to show what amount of damages he had suffered by reason of the failure of the contractor to complete the building in the time fixed by the contract, and that they should allow him such amount as they found was established by the evidence. We see no valid objection to this instruction. If appellant desired to have the court's construction of the contract as to whether the amount of damages for each day's delay was therein liquidated and fixed by the parties, he should have specifically requested it.

In view of the fact that a new trial must be awarded, we deem it proper to observe that appellant can, under the terms of the contract, only recover such of the expenses incurred by him for furnishing materials or finishing the work as shall have been audited and certified by the architect. No estimates of the architect were required after the contractor abandoned his contract, but it was explicitly agreed that the expenses incurred by the owner for materials and labor should be audited and certified by the architect, and that his certificate should be conclusive upon the parties. The purpose of this provision was to protect the sureties against excessive and unjust charges for work and material, and it was agreed that the certificate of the architect should be conclusive as to the amount of expenses incurred by the owner. It is evident that in no event can appellant recover more than the amount of damage he has sustained by reason of the default of the contractor. The judgment is reversed, and the cause remanded for a new trial in accordance with this opinion.

HOYT, C. J., and DUNBAR, J., concur.

PEPPERALL v. CITY PARK TRANSIT CO.

(Supreme Court of Washington. Oct. 9, 1896.)

APPEAL—HARMLESS ERROR—MISCONDUCT OF JURY.

Where the jury decides correctly a question of law submitted to them erroneously, their failure to follow the erroneous instruction will not be cause for reversal. Per Dunbar, J., dissenting.

Dissenting opinion. For majority opinion, see 45 Pac. 743.

DUNBAR, J. I dissent. I am forced to confess that the authorities are divided upon the main proposition discussed in the opinion, and, indeed, it seems that, from such investigation as I have been able to make, the weight of authority sustains the majority decision, although there are some cases, and compara-

tively recent ones, too, which take the other view. If, however, the authorities were uniform in holding that, where a jury decides a question of law rightly, which had been submitted to them erroneously by the court, such rightful decision would be ground of error, I could not give my assent to such doctrine, because it seems to me to be absurd, and opposed to the plainest principles of common sense. The only object of an appeal to this court is to enable the court to determine whether a fair trial has been accorded to the litigants below. How can it be said that an error of law has been committed if the jury has decided the law correctly, notwithstanding the fact that it is the duty of the court to instruct the jury as to what the law is? The essential thing is that the case should be decided under the law, and, if the jury decides it under the law which this court deems to be correct, then the object of the law is met. If the court had instructed the jury—as we will presume for the purposes of this case that it did—erroneously, and the jury had followed the instructions of the court, the verdict must necessarily have been erroneous, and the case would have been reversed on appeal to this court. The respondent could not have corrected it below, nor taken any exceptions to it, because it was in his favor. It is true that, under the theory of the law generally, and under the rule laid down by our constitution in particular, the trial judges shall declare the law. The language of the constitution is, "declare the law." But it presumes that the law shall be correctly declared, or, in other words, that the law shall be declared, and not something which is not the law, or which this court finds not to be the law. It has been the uniform announcement by this court that, where error was committed by the court in its instructions to the jury, if it affirmatively appeared that no other verdict could have been rendered under the law and the facts than the verdict which was rendered by the jury under the erroneous instructions, such error would be error without prejudice, and would not warrant a reversal of the cause. Nay, it has often been held that, where misconduct of the jury was proven, and yet it conclusively appeared that such misconduct was not responsible for the verdict, or that the verdict could not, under the law and the testimony, have been otherwise, such misconduct would not be error. Then, under what theory can it be held that the misconduct of the jury in a case of this kind—and I will concede it to be misconduct, and further concede that it was the duty of the jury to receive the instructions of the court as the law of the case—can be reversible error? When the case, for this alleged error, is reversed, and sent back for trial, all that can be done eventually, if the case is correctly decided, is to affirm the verdict of the jury already rendered, and it simply puts the litigants to the useless expense of another trial. The logic of this kind of a ruling is that the verdict and judgment in favor of the respondent

ent should be set aside because it does not follow the instructions of the court; and, if the jury had followed the instructions of the court, the judgment must necessarily have been set aside, because the verdict was rendered under an erroneous instruction by the court. It seems to me too plain for argument that, where the judgment was rendered by the jury under the law, the object of the law has been attained, and the parties should not be subjected to the expense and delay of another trial. The judgment, in my opinion, should be affirmed.

SCOTT, J., concurs.

GUND v. PARKE (PARKE, Intervener).
(Supreme Court of Washington. Oct. 9, 1896.)
INTERVENTION—COMMUNITY PROPERTY—LIABILITY FOR HUSBAND'S DEBTS.

1. In an action on a note executed by a married man, defendant's wife may intervene for the purpose of having it adjudged, in case judgment is rendered against defendant, that the debt is not a community debt, and that it shall not be satisfied out of the community property, though plaintiff is seeking no relief against said property.

2. Community real estate is not liable for the satisfaction of a judgment against the husband on an accommodation note, negotiable in form, in favor of a bona fide holder who acquired it before maturity, and without notice of its accommodation character.

3. Community personal property may be sold to satisfy a judgment against the husband for his separate debt.

Appeal from superior court, King county; R. Osborn, Judge.

Action by George J. Gund against James Parke to recover on a note. Fannie M. Parke, wife of defendant, intervened, asking that any judgment which should be rendered against defendant should declare that the debt was not a community debt, and that it should not be satisfied out of community property. The court overruled a demurrer to the complaint in intervention, gave judgment for plaintiff in accordance with the intervenor's prayer, and plaintiff appeals. Modified.

Allen & Powell, for appellant. White, Munday & Fulton and Greene, Turner & Lewis, for respondents.

DUNBAR, J. Plaintiff and appellant loaned to one F. L. Stinson the sum of \$3,000, and took as collateral security therefor his promissory note for \$3,500, payable to Stinson, and signed by Stinson and Parke and L. C. Gilman. This action was brought on the collateral note to collect a judgment against Parke only. Fannie M. Parke, wife of the defendant, filed a complaint in intervention, in which she alleged that she and defendant were the owners of community real property in King county, Wash.; that the note sued on was a separate debt of the defend-

ant, and not a community debt; and that judgment rendered therein against defendant, the husband, would be a charge on the community land. Her prayer was that any judgment that should be rendered against him should adjudge that the debt was not a community debt, and that it should not be satisfied out of the community property. To this complaint in intervention the plaintiff demurred on the ground that the same did not state facts sufficient to constitute a ground for intervention. The court overruled the demurrer. At the close of the evidence the court withdrew the case from the consideration of the jury, and directed judgment to be entered in favor of the plaintiff against the defendant, and further directed that the judgment should adjudge that the debt was a separate debt of defendant, and that it was not to be satisfied out of the community property. Judgment was entered accordingly, and an appeal was taken from so much of the decree as adjudged that the debt was not a community debt, and that it should not be satisfied out of the community property.

It is urged by the appellant that the wife showed no right to intervene, because she had no interest in the matter in litigation; that the matter in litigation was the husband's indebtedness to the plaintiff; that the plaintiff was not seeking relief against the community property or its lands; and that the question in litigation was not the question of how the husband's liability should be satisfied, but whether there was such a liability. It was held by this court in *McDonough v. Craig*, 10 Wash. 239, 38 Pac. 1034, that in an action upon a negotiable promissory note executed by the husband alone for what was alleged to be a community debt the wife was a proper defendant, and upon a finding in favor of the defendant upon such issue he was entitled to have the debt adjudged as that of the community. This case overruled the rule of practice which had been announced theretofore by the court in *Bank v. Scott*, 6 Wash. 499, 33 Pac. 829, and 34 Pac. 434, and we think the logic of *McDonough v. Craig* would permit the intervention of the wife and the determination of the liability of the community property before judgment as well as after. The court in that case said: "This leaves for consideration only the question of practice as to the time when this prima facie presumption can properly be made conclusive. That the one having such a claim may at some time have this prima facie presumption made conclusive so evidently results from well-settled rules of practice that it will not be questioned; and, if this is true, there would seem to be no good reason why this should not be done at the earliest possible moment when the necessary parties can be brought before the court for that purpose." And again: "It necessarily follows that the plaintiff is entitled to have his judg-

ment show upon its face the fact that it is or a community debt." If that be true, then it seems to us that it would equitably follow that the wife would have a right to have the judgment show upon its face the fact that it was not a community debt. The plaintiff, under the rule announced, had a right to make the wife a party, and he might have made her a party had he seen fit. Her rights are co-equal with those of the plaintiff. She introduced no new issues by her complaint in intervention, but only asked to have the question determined then that must necessarily be determined before the realization on the judgment. We therefore hold that the demurrer to the complaint was properly overruled.

The other proposition urged by the appellant raises the question whether the community real property is liable for the satisfaction of a judgment rendered upon an accommodation paper of the husband, negotiable in form, in favor of a bona fide holder who acquired the paper before maturity without notice of its accommodation character. It is urged by the appellant that in *McDonough v. Craig*, supra, and *Bierer v. Blurock*, 9 Wash. 63, 36 Pac. 975, it was held that all business which the husband transacts is presumed to be community business; that all contracts and obligations entered into by the husband are presumed to be contracts and obligations of the community. This is true, but the holding only went to the extent of a presumption, and the case of *McDonough v. Craig* was to the effect that this presumption could be overturned by testimony, and that the fact that the debt contracted was not for the benefit of the community would relieve the community real estate from liability. A lucid and strong argument is made by the appellant in his brief against the policy of this law, but it is an argument which should be more properly directed to the legislature than to the courts. The uniform holding of this court, from the announcement of the decision in *Brotton v. Langert*, 1 Wash. 73, 23 Pac. 688, has been to the contrary. In the face of the statute we are unable to hold that the note made to evidence a debt which is not for the benefit of the community can be collected out of community real estate. So much has been said on this subject that it hardly seems worth while to enter into a discussion upon the merits of that question now. The court, however, in this case decreed that the debt was a separate debt of defendant, and that it could not be satisfied out of the community property. This decision was too comprehensive, for, under the ruling of this court in *Powell v. Pugh*, 13 Wash. 577, 43 Pac. 879, the judgment could be enforced against the community personal property. It is conceded by the respondent that this case falls within the rule announced by the court in the case above cited, but the court is asked to overrule that case. We are, however, satisfied

with the ruling made in that case, and must hold that it was error in the court to exclude the community personal property from the operations of this judgment. From the record, however, we can easily determine that no good purpose would be subserved in reversing the case and ordering a new trial, and the case will therefore be remitted, with instructions to the lower court to modify its judgment in the manner above indicated, and, as so modified, it will be affirmed; the appellant to obtain costs of his appeal in this court.

HOYT, C. J., and SCOTT, J., concur. ANDERS, J., concurs in the result.

HORTON et ux. v. DONOHUE-KELLY BANKING CO. et al.

(Supreme Court of Washington. Oct. 9, 1896.)

APPEAL BOND—HUSBAND AND WIFE—COMMUNITY PROPERTY—LIABILITY FOR DEBTS—LEVY ON HUSBAND'S INTEREST FOR COMMUNITY DEBT.

1. The failure of the affidavit of the surety in an appeal bond to state that he is worth the required amount over and above debts and liabilities, as provided by statute, is not ground for dismissing the appeal. *Investment Trust v. Hender*, 41 Pac. 913, 12 Wash. 559, distinguish- ed.

2. Where a husband who held stock in a corporation for the benefit of the community became surety for the corporation in order to protect its business, the liability so incurred was enforceable against the community estate.

3. A levy on all the husband's interest in the community property, on a judgment enforceable against the community, authorizes a sale of the property standing in the husband's name for the benefit of the community. Scott, J., dissenting.

Appeal from superior court, King county; J. W. Langley, Judge.

Action by Julius Horton and Annie E. Horton, his wife, against the Donohue-Kelly Banking Company, a corporation, and A. T. Van de Vanter, as sheriff of King county, to enjoin a levy on execution. A demurrer to the answer was sustained, and judgment rendered for plaintiffs, and defendants appeal. Reversed.

Bausman, Kelleher & Emory, for appellants. John G. Barnes, for respondents.

ANDERS, J. Respondents move to dismiss the appeal for the reason that the affidavit of the surety in the appeal bond does not state that such surety is worth the required amount over and above all debts and liabilities, as required by the statute. It was held in the case of *McEachern v. Brackett*, 8 Wash. 652, 36 Pac. 690, that defects of this kind were not such as would justify the dismissal of the appeal; and such ruling was affirmed in the cases of *Warburton v. Ralph*, 9 Wash. 537, 38 Pac. 140, and *Cook v. Tibbals*, 12 Wash. 207, 40 Pac. 935. And while, in the case of *Investment Trust v. Hender*, 12 Wash. 559, 41 Pac. 913, it was held that an appeal bond to which no affidavit of the surety was at-

tached was insufficient, and that by reason of such insufficiency the appeal should be dismissed, the opinion in that case shows that it was not the intention of the court to in any manner overrule the cases above cited. On the contrary, it affirmatively appears therefrom that it was because the majority of the court thought that this case could be distinguished from those that the appeal was dismissed, notwithstanding the fact that such majority was satisfied with what had been theretofore held upon the subject. It follows that this court, in four or more cases, has announced the rule that defects like the one in the bond under consideration furnish no sufficient reason for the dismissal of an appeal; and such must be taken to be the settled rule of this court, and thereunder the motion to dismiss must be denied.

Stripped of technicalities, the real question presented for our decision upon this appeal is as to whether or not the consideration moving to a corporation of which the husband is an officer and stockholder, under such circumstances that his relations as such are in connection with the business of the community composed of himself and wife, will authorize the enforcement of a liability incurred by him, as surety for such corporation, against the property of such community. That the benefit to the corporation would furnish a sufficient consideration to the husband, so that the contract could be enforced against him, is conceded; but it is strenuously contended that the liability thus incurred is not that of the community, and cannot be enforced against the community property, and *Spinning v. Allen*, 10 Wash. 570, 39 Pac. 151, is cited to sustain the contention. In that case the husband was really but a nominal stockholder. The stock had been given to him, and was his separate property; and the case should be viewed in that light, although the opinion there rendered fails to state this, and it was not published in a statement of facts. In the case at bar a different question is presented. Here the surety had a substantial interest in the corporation, which he held for the benefit of the community. Hence, when he saw fit to incur liability as a surety, for its benefit, it will not be presumed that it was from pure friendship to the corporation, but rather for the purpose of protecting his interest therein. Hence the liability incurred was in the course of business, and this business did not relate to his own separate estate, but to property rights belonging to the community. If, to aid the corporation in which he was thus interested, he had performed services, and such services had resulted in a benefit to the corporation, such benefit would have inured to the community, and not to the husband alone. This being so, the converse must be true, and a liability incurred for the benefit of the corporation should be enforceable against the property of the community. As said by this court in the case of *Improvement Co. v. Sagmeister*, 4 Wash. 710, 30 Pac.

1058, it will not do to hold that the community occupies such a relation to the business done by the husband that it is entitled to reap all of the benefits thereof, without at the same time holding that it is subject to all its liabilities. Under the allegations of the answer in the case at bar, to which the superior court sustained a demurrer, it must be presumed that the husband, in all his relations with the corporation, was acting for the community, and that any benefits which might have grown out of his connection with such corporation would have belonged to the community. It must further be presumed that, when he incurred the liability as surety for such corporation, he did it as a matter of business, to protect the property and business of such corporation. It must follow that, in all he did in the matter, he bound the community.

It is claimed that, even if the community property was liable, the form of the levy made by the sheriff was insufficient; and the case of *Stockand v. Bartlett*, 4 Wash. 730, 31 Pac. 24, is cited to sustain the claim. What was held in that case was that the husband had no such separate interest in the community property that it could be reached upon an execution for a debt which could not be enforced against the community. But no such question is raised by the form of the levy in this case. The property presumably stood in the name of the husband, and a levy upon all of his interest in the property, upon a judgment which could be enforced against the community, would authorize a sale of the property standing in his name for the benefit of the community. But, whether or not this is so, the decree from which the appeal was prosecuted enjoined the enforcement of the judgment against the community property, and, under the law which we have found to govern the case, was unauthorized. It will therefore be reversed, and the cause remanded, with instructions to overrule the demurrer to the answer.

HOYT, C. J., and DUNBAR, J., concur.

SCOTT, J. I concur in all that is said, except as to the manner of enforcing the judgment.

McMULLEN v. WINFIELD BUILDING & LOAN ASS'N.

(Court of Appeals of Kansas, Southern Department, C. D. Oct. 7, 1896.)

NEW TRIAL — NEWLY-DISCOVERED EVIDENCE — WHEN CUMULATIVE—DILIGENCE—DISCRETION OF COURT.

1. When one of the issues in an action is the execution by one of the parties of a bond not produced at the trial, but its absence accounted for, and its contents proven, held, the bond, if found after the trial, is newly-discovered evidence.

2. If newly-discovered evidence is material to the issue upon which the verdict of the jury is

founded, it is sufficiently material to uphold an order granting a new trial thereon.

3. The question of diligence in producing evidence claimed to be newly discovered is so largely in the sound discretion of the trial court that his ruling thereon will not be disturbed except for a very gross abuse of such discretion.

4. Where witnesses testify upon the original trial of an action that they have inspected a bond (which cannot be found, and the execution of which is in issue); that it contained the signature of a person; that they are acquainted with his signature, and that it is genuine; and when, upon an application for a new trial on the ground of newly-discovered evidence, setting up the discovery of the bond, accompanied by their affidavit that they have the bond before them, that it contains the signature of the same person, that they are acquainted with his signature, and that it is genuine,—*held*, that such newly-discovered evidence is merely cumulative, and the new trial should be denied.

(Syllabus by the Court.)

Error from district court, Cowley county; A. M. Jackson, Judge.

Action by the Winfield Building & Loan Association against J. C. McMullen and another, in which there was a judgment for defendant McMullen. From an order granting a new trial, he brings error. Reversed.

M'Dermott & Johnson, for plaintiff in error. Stanley & Vermillion, for defendant in error.

DENNISON, J. This petition in error is prosecuted for the purpose of reversing an order of the district court of Cowley county, Kan., granting a new trial in the case of the Winfield Building & Loan Association v. J. C. McMullen. The original action was brought to recover upon a bond alleged to have been executed to the loan association by J. F. McMullen as principal and J. C. McMullen as surety, upon which default is alleged to have been made. The answer of J. C. McMullen was verified, and denied the execution of the bond by him as surety, denied that J. F. McMullen had defaulted, and pleaded the statute of limitations. These three questions were put in issue by the pleadings, and upon them the trial was had. Upon the trial the bond was not produced. It was claimed to have been delivered to J. F. McMullen, and its contents were proven. Several witnesses testified that the bond contained the signature of J. C. McMullen, and that the signature was genuine. J. F. McMullen testified that J. C. McMullen signed the bond in his presence. J. C. McMullen testified that he had signed a bond about three years prior to this bond, but that he had refused to sign this one for the year of 1885. The jury returned a verdict for the defendant J. C. McMullen. Afterwards the plaintiff filed a motion for a new trial, alleging as the grounds therefor newly-discovered evidence, and setting up that the bond had been found, and would be produced upon a new trial of the case. The district court sustained the petition, and granted a new trial upon the payment of the costs of the original action and of

this proceeding, and the plaintiff in error brings the case here to procure a reversal of the order granting such new trial. The petition in this case alleges as the grounds for a new trial the seventh subdivision of paragraph 4401 of the General Statutes of 1889, which reads as follows: "The former verdict, report or decision shall be vacated and a new trial granted upon the application of the party aggrieved for any of the following causes, affecting materially the substantial rights of such party. 7th. Newly discovered evidence material for the party applying, which he could not, with reasonable diligence, have discovered and produced at the trial." This subdivision presents three questions to be considered by the trial court in passing upon the application for a new trial: First, the question of the evidence being newly discovered; second, its materiality; third, the question of diligence. If we add to this a fourth question, is the newly-discovered evidence cumulative? we have all the questions necessary to be considered by the trial court upon the hearing of the application for a new trial. In the trial of the original action, J. C. McMullen denied the execution of the bond by him. The question was, did the name of J. C. McMullen appear on the bond, and did he put it there? There was no controversy as to the contents of the bond. The absence of the bond was accounted for, and its contents shown. The disputed point to be settled by the bond was the genuineness of the signature of J. C. McMullen. The bond was afterwards discovered. The newly-discovered evidence is claimed to be the bond itself. We think the court was justified in finding that the evidence was newly discovered. The counsel for the plaintiff in error contends that the evidence, even if newly discovered, is not material to all the issues raised by the pleadings. The issues were: First, the execution of the bond by J. C. McMullen; second, the default of J. F. McMullen; third, the statute of limitations. It must be admitted that the bond introduced in evidence could tend to prove but one of these issues; i. e. the execution of the bond by J. C. McMullen. It must also be admitted that, if any one of these issues is found in favor of the defendant, the verdict and judgment are correct.

We cannot adopt the theory of counsel for plaintiff in error that the newly-discovered evidence must be material to all the issues. If it is material to the issue upon which the verdict of the jury was founded, it is sufficient. In this case the jury found specially that J. C. McMullen did not execute the bond. The plaintiff in error contends that the jury were instructed not to answer the special questions if they found for the defendant below. However, they did answer this question, and the general verdict of the jury must have been arrived at in accordance with this finding.

Upon the question of diligence we think that it is a matter so largely in the discre-

tion of the trial court that the ruling thereon should not be disturbed, except for a very gross abuse of such discretion. In this case no such abuse of discretion is shown.

The only other question is as to whether the evidence is merely cumulative. At the trial of the original action the plaintiffs introduced evidence tending to show that the bond had been delivered to J. F. McMullen, and was not in the possession of the plaintiffs, and could not be procured by them. They thereupon offered evidence to prove the existence, execution, and contents of the bond. There was evidence tending to prove that J. C. McMullen signed the bond, and there was evidence tending to prove that he did not sign the bond. The evidence in the original action is all before this court, and we can easily determine whether the newly-discovered evidence is cumulative. In the original action J. S. Mann, W. C. Robinson, and Henry Goldsmith testified, in effect, that they had seen the bond in question, that it contained the signature of J. C. McMullen, that they were acquainted with his signature, and that it was the genuine signature. In their affidavits attached to the petition for a rehearing they testify, in effect, that they have the bond in question before them, that it contains the signature of J. C. McMullen, that they are acquainted with his signature, and that it is his genuine signature. The only variation in their testimony is that in the original action they testified in relation to the signature upon a bond that they had formerly inspected, while in the affidavits they testified in relation to the signature upon a bond they were then inspecting. We are irresistibly forced to the conclusion that the evidence contained in the affidavits is so nearly the same as that given upon the original trial that the court erred in not holding it cumulative, and in not denying the petition for a new trial. "Cumulative evidence is evidence of the same kind, to the same point." 1 Greenl. Ev. § 2. There was no attempt made to compare the signature on the bond with an acknowledged signature of J. C. McMullen, nor was there any showing made that such a comparison could or would have been made upon the new trial if one should be granted. It is with very great reluctance that we reverse the ruling of the trial court granting a new trial in any case, and we are fully cognizant of the fact that a much stronger case must be made for a reversal where a new trial has been granted than where it is refused; but we feel confident that in this case the trial court erred in its legal conclusions, and that, except for such error, the new trial would not have been granted. That newly-discovered evidence merely cumulative is not a sufficient ground for a new trial, see *Clark v. Norman*, 24 Kan. 515, and many other Kansas cases. The order of the district court in granting a new trial is reversed, and the case remanded, with instructions to deny the petition for a new trial. All the judges concurring.

MAHANES et al. v. DARTMOUTH SAV. BANK.

(Court of Appeals of Kansas, Southern Department, C. D. Oct. 7, 1896.)

SUBROGATION TO MORTGAGEE.

A person is not entitled to be subrogated to the rights of a mortgagee, or to be treated as his equitable assignee, who does not either directly or indirectly furnish any part of the money used in paying his mortgage.

(Syllabus by the Court.)

Error from district court, Greenwood county; C. A. Leland, Judge.

Action by the Dartmouth Savings Bank against William C. and Sarah E. Mahanes. Judgment for plaintiff. Defendants bring error. Reversed.

This action was brought in the district court of Greenwood county, Kan., by the Dartmouth Savings Bank, as plaintiff, against William C. and Sarah E. Mahanes, as defendants, to foreclose a mortgage of \$1,750, claimed to have been executed by Mahanes and wife to the Kansas Loan & Trust Company, and by it assigned to said bank. Mr. and Mrs. Mahanes denied the execution of the note and mortgage. The record, including the special findings of the jury, establishes the following state of facts, viz.: For a long time prior to December 5, 1889, Mahanes and his wife owned and occupied as a homestead a quarter section of land in said county, and on said date deeded the same to one N. W. Hackett, for the purpose of enabling him to make a sale of it for Mr. Mahanes. There were upon said land two mortgages, aggregating \$1,150, both being held by the Lombard Mortgage Company. While the title was in Hackett, an application purporting to have been signed by William C. Mahanes was sent to the Kansas Loan & Trust Company, for a loan of \$1,750, to be secured by a lien upon said land, and reciting that a portion of the money was to be used in paying the incumbrances held by the Lombard Mortgage Company. While the title was in Hackett, and on July 24, 1888, Hackett paid the Lombard Mortgage Company \$1,200, out of his own private funds, and procured the release of the two mortgages, without the knowledge of Mahanes or his wife. On August 22, 1888, Hackett and wife executed to William C. Mahanes a warranty deed to said land, and had the same filed in the office of the register of deeds in said Greenwood county, Kan. On August 22, 1888, Hackett forged the names of William C. and Sarah E. Mahanes to the note and mortgage, and to an order to the loan company to pay the money to him. The acknowledgment of Mahanes and wife purports to have been taken before Alton White, a notary public. The court submitted 15 special questions to the jury, which, with their answers thereto, are as follows: "Question 1. Did the defendants or either of them make the application for the loan sued on, or authorize N. W. Hackett or any one else to do so? Answer. No. Question 2. Did the defendants

execute the notes and mortgage sued on, or authorize N. W. Hackett or any one else to sign their names to them? Answer. No. Question 3. Did the defendants acknowledge the execution of the mortgage before Alton White as notary public? Answer. No. Is it not a fact that the application, notes, and mortgage, and order for the payment of the money to Hackett, are forgeries? Answer. Yes. Question 5. Is it not a fact that N. W. Hackett signed the names of the defendants to the notes, mortgage, and order? Answer. Yes. Question 6. Is it not a fact that Alton White signed the name of defendant W. C. Mahanes to the application? Answer. Yes. Question 7. Is it not a fact that said Alton White knowingly and wrongfully signed said name to the application, without the authority of W. C. Mahanes, and wrongfully and fraudulently witnessed the signatures of the appraisers thereto, and in said manner witnessed said notes and mortgage, and certified to the same as a notary public? Answer. Yes. Question 8. Is it not a fact that said Alton White was the agent of the Kansas Loan and Trust Company, mortgagee herein, in and about the making of the said loan? Answer. Yes. Question 9. Did defendants or either of them receive the proceeds of said loan, directly or indirectly, or any part thereof? Answer. No. Question 10. Did the proceeds of said loan or any part thereof go towards the payment of the Lombard mortgages, that had formerly been against said land? Answer. No. Question 11. Is it not a fact that N. W. Hackett paid said Lombard mortgages in full, out of his own private funds, and about a month before this mortgage purports to be executed by defendants? Answer. Yes. Question 12. Is it not a fact that N. W. Hackett paid said Lombard mortgages off without the knowledge, consent, or authority of the defendants? Answer. Yes. Question 13. Is it not a fact that he so paid the same without being under any obligation or necessity to do so to protect any interest he had in the land, and acted therein as intermeddler in paying the same? Answer. Yes. Question 14. Is it not a fact that, a month or thereabouts after he had paid the said Lombard mortgages, said N. W. Hackett received the proceeds of the notes and mortgage sued on herein in full from the said Kansas Loan and Trust Company, through its agent, Alton White, and upon a forged order from defendants? Answer. Yes. Question 15. Is it not a fact that at the time of making the loan sued on herein, and the payment of said Lombard mortgages by Hackett, the said N. W. Hackett was indebted to defendant William C. Mahanes in a large sum over and above any claim he may have had against said Mahanes or wife. Answer. Yes. [Signed] William Knox, Foreman." Upon the first trial of the case the jury returned a verdict for the defendant below, which was by the court set aside, and a new trial granted. Upon the last trial the judge gave, among others, the following instructions,

viz: "If you find that said note and mortgage were not signed by the defendants, or by any one authorized by them, then your verdict should be only for the amount of the indebtedness on their land at the time, to wit, the Lombard mortgages for \$1,000 and \$150, and the interest due thereon, with interest thereon from the date of their payment, at the rate of 6%." A verdict and judgment were rendered against the defendants below for \$1,428, and they bring the case here for review.

R. P. Kelley, for plaintiffs in error. Fuller & Whitcomb and Clogston & Fuller, for defendant in error.

DENNISON, J. (after stating the facts). To determine the legal proposition embodied in this case, we must decide whether the Kansas Loan & Trust Company, or its assignee, the Dartmouth Savings Bank, is entitled to be subrogated to the rights or to be treated as the equitable assignee of the Lombard Mortgage Company. It is clear that the loan company or its assignee is not entitled to be subrogated to the rights of the Lombard Mortgage Company, or entitled to the protection afforded by the lien of its mortgages. They did not either directly or indirectly pay the Lombard Mortgage Company the amount due upon the mortgages, or any part thereof. In fact, the Lombard mortgages had been paid by Hackett and released of record about a month before the loan company had paid out anything upon the loan. Hackett forged a mortgage upon the land, and obtained the money from the loan company by means of a forged order, at a time when the land was unincumbered. For the same reasons, the loan company or its assignee cannot be considered the equitable assignee of the Lombard Mortgage Company. Hackett tendered a forged note and mortgage and a forged order purporting to have been signed by Mr. and Mrs. Mahanes, and the loan company paid him the money upon them. Whatever may have been the status of the transactions between Hackett and Mahanes, and whatever rights the plaintiff below might have established under proceedings in garnishment or otherwise, it cannot be said that the necessary elements entered into this case to entitle said plaintiff to be subrogated to the rights of the Lombard Mortgage Company. The money of its assignor did not pay the Lombard Mortgage Company. Its assignor had parted with no money until about a month after the Lombard mortgages had been paid and satisfied of record. If the loan company had not paid out the money upon the forged note, mortgage, and order, the status of the Lombard mortgages would not have been changed. In fact, the loan company was not instrumental, either directly or indirectly, in procuring the payment or release of the Lombard mortgages, or in furnishing the money for that purpose. We are compelled to hold that the third instruction given by the judge was erroneous. The plaintiffs in error were entitled to a judgment

upon the special findings made by the jury. The judgment of the district court is reversed, and the case remanded, with instructions to render judgment for the defendants below upon the special findings of the jury. All the judges concurring.

CONE v. CITIZENS' BANK.

(Court of Appeals of Kansas, Southern Department, O. D. Oct. 7, 1896.)

CONDUCT OF TRIAL—REMARKS OF COURT.

In the submission of special questions to the jury upon the request of either party it is material error, prejudicial to the rights of the party requesting the submission of the questions, for the judge to make the following statement to the jury: "I want the jury to understand that these questions are got up to befuddle and mislead the jury, so that there will be error in the trial of this case, so that the verdict may be set aside."

(Syllabus by the Court.)

Error from court of common pleas, Sedgwick county; Jacob M. Balderston, Judge.

Action by the Citizens' Bank against Rufus Cone. Judgment for plaintiff. Defendant brings error. Reversed.

On January 10, 1888, the Kansas Furniture Company executed and delivered to the Citizens' Bank a chattel mortgage upon its entire assets to secure an indebtedness owing by it to the said bank for the sum of \$25,400, and at the same time executed and delivered to A. S. Martin an additional chattel mortgage upon the same property to secure an indebtedness of \$4,500. The Citizens' Bank, at the time of the execution of said mortgages, took possession of the entire assets of the Kansas Furniture Company, valued at about \$70,000, and conducted and carried on said business until the 10th day of April, 1888, at which time the following contract in writing was entered into: "This agreement, entered into between the Citizens' Bank of Wichita, Kansas, Mrs. A. S. Martin, Kansas Furniture Company, and the creditors of the said Kansas Furniture Company, witnesseth: That whereas, the said Kansas Furniture Company have been, and now are, indebted to divers parties in large sums of money, which they have been unable to pay at maturity; and whereas, the said Kansas Furniture Company are indebted to the Citizens' Bank and Mrs. A. S. Martin in large sums of money which they have heretofore secured by chattel mortgages, said mortgages being now on file in the office of the register of deeds of Sedgwick county, Kansas; and whereas, the said Citizens' Bank, under and by virtue of said mortgages, has taken possession of the stock of merchandise of the said Kansas Furniture Company in the city of Wichita, Kansas, and also certain other property of the said Kansas Furniture Company, and notes, accounts, and credits belonging to the said Kansas Furniture Company; and whereas, all of said parties are desirous that the said property shall be managed as hereinafter provided: It is

therefore agreed: First. That the assets of the said Kansas Furniture Company now covered by the said mortgage to the Citizens' Bank shall be taken into possession by R. Martin as trustee for the said mortgagees. Second. That said trustee shall continue the business as already established, and shall sell for cash, or on credit not to exceed 90 days, on good security, and credits of 90 days shall be considered as cash: provided, however, that no sale shall be made at any time to exceed \$200.00 except for actual cash in hand, without the consent of said bank to such sale; and no security shall be taken, to secure the payment of the amount due for any sale made without the approval of said bank. Third. At the end of each week said trustee shall pay out of the proceeds of said sales: (1) The necessary expenses incident to the management of said business, which shall not exceed 15 per cent. of the sales actually made. (2) He shall then pay to the said Citizens' Bank and to Mrs. A. S. Martin 60 per cent. of the proceeds of all sales and collections, to be prorated between them according to the amount of their respective claims, until the amount secured by said mortgages to the Citizens' Bank and Mrs. A. S. Martin shall be fully paid. (3) He shall use the remaining 40 per cent. to replenish the stock of merchandise belonging to said business, and pay off local bills unpaid existing in and about the city of Wichita, not to exceed \$200.00. (4) The said mortgages to said Citizens' Bank and to the said Mrs. A. S. Martin shall remain and constitute a valid lien upon all the property now secured by the same, and all additions to the stock of merchandise hereafter named, until the amounts secured by said mortgages shall be fully paid and discharged; and the rights and claims of all the creditors of the said Kansas Furniture Company (except the said Citizens' Bank and the said Mrs. A. S. Martin) shall be held to be inferior and subject to the said claims of the Citizens' Bank and said Mrs. A. S. Martin. (5) After the indebtedness of the said bank and Mrs. A. S. Martin shall have been fully paid, the said trustee shall then pay 60 per cent. of the net proceeds to all the creditors of the company pro rata, and 40 per cent. of the net proceeds to be applied to the purchase of goods to be added to the said stock of merchandise, as herein provided. It is agreed and understood, however, that all of the obligations and conditions of the said mortgages to said Citizens' Bank and Mrs. A. S. Martin shall at all times hereafter remain of binding force and effect, and the said Citizens' Bank hereby reserves the right at any time when it may deem itself insecure to re-enter into possession of all the goods, wares, merchandise, notes, accounts, and credits now covered by its said mortgage, and to dispose of the same as stipulated in said mortgage, or provided by law; and whenever said Citizens' Bank or Mrs. A. S. Martin shall so proceed to re-enter into possession or dispose of stock as provided by law, then all the other parties to this contract shall

be released from the obligations thereof. The said Citizens' Bank and Mrs. A. S. Martin agree to sign the above and foregoing whenever the same shall be signed by the said Kansas Furniture Company, provided the same shall be done within 20 days from the date hereof; and whenever a majority of the creditors and the said Citizens' Bank and Mrs. A. S. Martin shall sign this agreement the same shall go into full force and effect. This agreement shall cease and determine, and all parties be released from the obligations thereof, on the 9th day of August, 1890. Witness our hands this 27th day of Feb., 1888. Forest City Fur. Co., Lyon P. Ross, Treas. Rockford Union Furniture Company, P. A. Peterson, Secy. Kansas Furniture Company, S. W. Pearce, Pres. Adaline S. Martin. The Citizens' Bank, by Sluss & Stanley, its Attorneys." From said 10th day of April, 1888, until the 9th day of August, 1890, the business of the Kansas Furniture Company was carried on by Robert Martin, the trustee named in said contract, at which time the stock of furniture was turned back to the Kansas Furniture Company, and it continued to do business in its own name and on its own responsibility until the 20th day of October, 1890, at which time the Citizens' Bank again took possession of the goods and assets of the Kansas Furniture Company under a chattel mortgage executed by said Kansas Furniture Company and delivered to said bank to secure an indebtedness of \$9,445. This mortgage was never filed for record. Under this mortgage the business was conducted by the bank until the 24th day of November, 1890, at which time the goods and chattels covered by said mortgage were sold at chattel mortgage sale for the sum of \$7,000, and were purchased by said Citizens' Bank, which claims to be the owner of the said stock of goods under said purchase. The Milwaukee Furniture Company secured an order of attachment to be issued out of the district court of Sedgwick county, Kan., in an action wherein it was plaintiff and the Kansas Furniture Company was defendant; and this plaintiff in error, as sheriff of Sedgwick county, Kan., levied upon a portion of said furniture as the property of the Kansas Furniture Company. Otto Stechhan & Co. secured an order of attachment to be issued out of the district court of Sedgwick county, Kan., in an action wherein he was plaintiff and S. W. Pearce and the Citizens' Bank were defendants; and this plaintiff in error, as sheriff of Sedgwick county, Kan., levied upon a portion of said furniture as the property of said S. W. Pearce. D. T. Mitchell secured an order of attachment to be issued out of the district court of Sedgwick county, Kan., in an action wherein he was plaintiff and the Kansas Furniture Company was defendant; and this plaintiff in error, as sheriff of Sedgwick county, Kan., levied upon a portion of said furniture as the property of the Kansas Furniture Company. On the 9th day of January, 1891, the Citizens' Bank, defendant in error, commenced this action in the

court of common pleas of Sedgwick county, Kan., claiming of said Rufus Cone, this plaintiff in error, the sum of \$1,484.54, as damages for the alleged taking and conversion of the said personal property. The plaintiff in error contends that the mortgages of the Citizens' Bank and A. S. Martin were fully paid out of the proceeds of the sales made by Robert Martin as trustee, according to the terms of the above contract, and relies upon the special findings of the jury that said Robert Martin, trustee, had sold nearly \$70,000 worth of goods and had received about \$50,000 in money besides the amount received by the said Citizens' Bank while it had possession of the goods from January 10, 1888, to August 9, 1890, and from the 30th day of October, 1890, to the 24th day of November, 1890. The plaintiff in error also contends that the goods levied upon under the attachment issued in the case of Otto Stechhan & Co. v. S. W. Pearce, who was president of the Kansas Furniture Company, were goods sold directly to S. W. Pearce, and were not included in the mortgage given by the Kansas Furniture Company to said Citizens' Bank. This case was first tried to a jury on March 27, 1891, and a verdict returned for the defendant. Afterwards, on the 31st day of March, 1891, on motion of the plaintiff the court granted a new trial, and the case was again tried to a jury on the 13th day of May, 1891, when the following verdict was returned: "We, the jury impaneled in the above-entitled cause, do, upon our oaths, find for the plaintiff, and that the plaintiff was, at the commencement of this action, the owner and entitled to the immediate possession of the personal property described in plaintiff's petition, and we find the value of plaintiff's possession at fifteen hundred dollars." The jury also returned answers to 94 special questions submitted to them by the court. Defendant below filed a motion for a new trial, which was overruled by the court, and upon the overruling of said motion the case comes to this court for review.

Adams & Adams, J. D. Houston, and J. F. Craig, for plaintiff in error. Stanley & Vermillion, for defendant in error.

DENNISON, J. (after stating the facts). During the last trial of this case in the court of common pleas of Sedgwick county, Kan., the defendant below submitted to the court 94 special questions, requesting that they be submitted to the jury for answers. The court submitted them to the jury, and in presenting them he made use of the following language: "I want the jury to understand that these questions are got up to befuddle and mislead the jury, so that there will be error in the trial of this case, so that the verdict may be set aside." Among the grounds upon which a new trial was asked are the following: "First, irregularities in the proceedings of the court; second, the abuse of discretion by the court, by which this defendant was prevented from

having a fair trial." Paragraph 4401 of the General Statutes of 1889 provides that a new trial may be had upon these grounds. Upon an examination of the record we are unable to say that the defendant below was not prejudiced by the remarks of the court. By this statement the judge assumes that the verdict will be for the plaintiff below, and that the defendant below wants error committed in the trial, so that the verdict may be set aside, and that the questions were submitted to the jury to accomplish that result. It is well recognized that juries have a great respect for the opinion of the trial court, and are always on the alert for some intimation as to what the trial court thinks of the case. From the remark of the trial court the jury must have concluded that the court supposed, of course, that the judgment ought to be rendered for the plaintiff below; and this and several other remarks of the court, which were complained of, indicated very strongly to the jury that the trial court thought the judgment ought to be for the plaintiff below, and we are unable to say that their action was not influenced by the remarks of the court. "Any improper remark of the court in the presence and hearing of the jury, liable to influence their action, is misconduct." 16 Am. & Eng. Enc. Law, 524. "Judges must take great care to say nothing in the hearing of the jurors, while the case is progressing, which can possibly be construed to the prejudice of either party." *Cronkhite v. Dickerson*, 51 Mich. 177, 16 N. W. 371. "Error will lie on the demeanor of the trial judge if it be such as to prevent a fair trial, or prejudice the case upon the facts before the jury." *Wheeler v. Wallace*, 53 Mich. 355, 19 N. W. 33, 37. These cases are cited approvingly in *Walker v. Coleman*, 55 Kan. 381, 40 Pac. 640, which case was reversed, and a new trial granted, because of improper remarks made by the same judge who tried this case.

We think no good purpose can be served by an examination of the other errors complained of in this case. They are largely predicated upon the special findings of the jury, and upon another trial of this case the answers to the questions may not be the same. The judgment of the court of common pleas of Sedgwick county, Kan., is reversed, and the case remanded to the district court of Sedgwick county, Kan., for a new trial. All the judges concurring.

STUNKLE v. HOLLAND.

(Court of Appeals of Kansas, Southern Department, C. D. Oct. 7, 1896.)

SERVICE OF PROCESS—PRESUMPTIONS FROM RECORD—EVIDENCE IN REBUTTAL—SUFFICIENCY.

1. When the original process in an action in the district court is lost, and cannot be found, and the appearance docket recites that a summons was issued and returned "Served," the presumption is that such return was regular, and the service valid.

2. To overthrow the presumption of the valid-

ity of the service of original process and the return thereof where the original papers are lost, and cannot be found, positive testimony must be introduced, sufficient to show that the summons was not in fact legally served, or that the return thereof was irregular. Evidence which merely casts doubt upon such service or return is not sufficient.

3. To overthrow the presumption of the jurisdiction of the court to render any judgment which it did in fact render, positive testimony must be introduced, sufficient to establish the lack of such jurisdiction. Evidence which merely casts a doubt upon such jurisdiction is not sufficient.

(Syllabus by the Court.)

Error from district court, Sumner county; James A. Ray, Judge.

Ejectment by James H. Holland against Henry Stunkle. From a judgment for plaintiff, defendant brings error. Reversed.

This is an action in ejectment, brought in the district court of Sumner county, Kan., by James H. Holland, as plaintiff, against Henry Stunkle, as defendant, to recover the possession of the S. W. ¼ of section 11, township 30, range 1 W. of the sixth P. M., in Sumner county, Kan. The case was tried by the court without a jury, and he made the following findings of fact: "First. That the title to the land mentioned in the petition, to wit, the southwest quarter of section 11, township 30, range 1 west of the sixth P. M., in Sumner county, Kansas, passed from the government of the United States to the said plaintiff on the 15th day of May, 1874. Second. That on May 15, 1874, the plaintiff herein executed and delivered to the said defendant herein his certain promissory note for the sum of \$390, with 12 per cent. interest from date, and secured the payment of said note by executing and delivering to the defendant on the same day a mortgage on the last above described land, and the land described in the petition of the plaintiff; and that said mortgage was duly acknowledged, and filed for record in the office of the register of deeds of Sumner county, Kansas, on June 5, 1874. Third. That afterwards, on January 1, 1876, the said plaintiff, James H. Holland, together with his wife, executed and delivered a warranty deed for the property described in the petition to one John T. Holland, and that said deed was filed for record in the office of the register of deeds of Sumner county, Kansas, on January 17, 1876. Fourth. That on January 1, 1876, the said John T. Holland, together with his wife, executed and delivered to F. E. Bates & Co. a mortgage to secure the sum of \$1,650 on the land described in the petition of the plaintiff, and that said mortgage was duly filed for record in the office of the register of deed of Sumner county, Kansas, on January 17, 1876, after the same had been duly acknowledged. Fifth. That afterwards, said mortgage so executed by the said John T. Holland to the said F. E. Bates & Co. being in default, the said F. E. Bates & Co. commenced an action in the district court of Sumner county, Kansas, against John T. Holland, his wife, and the

defendant herein, Henry Stunkle, the object of which was to foreclose said mortgage as aforesaid given by the said John T. Holland to the said F. E. Bates & Co., and in said action the said Henry Stunkle filed his answer and cross petition setting up the said mortgage executed by the said John T. Holland, as aforesaid. Sixth. That the respective debts secured by the respective mortgages given by the said James H. Holland to Henry Stunkle, and by the said John T. Holland to the said F. E. Bates & Co., bore 12 per cent. interest from the dates in said mortgages, and that no part of said debts were ever paid by the said James H. Holland or the said John T. Holland, except by the sale of the land hereinafter described. Seventh. That the original papers in the said action of F. E. Bates & Co. against John T. Holland, Emma L. Holland, and Henry Stunkle are lost, and cannot be found, and that the appearance docket of Sumner county, Kansas, district court shows that in said action of F. E. Bates & Co. against John T. Holland and others the summons issued out of said court in said action was returned 'Served,' and said notation of the fact of said service of said summons appears on said appearance docket. Eighth. That said action, as aforesaid, was commenced in the month of September, 1878, and for some time prior thereto the said John T. Holland and wife were living on the land described in the petition of the plaintiff, but some two or three weeks prior to the commencement of said action, as aforesaid, of F. E. Bates & Co. against John T. Holland, Emma L. Holland, and Henry Stunkle, the said John T. Holland and wife removed from the land described in the petition of plaintiff to other land in the vicinity thereof. Ninth. That two or three weeks prior to the commencement of said action the said John T. Holland went from Sumner county, Kansas, into Sedgwick county, Kansas, and after the commencement of said action was seen in Sedgwick county, Kansas. Tenth. That the deputy sheriff of Sumner county, Kansas, testified that he left in the possession of certain persons, unknown to him, who were then residing on the premises described in the petition of plaintiff, two copies of the summons issued in said action of F. E. Bates & Co. against John T. Holland, Emma L. Holland, and Henry Stunkle, and that he reported the said fact of service in such manner to the person who was sheriff of Sumner county, Kansas, in 1878. Eleventh. That there was no evidence on the trial that the summons issuing out of the district court of Sumner county, Kansas, was not served upon the said John T. Holland in any other manner, and there was no testimony on the trial that said John T. Holland was not served at any time after the commencement of the action, and before the rendition of the judgment in the case of F. E. Bates & Co. against John T. Holland, Emma L. Holland, and Henry Stunkle, otherwise as stated in finding No. 10, and that the record in said case does

show that the said defendants John T. Holland and Emma L. Holland were not brought into court by service by publication. Twelfth. That in said action, as aforesaid, by F. E. Bates & Co. against John T. Holland, Emma L. Holland, and Henry Stunkle judgment was rendered on the 27th day of November, 1878, in the district court of Sumner county, Kansas, in favor of F. E. Bates & Co. against John T. Holland and Emma L. Holland in the sum of \$1,650 debt, with interest at the rate of 12 per cent. per annum from date of said judgment, and the sum of \$14.50 costs, and in the same action the defendant Henry Stunkle recovered a judgment against the defendant John T. Holland in the sum of \$1,205, with interest from the date thereof at the rate of 12 per cent. per annum; and in said judgment it was further directed, ordered, and adjudged that if said judgments were not paid within six months from the 27th of November, 1878, that the southwest quarter of section 11 and the southwest quarter of section 10, all in township 30 south, range 1 west, in Sumner county, Kansas, should be sold according to law, as upon execution, and without appraisal. Thirteenth. That, said judgments not being paid, on February 17, 1880, an order of sale was issued out of the clerk's office of said district court as aforesaid, directed to the sheriff of Sumner county, Kansas, and said order of sale was in due form and according to law, and commanded the said sheriff of Sumner county, Kansas, to sell the above-described land pursuant to said judgment; and that the sheriff of Sumner county, Kansas, having received said writ, did execute the same according to law, and on March 20, 1880, he sold the southwest quarter of section 11, township 30 south, range 1 west, to the defendant Henry Stunkle for the sum of \$500, and sold the southwest quarter of section 10, township 30 south, range 1 west, in Sumner county, Kansas, to said F. E. Bates & Co., and that afterwards, on April 24, 1880, the said sheriff of Sumner county, Kansas, having made his return of said sales in due form, the court having carefully examined the proceedings of said sheriff in making said sales, confirmed said sales, and thereupon an entry was placed upon the journal in the district court of Sumner county, Kansas, that the court was satisfied of the legality of such sales, and an order was made by the court directing the said sheriff to execute to said defendant Henry Stunkle, and to said F. E. Bates & Co., the purchasers at said sales, good and sufficient deeds for said lands and tenements, and that a short time thereafter the said sheriff of Sumner county, Kansas, did execute and deliver to said Henry Stunkle a good and sufficient deed according to law for the land described in the petition herein, to wit, the southwest quarter of section 11 in township 30 south, range 1 west, in Sumner county, Kansas, and did execute and deliver to the said F. E. Bates & Co. a good and sufficient deed, according to law, for the southwest quarter of

section 10, township 30 south, range 1 west, and that the said respective pieces of land last described have been at all times of the same value. Fourteenth. That afterwards, on February 11, 1882, the said plaintiff herein, together with his wife, executed and delivered to the defendant Henry Stunkle a deed, which was duly acknowledged in due form of law, for forty (40) acres off of the north side of the southwest quarter of section 11 in township 30 south, of range 1 west, in Sumner county, Kansas, and that the same was filed for record in the office of the register of deeds of Sumner county, Kansas, on February 13, 1882. Fifteenth. That on August 29, 1879, John T. Holland, together with his wife, Emma L. Holland, executed and delivered to said plaintiff herein a quitclaim deed for the southwest quarter of section 11, township 30 south, range 1 west, in Sumner county, Kansas, and that the said James H. Holland has had said deed in his possession at all times since, and did not file the same for record until October 4, 1884, when the same was filed in the office of the register of deeds of Sumner county, Kansas, for record, by said James H. Holland. Sixteenth. That the said James H. Holland, together with his wife, have lived in the vicinity of the land described in the petition of plaintiff ever since 1873, and has passed and has seen the land described in the petition herein almost every day continuously and consecutively since said time. Seventeenth. That the said James H. Holland was in the possession of the land described in the petition from the time he obtained title thereto from the government until some time in the year 1882, when the said defendant herein, Henry Stunkle, demanded the possession thereof from the said James H. Holland by virtue of said sheriff's sale, as aforesaid, and mortgage so given defendant by plaintiff, and thereupon on such demand the said James H. Holland yielded possession thereof to the defendant Henry Stunkle, and surrendered said possession in pursuance to said demand under said claim of title by the defendant Henry Stunkle; and that the defendant Henry Stunkle has been in the possession of the land described in the petition of plaintiff ever since, and is now in possession thereof. Eighteenth. That in the year 1883 the said defendant Henry Stunkle began the erection of a large and valuable flouring mill on the south 120 acres of the land described in the petition herein, and did complete the same some time in the year 1883; that said improvements consisting of the flouring mill, waterway, raceway, and water wheel are now of the reasonable market value of \$2,430; that, in addition thereto, the said defendant Henry Stunkle has placed other improvements on said north 120 acres aforesaid, consisting of a couple of small houses and of a fence, which are of the value at this time of \$296; that, in addition thereto, the said Henry Stunkle caused thirty-five (35) acres of the said 120 acres of land to be broken out,

and which at the time it was so done cost the said Henry Stunkle, and which was its value, the sum of \$70; that the said James H. Holland saw the improvements being made by the said Henry Stunkle, and made no objection thereto; that said 120 acres, without said improvements as aforesaid, is now of the market value of \$1,200. Nineteenth. That the rents and profits of the said land received by the said Henry Stunkle since he obtained possession of said land are of the value of \$500. Twentieth. That the said Henry Stunkle has paid the taxes upon said land at all times since the sale so made to him by the sheriff of Sumner county, Kansas; that on May 4, 1881, the said Henry Stunkle redeemed from a tax sale for the taxes upon the south 120 acres of the land described in the petition herein on the sale made for the taxes of the year 1877 and the taxes of the years 1878 and 1879, paid by the purchasers thereunder, and indorsed in said certificates, the sum of \$110.94, being the cost of the redemption of the said land at said time; that on May 4, 1881, the said Henry Stunkle paid upon the south 120 acres as aforesaid, as taxes, the sum of \$17.71; that on December 19, 1882, the said Henry Stunkle paid as taxes upon the land last described the sum of \$7.51; that on June 20, 1883, the said Henry Stunkle paid as taxes upon the land last described the sum of \$7.51; that on May 23, 1884, the said Henry Stunkle paid as taxes upon the land last described the sum of \$10.51; that on December 20, 1883, the said Henry Stunkle paid as taxes upon the land last described the sum of \$7.08; that on December 8, 1884, the said Henry Stunkle paid as taxes on the land last above described the sum of \$22.92, and that this was the first year in which taxes were assessed upon the said flouring mill; that on June 2, 1885, the said Henry Stunkle paid as taxes upon the land last described the sum of \$22.92; that on December 24, 1885, the said defendant Henry Stunkle paid as taxes upon the land last described the sum of \$18; that on June 23, 1886, the said Henry Stunkle paid as taxes upon the land last described the sum of \$18; that on December 15, 1886, the said Henry Stunkle paid as taxes upon the land last described the sum of \$27.50; that on December 15, 1887, the said Henry Stunkle paid as taxes on the land last described the sum of \$28.05; that on June 8, 1889, the said Henry Stunkle paid as taxes on the land last described the sum of \$39.90; that on November 19, 1888, the said Henry Stunkle paid as taxes on the land last above described the sum of \$39.90; that on December 1, 1889, the said Henry Stunkle paid as taxes on the land last described the sum of \$30.60; that on June 26, 1890, the said Henry Stunkle paid as taxes on the land last described the sum of \$42.03; that on December 27, 1890, the said Henry Stunkle paid as taxes on the land last described the sum of \$40.19; that on June 24, 1891, the said Henry Stunkle paid as taxes on the land last described the sum of \$40.91; that on December

18, 1891, the said Henry Stunkle paid as taxes on the land last described the sum of \$38.08; that the average annual taxation of said land for the five years prior to the erection of the improvements was \$10.03, and that the total of taxes on the land, exclusive of improvements by defendant, was \$180.54. Twenty-First. That the plaintiff, James H. Holland, has elected and does elect to accept and receive the value of said land described, to wit, the south 120 acres of the southwest quarter of section 11, in township 30 south, of range 1 west of the sixth P. M., in Sumner county, Kansas, and to allow the defendant Henry Stunkle to retain possession of said land and of all his improvements thereon, and elects to take and receive from the said Henry Stunkle the value of said land, as found by the court, and the amount of rents and profits received therefrom by the defendant Henry Stunkle, as found by the court, less the amount of taxes paid by the said Henry Stunkle, as found by the court, and the amount of the purchase price of said land, paid by the defendant Henry Stunkle, with interest thereon as found by the court." From said findings of fact the court states the following as its conclusions of law: "First. That the district court of Sumner county, Kansas, did not acquire any jurisdiction of the person of John T. Holland by reason of the commencement of said suit and service of summons as hereinbefore found, and that said proceedings and said sheriff's sale as made in the case of F. E. Bates & Co. against John T. Holland, Emma L. Holland, and Henry Stunkle are irregular, and that the sheriff's deed did not pass an absolute title to the land described in the petition of the plaintiff to the said Henry Stunkle. Second. That said plaintiff herein, James H. Holland, has the legal title to the south 120 acres of the southwest quarter of section 11, in township 30 south, of range 1 west, in Sumner county, Kansas. Third. That the said James H. Holland is not entitled to the possession of said land unless he repays and refunds to the said Henry Stunkle the value of said improvements and the purchase money of \$500 at the sale of said land, with interest at the rate of 7 per cent. per annum from the 20th day of March, 1890, and the taxes paid on said land by the said Henry Stunkle, amounting to \$180.54, less the value of the rents and profits of said land received by the said Henry Stunkle, to wit, the sum of \$500; and that the total amount and value of the improvements made by said defendant on said land at this time is \$2,796, and the total amount of taxes which the said Henry Stunkle is entitled to have refunded to him is \$180.54, and the total amount of said purchase price of said land, with interest to this date, is \$900; and the total amount now due to the said Henry Stunkle, after deducting the amount of the rents and profits received by him from said land from the said James H. Holland before he will be entitled to possession of said land is \$3,385.54; and that the

said plaintiff, James H. Holland, is not entitled to have possession of said land until he pays to the defendant Henry Stunkle said sum of \$3,385.54. Fourth. And that, the said James H. Holland having elected to take the value of the land at this time instead of paying the defendant the sum found to be due him for improvements, purchase money, and taxes, the court finds as a further conclusion of law that the said James H. Holland is entitled to claim and receive from the defendant Henry Stunkle the value of said land, to wit, the sum of \$1,200, and the value of the rents and profits therefrom received by the defendant, to wit, \$500, less the purchase price of said land paid by the defendant, with interest, to wit, the sum of \$900, and the taxes paid by the defendant, to wit, the sum of \$180.54, and is entitled to receive from the defendant, and is hereby awarded, the amount of the value of said land and said rents and profits, less the amount of said purchase price, with interest, and said taxes, to wit, the sum of \$610.46, and that the plaintiff is entitled to recover all the costs of this action. That a decree be entered in this case in conformity with the conclusions of fact and conclusions of law as herein stated. To each and every one of the conclusions of fact and conclusions of law as stated by the court the said plaintiff and the said defendant except." Whereupon judgment was rendered in favor of the plaintiff and against the defendant Henry Stunkle in the sum of \$610.46, to which judgment plaintiff in error excepts, and brings the case here for review.

Stanley & Vermillion, for plaintiff in error.
W. W. Schwinn, for defendant in error.

DENNISON, J. (after stating the facts). The contention of the plaintiff in error is that the court erred in not rendering judgment for the said plaintiff in error on the findings of fact as made by the court, and alleging that the judgment should have been given for the plaintiff in error instead of the defendant in error. The first conclusion of law arrived at by the court is based upon the seventh, eighth, ninth, tenth, and eleventh findings of fact, and attacks the jurisdiction of the court over the person of John T. Holland in the foreclosure action of F. E. Bates & Co. against John T. Holland and others. According to those findings, the original papers in said action were lost, and cannot be found. One of the original papers would be the original process or summons. The appearance docket shows that a summons was issued, and was returned "Served," and said notation of the fact of said service of summons appears on said appearance docket. The question for us to determine is, how was it served? The summons being lost, we are unable to say what the return was. The presumption is that it was served according to law. Now, what is there in the findings to overthrow that pre-

sumption? The finding is that two or three weeks prior to the commencement of said action John T. Holland and wife removed from the land described in the petition of plaintiff to other land in the vicinity thereof; that two or three weeks prior to the commencement of said action said John T. Holland went from Sumner county, Kan., to Sedgwick county, Kan., and, after the commencement of said action, was seen in Sedgwick county, Kan. The court also finds "that the deputy sheriff of Sumner county, Kansas, testified that he left in the possession of certain persons, unknown to him, who were then residing on the premises described in the petition of plaintiff, two copies of the summons issued in said action, and that he reported the said facts of service in such manner to the person who was sheriff of Sumner county, Kansas, in 1878." The court also finds that the record in said case does show that the said defendants John T. Holland and Emma L. Holland were not brought into court by service by publication. The court also finds that there was no evidence that the summons was not served upon said John T. Holland in any other manner nor at any time after the commencement of the action and before the rendition of the judgment. Upon a careful examination of the findings of fact, we must hold that the first conclusion of law of the court, to wit, that the court "did not acquire jurisdiction of the person of John T. Holland by reason of the commencement of the suit and service of summons," is not warranted by said findings of fact.

It will be presumed, in the absence of any showing to the contrary, that the district courts have jurisdiction to render any judgment or order which it is shown they in fact did render. All presumptions are in favor of the jurisdiction of the court. See *Carey v. Reeves*, 32 Kan. 723, 5 Pac. 22; *Head v. Daniels*, 38 Kan. 12, 15 Pac. 911; *English v. Woodman*, 40 Kan. 752, 21 Pac. 283. Not only are the presumptions in favor of the jurisdiction of the court over the person of John T. Holland, but the appearance docket of the district court of Sumner county, Kan., states that "a summons was issued out of said court in said action, and returned 'Served,' and the notation of the fact of service of said summons appears on said appearance docket." To overthrow the presumption of jurisdiction and the presumption of the legality of the service by the sheriff, the court finds that "two or three weeks prior to the commencement of the action the said John T. Holland went from Sumner county into Sedgwick county, Kansas, and after the commencement of said action was seen in Sedgwick county, Kansas." This was not a finding that he was not in Sumner county at the commencement of the action, or that service of summons was not

regularly made upon him either in said Sumner county or in Sedgwick county, Kan.

The court also finds that the deputy sheriff testified that he left copies of the summons in the possession of the unknown persons residing on the premises, and that he reported said fact of service in such manner to the person who was sheriff of Sumner county, Kan., in 1878. This is not a finding that the sheriff of Sumner county, Kan., accepted the report of the deputy as to the above service, and made his return thereon upon such statement. There is no attempt made to show whether the sheriff's return recited that the service was made by delivering a copy to the defendants in person, or whether it was made by leaving a true copy at their usual place of residence. For all that appears to the contrary, the sheriff made a legal service of the summons, and his return would show such service. The return of the sheriff upon original process is a very high class of evidence tending to support the truth of such return. The presumption is that such return was regular, and showed a valid service upon John T. Holland and Emma L. Holland. There is no attempt in this action to show that such was not the return of the sheriff. There was no attempt to show by John T. Holland or Emma L. Holland that they were not regularly and legally served, and the court finds that there was no testimony on the trial that the summons was not served in any other manner than as testified to by the deputy sheriff, and that there was no testimony that the said John T. Holland was not served at any time after the commencement of the action and before the rendition of the judgment. The most that can be claimed for the ninth and tenth findings of fact is, that they raise a doubt as to whether the summons was served upon them in Sumner county or in Sedgwick county, and whether or not the only service might not have been the leaving of the two copies by the deputy sheriff with the unknown persons residing upon the premises sought to be foreclosed. This certainly is not sufficient to overcome the presumption in favor of the jurisdiction of the court to render the judgment of foreclosure, and is not sufficient to overcome the presumption of the regularity and validity of the sheriff's return, and is not sufficient to overthrow the return of the sheriff.

It is not necessary to notice the other assignments of error, for the reason that our views upon the question of jurisdiction will compel the rendition of a judgment in favor of the plaintiff in error. The judgment of the district court is reversed, and the case remanded, with instructions to render a judgment in favor of the plaintiff in error, Henry Stunkle, and against the defendant in error, James H. Holland, for costs. All the judges concurring.

CRAIG et al. v. CALIFORNIA VINEYARD CO. et al.¹

(Supreme Court of Oregon. Oct. 19, 1896.)

REFERENCE—EXAMINATION OF ACCOUNTS—FRAUDULENT TRANSFERS—RIGHTS OF CREDITORS—CREDITORS' BILL—DISTRIBUTION OF FUND—INSOLVENT CORPORATIONS—DIVISION OF FUNDS—SALE—RESCISSION BY SELLER.

1. In a suit by creditors to set aside a bill of sale executed by, and a judgment rendered against, their debtor, a corporation, in favor of defendant bank, plaintiffs alleged that the indebtedness on which the judgment was recovered was the personal debt of the manager of said corporation to the bank, and prayed that said bank be compelled to disclose its claim, whereupon the cashier of the bank submitted a statement of its account, which occupied 26 printed pages. *Held*, that the court did not err in referring the cause, without the consent of the parties; a reference being authorized by Hill's Ann. Laws, § 397, as amended by Act Feb. 20, 1893 (Laws 1893, p. 26), in causes involving long and complicated accounts.

2. W., who owed defendant bank \$20,000, formed a corporation for the purpose of carrying on the same business in which he was then engaged, and transferred to it all his stock in trade, receiving in exchange therefor shares of corporate stock. The bank made no objection to such transfer, and afterwards recognized the corporation by loaning it \$30,000. Thereafter L., the president of the bank, induced the corporation to execute its notes for W.'s private debt to the bank; and while the corporation was insolvent, and its insolvency known to L., interest to the amount of \$1,100 was collected on said notes before they were surrendered, and W.'s personal note given in lieu thereof. The bank, instead of crediting this interest on its bona fide claim against the corporation for the \$30,000 loaned thereto, applied it to W.'s debt, took a bill of sale of a portion of the corporate property, and thereafter caused the property to be attached, and obtained judgment by default for the amount demanded, including the false claim for \$1,100. *Held*, that the attachment and the bill of sale, which were parts of the same transaction, were fraudulent as against subsequent attaching creditors of the corporation.

3. Where an attachment is held void as to subsequent attaching creditors, who have pooled their claims and joined in a common suit for their mutual benefit, the court may distribute the fund among them pro rata, instead of in the order of the lien of their respective attachments.

4. Where a bank accepts, from a corporation which it knows to be insolvent, money due the bank on the private debt of the manager of the corporation, equity will follow the corporate assets so diverted, and, upon their recovery, will apply them to the payment of corporate creditors according to their respective priorities.

5. Where an insolvent corporation orders large quantities of goods in anticipation of its failure, for the purpose of surrendering them to a preferred creditor, and such goods are thereafter fraudulently attached by such creditor, the owners of the property, pending an action by them to set aside the attachment, may rescind the sales, and bring replevin against the receiver to recover possession of their respective goods.

Appeal from circuit court, Multnomah county; Loyal B. Stearns, Judge.

Bill by O. H. Craig and others against the California Vineyard Company and others to enjoin a sale on execution, for the appointment of a receiver, and for other relief. There was a decree for plaintiffs, from which defendants appeal. Modified.

¹ Rehearing denied.

This is a suit to set aside a bill of sale executed by, and a judgment rendered against, the California Vineyard Company, a corporation, to enjoin the sale of its property under an execution issued upon said judgment, and for the appointment of a receiver. The material facts are: That about July 1, 1891, the defendant James Wolfsohn, under the name of the California Vineyard Company, opened a liquor store at Portland; but, having no means wherewith to carry on the business, the defendant the Merchants' National Bank, of which the defendant Julius Loewenberg was president, advanced money therefor, which on October 4, 1892, amounted to and was evidenced by Wolfsohn's promissory note of \$20,000, and Loewenberg also loaned him \$2,250. That prior to January 1, 1893, one Louis Kuhn loaned him \$10,610.85 more, and on that day the California Vineyard Company, having been duly incorporated, commenced business as a wholesale dealer in wines and liquors, with a capital stock of \$100,000, divided into 1,000 shares of the par value of \$100 each, of which Wolfsohn subscribed for 249, Kuhn 250, and one W. L. Boise 1 share. That, when the company incorporated, Wolfsohn, having prepared a trial balance, showing his assets to be \$31,691.80, and liabilities \$17,691.80, transferred to the corporation all the goods and property of his former business, subject to the payment of his debts for such goods; and Kuhn, from the amount so loaned by him, was credited with \$7,000 on account of his subscription to the capital stock, and Wolfsohn obtained credit on his subscription thereto for a like amount on account of the said transfer to the corporation. That on February 28, 1893, Louis Kuhn died, testate, and Louise Kuhn, his widow, having been appointed executrix of his last will and testament, duly qualified as such, and entered upon the discharge of her trust. That on February 28, 1893, the California Vineyard Company executed to the Merchants' National Bank its promissory note for \$25,000, payable in 90 days, with interest after maturity, and on March 1st of that year obtained a credit therefor of \$24,500, of which \$14,563.11 was applied in discharging overdrafts. That on May 23, 1893, Wolfsohn, having paid from the assets of the corporation \$250 on account of the money loaned by Kuhn, executed to Louise Kuhn his three promissory notes, amounting to \$10,360.85, payable in six, nine, and twelve months; and, in consideration therefor, the executrix assigned to him the shares of stock of said corporation subscribed by Kuhn, but held the certificates thereof as collateral security for the payment of said notes. The Merchants' National Bank, on June 28, 1893, loaned to the corporation \$5,000, taking its note therefor; and on September 18th of that year this note and the one for \$25,000 were taken up, and another

er for \$30,000 was executed by the corporation in lieu thereof. At the same time, upon the advice and request of Loewenberg, it executed the following notes: To the Merchants' National Bank, \$20,000, on account of Wolfsohn's said note of October 4, 1892; to Loewenberg, \$2,250, on account of money loaned by him to Wolfsohn; and to Louise Kuhn, \$10,300.85, on account of Wolfsohn's notes to her,—each of which was made payable on demand, with 8 per cent. interest from that date, but the note to Mrs. Kuhn was deposited with Loewenberg, to prevent her from maintaining an action thereon and attaching the property of the corporation; and, as a consideration for the execution of said notes, Wolfsohn gave the corporation his promissory note for \$32,610.85, the amount of the notes so executed by it. On February 12, 1894, the note of \$20,000 was taken up, and notes of \$8,000 and \$12,000 were executed by the corporation in lieu thereof, the interest thereon to that date, amounting to \$666.65, having been fully paid. On March 12, 1894, while being hard pressed by its creditors, and unable to secure any further advances from the bank, the corporation instituted a branch house at Tacoma, Wash., and ordered from Eastern dealers, and shipped from its Portland store, to the branch house, goods of the value of \$14,503. On February 22, 1894, the corporation paid \$320, interest on the \$12,000 note to June 12th of that year, and on May 24th \$120, interest on the \$8,000 note, making \$1,106.65 paid out of the assets of the corporation to the bank on account of Wolfsohn's private debt, and, on the date last mentioned, paid Loewenberg \$113.50 more, as interest on the \$2,250 note from September 13, 1893, to May 1, 1894. It also paid Mrs. Kuhn, as interest on her notes for \$10,300.85, eight monthly installments of \$69.17 each, amounting to \$552.56; and, upon Loewenberg's advice and at his request, it paid money and delivered invoices of goods to Mrs. Kuhn in payment of Wolfsohn's debt, amounting to \$7,262.83, thereby taking up two of his notes, and having a credit indorsed in the third, and making the total amount of the assets of the corporation thus diverted \$9,035.54. On May 24, 1894, the corporation discounted to the said bank certain notes executed to it, amounting to \$907.22, to which Wolfsohn added his note for \$32,610.85, and thus secured an apparent cash credit for the corporation of \$33,518.07 upon the books of the bank, against which it drew a check in favor of the bank for \$20,120 in payment of its said notes for \$12,000 and \$8,000, and another for \$2,800, which was credited on the \$30,000 note, the balance of the credit having been applied on an overdraft of the corporation. On May 31, 1894, it executed a bill of sale of its stock of goods at Tacoma to the bank, whose agent took possession of the

same, and filed the bill of sale for record; and, in consideration of the transfer, the bank paid \$592.25 on account of some expenses in the management of the branch house, and indorsed a credit of \$10,000 on said note for \$30,000, and on the next day commenced an action in the circuit court of Multnomah county against the California Vineyard Company to recover \$17,200, as the balance due thereon, and for \$1,750, attorney's fees; and, having duly sued out a writ of attachment, the defendant Penumbra Kelly, as sheriff of said county, in pursuance thereof, attached all the goods of the corporation in its store at Portland. Thereafter actions were commenced in said court against the California Vineyard Company by the plaintiffs in this suit, as follows: By C. W. Craig & Co., for \$1,351.60; Her & Co., \$2,087.64; Eisen Vineyard Company, \$1,285.93; William Wolf & Co., \$2,604.95; Siedeman, Lachman & Co., \$500.70; S. Lachman & Co., \$3,087.16; H. H. Veuve, \$776.03; C. H. Arnold, \$765.78; M. De Grouseau, \$1,420.70; and L. Jacobi, \$986. And, having sued out writs of attachment, the goods of the corporation at Portland were also attached in these actions. The Merchants' National Bank obtained judgment by default for the amount demanded, and an order for the sale of the attached property; and, an execution being issued thereon, the sheriff advertised the same for sale on June 25, 1894, on which day the plaintiffs herein, having obtained judgments in their respective actions and orders for the sale of said goods, and executions issued thereon having been returned nulla bona, commenced this suit, on behalf of themselves and all other creditors of the California Vineyard Company who might desire to join with them and pay their pro rata share of the expenses thereof, alleging that the defendants James Wolfsohn, manager of the company, and Julius Loewenberg, president of the Merchants' National Bank, entered into a conspiracy to hinder, delay, and defraud the creditors of said corporation, in pursuance of which the bank unlawfully absorbed all its assets, and that the California Vineyard Company, at the time said bill of sale was executed, was, and for a long time prior thereto had been, hopelessly insolvent, which fact was well known by Wolfsohn, Loewenberg, and the other officers of the bank, and pray for the relief hereinbefore stated. The court granted a temporary injunction, restraining the sheriff from selling said goods, and appointed a receiver, who took possession of the attached property, and also of the stock of goods which had been shipped to Portland from Tacoma, and, by order of the court, sold most of them. The issues having been joined, the cause was, without the written consent of the parties, referred to John Catlin, Esq., with directions to take and report

the evidence, with his findings of fact and law therefrom. Thereafter actions were, by consent of the court, brought against the receiver for the recovery of certain portions of the property so held by him, to wit: By Cook & Burnhelm Company, to recover the possession of 15 barrels of whisky, valued at \$1,419.58; I. De Turk, 3 barrels and 6 half barrels of brandy, of the value of \$579.45; Kohler & Frohling, certain wines, valued at \$1,571.58; and A. Dausseau, 3 bales of corks, of the value of \$357,—and the several issues embraced therein submitted for determination in this suit, by stipulation of parties. The referee having found for the plaintiffs in the replevin actions and for the plaintiffs in this suit, the court in the main affirmed his report, and decreed: (1) That the judgment rendered in favor of, and the bill of sale executed to, the Merchants' National Bank, so far as the plaintiffs are concerned, be set aside. (2) That there be paid to the plaintiffs in the replevin actions, from the money arising from the sale of the goods, and deposited with the clerk by the receiver, the following amounts, to wit: To the Cook & Burnhelm Company, \$1,050; I. De Turk, \$490; Kohler & Frohling, \$806.03; and the firm last named was also awarded the possession of two barrels of Zinfandel, two barrels of Burgundy, and one barrel of Reisling wine; and A. Dausseau was awarded the possession of three bales of corks,—the goods so awarded to these parties not having been sold by the receiver. (3) That the remainder of the proceeds of such sale be applied to the satisfaction of the several judgments obtained by the plaintiffs in this suit, but, if insufficient for that purpose, then to be applied thereon pro rata. (4) That the California Vineyard Company recover of the defendant Julius Loewenberg the sum of \$363.50. (5) That the injunction be made perpetual. (6) That, should any moneys remain after the application of the proceeds of such sale as hereinbefore decreed, the same to be paid to the Merchants' National Bank. (7) And that the plaintiffs recover of the defendants the Merchants' National Bank, Julius Loewenberg, and James Wolfsohn their costs and disbursements, other than the expenses of the receiver. From which decree the defendants the Merchants' National Bank, Julius Loewenberg, and Penumbra Kelly appeal.

J. M. Gearin and J. W. Whalley, for appellants. Jos. N. Teal, Jos. Simon, and J. M. Bower, for respondents.

MOORE, C. J. (after stating the facts). It is contended by counsel for the defendants that this suit does not involve the examination of long or complicated accounts, and, the parties not having consented thereto in writing, the court erred in referring the cause, and that the decree should therefore be reversed, and the cause remanded for trial by the court.

The power of the circuit court of Multnomah county to refer an issue of fact in a suit in equity to a referee for trial is limited to cases involving the examination of long and complicated accounts. Hill's Ann. Laws Or. § 387, as amended by an act of the legislative assembly approved February 20, 1893 (Laws 1893, p. 26). The plaintiffs, having alleged in their amended complaint that the indebtedness claimed by the Merchants' National Bank against the California Vineyard Company was the personal debt of the defendant James Wolfsohn, prayed that the bank, its officers and agents, be compelled to disclose the true character of its pretended claim against said corporation, in response to which the cashier of the bank prepared and submitted to the plaintiffs a statement of its account, forming the consideration for its note of \$30,000, which is printed in and occupies 26 pages of the appellants' brief. The court evidently entertained the opinion that this account was sufficiently long and complicated to bring the suit within the excepted cases in which a reference is authorized by statute, and we see no reason to doubt the correctness of its action in referring the cause under the circumstances. Section 815, Hill's Ann. Laws Or., as amended by an act of the legislative assembly approved February 20, 1893 (Laws 1893, p. 26), deprives the trial courts of the power they possessed under the former act to refer an issue of fact in a suit in equity to a referee, with direction to report the conclusions of fact and law as found by him. The manifest object of this amendment is to compel a trial by the court of the issues of fact and law in equity cases, to the end that it may observe and note the appearance of the witnesses, and their manner of testifying, thereby materially aiding the court in weighing the evidence, and reaching a correct conclusion therefrom; and, when it becomes necessary to refer an issue of fact to a referee in an equity case, it is incumbent upon the court to reach its conclusions of fact and law from the evidence reported, uninfluenced by any opinion of the referee thereon. The evidence is all before us, and the issues are here for trial de novo, so that there can be no good reason for reversing the decree, and remanding the cause for trial by the court without a reference, presuming, as we must, that the trial court reviewed the evidence, and reached its conclusions therefrom; but, as it did not see the witnesses, it could not note their manner of testifying, and hence had no advantages in reaching its conclusions superior to this court; and, this being so, a careful examination of the evidence becomes necessary.

2. The decree complained of proceeds upon the theory that the defendants Wolfsohn and Loewenberg were guilty of such acts of actual fraud in their dealings with the California Vineyard Company and its assets as to render void, as to the plaintiffs, the bill of sale executed to, and the judgment obtained by, the

Merchants' National Bank. After carefully reviewing the evidence relied upon, we think the allegations of fraud have been established. It appears that Loewenberg conceived the idea that the California Vineyard Company should assume and pay Wolfsohn's debts, and upon his request the corporation, on September 13, 1893, executed its notes for that purpose, and the bank thereafter collected interest thereon until May 22, 1894, when they were surrendered, and Wolfsohn's note given in lieu thereof; but this exchange of the evidence of indebtedness did not place the corporation in statu quo, because the amount of interest collected on Wolfsohn's debt was not credited upon the \$30,000 which was due from the California Vineyard Company to the Merchants' National Bank. Loewenberg was a brother-in-law of Louis Kuhn, and, upon the death of the latter, his widow, being anxious to ascertain the condition of her deceased husband's estate, applied to and obtained from Wolfsohn a statement of the assets and liabilities of the company; and Loewenberg, learning she had obtained such information, became offended thereat, and told her, if the condition of the corporation became known, its creditors would close out the business, and neither she nor the bank would obtain anything, but that, if the management of her business were intrusted to him, he would be able to secure the payment of both claims. Mrs. Kuhn testifies that Loewenberg promised to look after her interests, and to see that her claim was protected; but he, testifying upon this subject, says: "All I would say was, I would look out for her interests as I had my own. And I did better; as she got, I believe some \$7,800 worth of stuff, and I haven't anything for my indebtedness. He owes me \$2,250. I am a creditor of the California Vineyard Company to that amount." The bank would probably not be bound by Loewenberg's management of Mrs. Kuhn's claim against Wolfsohn, and the fact is noted only to show Loewenberg's method of securing the payment of Wolfsohn's debts, at the expense of the California Vineyard Company. In this connection another circumstance may be cited that tends to show the relation existing between Wolfsohn and Loewenberg. About two weeks before the goods were attached, Wolfsohn sent from the store of the corporation to Loewenberg's house a quantity of goods, which the witness H. S. Tulley, an employé in the store, says consisted mostly of imported goods, ales, and French wines; and J. A. Love, the drayman who delivered the same, testifies that he took a receipt for them in the delivery book of the corporation, and that they consisted of two barrels of what he supposed to be ginger ale, and ten or twelve cases of mineral water. The delivery book of the corporation, being offered in evidence, discloses that three pages had been torn therefrom, containing the dates from April 9 to May 14, 1894. Wolfsohn testifies that the value of the goods so delivered

was about \$200 or \$300, more or less, and that he was to receive a credit therefor on his note to Loewenberg of \$2,250; but the books of the corporation contain no entry of any sales of goods to Loewenberg between these dates. Wolfsohn, on January 1, 1893, prepared a trial balance, showing that the assets of the corporation exceeded its liabilities by \$14,000, but furnished to the commercial agencies of Bradstreet, Pickens, Fulton & Co., and R. G. Dun & Co. what purported to be copies thereof, in which the excess was falsely represented to be \$50,000. From January 1 to June 1, 1893, the California Vineyard Company purchased goods of the value of \$10,339.96, while for the same period in 1894 the purchases amounted to \$19,975.83, nearly all of which were made during the months of March, April, and May. About March 29, 1894, Charles M. Morgan, representing Bradstreet's Commercial Agency, called upon Loewenberg, informing him that the California Vineyard Company had been giving large orders for goods to Eastern houses, thereby creating a suspicion, and asked him if he thought the orders were given with any intention of securing a large stock of goods with a view to a failure by the company, to which Loewenberg replied "that he believed Wolfsohn was honest; that he would not gather a stock of goods for the purpose of having it on hand that he might fail; that he did not know how much the company owed; that they owed the bank some, but he would not care to state how much; and that he believed the company was good and responsible." At the time this representation was made to the agent, the company owed about \$50,000, while its assets were valued at about \$37,000. Loewenberg then knew that the officers of the bank intended to take a bill of sale of the Tacoma stock, and in all probability knew the goods in Portland were to be attached, for he testifies "that the cashier and directors, about two weeks previous to the attachment, insisted upon some action being taken against Wolfsohn and the California Vineyard Company; that the first step taken was to purchase all the bills receivable; that the bill of sale was made because Wolfsohn was pressed by the bank for payment or security, and he agreed to give the bill of sale of the Tacoma stock, which he did; that the purchases of the bills and the stock were made one right after the other, and after this was done the bank attached." The bills receivable, to which Loewenberg referred, were discounted by the bank May 22, 1894; and it is evident this was the date at which the bank adopted the course it pursued, although the bill of sale is dated May 31, 1894. Loewenberg knew the company had been losing money, that the bank would make no further advances to it, and that it was pressed by other creditors for payment of their demands; and he must also have known that it was insolvent,—in view of which it seems difficult to explain his statement to Morgan, "that he believed the com-

pany was good and responsible," upon any other hypothesis than that it was made to delay other creditors of the company until the bank could absorb all its property. But it may be claimed, and with good reason, that Loewenberg owed no duty to Morgan, or to the commercial agency which he represented, that compelled him to disclose the financial condition of the company, in view of which fact he might have declined instead of expressing a false opinion thereon.

There are in the record many other facts and circumstances tending to show a conspiracy existing between Wolfsohn and Loewenberg, but we deem the illustrations given sufficient to show that Loewenberg intended to absorb the assets of the company in the payment of its own and Wolfsohn's debts to the bank; for, being willing to apply its property to the payment of Wolfsohn's indebtedness to himself and Mrs. Kuhn, it is not assuming too much to say that he was also willing and intended to make a similar disposition of the assets of the company to the payment of Wolfsohn's debt to the bank, and, being its president, the latter should be bound by his act. The bank collected from the corporation \$1,106.65, as interest on Wolfsohn's private debts, and to this extent, at least, its other creditors were injured. It is true, the bank, prior to the incorporation of the company, loaned Wolfsohn \$20,000, which presumably went into his business, and helped to swell the assets he transferred to the company when it was incorporated; but the agents of the bank knew of the incorporation, and thereafter loaned to it \$30,000, thereby recognizing its legal existence. If the bank, knowing Wolfsohn intended to incorporate a company and to transfer to it the assets of his business, made no objections thereto, such acquiescence ought to be construed as an admission of its ratification of the course adopted, and that it relied upon Wolfsohn personally for the payment of his debt, and upon its ability to satisfy any judgment it might obtain against him by a sale of the stock in the corporation received by him for the property so transferred. It must be conceded, however, that, if the company had been incorporated by Wolfsohn to defraud the bank, the latter would not have been bound by the transfer of his property, and could, in equity, have followed it, and applied the proceeds thereof to the satisfaction of its debt (*Bennett v. Minott*, 28 Or. 339, 39 Pac. 997, and 44 Pac. 288); but the friendly relations existing between Wolfsohn and Loewenberg preclude any inference of fraud, so far as the bank is concerned, from such transfer. The business conducted by Wolfsohn being under his sole control when the bank loaned him the \$20,000, no equitable trust attached to his property; and, the company not having been incorporated for the purpose of hindering, delaying, or defrauding the bank, it had no equitable interest in the assets of the corporation by reason of

the transfer of Wolfsohn's property, and its remedy for the collection of the \$20,000 and interest thereon was against Wolfsohn's individual property, including his stock in the corporation received as an equivalent for the property so transferred.

The payment to the bank of interest on Wolfsohn's private debt was an application of the property of the corporation, which inured to the benefit of Wolfsohn, its stockholder, director, and manager; and the corporation being insolvent at the time such interest was collected, and the officers of the bank having knowledge thereof, a court of equity will follow the company's assets so diverted, and, upon their recovery, apply them to the payment of its creditors, according to their respective priorities. *Thomp. Corp. § 6527*. It must be admitted that the bank had a bona fide claim of \$30,000 against the California Vineyard Company, but it intentionally omitted to credit a payment thereon of \$1,106.65 (the amount collected on Wolfsohn's debt), caused the property of the company to be attached, and took judgment for the amount demanded, including the false claim of \$1,106.65, and obtained an order for the sale of the attached goods; and the question of law now involved is whether such attachment and judgment are fraudulent as to the creditors of the company who subsequently attached the same goods. In *Fairfield v. Baldwin*, 12 Pick. 888, it is held that if property be attached on a writ founded on two demands, one of which is honest and the other fraudulent, and a judgment is rendered for the plaintiff upon both demands, the attachment is wholly void as against a subsequent attaching creditor. In *Page v. Jewett*, 46 N. H. 441, it is held that if an attaching creditor take judgment for a claim larger than is due, and seek to collect the whole thereof, this would be such a fraud upon the rights of subsequent attaching creditors as to defeat the prior attachment, unless it affirmatively appear that the error embraced in the judgment was the result of mere accident or mistake. And in Connecticut an attachment predicated upon a claim willfully false in part is treated, so far as the rights of subsequent attaching creditors are concerned, as wholly fraudulent; but where a false claim, through accident or mistake, is inadvertently blended with a just demand, the attachment will be treated as security for the latter amount. *Ayres v. Husted*, 15 Conn. 503. The Merchants' National Bank having intentionally blended a false claim with a just demand against the California Vineyard Company, upon which it caused the property of the latter to be attached, and recovered judgment therefor, which it was seeking to enforce, for the whole amount, renders the attachment obtained by it void as to the subsequent attaching creditors of the company, who are entitled to the fund arising from the sale of the property so attached by them in the order of the lien of their respective attach-

ments; but the plaintiffs joined in a common suit for their mutual benefit, thus pooling their claims, in view of which we find no error in the distribution of the fund pro rata among them.

3. In the replevin actions it appears that Wolfsohn, as manager of the California Vineyard Company, anticipating its failure, ordered from the plaintiffs in the respective actions large quantities of goods, so that it might be able to surrender them to its preferred creditors. The goods, having arrived and been delivered to the company, were attached by the Merchants' National Bank; but the plaintiffs, rescinding the sales thereof, by consent of the court, brought their actions against the receiver to recover the possession of the goods of which they had been fraudulently deprived. The right of the plaintiffs in such actions, upon the discovery of the fraud, to rescind the contracts of sale, is unquestioned (2 Pars. Cont. [7th Ed.] 922; Newm. Sales, § 359; Cobbey, Repl. § 265); and, the attachment by the bank being fraudulent, the several plaintiffs in said actions are entitled to the possession of their respective goods remaining on hand, and to the amount realized by the receiver for the portion thereof sold by him.

4. The plaintiffs in this suit do not invoke the doctrine of an equitable trust attaching to the property of the corporation by reason of its insolvency, but maintain that, in consequence of the fraud practiced by Wolfsohn and Loewenberg, the bill of sale and transfer of the stock of goods at Tacoma are fraudulent as to them. The bill of sale and attachment were, in our judgment, parts of one scheme to absorb all the assets of the California Vineyard Company; and, the attachment being fraudulent, it follows that the bill of sale, which was a part of the same transaction, was equally so, and there was no error in setting it aside, and applying the proceeds arising from the sale of the goods thereby transferred to the satisfaction of the judgments obtained by the plaintiffs.

5. The plaintiffs in this suit also seek to recover from the Merchants' National Bank and Julius Loewenberg all moneys fraudulently obtained by them from the company; and it appearing that the bank collected from the company \$1,106.65 on account of Wolfsohn's debt, and Loewenberg having obtained from the same source and for a similar purpose \$113.50 and goods of the value of \$250, amounting to \$343.50, judgments will be rendered against each in favor of the plaintiffs for these respective amounts, which, when collected, will be applied, after the application of the proceeds of the sale of said goods, so far as necessary, to the satisfaction of the judgments awarded the plaintiffs in their respective actions, upon the discharge of which any money so collected from the bank and Loewenberg will be returned to each in proportion to the amount so paid; and, as thus modified, the decree is affirmed.

CLARNO v. GRAYSON.¹

(Supreme Court of Oregon. Oct. 19, 1896.)

CONTRACTS—OPTION—CONSIDERATION—SPECIFIC PERFORMANCE.

1. A contract provided that plaintiff, without payment, should be allowed to enter into the possession of a mine owned by defendant, for the purpose of developing the same. Such development contemplated the expenditure of money. The net proceeds of the ore extracted were to be turned over to defendant. The contract also gave plaintiff the privilege of purchasing the mine for a certain sum, payable on or before a certain time. In the event of a purchase the net proceeds of the ore turned over to defendant were to be credited on the purchase price. *Held*, that there was a sufficient consideration, after plaintiff had entered upon the development of the mine, to render the option of purchase irrevocable.

2. A contract for the sale of a mine at plaintiff's option provided that plaintiff should be allowed to enter into possession and operate the mine; the net proceeds of the ore extracted to be paid over to defendant, which were, in the event of a consummation of the purchase, to be credited on the purchase price, \$45,000, which was required to be paid by a certain time. Time was specified as of the essence of the contract. Defendant wrongfully resumed possession of the mine before the time for performance had expired, and operated it, extracting about \$19,000 of ore, the net proceeds of which were about \$3,500. *Held*, that plaintiff was not entitled to specific performance, in the absence of a demand for an accounting by defendant for the ore extracted, and a tender of the balance due on the purchase price, or an allegation in the complaint of a willingness to pay such balance.

3. In such a case, plaintiff will not be put in possession of the mine, and a new time fixed, in which he may satisfy any balance found due.

Appeal from circuit court, Baker county; Robert Eakin, Judge.

Action by Francis Clarno, assignee of the Virtue Mining Company, a corporation, against George W. Grayson. There was a judgment for defendant, and plaintiff appeals. Affirmed.

Dell Stuart and Thos. O'Day, for appellant. T. Calvin Hyde, F. L. Moore, and Robert M. Clarke, for respondent.

WOLVERTON, J. This suit is based upon a certain contract, and its modifications, touching the Virtue Mine, situated in Baker county, Or. On the 19th day of November, 1891, the defendant, George W. Grayson, being the owner of the mine in question, entered into a contract under seal with one William C. Ralston, of San Francisco, Cal., wherein, for the consideration of \$10 in hand paid, the said Grayson agreed "to give to the said party of the second part [Ralston] a working bond on the aforesaid mining claim, with the privilege of purchasing said claim, on the following conditions: 1st. The said party of the second part shall be allowed, on the signing of this agreement, without payment, to enter into full possession of said mining claim, for the purpose of working and developing the same and extracting ores; provided, however, that all of such development work must be done in a proper, work-

¹ Rehearing pending.

manlike manner, and not to the injury of said mine, or to the interest of the party of the first part: and provided, further, that the party of the second part must post notices necessary according to law to hold the said party of the first part free from the payment of any expenses or costs which the said party of the second part may incur during his working of said mine. 2nd. If within one year and twelve days from the date of this agreement (to wit, the first day of December, A. D. 1892) the said party of the second part shall pay to the said party of the first part the sum of forty-five thousand (\$45,000) dollars, legal coin of the United States, then and on that condition the said party of the first part agrees to deliver to said party of the second part a good and sufficient deed, conveying the said mining property to the said party of the second part." The third paragraph is superseded by paragraph 4 of the modified contract, and hence is omitted. "4th. If within a year and twelve days from the date of this agreement (to wit, the first day of December, 1892) the said party of the second part does not pay to the said party of the first part said sum of forty-five thousand (\$45,000) dollars, legal coin of the United States, then this agreement to be null and void and of no effect. Time is of the essence of this agreement." Then, after giving a description of the mine, the contract proceeds: "Together with all the dips, spurs, and angles, etc., and also all and singular the tenements, hereditaments, and appurtenances thereunto belonging; also the hoisting works and improvements connected therewith; and also all that certain twenty stamp power quartz mill situate on the aforesaid Virtue Mine." Subsequently this contract was assigned by Ralston to A. V. Oliver, and by his and mesne assignments became the property of a corporation of Stockton, Cal., known as the Virtue Mining, Milling & Development Company, all with the written assent of Grayson. The Stockton Company entered into possession of the mine, and expended a considerable sum of money in equipment and development work, and on August 18, 1892, entered into a modified agreement with Grayson as follows, omitting preamble: "Now, therefore, in consideration of the premises, and of a valuable consideration given by the party of the second part to the party of the first part, the party of the first part agrees to extend the time on said bond nine (9) months, to wit, the first day of September, 1893, under the following conditions, to wit: 1st. It is agreed and understood that all the conditions, except the limitation of time, named in the original bond between George W. Grayson and William C. Ralston (reference being had thereto), shall remain in force until the first day of September, 1893; said original agreement, to which reference is had, being dated November 18, 1891, and together with all its assignments and transfers, duly sign-

ed and acknowledged; being of record in the records of Baker county, Oregon, in Book of Deeds, volume U, page 268. 2nd. It is further agreed and understood that, in case the said party of the second part should not complete the purchase of said mine in accordance with condition No. 2 of the said original agreement, then and in that event it is expressly agreed and understood that any mills, mining, or hoisting works, and all improvements of every kind soever, erected and used by the said party of the second part in connection with the working or developing of said mine, shall become absolutely the property of the party of the first part. 3rd. It is further agreed and understood that condition No. 3 of said original agreement be canceled. 4th. It is further agreed and understood that the net proceeds, if any there be, of all the ores extracted from said mine, or removed from the dump belonging to the said mine, during the existence of this agreement, after deducting all costs incidental to mining and milling the same and extracting the gold therefrom, shall be turned over monthly, on the fifteenth day of each month, to the party of the first part, or his agent. Should the purchase be completed in accordance with the conditions of this agreement, to wit, by the payment of forty-five thousand (\$45,000) dollars on or before the first day of September, 1893, then and in that event the said party of the first part agrees to consider the amounts so received, if any there be, as part of the purchase price; but should the purchase not be completed by the payment of forty-five thousand (\$45,000) dollars on or before September 1, 1893, then and in that event it is fully agreed and understood that any and all of these amounts so received by the party of the first part from the net receipt of all such ores extracted or worked from the mine or dump of said property by the said party of the second part shall belong absolutely to the said party of the first part, without recourse, and the said party of the second part hereby waives all claim to the same. And it is further agreed that the expenses above referred to as incidental to mining and milling of said ores shall be reasonable, and to the satisfaction of the said party of the first part, and that at the end of each month the said party of the second part shall render to the said party of the first part, or his agent, a full and exact statement of all the ores extracted from said mine during said month, with complete, detailed statement of the workings of the same. And it is further agreed and understood that at any time during the existence of this agreement the party of the first part, or his agent, may at any time have full access to the said property, and to the books of the corporation, for the purpose of examining the same and verifying any accounts. 5th. It is further understood and agreed that if the said party of the second part should fail

to turn over monthly, on the fifteenth day of each and every month, to the party of the first part, or his agent, the net proceeds of all ores extracted from said mine, or removed from the dump belonging to said mine, or shall fail to work said mine for any period of sixty (60) days, or shall fail to pay said sum of forty-five thousand (\$45,000) dollars, as provided, on or before the first day of September, 1893, or shall at any time during the continuance of this agreement remove, or attempt to remove, any of the improvements whatsoever erected or used by the said party of the second part in connection with the working and developing of said mine, or should refuse the party of the first part, or his agent, access to the said property, or to the books of the said party of the second part, for the purpose of examining the same and verifying any accounts of the party of the second part, or shall fail to perform any of the conditions or provisions of the said bond or of this agreement, as therein and herein provided, then this agreement shall immediately terminate and end, and the party of the first part shall be entitled, without notice and without demand, to take immediate possession of all the property agreed to be sold under said bond and under this agreement. This agreement is executed in duplicate. Time is of the essence of this agreement."

The complaint, after setting out the contract, its modification, and transfers, shows that subsequent to the modification it was transferred by the Stockton Company and mesne assignments to the Virtue Mining Company, a corporation having its principal place of business at Portland, Or., and that said last-named company took possession of the mine, and, at great expense for machinery and labor, equipped, worked, and developed the same, all of which was incurred in good faith; that the defendant about June 9, 1893, wickedly, fraudulently, and unlawfully, and without color of right or authority, ousted the said Virtue Mining Company, and took possession of said mine, with all its appurtenances and improvements, and has ever since unlawfully withheld the same from said company and plaintiff, although possession has been repeatedly demanded of him; that he so entered into the possession of said mine with the purpose and intent to hinder and delay the company in the operation thereof, and prevent it from paying the price agreed upon for its purchase on the 1st day of September, 1893, and has so prevented it, as otherwise it would and could have made such payment at the appointed time; that defendant has, since he took possession, extracted from said mine gold bullion to the value of \$75,000, and has damaged the plaintiff in the further sum of \$48,000, by preventing it from operating said mine and running the mills and machinery to their full capacity. The company assigned all its property about May 29, 1893, for the benefit of its creditors, and the plaintiff

was appointed assignee. The facts touching the assignment are shown, and it is then further alleged "that he [plaintiff] is ready, willing, and waiting to perform said contract on the part of said corporation," and that "he does not tender the said balance of purchase price because Grayson, prior to the expiration of said contract, had taken vastly more out of said mine, in gold bullion, than the amount thereof, and he now holds the same, and refuses to turn any part of it over to the plaintiff, or to account for it in any way; that he is also justly indebted, by said damages, in a sum much larger than said balance; that he is a resident of the state of California, and is now insolvent, and plaintiff could not collect from him said sums, or either of them, if recovered as damages." The issues tendered by the answer are: First, the right of the Virtue Mining Company, under the contract, to assign to Clarno without the assent of Grayson. Second, whether said company on or about the 1st of June, 1893, abandoned and forfeited the right to the possession, and to work and operate the mine, by reason of certain alleged acts, such as attempting to place plaintiff, a stranger to said contract, in possession without the consent of Grayson; failing and refusing to prosecute development work in a proper and workmanlike manner, or to extract ore as provided by the contract, or to account for and turn over the net proceeds; by not making the operating expense reasonable; by failing to render a monthly statement of all ores extracted, with a detailed statement of the operation of said mine; and by refusing to turn over such proceeds to defendant on the 15th day of each month. And, third, whether plaintiff has lost the right or privilege accorded by the contract, of purchasing the mine, by reason of the alleged failure to tender or pay the purchase price of \$45,000 on or before September 1, 1893.

We had occasion to construe a contract similar to the one under consideration in *Stinson v. Hardy*, 27 Or. 584, 594, 41 Pac. 116, wherein it was determined that after taking possession, making improvements, and incurring expenditures, the second party acquired a license coupled with an interest, exclusive and irrevocable. By the terms of the contract under consideration,—and when we speak of the contract we have reference to it in its changed condition, as it is conceded by the parties that it has been regularly modified,—it is conditioned that the party of the second part shall be allowed, on signing the agreement, without payment, to enter into full possession of said mining claim for the purpose of working and developing the same and extracting ores, with a proviso, followed by the conditions upon which the work of development and the extraction of ores shall be carried on or prosecuted. The contract contemplates the expenditure of labor and money by the second party, and when entry was made thereunder, and such expenditures incurred, it became a license coupled with an interest, exclusive in the second party, and irrevocable ex-

cept under the express conditions following the proviso, so that possession could be maintained by the second party by observance of its provisions throughout the entire limitations of the contract. Coupled with this license, the second party is granted the privilege of purchasing the mine for \$45,000, payable on or before the 1st day of September, 1893. Provision is made whereby the net proceeds, if any, arising from the operation of the mine, should be paid to the first party, and in the event of the purchase being consummated on or before September 1, 1893, such proceeds were to be considered as part of the purchase price; but it is further conditioned that, in the event the \$45,000 was not paid on or before the date named, such net proceeds as were thus received by said first party should belong to him absolutely, and all claim thereto is waived by the second party. When he assumed to operate the mine the said second party was required to observe the conditions prescribed by the contract as to the manner in which he should proceed, or, by disregarding them, incur the risk of terminating the agreement. The conditions of the contract did not obligate him to pay the \$45,000 named as the consideration for the mine, or any part of it. It was left optional with him to consummate the purchase, or not, as he might elect. The contract, therefore, is in that respect unilateral, as it is binding in the one direction only. The entry and outlay of labor and money in operating the mine, especially as it is stipulated in the contract that in case the purchase was not completed all improvements made should become the property of the first party, constituted a sufficient consideration to support the option, and rendered it irrevocable within the time limited. *House v. Jackson*, 24 Or. 89, 32 Pac. 1027; *Hall v. Center*, 40 Cal. 68; *De Rutte v. Muldrow*, 16 Cal. 513; *Willard v. Tayloe*, 8 Wall. 557; *Corson v. Mulvany*, 49 Pa. St. 98; *Schroeder v. Gemeinder*, 10 Nev. 355; *Souffrain v. McDonald*, 27 Ind. 269; *Pom. Spec. Perf.* § 169, and note. To this point, there is but little difficulty.

By its terms, time is expressly made of the essence of the contract, but notwithstanding it seems to be contended that, treated and considered as an equitable proposition, in reality it is not; that possession having been given, and large expenditures of labor and money having been made by the contemplated purchaser upon the faith of the contractual relations, the time-essence clause is thereby made to stand as a dead letter, which equity will not enforce. It was perfectly competent for the parties to introduce such a stipulation, and they must be held to be bound by it, whatsoever may be its legitimate effect, either at law or in equity. It was early intimated by Lord Thurlow in *Gregson v. Riddle*, cited in *Seton v. Slade*, 7 Ves. 268, that time could not, in equity, be made of the essence of a contract, even by positive stipulations; but this idea never came to be judicially established, and

it is now firmly settled that time may become of the essence of the contract in several ways: By stipulation of the parties, by the nature of the subject-matter of the contract, and, where not originally essential, by delay upon the one side, and reasonable notice upon the other, to complete. *Pom. Spec. Perf.* § 382. And by one line of decisions it is held that time is of necessity an essential element in all unilateral contracts, but another line asserts that, while it is material in such contracts, it is not strictly essential. *Id.* § 387. It is somewhat difficult, and perhaps impossible, to harmonize the discordant opinions relating to the effect of such contracts, and whether or not time is inherently and necessarily an essential ingredient. Mr. Pomeroy attempts to reconcile the conflict by the following suggestions: "Where the contract is really an offer on one side, with a provision that this offer must be assented to and accepted, when a mere acceptance is contemplated, or payment must be made, when payment was the act of acceptance contemplated, at or before a specified date, then, of course, the act of assent or of payment must be done within the prescribed time, and time is, from the very form of the contract, essential." "If, however, the offer or option * * * is not made to depend upon an acceptance or payment at or before any particular or specified day, but simply calls for an assent and acceptance, or for a payment, as the case may be, and is silent with respect to the time within which such acceptance or payment must be made, then, so long as the offer remains unrevoked, it is enough that the acceptance or the payment be made within a reasonable time." In such a case time is material only, and not in the true sense essential. *Pom. Spec. Perf.* §§ 387, 388. Mr. Freeman, in his note to *Wells v. Smith*, 31 Am. Dec. 278, suggests that the cases could be harmonized by establishing the rule "that, if the performance of an act at a time stated be made by the contract a condition precedent to the acquisition of any right thereunder, then that time is of the essence of the contract. * * * If, on the other hand, some right has already been acquired under the contract, as where part of the purchase price has been paid, or the purchaser has taken possession with the assent of the vendor, and made permanent and valuable improvements, any provision looking to the forfeiture of the contract will be treated as a condition subsequent, and relieved against, if its enforcement be shown to be inequitable." In support of the rule the learned annotator cites 2 Lead. Cas. Eq. 1134, wherein is found *White & Tudor's* notes to *Seton v. Slade*, 7 Ves. 265. They say: "It may be inferred from the authorities which have been cited that where the intention manifestly is that payment, or the conveyance of a good and sufficient title, at or before a

certain time, shall be a prerequisite, without which no right shall vest under the contract, a chancellor cannot make a new agreement for the parties by holding a subsequent tender equivalent to the punctual performance which they have prescribed. Under these circumstances, the case falls within the rule that an executory agreement falls utterly, if it be not exactly fulfilled. When, on the other hand, the effect of the contract is to vest an immediate right in the purchaser, which would descend to his heirs, or pass under a general or residuary devise, relief may be given against a subsequent default which is not willful or injurious." The right which Mr. Freeman refers to as having vested is much broader in its significance than the right Messrs. White and Tudor speak of, such as "would descend to the heirs, or pass under a general or residuary devise." The latter evidently restricts the right which must vest by the contract, and which will excuse punctuality to lands or realty,—a right *in rem*,—while Mr. Freeman's idea of it seems to comprehend any right, including such as might be acquired by the contract, regardless of a right in the thing itself. The distinction would appear to be significant. If the contract is such that an equitable conversion has taken place under it, so that equity will regard that as done which ought to be done, then a right in the property has vested, and the case ought to present clear and satisfactory countervailing equities in which a court would declare a forfeiture. But if the right acquired by the terms of the contract is simply a privilege or an option, or a right to acquire a right or an interest in the subject-matter of the contract, it is then not a question of the forfeiture of any vested right in the property or a divestiture of title, whether termed equitable or legal, but a question of the enforcement or nonenforcement of a stipulated, personal right or privilege. The privilege of acquiring a vested, equitable right must be distinguished from the right. The privilege is acquired directly by the contract, but the acquisition of the right, while it is stipulated for under its terms, is dependent upon the performance of a condition. When such a condition is performed, the right vests, and not until then. *Richardson v. Hardwick*, 108 U. S. 254, 1 Sup. Ct. 213. Now, it would seem that if the performance of a certain condition, such as acceptance of an offer, or the payment of a sum of money, at or within a certain time, which acceptance or payment is a matter purely optional with the purchaser, is a prerequisite to the acquirement of a right to the subject-matter of the contract, time ought to be considered of the essence of such a contract. Until such a performance, there is not a meeting of minds that the property shall be transferred. The purchaser has not consented to take, nor the

vendor to convey. The act to be done is the very thing needful to a consummation of the agreement. It is the special manner indicated for expressing assent, and the law will not compel an assent. There must be an agreement, without which the law is powerless. He whose duty it is to assent to a condition within a given time, if he would obtain a right, should be held to punctuality in performance, as it would be inequitable to the party whose property rights are dependent upon such an act to be held to a performance for an indefinite length of time, notwithstanding a specific date is agreed upon within which the assent shall be made manifest. *Bullock v. Adams' Ex'rs*, 20 N. J. Eq. 371-374. A mere offer to sell land at a given price within a stated time, if accepted, will constitute a contract, the specific performance of which may be enforced in equity. *Railroad Co. v. Bartlett*, 3 Cush. 224; *Perkins v. Hadsell*, 50 Ill. 216; *Smith & Fleek's Appeal*, 69 Pa. St. 475. It may, however, be retracted at any time before acceptance. It cannot be contended that such an offer, without an acceptance, will vest an equitable interest in the land in the contemplated purchaser. Now, if we go a step further, and consider an offer based upon a sufficient consideration, with an option to purchase within a given time, the offer cannot be withdrawn within the time. It must remain open until the day for performance by the contemplated purchaser has come and gone; but unless the offer be accepted, or the price paid,—that is, the condition be performed upon which the option is granted,—is there any greater or more cogent reason why an equitable interest should vest prior to performance in the latter case than in the former? It would seem not. So long as the consideration named is the price of the option, and not to be deemed a part payment for the property unless the offer is accepted in the manner agreed upon, it seems clear that no equitable right could vest. There may be, and perhaps are, instances in which the consideration to support the option is so grossly in excess of its value as that the court may construe the contract as evincing an intention of the parties to accord a present right to the purchaser in the subject-matter, or the party bound may, by encouraging large expenditures, be deemed to have waived strict performance. In such instances provisions looking to a forfeiture might be treated as conditions subsequent, and relieved against, as it would be inequitable not to do so. *O'Fallon v. Kennerly*, 45 Mo. 127. Where, however, the contract is fairly entered into with a view to accord an option only, the stipulated condition for asserting the option must be complied with before there can be mutuality in a contract for the purchase of land, and must be deemed a condition precedent to the vesting of an equitable interest

in the subject-matter, and time becomes an essential element, as it is evident that the parties intended it as such. It is said that, when the option has been declared, it takes effect as an equitable conversion, by relation back to the date of the original contract. *Kerr v. Day*, 14 Pa. St. 112; *Ripley v. Waterworth*, 7 Ves. 436; 3 Pom. Eq. Jur. § 1168. But it has been held that this doctrine of relation does not apply as between vendor and purchaser. *Edwards v. West*, 7 Ch. Div. 863. At any rate, there can be no vested interest until the option is declared, whether it relates back, or takes effect from the date of performance of the condition.

We have discussed this matter much at length, because of the fact that a great deal of stress, both in the argument and the briefs, has been laid upon the question whether time was, in effect, the essence of the contract, and if so determined whether it had not been waived; and the discussion, we trust, has not been without profit. It is not a question here whether time is of the essence, as all the acts relied upon as constituting a sufficient performance under the circumstances of the case have been performed, or an alleged adequate performance proffered, and suit instituted prior to the expiration of the stipulated time in which the company might have exercised its option to purchase. The question is one of performance, and not whether exact, punctual performance has been excused. Much that has been said relative to the necessity for the performance of a condition precedent within the time, where made essential, has application to the quality of the performance which will require a specific performance by the party granting the option. As indicative of the company's desire to purchase under its privilege or option, it was required to perform a condition precedent; that is, to pay \$45,000. No equitable or other estate passed to it in this mine without such performance, unless it was excused by the acts of the defendant, as it could not be compelled to purchase without its assent. Or, as expressed by Mr. Pomeroy, "Where the contract is thus conditional,—that is, where it rests upon a condition precedent,—until the performance of the condition it cannot be enforced, because until that time there is no true contract." Pom. Spec. Perf. § 334. It may be said to be well settled that such acts or declarations which amount to a rescission or repudiation of the contract, and an absolute and positive denial of any and all duties under it, may render strict performance before suit unnecessary, upon the ground that it would be a useless and a vain thing to tender the stipulated performance, knowing that it would not be accepted. The denial of the right to make the tender, or the positive and unqualified assertion by the party who may insist upon punctuality or exact performance that thenceforth he is not bound,—and this state of affairs may be inferred from unequivocal acts as well as direct assertion,—is, in effect, a waiver of

strict performance, and a notice that the other party may as well proceed in due time to the enforcement of the obligation, as otherwise no performance could be obtained at his hands. *Brock v. Hidy*, 13 Ohio St. 306; *White v. Dobson*, 17 Grat. 262; *Maughlin v. Perry*, 35 Md. 352; *Delchmann v. Delchmann*, 40 Mo. 107; *Lowe v. Harwood*, 139 Mass. 133, 29 N. E. 538; *Gray v. Daugherty*, 25 Cal. 266; *Baumann v. Pinckney*, 118 N. Y. 604, 23 N. E. 916; *Brown v. Eaton*, 21 Minn. 409; *Mattocks v. Young*, 66 Me. 459; *Dulin v. Prince*, 124 Ill. 78, 16 N. E. 242; *Mansfield v. Hodgdon*, 147 Mass. 304, 17 N. E. 544.

Another proposition insisted upon, which is sound in law and based upon good morals, is that he who would insist upon strict performance must himself not be the cause of the breach. His own wrong can never operate under the sanction of law to his advantage, nor to the injury of another. This may be regarded as fundamental, and no authorities are necessary to support it.

Having premised this much of what seems to be the law touching a construction of the contract under consideration, and the rights and duties of the parties thereto, we will examine the facts as they appear to us to be exhibited from the evidence in the record. By reason of the great volume of the testimony, we can do scarcely more than to state our conclusions, without any very extended reference thereto:

Prior to December, 1892, the Virtue Mining, Milling & Development Company, of Stockton, Cal. (known herein as the "Stockton Company"), and its predecessors in interest, under the contract with Grayson had incurred a large indebtedness, which was outstanding, in the way of divers demands against the company and its assignors. For some reason, which is not disclosed in the evidence, Grayson had resumed possession of the mine, with its mills, pumping apparatus, and appurtenances. At any rate, he was in the sole possession when he consented, a little later, that the Virtue Mining Company, of Portland, Or., should enter and assume control. On December 9, 1893, the Stockton Company, by deed, duly assigned its interest in the contract, mine, and appurtenances to one L. M. Robinson, and he, on the 12th, to David Ogilvy, who was then one of the promoters, and afterwards president, of the Portland Company. He with others at the time had in contemplation the incorporation and organization of the company last named, and, as a means of transferring said contract and the interest thereby obtained in the mine to the company, the deed was made to Ogilvy, for the time being, in trust for said promoters and the company when organized. The company was afterwards, on January 10, 1893, duly incorporated, and in due time organized by its promoters; and on the 9th day of April, 1893, Ogilvy, by deed, assigned to it, as designed by those concerned. As a consideration for the assignment to the promoters of

the Portland Company, they agreed to pay about \$18,000 of the indebtedness that had been incurred under the contract; and, having thus become interested in the contract, they applied to Grayson for his consent to the assignment, and that they be installed in possession of the mine. The agreement may have been conditional upon their obtaining Grayson's consent, but it is of little importance whether conditional or absolute. Grayson was induced to go to Portland during the last days of December, and at that time consented to the transfer, and gave an order upon George W. Boreman, who was then his agent at Baker City, Or., who later on (about January 6, 1893) put them in possession. Grayson says the conditions upon which he gave his consent were that they would pump the water out of the mine, pay off the old claims, free the mine of attachments and other liens, put up a working capital of from twenty to thirty thousand dollars, to meet all liabilities, and work the mine in accordance with the stipulations of the contract, all of which was agreed to by the promoters of the Portland Company. It was contended by Grayson's counsel at the hearing that this alleged agreement modified the original contract, and that a failure of said promoters and the company to comply therewith operated as a forfeiture of their rights and privileges under the contract. But no such modification is pleaded, nor is there any assignment of a breach of these alleged new conditions, so that any available breach must be sought for under the original contract and the modification of August 16, 1892. The promoters deny this alleged agreement, but this much is established: They were to free the mine of water, and otherwise operate it as the contract directed. It was also understood that if, at any time, they should conclude to abandon the mine, Grayson should be notified, so that he might take hold of it at once, and prevent it from again filling with water.

Some talk was had as to who should superintend the operation of the mine, Grayson insisting upon the employment of George W. Boreman. N. S. Wight, however, one of the promoters of the Portland Company, was appointed, and took charge, when possession of the mine was obtained, and Boreman became foreman under him. Wight continued to act as superintendent until about March 23, 1893, when he resigned, and severed his relations with the company, whereupon Boreman was appointed as his successor, and the latter continued in the office while the company had the management. During all this time, George Walker, who was one of the stockholders and one of the original promoters of the company, had a general oversight of the mining operations; he being present in person during the whole time up to May 26th, except, perhaps, 10 days in March. He was the direct representative of the company on the ground, for the purpose of protecting and promoting its interests. On May 26th, while the mine was

in full operation, some of the mining machinery was attached in an action begun against the Portland Company, presumably upon some of the demands of the old Stockton Company. Boreman was put in charge by the sheriff, as keeper, but the working of the mine was not thereby impeded. At about the same time Walker attempted to incumber the mills and machinery with a chattel mortgage, but his authority for so doing was denied by the company. Walker went immediately to Portland, leaving Boreman in charge; and the company, upon being apprised by him of the condition of affairs at the mine, determined, by resolution duly adopted by its board of directors at a called meeting on May 29th, to make a general assignment for the benefit of its creditors. In pursuance of the resolution a deed of assignment was made to Francis Clarno, of Portland, the plaintiff herein, which appears to have been acknowledged, and the schedule and list of creditors sworn to, on June 1st. The contract with Grayson is scheduled as the only property of the company, and is valued at \$20,000. The liabilities are shown to be \$17,498.77. The deed was filed for record in Multnomah county June 2d, and in Baker county on the 3d. No undertaking was entered into, executed, or filed by the assignee until August 26, 1893. Clarno went from Portland to Baker City, arriving there in the forenoon of June 3d, and at once notified Boreman of his authority in the premises, and his purpose to take possession of the mine. Boreman at once telegraphed the situation to Grayson, who was then in Oakland, Cal. Late in the afternoon, Boreman went with Clarno to the mine, presumably for the purpose of turning the same over to him, but when they arrived they found the miners had taken forcible possession. A committee had been appointed by them to take control of its operation, and they refused to give Clarno possession, or to recognize the authority of Boreman. I. H. McCord, Boreman's bookkeeper, preceded Clarno and Boreman to the mine, and, it is claimed, got the miners drunk, and incited them to mutiny against the company and its assignee; but it is not clear from the testimony that such was the case, although McCord was himself drunk, and had a personal encounter with one or more of the men. Grayson, in reply to Boreman's dispatch, sent him the following telegram from Oakland in the afternoon of the same day, which was received at Baker City at 6:50 p. m.: "Follow attorney's advice. Keep water pumped out. Leave for Portland to-night." It appears that prior to, and perhaps at, this time, Hon. T. C. Hyde was Grayson's counsel at Baker City. Grayson arrived at Portland on the 5th, and at once called on Mr. G. Heitkemper, secretary of the Portland Company, with reference to the condition of affairs at Baker City and the mine; and a conference of some of the directors and stockholders and their attorney, Judge Dell Stuart,

was arranged and had with Grayson, at which it appears that he was apprised of the fact that they had information from Baker City that Boreman was holding the mine for him, and in pursuance of his direction. Grayson denied that Boreman had any authority for so doing, but declined their request for an order upon Boreman to surrender the mine to them; saying, in effect, that he did not know the condition of affairs, that he would do nothing until he went to Baker and learned the situation, and that he would then make things right. The condition of the company, and the reason for the assignment, were discussed. Grayson went on to Baker City, arriving there on the 6th, and a conference was had with Clarno. Touching what was said at this conference, there is conflict in the testimony. Clarno claims that he demanded possession of the mine from Grayson, and the latter denies that any direct demand was made, but says the matter was talked over between them, and that he told Clarno he was not in a position to surrender possession, as the miners were holding it, and that it was useless for him to try to act until they were satisfied. Another meeting was appointed for the following day, but Clarno left for Portland in the evening, and no further consultation was had between them. Afterwards Grayson attempted to get possession from the miners, but they refused to surrender until they had taken out enough gold to pay themselves; but finally they agreed to cease operations on the 11th, and did at midnight of that day leave off the extraction of ore from the mine. On the 12th they cleaned up the mill, secured the bullion, and on the 14th the fund of \$5,410.98 derived therefrom was distributed, through the committee's direction, among the miners, pro rata, in proportion to their several claims against the company up to the time of their taking possession, the fund paying 94 per cent. of their respective demands. By direction of the committee the checks were drawn by Boreman in their behalf. Grayson assumed possession on or about the 14th. In the meantime the pumps had been kept running, through his directions, he becoming responsible for the expenses thereof. On the 17th Grayson wrote to the secretary of the Portland Company: "You have forfeited your rights under the bond I gave to the Virtue Mining, Milling, and Development Company, under which you were operating said mine, and abandoned it to your creditors. I have taken hold of the property, as my right under the bond." On June 30th the attorney, signing both for the company and its assignee, wrote Grayson at Baker City: "Mr. Heitkemper finds your letter on his return from Chicago, and gave it to me to answer. The property of the company, as you well know, was not abandoned to its creditors, or any one else. Your right or authority to take possession of it, its proceeds or earnings, is denied. The assignee demands the mine and

its proceeds and earnings from you; also the 20-stamp mill, which you still fail to deliver." Grayson claims to have never received this letter. On July 13th he again wrote from San Francisco to the president of the company, saying, among other things: "When I was in Portland, in June, your secretary stated that you had so far had a hard time, and spent a large sum of money, and, in view of that, I should be as lenient as I could in enforcing the bond under which you were working. Your only hope then seemed to be that you might sell to some one, and get your money back. I have not at any time desired to prevent you from selling, so that you might reimburse yourself, and will not now stand in your way, between this and September." After Grayson took charge the mine was cleaned up, and what water remained was pumped out; and to some extent it was operated by the extraction of ore, and milling the same, under Boreman's supervision, he acting for Grayson until near the 1st of August. In the latter part of July a rich pocket was discovered, and Grayson again visited the mine. While there on this occasion, Mr. Heitkemper and Judge Stuart went from Portland to see him; and Mr. Heitkemper testifies that Judge Stuart, in behalf of the assignee, made a positive demand of Grayson for a surrender of the possession of the mine. Grayson denies the demand sub modo, although he admits it was talked about. Stuart remained but a short time, but Heitkemper stayed for several days. During the time that one or both these parties were on the ground, Mr. J. McNally, a miner of large experience, and with whom Grayson had been in correspondence, came to Baker City, and, while Heitkemper was still there, assumed the supervision of the mine, in the place of Boreman. Grayson testifies that it was by virtue of an understanding between him and Heitkemper that he was put in charge, but Heitkemper denies this, and McNally says that Grayson and Heitkemper employed him to take charge. McNally had not been at the mine at the time, and, when he went for the first time, Heitkemper and Grayson went with him. Heitkemper says in this connection: "I was still negotiating with some parties in Chicago who wanted to buy the mine, and he [McNally] wrote me a very nice letter, that I could show, so I might still sell the mine. Q. You thought you might make the sale? A. Yes, sir; because Mr. Grayson said if I could sell the mine he would have no objections, but he would not let us run it, or would not let us have possession of it." Heitkemper waited over several days, expecting a party from Chicago, who it was intended should inspect the mine with a view to purchasing. As touching Grayson's willingness to allow the purchase under the contract, Clarno, in giving an account of his conference with him on June 6th, says: "He [Grayson] stated that, if they were able to pay him \$45,000, he would surrender the mine;

that he did not want the property; that he had other mines; that he was getting old, and it was a long way from home; and that if they would pay him \$45,000 he was willing to give up the mine." Grayson testifies that when McNally took charge it was agreed with Heitkemper that he should run the mine in the interest of the Virtue Mining Company, keep it open, and give all benefit that might arise therefrom to the company; that he (Grayson) was to reserve only the expenses of mining it, and the company to have the benefit of the net proceeds under the bond. This is denied by Heitkemper in a general way. Grayson made no attempt at concealment of the specimens of rich ore they had discovered. On the contrary, he freely exhibited them to Heitkemper and Stuart, and some of them were exhibited in Portland, to aid in disposing of the mine; and one, in value about \$900, was left with Heitkemper, which was later on returned to Grayson. This concludes a narrative of the most important events touching the present dispute, and from it we are to determine the relative rights of the parties.

It is contended: First, that Grayson and Boreman entered into a conspiracy to hinder and delay the Virtue Mining Company in raising the water from the mine, and to so burden and incumber the operation of it as to compel the company to abandon its privileges under the contract after it had, at large expense, practically freed the mine of water, that Grayson might thereby reap the benefit of such outlay, and that the fact of the miners having taken forcible possession was but the means of a preconceived scheme by which Grayson should obtain possession through them; second, that, if the conspiracy is not established, nevertheless Boreman has been grossly culpable in his management of the mine, that he incited the men to riot, and that, having gained possession through this means, the acts of Boreman became Grayson's acts, by adoption, and therefore his possession was wrongful; third, that in any event the company was not in default under the contract, and Grayson was not entitled to possession; and, fourth, that as a result of Grayson's entry he has waived strict performance upon the part of the company in tendering payment of the purchase price before suit, because (1) he is himself at fault; (2) he has rescinded or repudiated the contract; and (3) an accounting was made necessary. Grayson contends: First, that the company had abandoned the mine when he took possession, and therefore his entry was rightful; second, that his possession was acquiesced in, and his management agreed to, by the company; and, third, that, the company having failed to tender the purchase price, it has forfeited its privilege of purchasing under the contract.

That the mine was not successfully operated under the supervision of Mr. Boreman is a fact beyond dispute, but the company was

all the while cognizant of his methods of management. George Walker, its representative and managing agent, was on the ground, and Boreman was subject to his superior authority, and it seems that Boreman's supervision was concurred in, in the main. We recall but a single instance of protest. Boreman was perhaps unduly solicitous to serve the interest of Grayson,—from what motives it does not appear; possibly personal to himself. This is made apparent from a letter written by Boreman April 29th, addressed to Grayson, but never sent, wherein he gives several reasons why he thought the company could not succeed, and suggested that, if Grayson would come to Baker City about May 10th or 12th, he could see for himself where it would be to his interest to take hold of the mine. He says: "I earnestly ask you to come up as soon as possible. It is essential you should come, and to your best interests." His acts about the time of the assignment and change of possession also indicate as much. But it is not clear that Grayson acceded to his wishes, or in any manner connived with him in the embarrassment of the company, or the displacement of its possession. He did appear at Baker City about the 9th of May,—openly, however, and without any attempt to conceal his presence. The company knew it, and Mr. Heitkemper, its secretary, was on the ground at the time, and the condition of affairs was discussed between them. Nothing was done or attempted on the part of Grayson indicating his intention to take charge of the mine until the assignment was made known to him, and we conclude that no conspiracy existed between him and Boreman to oust the company of possession.

As to the second contention: Boreman, as superintendent of the mine, being directly under the supervision of the company and its representatives up to the time of the assignment, his acts must be deemed the acts of the company, and we do not think it proven that he incited the miners to riot. They probably took charge of the mine of their own volition, in order to make sure of their wages then unpaid, knowing that the company had assigned, which indicated its insolvency, so that there were no acts imputable to Boreman touching the change of possession for which any responsibility could attach to Grayson. The dispatch from Oakland would indicate that Grayson had employed a Baker City attorney to look after his interests. This he had a right to do, and to keep himself informed of any contemplated surrender of the company's rights, to know of the exact condition of affairs at the mine, at all times, and especially of such an important matter as the assignment by the company of all its assets, which carried to the assignee the contract under which it was operating.

Under the third head, the company was evidently not in default, unless the assignment, the attendant circumstances, and the

acts of the assignee operated as an abandonment. It is claimed that the company forfeited its right to possession by reason of not having operated and developed the mine in a proper and workmanlike manner, but this contention is not supported by the evidence. While, perhaps, it was not operated as Grayson thought it should be, yet other persons of experience would not be willing to condemn the work as being unskillfully done. We are not inclined to hold that the act of assignment was itself an abandonment, as it seems to have been resorted to as an expedient for the purpose of dissolving the attachments, and thereby removing an obstruction to the operation of the mine. The stockholders were prepared to meet the expenses under the management of the assignee, and it was the intention of all concerned to keep it running. However, some acts of the company and the assignee subsequent to the assignment are strongly indicative of a purpose not to press their right to possession. The assignee, after appointing a meeting with Grayson on the morning following their conference on June 6th, came away to Portland without keeping the appointment; and, although the miners remained in possession some six days later, neither he nor any person in behalf of the company returned to Baker City with a view to settling with the men, or regaining possession of the mine, nor was there any correspondence had to that end. In fact, no representative of the company appeared at the mine to claim possession until Mr. Heitkemper and Judge Stuart made the alleged demand for it during the latter days of July. Shortly after Mr. Grayson assumed possession, he notified the company of what he had done, and his position in the premises. Thirteen days later both the assignee and the company, by letter, disclaimed any abandonment upon their part, and demanded the mine and its proceeds and earnings. These circumstances, to say the least, do not indicate a great deal of solicitude on the part of the company, as respects possession, for the time being; but they were perhaps sufficient to forestall an abandonment upon its part, or the part of the assignee. Under the contract, the company need not have operated the mine for a period of 60 days, but by its arrangements with Grayson he was to be notified if it determined at any time to discontinue its operation, so that he could keep the water from rising again; and Grayson claims that, although not notified, the conditions were such that he was justified in believing that the company did intend to cease operations, and in entering for the purpose of preserving the property from damage. We are not prepared to say that Grayson was not at fault in entering when he did. The conditions under which he was entitled to enter had not transpired, and we believe his possession was wrongfully obtained. It was urged, however, that Heitkemper, the secretary of the

company, agreed with Grayson in the latter part of July that he (Grayson) should retain possession of and operate the mine, and account to the company for the net proceeds, after deducting expenses for operation, and that McNally should be employed as superintendent during the life of the contract. But it is useless to discuss this proposition, as Heitkemper was without authority to enter into such an agreement, and Grayson continued in possession in violation of his contractual relations with the company.

Again, it is strenuously urged that Grayson, by the act of entry and attendant circumstances, rescinded and utterly repudiated the contract which operated as a denial of the company's right to purchase, and hence that it was absolutely excused from even a tender of performance before entering suit. On the 17th Grayson wrote: "You have forfeited your rights under the bond * * * under which you were operating the mine, and abandoned it to your creditors. I have taken hold of the property, as my right under the bond." The letter would seem to be broad enough to include a denial of all the company's rights under the contract, but it must be construed in the light of the attendant circumstances. Some time later Grayson wrote, "I have not at any time desired to prevent you from selling, * * * and will not now stand in your way, between this and September." The company, prior to the entry by Grayson, had been endeavoring to sell, and had on May 29th offered to sell to Grayson its interest in the contract, on condition that he pay to it simply the amount of money which had been expended. Although this letter was intended to explain the former, it cannot change its effect. But, prior to writing the letter of the 17th, Grayson told Clarno that the company could have the mine upon paying the \$45,000. Later he told Heitkemper the same thing, in effect, and even made a more liberal offer; and not only this, but Grayson and McNally, his superintendent, lent their assistance to the company and its officers in their endeavor to sell the mine, and we think it was fairly understood between the parties that Grayson did not gainsay the company's privilege or right to purchase under the contract. In the light of these incidents, Grayson cannot be held to have repudiated the contract. So that we have here the conditions of defendant occupying possession in contravention of the stipulations of the contract, and by reason of which he has rendered himself liable to account, on some recognized equitable basis, for the output of the mine during the holding prior to the institution of the suit. Grayson's wrongful possession, however, does not alone excuse performance on the part of the company. If it has suffered injury by such possession, it has its action at law for damages; but if it would have a specific performance, which seems to be the purpose of the present suit, it must itself perform all that is required of it under the contract. What it was

required to do in order to entitle it to a conveyance of the mine was not prevented by Grayson's wrongful possession, nor was a tender of performance waived thereby, as it was not a denial of the company's privilege to purchase. We think it was well understood that Grayson's possession in no way interfered with the exercise of its option to purchase the mine. It was persistently urged in behalf of plaintiff that the company was entitled to the exclusive possession during the whole time to September 1, 1893, so as to enable it within the spirit of the contract to make up its mind as to whether or not it would exercise its privilege, and that Grayson not having kept a condition which, in point of time, was to precede performance on the part of the company, thereby the company was excused from performing, or at least from performing strictly. It is very true that the company was entitled to possession for the purposes indicated, but, notwithstanding the fact that Grayson obtained and kept possession, plaintiff has chosen to enforce performance. This it could not do without paying the purchase price, and, if it must first pay, what is there in the transaction that will waive payment in the manner and at the time designated? Nothing that we can see. So that the fact of Grayson's wrongful possession does not alone excuse strict performance on the part of plaintiff, if he would enforce specific performance. It might have excused punctuality, but not performance.

Now as to the accounting. It appears that Grayson extracted bullion to the value of \$19,869.81 between the time of his taking possession and September 1, 1893. His expenses for the same length of time were \$16,273.17. During this period no improvements were made, except what was necessary for the operation of the mine. This leaves a net product of \$3,596.64. This amount the company should have the benefit of, providing it exercised its privilege to purchase; otherwise it could have no interest in it. That is to say, if it concluded to take the mine and pay the difference between this sum and the \$45,000, the right was accorded under the contract; but, if it did not want the mine, then it could not claim any interest in this particular fund. At most, it could claim no greater benefit than the value of the gross product. There is no pretense that either the assignee or the company tendered to Grayson any part of the purchase price, or that an accounting was ever requested or demanded preliminary to an ascertainment of the amount required to be tendered to meet the balance due. An accounting out of court would have obviated the necessity of an accounting in court, and, whatever might have been the result of such a demand, it is certain there has been no refusal on Grayson's part to account. It was held in *Deichmann v. Deichmann*, 49 Mo. 110, that uncertainty as to the amount actually due will obviate the necessity of a tender.

But, unless Grayson refused to account with the plaintiff, it is difficult to see how the simple fact that there was an unadjusted account between the parties can operate as a waiver of the tender. But, aside from this, if there was a balance remaining after deducting the proceeds, whether net or gross, from the \$45,000, it was incumbent upon the plaintiff to tender such balance. Payment being the manner of declaring his privilege, no interest passed to him in the mine unless he so declared it. Hence a suit for specific performance cannot lie. *Bird, V. C., in Miller v. Cameron* (N. J. Ch.) 15 Atl. 842, says: "There may be, doubtless are, many cases in which the complainant would be excused from showing an offer to perform; but I cannot but think, in a case where the complainant is not originally bound,—that is, is not bound at all by the contract, and cannot himself be brought into court,—he should, by all means, be required to show that he had most faithfully performed every stipulation on his part to be performed, so far as they appear upon the record. If he intends to hold the other party to the contract which he has signed, he himself should not be guilty of a moment's trifling, without a most satisfactory excuse." See, also, *Pom. Spec. Perf.* §§ 315, 324. As touching the amount which he should have tendered, he was called upon to determine that at his peril, or he may have tendered on condition that Grayson account. Of course, if Grayson had taken out a net product of \$45,000 prior to September 1, 1893, no tender would have been necessary, and this is the theory that plaintiff seems to have proceeded upon. Or perhaps if he had taken out approximately that amount, so that it might reasonably be presumed that plaintiff purposed purchasing under his option, the result might have been the same. Equity has regard for substance, rather than technical exaction. But he has not proven such a case. He does not even tender performance in the complaint, or a willingness to pay any balance that may be found remaining of the \$45,000 on an accounting. In *Duvall v. Myers*, 2 Md. Ch. 406, *Johnson, Ch.*, says: "A party not bound by the agreement itself has no right to call upon the judicial authority to enforce performance against the other contracting party, by expressing his willingness in his bill to perform his part of the agreement. His right to the aid of this court does not depend upon his subsequent offer to perform the contract upon his part, when events may have rendered it advantageous to do so, but upon its originally obligatory character." See, also, *Ducie v. Ford*, 8 Mont. 240, 19 Pac. 414, and *Askew v. Carr*, 81 Ga. 686, 8 S. E. 74. The allegation is that he is "ready, willing, and waiting to perform." This is not a tender of performance. The offer in the complaint, if otherwise sufficient, should have been to do the things necessary to complete or mature the right which it was the plaintiff's privilege to ac-

quire, so that there could have been no uncertainty touching his intention to purchase, providing the fund in the hands of Grayson proved insufficient to pay the purchase price. As the complaint stands, plaintiff does not disclose a desire to purchase upon any other condition, except that of finding funds upon an accounting sufficient to pay the purchase price. He has failed to establish the condition, and the suit cannot be maintained.

One element of the prayer of plaintiff is that he be put in possession, and maintained there, and that a future time be fixed in which plaintiff shall satisfy any balance found due on the accounting after possession given, and this proposition was urged both in the briefs and at the argument. But we think it untenable for two reasons: First, the act required of the court comprehends an order continuous in its nature, requiring protracted supervision and direction, with the exercise of special knowledge, skill, or judgment in the oversight, to determine whether the mine is being operated under the conditions of the contract, and will not be specifically enforced. *Pom. Spec. Perf. § 312; Marble Co. v. Ripley*, 10 Wall. 358; *Beck v. Allison*, 56 N. Y. 367; *Mastin v. Halley*, 61 Mo. 196. And, second, the fixing a new time for payment would be the making of a new contract. The court cannot make contracts for parties. Its duty is to determine their rights under the contracts they have made for themselves, and when this is done it can do no more.

This leaves undisposed of the question touching the right of the company under the contract to assign to Clarno without Grayson's assent, and the incidental questions of the power and authority of the assignee to take the possession of the property assigned prior to filing his undertaking as such an officer, or to operate the mine and declare the option by performance of the conditions made necessary by stipulation of the original parties and his right to maintain the suit, their settlement not being necessary to a determination of the cause. What we have incidentally said touching such rights and authority has been upon the assumption that he was duly clothed therewith, but we are not to be understood as having decided any of these questions.

There was some controversy touching a 20-stamp mill which it is alleged that Grayson agreed to furnish. This mill was constructed at the mine prior to the execution of the contract with Ralston, and subsequently, and prior to the time at which the Portland Company became interested, was renovated and reconstructed into a 10-stamp concern, and this latter went into possession of the company, so there was no obligation on the part of Grayson to furnish a 20-stamp mill, as demanded. The renovated mill became the property of Grayson when the company failed to purchase the mine under the stipulated privilege. Let a decree be here entered affirming the decree of the court below.

CASCADE COUNTY v. CITY OF GREAT FALLS.

(Supreme Court of Montana. Oct. 19, 1896.)
HIGHWAYS — PUBLIC BRIDGE — REPAIRS — WHAT MUNICIPALITY LIABLE FOR.

Comp. St. div. 5, §§ 325, 419, authorize city councils to establish and improve streets, and to regulate their use, etc.; sections 1852-1854 provide for the raising of funds to repair streets; and section 435 declares that no part of the streets of any city shall be in any road district established by the county commissioners, nor be under the control of any county officers. *Held* that, where a city extends its limits so as to include a bridge previously purchased by the county from a private corporation, such bridge becomes a part of the street, and the city is liable for repairs.

Appeal from district court, Cascade county; C. H. Benton, Judge.

Action by Cascade county against the city of Great Falls, submitted to the district court on an agreed statement of facts, to determine which corporation was liable for the repair of a bridge within the city limits. Judgment for plaintiff, and defendant appeals. Affirmed.

The controversy for determination is whether the city of Great Falls or the county of Cascade is liable to repair and maintain a wagon bridge spanning the Missouri river in that city. The case was submitted to the district court upon an agreed statement of facts, as provided by statute. The court rendered a judgment in favor of the county. The city appeals.

An epitome of the facts is as follows: In 1888 a private corporation built the bridge. At that time, the city of Great Falls extended to the river and the bridge, but did not include the bridge. In 1890 the county bought the bridge from the private corporation. In 1892 the county replanked the bridge, and insured the same for a period of three years in favor of the county. In 1891 the said city of Great Falls, pursuant to the laws governing municipal corporations, extended its limits to the other side of the river, so that the city now includes the bridge and its approaches on both sides. There are some other facts stated, which, however, are not material to the controversy. The bridge is in a bad state of repair, and both the county and city refuse to repair it. The question for determination is simply whether the city or the county is liable for said repairs.

The statutes of the state which are material to the inquiry are as follows:

Section 325, div. 5, Comp. St., reads as follows: "The city council of all cities incorporated under this act shall have the following powers: * * * (10) To lay out, establish, open, alter, widen, extend, grade, pave or otherwise improve streets, alleys, avenues, sidewalks and public grounds, and vacate the same; to provide for lighting and cleaning the streets, alleys, avenues; to reg-

ulate the use of sidewalks, and require the owners of the premises adjoining to keep the same free from snow or other obstruction; to regulate the depositing of ashes, garbage or other offensive matter, in any street, alley or on public grounds; to provide for and regulate street crossings, curbs and gutters; to regulate and prevent the use or obstruction of streets, sidewalks and public grounds, by signs, telegraph poles, posting hand bills and advertisements."

Other sections are as follows:

"Sec. 419. The city council shall have power to condemn and appropriate private property for opening, establishing, widening or altering any public street, avenue, alley, lane, park, sewer, waterway, or for any other public use, and the resolution or ordinance of the city council ordering, directing, authorizing or providing for the taking of private property for any such use shall be conclusive as to the necessity for such taking."

"Sec. 1842. It shall be the duty of the board of county commissioners at each session thereof to apportion the amount of money in the treasury available for road purposes to the several road districts, and notify the road supervisor of the amount subject to his order, and in no case shall any supervisor be allowed to draw more money than is apportioned to said district."

"Sec. 1852. It shall be competent for the municipal authorities of any town or city incorporated under the laws of this state to provide by ordinance for the levy and collection of a tax of not exceeding two mills on the dollar on all taxable property within the corporate limits of such town or city, and also a special tax of three dollars on each able bodied man between the ages of twenty-one and forty-five years, residing within the corporate limits of such town or city, which shall constitute a street fund, and shall be expended in opening, improving and keeping in repair the streets and alleys of such town or city."

"Sec. 1853. All ordinances for the levy and collection of street taxes, either special or ad valorem, shall provide that persons liable to pay the same may work out such taxes, if they elect so to do, under the direction of the street commissioner or supervisor of such town or city, upon the streets thereof, and shall provide for giving notice of the time and place when and where such work shall be required to be done."

"Sec. 1854. Whenever any such town or city shall provide by ordinance for the levy and collection of such street taxes, no further or other road tax shall be levied or collected by the county treasurer of the county in which such town or city is situated, of or from the residents thereof, nor shall any portion of the road taxes collected in the county be expended upon the streets or alleys of such corporate town or city, and thirty per cent. of the ad valorem tax collected under and by virtue of any such ordi-

nance shall be paid into the county treasury by the city treasurer, and so much of said thirty per cent. as may be necessary shall be apportioned to the road district in which such town or city is situated, to be expended on roads of said district outside town limits, and the surplus, if any, shall be for the credit of the general road fund."

"Sec. 435. No parts of the streets of any city shall be in any road district established by the county commissioners, nor be under the control of any county officers. No overseer of highways shall be elected in and for such city, but the poll tax shall be collected as hereinafter provided, and shall be expended on the streets, highways and public places governed by the city council and officers of their appointment."

Sam Stephenson, for appellant. H. J. Haskell, for respondent.

PER CURIAM. When the bridge was purchased by the county from the private corporation, it was made a free public bridge. A public bridge is part of the highway. 11 Am. & Eng. Enc. Law, 541; Elliott, Roads & S. p. 21 et seq.; Morrill, City Neg. p. 69 et seq.; and numerous cases cited in these textbooks. We are of opinion that the statutes quoted in the statement foregoing are decisive of this case. A bridge, being a part of the street, cannot be in any road district established by the county, nor can it be under the control of any county officer. Comp. St. div. 5, § 435. It is within the jurisdiction of the city officers. Id. § 325, subd. 10; Id. § 419. Sections 1852 to 1854 provide for the raising of funds by the city for repairing the streets. The reports are full of cases deciding these questions, but they are not of special interest in this controversy, for the reason, as above noted, that it clearly appears that the statutes are conclusive. The judgment of the district court will therefore be affirmed. Affirmed.

STATE ex rel. MATTS v. REEK, County Clerk.

(Supreme Court of Montana. Oct. 22, 1896.)

ELECTIONS—PARTY NOMINATION—CERTIFICATE OF ELECTORS—INDEPENDENT CANDIDATE—BALLOT—INJUNCTION.

1. A candidate for district judge was nominated by a certificate signed and filed by the electors of the Silver Republican party in the counties composing the district. The certificate of nomination was filed under the direction of the state and county central committees of the district, and it was sought to place the nominee's name on the official ballot under the head of the Silver Republicans. *Held*, that the direction of the central committees did not make the nomination a party action, so as to take it out of the rule that a nomination of a regular existing party cannot be made by a certificate of electors. *State v. Motwitt* (Mont.) 46 Pac. 370, followed.

2. Such a nominee cannot be placed on the ballot as one independent candidate, since it is

apparent that the electors who signed the certificate of nomination intended to nominate him as a Silver Republican, and it will not be presumed that they would have signed a certificate to nominate him as an independent candidate. *State v. Rotwitt* (Mont.) 46 Pac. 370, followed.

Petition by E. D. Matts to enjoin W. J. Reek, county clerk of Granite county, from placing the name of Theodore Brantley on the official ballot, as a candidate for district judge, under the head of the Silver Republicans. Writ of injunction made permanent.

T. J. Walsh, for relator. H. J. Haskell and McConnell & McConnell, for respondent.

PEMBERTON, C. J. E. D. Matts, the relator, is the regular Democratic candidate for district judge for the Third judicial district of the state of Montana, composed of the counties of Deer Lodge and Granite. It appears also that Theodore Brantley is the regular nominee of the Republican and Populist parties for judge of said district. It also appears from the petition that Theodore Brantley was nominated by a certificate signed and filed by the electors of the Silver Republican party in the counties composing said district. This certificate was filed with the secretary of state, and the nomination of said Theodore Brantley under said certificate has been duly certified by the secretary of state to the county clerks of Deer Lodge and Granite counties. By this petition the relator seeks to enjoin W. J. Reek, who is county clerk of Granite county, from placing the name of Theodore Brantley on the ballot as a candidate for said office under the head of the Silver Republicans. In *State v. Rotwitt* (just decided) 46 Pac. 370, this court held that a party nomination could not be made by petition, as is sought to be done in this case. But counsel for the defendant contends that as the certificates of nomination in this case were signed only by Silver Republicans of the district, and that said certificates of nomination were filed under the direction of the state and county central committees of said district, it thereby became a party action, and legalized such nomination of Theodore Brantley. But in answer to this it is sufficient to say if the law does not permit a nomination of a regular existing party to be made by certificate of electors, as was attempted to be done in this case, and which was so held in *State v. Rotwitt*, supra, then the direction of the central committees to the electors to so act would have no binding force or effect, or take it out of the rule laid down in *State v. Rotwitt*, by this court.

Counsel for the defendant asks that, if we hold the nomination of Theodore Brantley bad as a party nomination, then that we hold "that the name of said Theodore Brantley be allowed to appear upon the ballot as the electors' Silver Republican candidate for the office of district judge of the Third judicial district in a separate column, or, if the court should be of the opinion that the electors had

no right to use the name of the Silver Republican party, that their nomination of the said Theodore Brantley be allowed to appear on the ballot as the electors' Independent nomination in a separate column for the office of district judge of the Third judicial district." We are of opinion that under no circumstances can the name of Theodore Brantley be permitted to appear as the electors' Silver Republican candidate, because we do not believe the electors are authorized to nominate Theodore Brantley as a Silver Republican candidate. Nor do we think his name should be permitted, under the circumstances of this case, to appear on the ballot as an independent candidate. In determining this question, we must consider the rights of the electors who signed the certificate of nomination of Theodore Brantley. It evidently was the intention, as appears from the allegations in the answer, of the electors who signed the certificate of nomination, to nominate Theodore Brantley as a Silver Republican. It does not appear anywhere that the electors ever intended to nominate him as an independent candidate. He is nominated and certified as the candidate of the Silver Republican party. We have no right to presume that the electors who signed this certificate of nomination would ever have done so if it had been proposed to them to nominate Theodore Brantley as an independent candidate for judge of that district; and for this court now to change the nomination of Theodore Brantley from that of a candidate of the Silver Republican party to that of an independent candidate for judge of said district, we think, would be unauthorized by the law and by the action of the electors of that district, and might operate as a wrong, an injustice, and a fraud upon the electors.

We are of opinion that the questions involved in this case were practically determined in the case of *State v. Rotwitt*, supra. It is therefore ordered that the writ of injunction issued in this case be made permanent.

DE WITT and HUNT, JJ., concur.

HARMON v. HAWKINS, Sheriff.

(Supreme Court of Montana. Oct. 19, 1896.)

SALE—STATUTE OF FRAUDS—PLEADING—FAILURE TO ALLEGE DELIVERY.

Under Comp. St. 1887, div. 5, § 226, providing that a sale of chattels in the possession of the seller, unless accompanied by an immediate delivery, and followed by a continued change of possession, is conclusive evidence of fraud, as against the seller's creditors, a complaint in an action by a purchaser against a sheriff for conversion of property seized under an attachment against the seller, which shows the property to have been in the seller's possession when purchased, and does not allege an actual delivery and change of possession, is demurrable.

Appeal from district court, Custer county; George R. Milburn, Judge.

Action by Leo C. Harmon, receiver of the Stock Growers' National Bank of Miles City, against James B. Hawkins, as sheriff of Custer county. From a judgment for defendant, plaintiff appeals. Affirmed.

This is an action for damages for the alleged conversion of personal property. It is alleged in the complaint that the sheep in question were purchased by E. E. Batchelor, as trustee of the plaintiff bank. The sheep, it is alleged, were at the time of the alleged purchase in the possession of one Dan H. Bowman; that the said Bowman was at the time of the alleged purchase notified by Batchelor of the same; that Bowman received the sheep from said Batchelor, and agreed to herd and care for the same until they were otherwise disposed of. The sheep were purchased by Batchelor from said Bowman and one Merrill. It seems, from the imperfect record of the case, that there was a trial of some sort, of the case, before the court without a jury. Pending the trial the plaintiff asked and obtained leave of court to amend the complaint by interlining therein words showing that Batchelor purchased the sheep as trustee of the plaintiff. This continued the case, and the court granted defendant time and leave to demur to or answer the amended complaint. The defendant demurred on the ground that the amended complaint did not state facts sufficient to constitute a cause of action, and also on the ground that the amended complaint was inconsistent with the former complaints filed by plaintiff. The court sustained the demurrer. Plaintiff declined to amend the complaint, whereupon judgment was entered in favor of defendant for costs. Plaintiff appeals from the judgment.

C. H. Loud, for appellant. Strevel & Porter, for respondent.

PEMBERTON, C. J. (after stating the facts). The sheep in controversy, as shown by the complaint, were, at the time it is alleged Batchelor purchased them of Bowman and Merrill, all in the possession of Bowman. It is nowhere alleged that Bowman and Merrill, or either of them, ever delivered the sheep to Batchelor. The most that can be claimed is that when Batchelor purchased the sheep they were in the possession of Bowman, and that they were permitted to remain in his possession upon his alleged promise to herd and care for them until they were otherwise disposed of. It is not alleged that there ever was an actual delivery of the sheep to Batchelor by Bowman and Merrill, or either of them. There is no allegation in the complaint that there was a change of possession at the time Batchelor purchased the sheep, or at any other time before they were attached by the defendant. The defendant is the sheriff of Custer county, and attached the sheep, in possession of Bowman as such officer, in a suit by one Jordan against said Merrill, and afterwards sold the sheep under an execution issued out of the district court of said county in said suit. These facts constitute the

conversion alleged in the complaint. It is stated in the brief of counsel for the respondent that the court held the complaint bad because of the want of an averment therein that Batchelor ever took actual possession of the sheep under his alleged purchase from Bowman and Merrill. Section 228, div. 5, Comp. St. 1887, under which this case was tried, is as follows: "Every sale made by a vendor of goods and chattels in his possession or under his control, and every assignment of goods and chattels, unless the same be accompanied by the immediate delivery, and be followed by an actual and continued change of possession of the thing sold and assigned, shall be conclusive evidence of fraud as against the creditors of the vendor or the person making such assignments, or subsequent purchasers in good faith." We think the allegations of the complaint fall far short of stating facts sufficient to constitute an immediate delivery, and an actual and continued change of possession, of the sheep, as required by said statute, in order to constitute the sale to Batchelor valid against creditors and subsequent purchasers in good faith. The action of the court in sustaining the demurrer to the complaint is the only error assigned. We see no error in the action of the court. The judgment appealed from is affirmed. Affirmed.

DE WITT and HUNT, JJ., concur.

STATE ex rel. GILLIS v. JOHNSON, County Clerk.

(Supreme Court of Montana. Oct. 22, 1896.)

ELECTIONS—PARTY NOMINATIONS—RIVAL CONVENTIONS.

A court will not attempt to determine which of two rival county conventions, held by opposing factions of the same political party, and each composed of delegates regularly elected to a convention called by the constituted authorities of the party, is entitled to represent the party, by enjoining the county clerk from placing the names of the nominees of either convention on the official ballot.

Petition on relation of Malcolm Gillis against Charles Q. Johnson, county clerk and recorder of Silver Bow county, for a writ of injunction. Writ denied.

F. T. McBride, L. J. Hamilton, and J. F. Forbis, for relator. Thompson Campbell, for respondent.

PER CURIAM. It appears in this action that the regularly elected delegates to the county Republican convention of Silver Bow county assembled pursuant to regular call, but were unable to agree on an organization, the disagreement arising when the secretary of the Republican committee attempted to call the convention to order. Confusion reigned, and some violence is alleged to have occurred, in the Auditorium, where the delegates were gathered. Thereupon, and it is averred by reason of these acts of violence and other wrongs, certain delegates with-

drew, and assembled at another place; still acting, it is claimed, under the regular call. At this other place these delegates organized into what is claimed to be a convention, nominated a full county ticket, and adopted a name, to wit, the "Silver Republican Party," but, it is averred, with "no purpose of forming a new or other party, and for the sole and only purpose of designating the party as the 'Silver Republican Party,' for and as a principle only, and for the purpose, further,—there being another ticket nominated, under the name 'Republican Party,'—to designate for the information and knowledge of the electors of the state of Montana, that no mistake might be made, and that there should be no confusion in the identity of the two tickets." Meantime the delegates who remained at the Auditorium organized, and they, too, proceeded in convention to nominate a county ticket. We are now asked by the petitioner, Gillis, who is chairman of the Republican central committee of Silver Bow county, to enjoin the county clerk from placing on the official ballot the names of those persons certified as nominated by the Silver Republican convention. No question of the right of the delegates who assembled under the call to organize a convention is presented in this case. The question is simply one of the relative rights of rival factions within the ranks of the regularly elected delegates. Such a contention, under all the facts of the case, it is well to leave to the electors to determine. They cannot well be misled, because the names of the two factions should appear under different heads on the ballot, and each faction will appear but once. At all events, we shall follow the rule laid down in *Phelps v. Piper* (Neb.) 67 N. W. 755, and decline to interfere. The proceeding is dismissed.

MURRAY et al. v. SWANSON et al.

(Supreme Court of Montana. Oct. 19, 1896.)

MECHANICS' LIENS—PRIORITIES—MORTGAGE—ALLOWANCE OF ATTORNEY'S FEES.

1. Under Gen. Laws 1887, div. 5, § 1374, providing that liens for work done or material furnished as specified in said chapter "shall be prior to and have precedence over any mortgage * * * made subsequent to the commencement of work on any contract for the erection of such building," etc., a lien for work done in plastering a building is superior to a previous mortgage given after the commencement of said building.

2. Act March 14, 1889 (16th Leg. Assem. p. 172), providing that, in an action to enforce a mechanic's lien, plaintiff shall, if successful, recover a reasonable attorney's fee, as costs, relates to fees taxable as costs in the trial court only, and not in the supreme court.

Appeal from district court, Silver Bow county; William O. Speer, Judge.

Action by E. E. Murray and C. C. Murray, co-partners as Murray Bros., against Sadie Swanson and others, to foreclose a mechanic's lien, and have it declared a superior lien on

the premises. From a judgment for plaintiffs, defendant Samuel H. Stuart appeals, the other defendants having defaulted. Affirmed.

This is an action by Murray Bros., co-partners, to foreclose a mechanic's lien on certain property formerly owned by the defendant Swanson, and to have the claims or liens of the other defendants declared inferior to the lien of plaintiffs. The defendants defaulted, except S. H. Stuart, the appellant, who held the mortgage on the premises covered by the liens. The complaint alleged the performance of the work for which the plaintiffs claimed a lien, alleged its reasonable value, and prayed for a reasonable attorney's fee. It is admitted by the pleadings that plaintiffs' lien was filed for plastering a frame building owned by Sadie Swanson at the time the work was performed; the plastering having been done between the 5th and 15th days of December, 1892. The amended complaint averred that S. H. Stuart claimed a lien by virtue of a mortgage given to him by Sadie Swanson, dated November 24, 1892. It was also alleged that the mortgage was given after the commencement of the work on various contracts for the erection of the building situated upon the premises described in the lien. The answer raised the question whether the mortgage of Stuart was a prior lien on the property, and whether it was entitled to precede the lien of the plaintiffs. The plaintiffs moved for judgment on the pleadings. This motion was sustained, and judgment ordered for the plaintiffs, and decree entered adjudging the lien set up in the plaintiffs' complaint to be superior and paramount to the interest of the mortgagee, Stuart, and awarding the plaintiffs \$50 attorney's fees. The appeal is from the judgment.

Chas. O'Donnell, for appellant. C. R. Leonard, for respondents.

HUNT, J. (after stating the facts). The portion of section 1374, div. 5, Gen. Laws 1887, applicable to the present controversy, is as follows: "The liens for work or labor done, or material furnished, as specified in this chapter, shall be prior to and have precedence over any mortgage, incumbrance or other lien made subsequent to the commencement of work on any contract for the erection of such building, structure or other improvement." A former statute of the territory of Montana provided that "the liens for work or labor done * * * shall have priority * * * and shall be preferred to all other liens and incumbrances which may be attached * * * to the extent aforesaid * * * made subsequent to the commencement of said building, erection or other improvement." Gen. Laws 1879, div. 5, § 827. In *Davis v. Billsland*, 18 Wall. 659, the supreme court of the United States decided that, under this statute quoted above, liens secured to mechanics and material men had precedence over all other incumbrances put upon the property after the commence-

ment of the building. This construction of the statute was regarded as just, the court there saying, "Why should a purchaser or lender have the benefit of the labor and materials which go into the property, and give it its existence and value?" The same view of the statute was taken by the supreme court of the territory in *Mason v. Germaine*, 1 Mont. 263, where the court were of opinion that the statute expressly gave preference to liens of mechanics and material men over any incumbrance made subsequent to the commencement of the building. It will be observed that there is a difference in the wording of the statute construed in *Davis v. Bilsland*, supra, and section 1374, quoted above. The latter reads thus, "Subsequent to the commencement of work on any contract for the erection of such building, structure or other improvement;" while the former reads "subsequent to the commencement of said building, erection or other improvement." But this difference is expressly referred to and commented upon in *Merrigan v. English*, 9 Mont. 113, 22 Pac. 458, where Justice Bach, for the court, said: "But there is no difference in the meaning. When Crawford commenced to erect the building, work was commenced on a contract for the erection of the building; in other words, that was 'the commencement of the building.' Such a construction of the statute as is stated in the case last cited is not unjust. The mortgagee knew the law. He knew, or could have known, that work had been commenced on a contract for the erection of a building. He knew that persons other than the original contractor would perform work and labor which would improve the property upon which, as security, he advanced the money. He knew of the lien which such subcontractor could acquire. To hold otherwise would be to destroy the very purpose of this law, which was to give to the subcontractor a direct lien for the value of his labor, because it is evident, if the contrary was held, such liens would be made worse than a farce by so-called blanket mortgages filed the day after the improvement was commenced." The case is therefore, upon this point, determined by these former constructions of the Montana lien statutes, and the court properly adjudged the mortgage a subsequent lien to that of plaintiffs.

The district court allowed the respondents \$50 attorney's fee, as part of the costs. This was authorized by act of the Sixteenth legislative assembly, approved March 14, 1889.¹ *Wortman v. Kleinschmidt*, 12 Mont. 316, 30 Pac. 280. Respondents' counsel now asks this court to allow him to be taxed as costs a reasonable fee for services of counsel in the supreme court. The only question involved is whether the statute referred to allowed attorney's fees as part of costs in the supreme court, as well as the district court. Upon the

¹ Act March 14, 1889, provides that, in actions to enforce mechanics' liens, plaintiff shall, if successful, recover a reasonable attorney's fee, as costs.

general principle that costs are recoverable at law only by force of statute, and depend upon the terms of the statute strictly construed, we do not find authority in the statute to allow counsel fees in the supreme court. The statute is a severe one, at best, and ought to be strictly construed. We therefore think that its application should govern attorney's fees taxable as costs only in the court in which the action is instituted. Judgment affirmed. Affirmed.

PEMBERTON, C. J., concurs.

DE WITT, J. I concur in the judgment, but in the allowance of the attorney's fee in the district court only on the ground of stare decisis and res adjudicata. *Wortman v. Kleinschmidt*, 12 Mont. 316, 30 Pac. 280; *Supply Co. v. Wells*, 16 Mont. 65, 40 Pac. 78.

STATE ex rel. SLIGH v. REEK.

(Supreme Court of Montana. Oct. 22, 1896.)

ELECTIONS—APPLICATION FOR INJUNCTION—LACHES OF RELATOR.

Where a relator has been guilty of such laches in bringing before the court an application for an injunction against an officer charged with the duty of preparing the official ballots for an election, that the court has not sufficient time for the proper consideration of the questions involved before the officer is compelled by law to act, the application will be dismissed.

Application, on relation of James M. Sligh, for an injunction against G. J. Reek, county clerk and recorder of Granite county. Dismissed.

J. W. Kinsley, for relator. McConnell & McConnell and H. J. Haskell, for respondent.

PER CURIAM. This proceeding, in its nature and object, is similar to the many other election ballot cases which we have heard during this week. The relator seeks to restrain the county clerk from placing upon the official ballot certain names. The question raised here differs somewhat from that presented in any of the other cases. The contention between the relator and those persons whom he seeks to have excluded from the official ballot is: This relator and his associates claim to be the nominees of the Silver Republican party of Granite county, duly nominated by a regular convention of that party. The persons whose nominations he attacks make precisely the same claim. In other words, we have a contention between two rival conventions, each naming candidates for the same county offices, and each convention claiming to be the only regular convention of the Silver Republican party. It appears that each convention was in fact composed of delegates as to whom there is a showing that they were elected from the body of the electors of the county. This raises a question not heretofore decided, and one of very great importance. We are in-

formed that the official ballot must be printed and advertised to-morrow. All business of this court has been set aside for the last week, and our whole attention has been occupied in the hearing of these election ballot cases. The certificate of nomination which this relator seeks to attack was filed on October 13th. The vitally important questions avowed in the case have been allowed to rest until this time, and now their consideration is thrust upon us, when there is absolutely no time for a consideration which would enable us to arrive at any proper conclusion, or one that would be satisfactory to ourselves or the electors. Just what may be the duty of the court as between rival conventions which make something of a showing (how satisfactory it may be we are not prepared to say) that they were representative and composed of delegates coming from the electors, we are not able to determine in a few hours' consideration. The subject is too important and too far-reaching. By reason of laches and negligence of the relator in not presenting his case so that the court would have a reasonable time for its consideration, we shall dismiss the application, and refuse in any way to interfere with the action of the county clerk. We do not consider that it is our duty to stop the proceedings of an election when the question is forced upon us at this late hour. We reserve any expression of opinion as to the merits of the case.

BARDWELL et al. v. ANDERSON et al.
(Supreme Court of Montana. Oct. 19, 1896.)
MOTION FOR NEW TRIAL—SPECIFICATIONS OF ERROR
—INSUFFICIENCY OF EVIDENCE—INADE-
QUATE ASSIGNMENTS.

1. An action on an account and to foreclose a mechanic's lien was tried to the court. The court made no findings, and held generally for defendants. On a motion for a new trial, a specification of error was: "The court erred in finding that M. was in any way incapacitated from making a contract with A., the contractor, to furnish materials described in plaintiff's complaint, * * * and the evidence herein fails wholly to sustain the finding of the court in this particular." *Held*, that the statement did not specify the particular errors on which the party would rely, as required by Code Civ. Proc. 1887, § 298, subd. 3, and was properly disregarded.

2. A specification of the insufficiency of the evidence to justify the verdict or other decision, on a motion for a new trial, in terms, "The findings of the court to the effect that the value of the materials described in the complaint had not been sufficiently proven are unsupported by the evidence, and in direct conflict with the same, and are one of the errors specified by the plaintiff herein," is bad as an assignment of insufficiency.

Appeal from district court, Cascade county; O. H. Benton, Judge.

Action by Charles S. Bardwell and others, partners as Bardwell, Robinson & Co., against H. A. Anderson, Timothy E. Collins, and John Lepley. From a judgment in favor of defendants, and an order denying a new trial, plaintiffs appeal. Affirmed.

T. E. Brady and F. A. Merrill, for appellants. Wm. Piggott, Ransom Cooper, and J. A. Hoffman, for respondents.

DE WITT, J. This is an action upon an account and to foreclose a mechanic's lien. The plaintiffs are assignees of the account and the lien of F. M. Morgan, who furnished material to the defendant Anderson, a contractor, to go into the building of defendants Collins and Lepley. The case was tried to the court without a jury. The court found for the defendants who were served, to wit, Collins and Lepley. Plaintiffs moved for a new trial, which was denied, and appeal now from that order, and from the judgment.

The points discussed by counsel are those made upon the motion for a new trial. At the outset, the respondents stand firmly upon their position that upon the motion for a new trial there was no sufficient specification of errors of law or insufficiency of evidence. As remarked in *Zickler v. Deegan*, 16 Mont., at page 200, 40 Pac. 410, this court has been lenient in entertaining appeals where the specifications were, perhaps, not wholly what they should be. But we cannot ignore the objections made to these specifications. A particular point is made upon them by respondents. We must therefore examine their alleged insufficiency.

The court made no findings whatever. It simply held generally for the defendants. There being no jury trial, and thus no instructions, therefore the view which the court took of the law is not clearly apparent. The statement on motion for new trial opens with the recital that the court gave judgment in favor of the defendants, and then proceeds to what the moving parties claim are the specifications of error. They state as follows: "In reaching said conclusion and the rendition of said judgment, the court erred in the following particulars, all of which were excepted to by the plaintiffs, to wit." Then follow 11 paragraphs. We will take the first as an example. It is as follows: "The court erred in finding that F. M. Morgan was in any way incapacitated from making a contract with H. A. Anderson, the contractor, to furnish the materials described in plaintiff's complaint to the Collins and Lepley building, by reason of any relations existing between him and Collins and Lepley, the defendants; and the evidence herein fails wholly to sustain the finding of the court in this particular." This purports to be a specification of an error of law. It is not an error of law at all. The practitioner is complaining that the court found that which he states the evidence wholly fails to sustain. In so finding, if there is any cause for complaint, it is not that there was any error of law, but, on the other hand, it would be that the evidence did not sustain the finding. Our statute pro-

vides (Code Civ. Proc. 1887, § 298, subd. 3) as follows: "When the notice for the motion designates, as the ground of motion, the insufficiency of the evidence to justify the verdict or other decision, the statement shall specify the particulars in which such evidence is alleged to be insufficient. When the notice designates, as the ground of motion, errors in law occurring at the trial, and excepted to by the moving party, the statement shall specify the particular errors upon which the party will rely. If no such specifications be made, the statement shall be disregarded on the hearing of the motion." As to this matter, Mr. Hayne, in his book on New Trial and Appeal, says, at page 426, § 149: "And it is to be observed that specifications of errors in law are not to be confounded with specifications of the insufficiency of the evidence. An instance of this is to be found in *Smith v. Christian*, 47 Cal. 18. In that case the specification was as follows: 'Defendant specifies the following particulars in which the court erred: The testimony shows that the award is void, it having been made by an umpire selected by lot. The testimony or pleadings, as admitted, show that the segregation of the award was without authority; that, by the submission, it was only provided for awarding damages in the aggregate, if any, and the arbitrators had no authority to determine what each party should pay. There was no subsequent promise to pay. There was no consideration to support any such promise if made.' This was held to be insufficient, and the court said: 'These specifications cannot be considered to be specifications of the particulars in which the evidence was insufficient, because they are not stated to be such. On the contrary, they are expressly set forth as being errors in law,—'particulars in which the court erred.'" But it is clear that the matters thus set forth do not constitute errors of law. It is not an error of law that the evidence is insufficient to justify a particular finding of fact." See, also, section 150. The case which Mr. Hayne cites, *Smith v. Christian*, is affirmed in *Hellbron v. Ditch Co.*, 76 Cal. 10, 17 Pac. 932; *Nichols v. Jones*, 14 Colo. 60, 23 Pac. 89; *Cunnington v. Scott*, 4 Utah, 446, 11 Pac. 578.

Applying these principles to the specification before us, we find that it is wholly insufficient as a specification of an error of law, because it does not describe in any way an error of law. If the court were inclined to take a loose view of the subject, and say that, while the counsel has pretended to specify an error of law, we will still consider his language as a specification of insufficiency of the evidence, even then the specification would be wholly bad, for the reason that it simply states, "The evidence herein fails wholly to sustain the finding of the court in this particular." This would be bad even as a specification of insufficiency. *Bank*

v. Roberts, 9 Mont. 323, 23 Pac. 718; *Zickler v. Deegan*, 16 Mont. 198, 40 Pac. 410.

We will quote a few more of the specifications to illustrate their insufficiency: "(2) The court erred in finding that there was any fraud perpetrated upon the defendants Collins and Lepley by reason of the transaction set forth in plaintiffs' complaint, between F. M. Morgan and the defendant H. A. Anderson, which fraud would in any way be to the injury of the defendants Collins and Lepley. (2) The court erred in holding that the agreement between F. M. Morgan, the assignor of plaintiffs' lien, and H. A. Anderson, was a void transaction as between F. M. Morgan and the defendants Collins and Lepley, instead of being, at most, a voidable transaction. (4) The court erred in holding that the defendants Collins and Lepley were entitled to a dismissal of this action, or had any defense to the claim of the plaintiffs herein, without having first paid plaintiffs the reasonable value of the lumber and materials used in the construction of their building, or the return of said materials, and that their retention of said materials was not a waiver of any rights they might have to repudiate said contract. (5) The court erred in finding that the defendants Collins and Lepley, and particularly Timothy E. Collins, who had the management and control of the erection of this building for Lepley and himself, were not aware that F. M. Morgan was furnishing to Anderson the materials described in the complaint, as the evidence plainly shows that he (Collins) did know it, and neither he nor Lepley ever objected to Morgan carrying out said contract, but expressly ratified such action, as the evidence appears, by paying to Morgan the moneys he had expended in payment of freight upon these materials, and also by paying him moneys which he claimed due at the same time for several materials that he furnished to the contractor Anderson. (6) The court erred in finding that the plaintiffs had not proved all the issues set up by the pleadings in favor of the plaintiffs." While these specifications pretend to point out an error of law, they have to do not at all with the law, but wholly with the facts. Specification No. 10, perhaps, is an assignment of insufficiency. It reads as follows: "The findings of the court to the effect that the value of the materials described in the complaint had not been sufficiently proven are unsupported by the evidence, and in direct conflict with the same, and are one of the errors specified by the plaintiffs herein." This is plainly a specification as to the insufficiency of the evidence, and an inspection of it shows that, as such a specification, it is clearly bad. See Montana cases above cited. The district court was justified in ignoring these specifications, and we must sustain its action in denying a new trial.

This disposes of all that is sought to be brought before us on this appeal. The plaintiffs do not contend that they were entitled

upon the trial to a personal judgment against the contractor Anderson, for the reason that he had not been served with summons, and never appeared in the case. The judgment and order denying a new trial will therefore have to be affirmed. Affirmed.

PEMBERTON, C. J., and HUNT, J., concur.

STINSON v. ROURKE.

(Supreme Court of Idaho. April 24, 1896.)

APPEAL—HARMLESS ERROR.

Where the allegations of the complaint are supported by the proofs, and the verdict and judgment are in accordance with both, the supreme court will not grant a new trial because an instruction was given which, although correct as an abstract principle of law, was not applicable to the case.

(Syllabus by the Court.)

Appeal from district court, Nez Perces county; W. G. Piper, Judge.

Thomas Stinson, plaintiff, brings suit against T. F. Rourke, defendant, for work and labor in threshing wheat, demanding the sum of \$330.36, and also as the assignee of 11 other parties who claim to have performed work and labor for the defendant in harvesting and threshing said grain; amounting in the aggregate, together with the claim of Stinson himself, to the sum of \$1,078.01. The defendant demurred to the complaint, which demurrer was overruled by the court, and defendant filed his answer, denying each and every allegation in the complaint. The cause was tried before the court and a jury, resulting in a verdict and judgment for plaintiff in the sum of \$1,040.06. Defendant moved the court for a new trial, which was denied. Thereupon he appealed to this court, both from the judgment and from the order overruling motion for new trial. Affirmed.

James E. Babb, for appellant. S. S. Denning and James W. Reid, for respondent.

MORGAN, C. J. (after stating the facts). The witnesses, being assignors of the claims upon which suit is brought, testified that one G. V. Hamilton, who claimed to be the agent of Rourke, the defendant, came upon the ground where the wheat was grown, on the Indian reservation in Latah county, Idaho, and employed them to work in the harvesting and threshing of the wheat raised by Bergevin Bros. & Martin, and upon which the defendant held a mortgage. As evidence of his right to make contracts for the defendant, Rourke, Hamilton exhibited a letter of attorney from the defendant, of the following tenor: "To Whom Handed: This is to satisfy that I have this day appointed the bearer, George V. Hamilton, my agent for the purpose of looking after and handling, and taking such action as he may deem best and proper in the matter of the Bergevin Bros. & Martin crop of wheat, on the Nez Perces Indian reservation, near Genesee, Idaho, on which said

crop I have a mortgage. Any arrangements or contracts entered into by him in connection therewith will be protected and enforced by me. He has full power and authority to make any arrangements or contracts he may deem best in the premises. [Signed] T. F. Rourke, Pendleton, Oregon. September 6th, 1895." A copy of this letter was produced by Hamilton, and put in evidence in this case. It will be seen that this letter gives Hamilton full power to act for defendant in the premises, and in it Rourke agrees to protect and enforce any and all arrangements and contracts entered into by Hamilton, for defendant, in the matter of harvesting and securing the said crop of wheat. The evidence shows that, before the appearance of Hamilton, one Jackson, who had taken the contract for harvesting the wheat from Bergevin Bros. & Martin, had ceased the work of harvesting, for the reason that Bergevin Bros. & Martin could no longer furnish the means to pay for the harvesting and threshing of the grain. The men, being fearful of losing the pay for their work, had quit also. Upon the arrival of Hamilton, he shows this letter of attorney from Rourke to the men who had been engaged in the harvesting of the crop, and to others whom he wished to engage to assist in the work, and represented to these men that he had full power to act for Rourke in the harvesting of the grain; that thereafter there would be no trouble about the money for paying the men for their work. Upon these representations of Hamilton being made to these men, and to parties whom he desired to employ to go upon the ground and thresh the wheat, work was again commenced. The men testified that Hamilton, in person, employed each one of them, at a stipulated price, to go on and perform this work; also agreed with the threshers upon the amount they were to receive per bushel for threshing the grain; stating also to them that the money was ready as soon as the work was done. It is true that Hamilton, in his testimony, denied making special contracts with these men, or any of them; but the evidence that he did make these contracts, and representations to the men, is overwhelming, and, it seems, was not doubted at all by the jury, and certainly is not by the court. There can be no question of the fact that Hamilton employed these men to do this work, and also that he represented to them that he had the money to pay them, and that he was the agent of Rourke, and obtained the money from Rourke.

The appellant relies specially upon the following assignment of errors: "The court erred in giving to the jury the following instruction: 'You are further instructed that while one person cannot make another his debtor, without the consent of the latter, or recover for services rendered for another without a request, express or implied, yet if one stands by, and sees another doing work for him, beneficial in its nature, and overlooks it as it progresses, and does not interfere to prevent or forbid it, but appropriates such labor to his own use, then, in the ab-

sence of a special contract, a request will be implied, and the person for whom the work has been done will be liable to pay for the work what the same was reasonably worth, unless it expressly appears from the evidence that it was done as a gift or gratuity. And you are further instructed that when one person labors for another, with his knowledge and consent, and the latter voluntarily takes the benefit of such labor, then the law will presume that the laborer is to be paid for his labor, unless the contrary is shown by the evidence; and if no special contract is proved, fixing the price, then the laborer is entitled to have what his services were reasonably worth.'—First, because it is not applicable to the liability of a crop mortgagee for labor performed in heading or threshing the crop; second, because the complaint in this case is not based upon implied contracts, but upon express ones." The second objection will be considered first, as the consideration of that would appear to settle both.

The plaintiff testifies to the contract substantially as alleged. Seven of the men who were the assignors of Stinson also testify in the case, for each of whom an express contract was alleged with Hamilton, as the agent of Rourke, the defendant. The testimony of Means and Hamilton abundantly show the agency of Hamilton. D. A. Woods, one of the threshers, swears to a specific contract in detail. J. I. Long made a contract with Girault, but declined to go to work until he saw Hamilton. By this contract he was to get 50 cents per day, each, for 15 head of horses, and \$5 per day for himself and his machine. When he saw Hamilton the latter asked him why he did not go to work. Long replied that he would go to work as soon as he knew who was to pay. Hamilton said, "All right," he would see that he was paid. Hamilton also told Long that whatever contract Girault made, he (Hamilton) would stand by. G. T. Riley swears to a personal contract with Hamilton, substantially as alleged, with much conversation concerning the pay, unimportant in itself, but important as giving character to the whole of his testimony,—giving it the impress of truth. A. K. Richardson ran a header. He swears to an express contract with Hamilton about the 27th of October, 1893. He agreed to pay Richardson \$6 per day for himself and six horses, with machine. Hamilton paid him \$10. Otto Haberle testified that Hamilton told him to go out and work. Haberle said: "'Mr. Hamilton, I want to understand about my pay.' 'Well,' he says, you need not be afraid. Mr. Rourke, of Pendleton, is good for it.' I said: 'All right. I will go to work.'" And he did so. Hamilton offered him \$3 a day, and 50 cents each for his horses. This was the last of October, 1893. William Alexander testifies: "I commenced work at the request of Girault, and saw Hamilton afterwards. I was a little in doubt about Girault's authority, and

spoke to Hamilton about it; and he said it was all right, and he would pay me when I got through." This testimony was repeated in different forms, but in each substantially the same. It was agreed that Alexander was to have \$6 per day for himself and six horses. He ran a header. For each one of these men, as stated, an express contract was alleged, and substantially proven beyond question. The jury are the sole judges of the weight to be given to the testimony of each witness. Evidently the statements of the workmen were believed by the jury, as against that of Hamilton. The aggregate amount due, as testified to by Stinson and the seven workmen is \$1,158.10. The amount alleged in the complaint to be due these parties is \$1,060. The amount found by the jury to be due Stinson, plaintiff, on his own claim and as assignee, is \$1,040.06. For this amount judgment is rendered. Hamilton swears that he never made any contract with these men, but he also swears that the power of attorney was not given to him to do anything that was necessary to save the crop and get it shipped out. "It was only given me," he says, "to settle accounts that had been contracted prior to that date." The power of attorney tells an entirely different story. The circumstances surrounding the parties and the grain when Hamilton appeared tell a different story. All bear witness against Hamilton and the contention of the defendant. The jury believed them. We must believe them also. We have their express contracts alleged and proven beyond question, and the verdict and judgment supported. It is neither necessary nor proper to allege all the details of a contract in the complaint. Only ultimate facts need be alleged. We agree, then, with the appellant that the instruction given had no place in this cause, and for the reason given,—that "the case was not based upon implied contracts, but express ones." It was not applicable to either the law or the evidence. As an abstract statement of law, it is substantially correct, and might be properly given, under certain conditions. To proceed to inquire whether such an instruction can ever be applicable to a suit against a crop mortgagee for wages in harvesting the crop would clearly be a bootless undertaking, as it could not, in either case, change this decision. Where the allegations of the complaint are supported by the proofs, and the verdict and judgment are in accordance with both, it cannot be the duty of this court to grant a new trial because an instruction was given which, although correct as an abstract principle of law, was not applicable to the case, and when it is apparent that the jury paid no attention to the instruction, and where, if they had, it could have made no difference in the result. The judgment of the lower court is affirmed, with costs to respondent.

SULLIVAN and HUSTON, JJ., concur.

On Petition for Rehearing.

(Oct. 16, 1896.)

MORGAN, C. J. The reasons therefor, as given in his petition, are answered in their order.

First, the evidence in the case was so strong, and preponderating to such an extent, that it would have been the duty of the court to set aside the verdict and grant a new trial, had the verdict been for the defendant. The statement that Rourke's only connection with the account was to guaranty the payment of the Vollmer account is erroneous, as Rourke's letter of instructions to Hamilton is substantially as follows: "I have appointed George V. Hamilton my agent for the purpose of looking after and handling, and taking such action as he may deem best and proper in the matter of Bergevin Bros. & Martin crop of wheat, * * * on which said crop I have a mortgage. Any arrangements or contracts entered into by him in connection therewith will be protected and enforced by me. He has full power and authority * * * to make any arrangements or contracts he may deem best in the premises. [Signed] T. F. Rourke." This letter shows conclusively that the agent had full power in the premises for all purposes. It is immaterial whether this power of attorney or letter was shown to the workmen or not. He had it, and the workmen contracted with him. This is sufficient to fix his responsibility. The statement of appellant's witness that the letter was given him only to settle bills at Vollmer's, and arrange for more credit for Bergevin Bros. & Martin, is shown to be untrue by the letter itself. There appears to be no reason for granting a rehearing in above cause. Petition denied.

SULLIVAN and HUSTON, JJ., concur.

UNITED STATES v. FOLSOM.

(Supreme Court of New Mexico. Sept. 4, 1896.)

Appeal from district court, Bernadillo county; before Justice N. C. Collier.

Stephen M. Folsom was convicted of a violation of the banking law, and appealed. Judgment affirmed. 38 Pac. 70. The attorney general of the United States asked a suspension of sentence. Denied. No opinion.

F. W. Clancy and N. B. Field, for appellant. W. B. Childes, for the United States.

HAMILTON, J. (dissenting). I regret that I find it necessary, in obedience to my own convictions, to record my dissent to the conclusions reached by the court in ordering the sentence to be executed in this cause. When the attorney general, some weeks ago, through the United States attorney, indicated his wish to have no steps taken, and expressed a desire

that the execution of the sentence be suspended for the present, I was then impressed with the view that this desire of the attorney general should be respected, and that the execution of the sentence should not be enforced at this time. Subsequent reflection has confirmed me in the opinion I then had.

While it may be admitted that the judicial branch of the government possesses the absolute right to the exclusive control of the administration of all business distinctively within its department; that it has the power to regulate and control its proceedings, render and execute its judgments and decrees, so long as it acts within the limit of that constitutional and legislative authority by which it is created and controlled; and while it may be true that this right cannot be taken away, limited, suspended, or controlled by any other department of the government, save by legislative authority, yet it is also true that conditions may arise, facts and circumstances may have occurred in the trial and conviction of a person charged with a crime under the laws of the United States, which make it not only legal and proper, but a matter of justice, that the court should give heed to the reasonable request of another department of the government as to the time and manner of enforcing the judgment and sentence under that trial. Especially is it so when we conclude that to grant this request no harm can come to the government, and to refuse the request injustice may be done to the citizen. The department of justice, through the attorney general and his subordinate officers, has the management, direction, and control of all the prosecutions arising under the laws of the United States. These officers investigate offenses, prepare indictments in cases where they are required, manage and direct all trials on behalf of the government, and often discontinue or dismiss a prosecution which, in their judgment, ought not to be continued; and the court rarely, if ever, denies or disputes their right to do so. They being sworn officers of the court and of the government, and having the interest of the latter specially in charge, the court has a right to assume that they are guided in their course by a due regard for the proper administration of public justice. The defendant in this case was indicted, tried, and convicted in the Second judicial district court of this territory for a violation of the provisions of the laws relating to national banks. He brought the case to this court, where the judgment was affirmed. 38 Pac. 70. Feeling himself aggrieved by that decision, he sought to take his case to the appellate court for review, but the supreme court of the United States (16 Sup. Ct. 222) held that there was no existing law authorizing a review of the case, and it was sent back. Pending these proceedings, a bill was introduced, and is now pending in congress, which enlarges the jurisdiction of the circuit court of appeals of the United States so as to permit a review by that court of this class of cases. Pending this legislation the defendant has laid before the attorney general of the

United States a copy of the record of his trial and conviction, and has petitioned for a suspension of his sentence until it is ascertained if the coming congress will adopt the legislation giving a right of review in the appellate court in this class of cases. The attorney general has investigated the case, and found, as I must conclude, sufficient merit in the appeal to request a suspension of the sentence, and he asks that no action be taken in the execution of the sentence at this time. Is it our duty to respect this request, and delay the execution of the sentence, or ignore the request, and imprison the defendant, pending his possible right of appeal to a higher court? A majority of the court have determined on the latter course; a conclusion to which I cannot agree. If this request came from the defendant himself, it might not commend itself to my favorable consideration; but coming, as it does, from the side of the government, whose interests are managed and controlled by the attorney general, through whose department this conviction was secured, he, after giving the matter investigation, and prompted, as I conceive, by a desire to see that justice is done alike to the government and the defendant, has made the request that no action be taken in the matter at this time; and I believe it to be due him, and but justice to the defendant, to yield to his request.

I was not a member of this court at the time of the trial, or at the time of the affirmance of the judgment by this court, and consequently, from the record, I know nothing as to the trial or the verdict. I may assume, however, that the trial was proper, and the verdict was correct; still I must also believe that the attorney general, after an investigation of the record of the conviction, has discovered therein sufficient merit in the appeal of the defendant to justify him in the conclusion that an opportunity should be given to the defendant to have the case reviewed by the appellate tribunal, and that a stay of sentence should be had until it is ascertained if this can be done. It may be said that the action of the attorney general in this regard is unusual. May it not also be true that upon an investigation of the case he has come to the conclusion that the government would suffer no injury by the delay, and that a due regard for the rights of the defendant has led him to the adoption of this course? Suppose the right of review should be given, and the appellate court should determine that there was error in the trial, and reverse the cause. Then the sentence now imposed by the court in that event would be both improper and unjust to the defendant. On the other hand, if no review is allowed, or if, on such review, the case should be affirmed, then no harm or injustice is done to the government, so long as defendant is under good and sufficient bond to submit to the sentence which may be imposed upon him. If the trial at which he was convicted should prove to be erroneous, to impose the sentence now would, in my judgment, but force him to submit to an unjust imprisonment, based upon an erroneous trial, and thus visit

upon him an unjust punishment founded upon an illegal verdict. I am fully persuaded that a due and proper administration of justice does not require us to execute a sentence and visit a punishment which may lead to such a possibility. I am constrained, therefore, in view of the desire expressed by the attorney general, to dissent from the action of the court in ordering the sentence executed upon the defendant at this time.

ALBRIGHT et al. v. TEXAS, S. F. & N. R. CO. et al.

(Supreme Court of New Mexico. Sept. 1, 1896.)

CORPORATIONS—UNPAID SUBSCRIPTIONS—CREDITORS' BILL—JUDGMENT—EXECUTION RETURNED NULLA BONA—DECREE PRO CONFESSO—AMENDED BILL—SERVICE OF PROCESS.

1. Unpaid subscriptions to the stock of a corporation are, in equity, a trust fund for the benefit of creditors.

2. Where it is sought by equitable process to reach equitable interests of a debtor, the bill, unless otherwise provided by statute, must set forth a judgment in the jurisdiction where the suit is brought, the issuing of an execution thereon, and its return unsatisfied, or must show that it was impossible to obtain such judgment in any court within such jurisdiction.

3. Where complainant brings his case to a hearing, and fails to take a decree pro confesso against a defendant personally served, but not answering, the complainant must prove his case before taking a decree against him.

4. Where leave to file an amended bill is granted on condition that defendants be served with notice of the amended bill before the cause come to a hearing, a decree pro confesso taken on the same day without serving process cannot stand. 42 Pac. 73, reversed.

Appeal from district court, Bernalillo county; before Justice W. D. Lee.

On rehearing. Reversed.

For former report, see 42 Pac. 73.

It is stated in the original bill, and repeated in the amended bill, that on the judgment recovered by Albright there was issued on November 24, 1885, an execution; and that afterwards, on January 13, 1886, the sheriff made a return of nulla bona; and that there was a similar return on the execution issued on the Marshall judgment. The sheriff's return on the Albright execution of January 13, 1886, shows "that, after diligent search, I am unable to find any property of the defendant in my county subject to execution, and I further certify on the 4th day of December, 1885, in my county, I served a written notice as garnishee, together with copy of execution, upon one Lehman Spiegelberg," etc. There was no return of nulla bona shown on the Marshall execution. The record also shows that a venditioni exponas upon the Albright execution issued out of the district court on June 6, 1887, for the sale of certain property levied on as the property of the defendant company on January 27, 1887, being two locomotives, a number of cars, timber, ties, and other things; that on June 22, 1887, the sher-

iff advertised said property for sale on July 11, 1887, but received notice from the president of defendant company that the property did not belong to it, but to the Southern Trust Company. He postponed sale, notifying plaintiffs' counsel that he demanded an indemnifying bond; and, it not being furnished, the sheriff made public proclamation that the sale of the said property would not take place. It is not shown that anything further was done with said execution, nor that anything was done with the garnishment served under the first execution.

E. A. Fiske and Chas. A. Spiess, for appellants. W. B. Childers, for appellees.

COLLIER, J. (after stating the facts). Upon the rehearing which was granted, the whole case was again elaborately argued, the solicitor for appellants urging strenuously and with great zeal that the decision already rendered in this cause, holding that unpaid subscriptions for stock are, in equity, a fund for the benefit of creditors, though conceded by him in his brief on the first hearing, is not the law since the decision of *Hollins v. Iron Co.*, 150 U. S. 381, 14 Sup. Ct. 127. We think the construction counsel seeks to put upon this decision—viz. that it is a modification, if not an absolute reversal, of prior decisions of the United States supreme court tribunal—is not tenable; and his brief, in the paragraph quoted by us in our former decision, is still, we believe, a correct exposition of the law on this subject. Referring, however, to the additional statement of facts above set forth, it appears that, as to the Marshall judgment, there has not been even an execution issued, and, of course, no return of nulla bona. Unless the garnishment served upon the execution prevents, it may be said that there was a return in January, 1886, of nulla bona upon the execution on the Albright judgment. But it also appears that a year later another execution issued upon the Albright judgment, and that there was property levied on apparently largely exceeding in value the amount of the judgment, and that no sale was made of the same, because it was claimed by the president of defendant company to be property not belonging to it. The sheriff declined to proceed with the sale thereof, because of refusal on plaintiffs' part to give an indemnifying bond.

It is urged by counsel for appellees that, whether the statement of the president of defendant company that the property levied on was not its property was true or false, so far as this case is concerned it was a statement blinding said company, and that said return, containing said statement, was equivalent to a return of nulla bona. If it had appeared in the sheriff's return that, after diligent search, he had been unable to find any other property of defendant, this conclusion or presumption might possibly arise; but no such statement appears, and,

strictly, it would have to be held that allegations of the bill and amended bill as to there being returns of nulla bona upon executions of said judgments, or either of them, are not proven. While counsel for appellees contended in his oral argument that return of nulla bona was merely one of the means of showing insolvency, so that the right of the creditor of a corporation to sue for unpaid subscriptions on stock would accrue, yet in his brief on the rehearing he contends as to the time the statute of limitations began to run, and supports his contention with much authority, that the creditor must have obtained judgment against the corporation, with a return of nulla bona, before he can sue the stockholders. Thus, in *Taylor v. Bowker*, 111 U. S. 110, 4 Sup. Ct. 397, the court holds that, under the Maine statute, the creditor could not file his bill until execution was returned nulla bona. The rule as to this is plainly stated in *Tube-Works Co. v. Ballou*, 146 U. S. 523, 13 Sup. Ct. 166, in which it is said that, "where it is sought by equitable process to reach equitable interests of a debtor, the bill, unless otherwise provided by statute, must set forth a judgment in the jurisdiction where the suit is brought, the issuing of an execution thereon, and its return unsatisfied, or must make allegations showing that it was impossible to obtain such a judgment in any court within such jurisdiction." The point of there being no return of nulla bona was not directly involved in *Tube-Works Co. v. Ballou*, supra, as the suit was upon a foreign judgment, and was dismissed upon demurrer, because there was no averment of any judgment or effort to obtain one, or that it was impossible to obtain one; but in the discussion of the case the above doctrine was laid down, and for its support *Taylor v. Bowker*, supra, and numerous other decisions, were cited. In *Terry v. Anderson*, 95 U. S. 628, one of the cases cited in *Tube-Works Co. v. Ballou*, supra, it is said by the court that, "ordinarily, a creditor must put his demand in judgment against his debtor, and exhaust his remedies at law, before he can proceed in equity to subject choses in action to its payment; and to this rule, however, there are some exceptions." In the case of *Jones v. Green*, 1 Wall. 330, there was a bill by judgment creditors to subject property held in secret trust, it being alleged that the debtor was insolvent. There was a decree in favor of complainants, and it was held that the objection that it was not shown that complainants had attempted to enforce their remedy at law was fatal to the relief prayed. The bill alleges that executions were issued upon the judgments of complainants, and were returned unsatisfied, but no proof on this subject was produced at the hearing. This is precisely the situation as to the Marshall judgment, as no execution whatever is shown to have issued, and the only question as to the Albright judgment is whether there

is a sufficient return showing nulla bona. *Jones v. Green*, supra, went up from the territory of Nebraska, and it seems in harmony with *Tube-Works Co. v. Ballou*, supra, in the principle announced by the latter that, "unless otherwise provided by statute, there must be judgment and return of the same unsatisfied."

We have examined with care the authorities which counsel for appellees cite in support of the contention that the return of nulla bona is not essential to the giving of these plaintiffs a standing in a court of equity, and notice them as follows: The case of *Terry v. Tubman*, 92 U. S. 100, shows that a demurrer was filed to the plea of the statute of limitations, framed upon the statute in force in the state of Georgia, the demurrer proceeding upon the idea that the plea was bad, inasmuch as it merely alleged the notorious insolvency of the corporation, as a starting point of the statute; and the demurrer was overruled distinctly upon the ground that such an allegation was, at least, the equivalent of what was alleged in the bill about insolvency of the same corporation, and that the demurrer cut back to the first error in pleading. The inference in this decision is rather against than in favor of appellees' contention. The case of *Camden v. Doremus*, 3 How. 533, was a suit upon a guaranty, and the court's holding was based solely upon a construction of the words "use of reasonable and due diligence," found in the contract of guaranty, and is in no sense an authority on this question. The case of *Reynolds v. Douglass*, 12 Pet. 497, is more nearly in point, as there it is held that, in an action at law against a guarantor, the insolvency of the principal debtor need not be proved by record evidence, but it should not be construed as militating against what, in the cases herein cited, is stated to be the rule governing creditors who pursue equitable interests of a debtor after judgment obtained. The only cases counsel refers us to as seeming directly in point are *Tabb v. Williams*, 4 Jones, Eq. 352, and *Hough v. Cress*, Id. 295; and there it is stated that relief ought to be had whenever, by an execution and return of nulla bona, or otherwise, it appears, etc.; but, in the first place, these cases seem to conflict with the supreme court of the United States; and, in the second place, the bill in this case claims relief simply upon the ground of a return of nulla bona, and not upon any other ground as showing insolvency.

For these reasons, which are more elaborately considered than in our former opinion, we think the conclusion we arrived at was erroneous, and that the judgment of the lower court should be reversed. The extent to which this reversal goes is a matter we will proceed to discuss. Certainly, it should be reversed as to the appellants *Lehman Spiegelberg* and *Bernard Seligman*, and it remains to be considered what should be done as to the de-

fendants and appellants *Gildersleeve*, *Martinez*, and *Ortiz y Salazar*.

The record shows: "Leave to amend bill filed to correspond with proofs taken, and that defendants are required to answer said amended bill within twenty days from time of service of copy of same, and that said cause be set down for hearing as soon as same is at issue on the amended pleadings." The amended bill was filed on June 30, 1892, and notice thereof, and order allowing it to be filed and be answered in 20 days after service of copy thereof, were served on "C. H. Gildersleeve, for himself and E. A. Fiske, solicitor for defendants in the said cause," on June 14, 1892. There is nothing showing that *Martinez* or *Ortiz y Salazar* was given notice either personally or through their solicitor, unless notice to *Gildersleeve*, which on its face was restricted to him personally, can be considered notice to them. Neither *Martinez*, *Ortiz y Salazar*, nor *Gildersleeve* answered the amended bill, though the final decree recites that *Gildersleeve* did. As to *Martinez* and *Ortiz y Salazar* the final decree recites a failure to answer, and that the amended bill "be taken as confessed" as to them and defendant company. Neither is there anything in the record that notice of the filing of the amended bill was given to defendant company. The amended bill differs from the original bill in that it sets forth more at length the alleged transactions of the charter subscribers in subscribing for stock, and failing to pay cash, required for organization, but putting up checks never intended to be presented for payment, instead.

It appears, therefore, that, in the order giving leave to file the amended bill, two things were required: (1) That it was to correspond with the proofs already taken; and (2) that defendants were to be served with notice of the amended bill before the cause could come to a hearing. If what we have already said in this opinion as to complainants' failure to show a return of nulla bona be true, it would seem that the amended bill, inasmuch as it merely repeats the allegations of the original bill on this subject, does not conform to the proofs taken; and, if *Martinez* and *Ortiz y Salazar* had no notice of the filing thereof, they ought not to be bound by complainants' act with respect to the amended bill. That leave, in effect, authorized the complainants to set forth in apt language, by their amended bill, the necessary averments which were justified by the proofs already submitted. A reply to this may be, however, that, so far as *Martinez* and *Ortiz y Salazar* are concerned, they had established, by the decree pro confesso upon the original bill, the fact that there had been a return of nulla bona, though the same cannot be said as to *Gildersleeve*. As to *Gildersleeve* we think the matter may be disposed of by saying that he either answered or he did not answer. If he answered, as the final decree recites, there is the same infirmity in proof as to him as

against Spiegelberg and Seigman. If he did not answer, there should have been a decree pro confesso, and none was taken. It is held in *Pegg v. Davis*, 2 Blackf. 281, that, if any particular claim be not answered, a decree may be taken pro tanto as confessed, and that if complainant, instead of so doing, bring the case to a hearing, he can only be entitled to relief in this regard by proving it. This decision presupposes the necessity of taking a decree pro confesso upon the whole bill, or proving the case. It has been held in *Shields v. Bryant*, 3 Bibb. 525, that a decree cannot be taken against a defendant not answering unless default has been taken; and in *Carman v. Watson*, 1 How. 333, that, where one of the co-defendants did not answer, a decree against him, without taking the bill pro confesso, was irregular, and should be set aside. As to the defendants Martinez and Ortiz y Salazar, we find it stated that, after an order to take the bill pro confesso has been obtained, it cannot be amended even to the extent of correcting a clerical error, without vitiating the proceedings. 1 Daniell, Oh. Pl. & Prac. § 522. And in *Harris v. Deltrich*, 29 Mich. 368, it is held that, if a bill is materially amended when the defendant fails to appear, the taking of the decree pro confesso on the same day, and without serving process, is irregular, and a sufficient ground for opening it, and granting a rehearing. As enforcing the idea that, in the absence of a decree pro confesso, the complainant must prove his case, it is stated to be at the election of complainant to take a decree pro confesso, when the cause shall be proceeded in ex parte, etc. Rule 14 of equity rules. Unless it is within the province of this court to enter a final decree against the defendants Martinez and Ortiz y Salazar upon the original bill, it is difficult to see how any such decree may be entered against them at all. We think it should be held that appellees stand before the district court, and now stand before this court, asking relief, not upon the original, but only upon the amended bill; and, it not appearing that Martinez or Ortiz y Salazar have ever had any day in court as to the amended bill, the decree against them thereon cannot stand. Wherefore it is considered and ordered that the judgment heretofore rendered by this court, affirming the decree of the district court, be, and the same is, upon this rehearing, set aside, and the cause is reversed, with directions to the district court to vacate in conformity with this opinion the decree entered in the district court, with costs in behalf of appellants to be taxed.

LAUGHLIN, J., concurs.

BANTZ, J. Without dissenting from the views expressed by Justice COLLIER, I prefer to base the judgment of reversal upon the distinct ground that the indebtedness for which a decree was rendered against appellees was barred by the statute of limitations.

HAMILTON, J. I concur in the conclusion reached by the court in this case, and think the judgment should be reversed; but I cannot agree with the views expressed in the opinion upon the question of what is known as the "trust-fund doctrine"; nor can I agree with the court as to the effect to be given to the decision of the supreme court of the United States in the case of *Hollins v. Iron Co.*, 150 U. S. 871, 14 Sup. Ct. 127. I understand the doctrine as announced and approved by that decision to be that there is no direct and express trust or lien attached to the property and assets of a corporation in favor of its creditors so long as the corporation remains a solvent and going concern; that, when a corporation is created and placed in operation under its charter, it is a distinct entity—a distinct personality—in the eyes of the law; and, while it remains solvent, it has the same right to control and direct its affairs within the limits prescribed by the terms of its charter that an individual would have over his property. It has the right to acquire, lease, mortgage, sell, and dispose of its property within the limits of its charter, and so long as it acts without fraud or collusion, to the detriment of its stockholders or creditors. If its directors or officers attempt, by fraudulent means, to convey or misapply its funds or property, then a court of equity will interfere to protect the rights of the creditors and stockholders. But, while it remains solvent, it controls and directs its affairs independent of its creditors and stockholders, and there is no express trust or lien in favor of either against its funds or property. Becoming insolvent and in the hands of the court, it loses control over all its assets, and the same at once become a trust fund in the custody of the court, who, in the absence of a trustee, administers upon and distributes them for the benefit of those who, under the law, may be entitled to them. Solvent and going, there is no lien or trust relation between the creditor and the company, but only the ordinary relations of debtor and creditor. Insolvent and in the custody of the court, the relations of trustee and cestui que trust at once arise, and the chancellor administers the trust, and disposes of the property, and distributes the proceeds—first, to the creditors, and, secondly, to the stockholders.

It is earnestly contended by counsel for the complainants that this position is in open hostility to the fixed and settled doctrine of the supreme court of the United States, announced in all of its previous decisions. It is insisted that the capital stock of an incorporated company is a fund set apart for the payment of its debts; that the corporation is merely a trustee, holding its property for the benefit of its creditors and stockholders.

It may not be out of place to look into some of the previous decisions of that court upon this question, and see if such a doctrine as contended for has really ever been the settled rule of that court, and, if so, to what

extent has such rule been modified by the rule in the *Hollins* Case, above cited. Perhaps the most positive and expressive language of that court upon this subject is to be found in the opinion of Justice Swayne in the case of *Sanger v. Upton*, decided in October, 1875, and reported in 91 U. S. 56, as follows: "The capital stock of an incorporated company is a fund set apart for the payment of its debts. It is a substitute for the personal liability which subsists in private co-partnerships. When debts are incurred, a contract arises with the creditors that it shall not be withdrawn or applied otherwise than upon their demands, until such demands are satisfied. The creditors have a lien upon it in equity." In order to understand fully the scope and meaning which should be given to the language of the court used in the above quotation, we must be advised as to the nature of the case which the court then had under consideration, that we may understand the principles of law therein declared as applied to the facts of the case which were then before the court. The Great Western Insurance Company, with an authorized capital of \$500,000, had become insolvent, as a result of the great Chicago fire, of 1871. It was forced into bankruptcy, and all of its effects had passed into the custody of the bankrupt court, and were being administered by its assignee. Its assets consisted largely of the unpaid subscriptions to its capital stock. The bankrupt court, under the authority given it, and to provide means for the payment of creditors, made an order which had the effect of a call upon the delinquent subscribers for their unpaid subscriptions, and the assignee, *Upton*, was ordered to collect the same. The appellant, *Sanger*, declined to pay, and suit was brought by the assignee to recover upon the stock. The company having become insolvent, and its property and effects having passed into the custody of the bankrupt court, to be administered by its assignee, the court held that the unpaid subscription to the capital stock was a trust for the benefit of the creditors. The court was there dealing with the property of an insolvent and dissolved corporation, then in its custody, and held that all of its property and effects, including its unpaid subscriptions to its stock, were a trust fund set apart for the payment of the debts of the company. Broad as is the above language used by the court, it must be construed as applying to a class of cases such as the one then under consideration. The court was then dealing with a bankrupt corporation, and announced a doctrine and applied a rule governing the property of a corporation in its insolvent state. I cannot believe that the court intended to announce a broad and unvarying rule which should apply as well to the property and assets of a solvent and going corporation as it did to the property of an insolvent company in the hands of the court. Solvent and going, the property and assets of a corporation are

managed and controlled absolutely by the directors and officers of the company, subject only to the rules of law applicable to debtor and creditor, and the right of the latter to collect its demands. If the company becomes insolvent, and is taken charge of by the court, the conditions in relation to its property at once change. The company loses control, and a trust is created on behalf of both creditor and stockholder against such property and assets; and the right then to have the same collected, converted into money, and applied by the court to the payment, first, of the creditors, and next to the stockholders, clearly exists. If an attempt should be made by the directors or officers of the insolvent corporation to fraudulently misapply its funds, or to engage in enterprises not warranted by its charter, the stockholders may interfere and call them to account for such action, and prevent such attempted abuse of their powers. This right of the stockholders of a solvent corporation to interfere in such cases is based, not upon the idea that they have a lien upon the property of the company, or an express trust in their favor, but upon the ground that the agent may always be compelled to account for the misapplication of the funds of his principal, and for the abuse of the power of his agency. I do not think that the supreme court, by the language used in the case of *Sanger v. Upton*, supra, or in other similar cases, intended to lay down the universal rule that the property and assets of a solvent and going corporation are a trust fund in the hands of the company, for the benefit of its stockholders and creditors, but intended only to make such rule applicable to corporations which were insolvent and in process of liquidation. That this is the correct view as to what has been decided by that court is confirmed by the language used by it in subsequent decisions.

In the case of *Webster v. Upton*, decided by the same court, at the same term, and in a case arising out of the same bankrupt company, brought by the assignee to collect its unpaid stock subscriptions, Justice Strong, in speaking of the liability of the subscribers for the unpaid subscriptions, observes: "This results from the fact that the whole subscribed capital is a trust fund for the payment of creditors when the company becomes insolvent." 91 U. S. 71. This clearly shows that the court, in the use of the language in the *Sanger* Case, "that the capital stock of a corporation is a fund set apart for the payment of the debts to that extent," intended only to apply the same to insolvent corporations in process of liquidation by the court, and not to solvent corporations generally.

In the case of *Terry v. Anderson*, 95 U. S. 628, the Planters' Bank of the State of Georgia had become insolvent and failed, and an assignment was made for the benefit of its creditors. A bill was filed against the stockholders to reach the unpaid subscrip-

tions to the stock of the bank. Chief Justice Waite, in delivering the opinion of the court, says: "Ordinarily, a creditor must put his demand into judgment against his debtor, and exhaust his remedies at law, before he can proceed in equity to subject choses in action to its payment. To this rule, however, there are some exceptions; and we are not prepared to say that a creditor of a dissolved corporation may not, under certain circumstances, claim to be exempted from its operation. If he can, however, it is upon the ground that the assets of the corporation constitute a trust fund, which will be administered by a court of equity in the absence of a trustee; the principle being that equity will not permit a trust to fail for want of a trustee." The court in that case was dealing with an insolvent corporation, and settling a controversy between the creditors of the company and the liability of a delinquent subscriber, and declares simply that the assets of an insolvent corporation are a trust fund which will be administered by a court of equity, and would not allow the trust to fail for want of a trustee.

In the case of *Graham v. Railroad Co.*, 102 U. S. 148, a bill was filed by the complainant, Graham, against the La Crosse & Milwaukee Railroad Company, and the Milwaukee & St. Paul Railway Company, and Moses Kneeland and others, to set aside certain conveyances made by the officers and agents of the company of certain real estate belonging to the company, and to subject the same to the payment of the claims of the complainant, who became a judgment creditor of the company subsequent to the conveyance. The conveyances were alleged to have been fraudulently made by and to the agents and officers of the company, and for less than their full value. The conveyances were made at the time when the company was a solvent and going concern. The supreme court affirmed the decision below, denying the right of recovery. Justice Bradley, in delivering the opinion of the court, in discussing the trust-fund doctrine, and the right of solvent and insolvent corporations to manage and dispose of their property and assets, on page 160, 102 U. S., observes: "It is contended, however, by the appellant, that a corporation debtor does not stand on the same footing as an individual debtor; that, whilst the latter has supreme dominion over his own property, a corporation is a mere trustee, holding its property for the benefit of its stockholders and creditors; and that if it fail to pursue its rights against third persons, whether arising out of fraud or otherwise, it is a breach of trust, and creditors may come into equity to compel an enforcement of the corporate duty. This, as we understand, is the substance of the position taken. We do not concur in this view. It is at war with the notions which we derive from the English law with regard to the nature of corporate bodies. A corpora-

tion is a distinct entity. Its affairs are necessarily managed by officers and agents, it is true; but, in law, it is as distinct a being as an individual is, and is entitled to hold property (if not contrary to its charter) as absolutely as an individual can hold it. Its estate is the same. Its interest is the same. Its possession is the same. Its stockholders may call the officers to account, and may prevent any malversation of funds, or fraudulent disposal of property on their part. But that is done in the exercise of their corporate rights, not adverse to the corporate interests, but coincident with them. When a corporation becomes insolvent, it is so far civilly dead that its property may be administered as a trust fund for the benefit of its stockholders and creditors. A court of equity, at the instance of the proper parties, will then make those funds trust funds, which, in other circumstances, are as much the absolute property of the corporation as any man's property is his." If the language used by that court in any of its previous decisions were such as to leave a doubt as to its position upon the trust-fund doctrine, and as to the power of a corporation over its funds or property, or as to the legal relations existing between a corporation and its stockholders, such doubt is clearly removed by the expressive language used by Justice Bradley in this decision. It is, in effect, that a corporation, in its solvent condition, subject only to the terms of its charter, has absolute dominion over its property and assets, freed from any lien or trust in favor of either the creditor or stockholder. Becoming insolvent, the corporation is civilly dead; and a court of equity, at the instance of the proper parties, will take charge of its property and effects, and will administer them as a trust fund, for the benefit of those who may be entitled to it. The insolvency of the company, and the possession of its affairs by the court, convert at once all of the property into a trust fund, which till then is not a trust fund, or subject to any lien on behalf of the creditor.

In the case of *Railway Co. v. Ham*, 114 U. S. 587, 5 Sup. Ct. 1081, there had been a consolidation of four railroad companies, under an agreement whereby the new company was to protect the rights of the old companies. The new company, subsequent to the consolidation, executed a new mortgage on all the property, to pay a large bonded indebtedness. In a controversy between the bondholders of the new company and a mortgagee of one of the old companies, it was contended that the property of the original company, the Toledo & Wabash Railway Company, was a trust fund for the payment of all of its creditors; and, when the new company took the property of this company under the consolidation, it took it charged with that trust. Justice Gray, in delivering the opinion of the court (114 U. S. 594, 5 Sup. Ct. 1084), says: "The property of a cor-

poration is, doubtless, a trust fund for the payment of its debts, in the sense that when the corporation is lawfully dissolved, and all its business wound up, or when it is insolvent, all its creditors are entitled, in equity, to have their debts paid out of the corporate property before any distribution thereof among the stockholders."

The case of *Hawkins v. Glenn*, 131 U. S. 319, 9 Sup. Ct. 739, was a bill in equity filed by Glenn, as trustee of the National Express & Transportation Company, an insolvent corporation, to recover the unpaid subscription due from delinquent shareholders. Chief Justice Fuller, in rendering the opinion of the court (131 U. S. 332, 9 Sup. Ct. 743), observes: "Unpaid subscriptions are assets, but have frequently been treated by courts of equity as if impressed with a trust sub modo, upon the view that, the corporation being insolvent, the existence of creditors subjects these liabilities to the rules applicable to funds to be accounted for as held in trust."

In the case of *Fogg v. Blair*, 133 U. S. 534, 10 Sup. Ct. 338, the St. Louis & Keokuk Railroad Company was chartered by the legislature of the state of Missouri in 1867. It located its road, and the appellant, Fogg, did something over \$9,000 worth of work for the company, the amount of which was settled upon between him and the company in September, 1870. In June, 1872, another company, known as the St. Paul, Hannibal & Keokuk Railroad Company, was also chartered; and, under an arrangement made between the two companies, the first company sold to the latter all its property and effects, the latter agreeing to assume and pay all liabilities incurred by the first company. Subsequent to this, the new company executed a mortgage to the defendant, Blair, as trustee, to secure a large amount of bonds issued by the new company upon the road. Upon default being made upon the bonds, Blair brought a suit to foreclose the mortgage, to which Fogg was made a party. The latter answered, and filed a cross bill, claiming a lien prior to the bonds, and contended that the new company, under the contract of purchase, took all of the property of the old company, charged with a trust in favor of himself and other creditors of the old company. This contention was denied, and the cross bill dismissed. Justice Field, rendering the opinion of the court (133 U. S. 541, 10 Sup. Ct. 341), says: "We do not question the general doctrine invoked by the appellant, that the property of a railroad company is a trust fund for the payment of its debts, but do not perceive any place for its application here. That doctrine only means that the property must first be appropriated to the payment of the debts of the company before any portion of it can be distributed to the stockholders. It does not mean that the property is so affected by the indebtedness of the company that it cannot be sold, transferred, or mortgaged to bona fide purchasers for a

valuable consideration, except subject to the liability of being appropriated to pay that indebtedness. Such a doctrine has no existence."

A careful examination of the above cases will show that they do not support the contention that there is any direct trust or lien upon the property and assets of a corporation in favor of its creditors. I do not think that that court, in any of the above cases, intended to declare such a rule to be the doctrine of that court; but, if there should have existed any doubt upon this subject from any language used by the court in any of the above cases referred to then such doubt is clearly removed, and the position of that court distinctly defined, by the clear language used by it in the case of *Hollins v. Iron Co.*, 150 U. S. 371, 14 Sup. Ct. 127. The defendant company was created a corporation under the laws of Alabama. In 1882 it made and executed to Preston B. Plumb a mortgage to secure \$500,000 in bonds. In August, 1887, he, as trustee, took possession of all of the property, and filed a bill to foreclose the mortgage. Some three months after the commencement of this suit, the complainant, who was simply a contract creditor, with no lien upon the property, filed a bill on behalf of himself and other unsecured creditors against the company, the trustee, and unpaid subscribers to the stock of the company, charging that the bonds and mortgages were invalid, setting up the unpaid subscriptions to the stock, asking for a receiver, that the stock be collected, and that the property be sold for their benefit. A decree of foreclosure was entered in the Plumb suit, and the bill of the complainant dismissed. It was contended by the complainant that the property and assets, including the unpaid subscriptions to the capital stock of the company, were a trust fund for the benefit of himself and other general creditors, which could be enforced in their behalf. The court, by Justice Brewer, after reviewing the decision of that court upon the doctrine of trust funds, observes (150 U. S. 381, 14 Sup. Ct. 129): "While it is true language has been frequently used to the effect that the assets of a corporation are a trust fund held by a corporation for the benefit of creditors, this has not been to convey the idea that there is a direct and express trust attached to the property. As said in 2 Pom. Eq. Jur. § 1046, they 'are not, in any true and complete sense, trusts, and can only be called so by way of analogy or metaphor.'" And the court, in further discussing this subject, on page 388, 150 U. S., and page 129, 14 Sup. Ct., says: "In other words,—and that is the idea which underlies all these expressions in reference to 'trust' in connection with the property of a corporation,—the corporation is an entity, distinct from its stockholders as from its creditors. Solvent, it holds its property as any individual holds his, free from the touch of a creditor who has acquired no lien; free, also, from the touch of a stockholder

who, though equitably interested in, has no legal right to, the property. Becoming insolvent, the equitable interest of the stockholders in the property, together with their conditional liability to the creditors, places the property in a condition of trust, first, for the creditors, and then for the stockholders. Whatever of trust there is arises from the peculiar and diverse equitable rights of the stockholders as against the corporation in its property, and their conditional liability to its creditors. It is rather a trust in the administration of the assets after possession by a court of equity than a trust attaching to the property, as such, for the direct benefit of either creditor or stockholder." Further continuing this discussion, the court says, on page 385, 150 U. S., and page 130, 14 Sup. Ct.: "The officers of a corporation act in a fiduciary capacity in respect to its property in their hands, and may be called to an account for fraud, or sometimes even mere mismanagement, in respect thereto; but, as between itself and its creditors, the corporation is simply a debtor, and does not hold its property in trust, or subject to a lien in their favor, in any other sense than does an individual debtor."

The relation existing between a corporation and its creditors is somewhat analogous to that which exists between a partnership and its creditors. If a partnership becomes insolvent, a court of equity assumes charge of all of its property and effects, and, through its officers, collects and distributes the fund, first, to partnership creditors, before any portion of it can be applied either to the partner or to his individual creditor. It may be said that the court holds the property in trust for the partnership creditors, or that they have an equitable lien thereon. This means that the partnership creditors simply have an equitable prior right to have their claims satisfied out of the partnership property in the hands of the court belonging to the insolvent partnership before individual creditors can be paid. So it is with a corporation. Solvent and out of the hands of the court, it holds complete dominion over its property, unfettered by any direct trust or specific lien in favor of either creditor or stockholder. It can deal and be dealt with in relation to its property as effectually as an individual can with his. While the directors and officers stand in a fiduciary relation in respect to its property, and may be called to account by the stockholders for any fraud or mismanagement of its affairs, yet, as between the corporation and its creditors, there exists simply the relationship of debtor and creditor, and the company does not hold its property charged with any direct trust or lien in their favor. It may be contended that his view is in antagonism to the prevailing and settled opinions of both state courts and text writers upon this subject. Whatever may have been the views of text writers, ratified and supported as they may

have been by courts of high state authority, it is sufficient for us that the supreme court of the United States, in the case last cited, has given, in clear and unambiguous language, its latest emphatic expression upon this question, and its opinion is a controlling authority upon this court.

It is said that to adopt this view is to overturn a settled rule applicable to trust funds, which from the days of Judge Story has grown and become deeply imbedded in our state and national jurisprudence. To say that this will overturn a settled rule is but to confound the destruction of a principle with the time and manner of its application. There is a wide distinction between overturning a principle and the time, method, and circumstances of its application. The principles underlying the trust-fund doctrine, as applied to the property and assets of a corporation, are not overturned, but still exist; not, however, in the broad and unlimited degree which some courts of high authority have announced, but in a more limited sense; not in the broad sense that the entire property and assets of a solvent and going corporation are a trust fund, charged with an express trust or a specific lien in favor of either stockholder or creditor, but in the sense that when the conditions and circumstances in relation to the business of a corporation arise, when it becomes insolvent and in the custody of the court, then the principles of the trust fund will apply, and will lay hold of the property, and, under the supervision of the court, will be administered to the creditors and stockholders. We may observe that this view is consonant with both logic and reason. The trust-fund idea had its origin in the early history of our jurisprudence, when the business of the country was confined to narrow limits, when there were comparatively but few organized companies engaged in the transaction of business, and when there were but few, if any, railroad corporations in existence. From a provincial state, we have become a great commercial nation, whose vast business interests are largely owned and conducted by artificial persons, in the form of corporate bodies. Probably four-fifths of the capital invested in the commerce and business of the country is controlled and managed in this manner. To declare that this entire property is held by those corporate bodies charged with an express trust in favor of the individual stockholders, or covered by a specific lien in favor of the creditor, is to extend the application of the trust-fund idea to a dangerous limit, and to a limit never contemplated by the founders of that doctrine. This is not the abrogation of the rule, nor the destruction of the doctrine, but simply to limit its application to that class of cases where the facts and circumstances will justify the courts in invoking its aid for the relief of creditors and stockholders.

The individual defendants in the case un-

der consideration could not, or did not, pay their 10 per cent. on their subscriptions to the stock of the railroad company. The officers and directors of the company conceived that it would be to the interest of the company to take back this stock from these original subscribers, sell and negotiate it to other persons, and thus utilize it in the construction of the road. This the officers and directors of the company did, at a time when the corporation was solvent, and managed by a board of directors and officers composed of other persons than the defendants. The corporation, by this transaction, did not lose the benefit of this stock subscription, but controlled and disposed of the same, so that the company received the full benefit of it in the final construction of the road. The company being a solvent and going concern at the time of this transaction, there was no lien or trust in favor of the complainants as against this stock or the unpaid subscriptions of the company; and the directors, pursuing a course which they deemed for the best interest of the company, chose to take back the stock, and sell and dispose of it to other parties, for the use and benefit of the company; and, there being no actual fraud alleged or shown in the transaction, the complainants have no legal right to complain.

I therefore concur in the conclusion reached by the court, upon the grounds herein stated, and also upon the grounds stated by Associate Justice BANTZ as to the statute of limitation.

SIEBE v. SUPERIOR COURT, CITY AND COUNTY OF SAN FRANCISCO.
(S. F. 537.)

(Supreme Court of California. Oct. 17, 1896.)
OFFICER—ASSESSOR—INADEQUATE ASSESSMENT—
CRIMINAL LIABILITY FOR.

Pen. Code, § 772, authorizing the superior court to entertain an accusation made under oath by a private citizen against an officer within its jurisdiction, charging him with having collected illegal fees, or with having refused or neglected to perform his official duties, does not confer jurisdiction to entertain such an accusation charging an assessor with having assessed certain property at a sum below its full value; such act, if corruptly done, being "willful and corrupt misconduct in office," subjecting the officer to indictment, and, if not, being of a judicial nature, and one for which he is not amenable to the penal laws.

In bank. Petition by Siebe for a writ of prohibition to the superior court, city and county of San Francisco. Peremptory writ granted.

E. S. Pillsbury, for petitioner. A. J. Clunie, for respondent.

PER CURIAM. The petitioner herein was elected to the office of assessor for the city and county of San Francisco at the general election in 1894, and qualified for said office

in the succeeding January, and has since acted as such assessor. Prior to the 1st day of July, 1895, as such assessor, he assessed the property of the Market-Street Railway Company, a corporation organized under the laws of this state, and having property in said city and county, for the fiscal year ending July 1, 1895, at the sum of \$3,883,866. On the 11th of May, 1896, an accusation in writing against him was presented to the superior court of San Francisco, alleging that the value of the property of said corporation at the time of such assessment was \$17,500,000, and that the petitioner, "for the purpose and with the design of enabling said Market-Street Railway Company to evade taxation for the fiscal year ending July 1, 1895, upon the full cash value of said property, willfully and knowingly failed and neglected to, and did not, assess the said property of said Market-Street Railway Company for the purpose of taxation for said fiscal year at its full cash value, but with said object and purpose then and there assessed the same at the value of but \$3,883,866, and that no other, further, or additional assessment of said property for said fiscal year was made." Thereupon the superior court appointed the 18th day of May, 1896, as the time at which it would hear the said accusation and the evidence offered in support of the same, and directed a citation to be issued to the petitioner to appear at that time. On that day he appeared before the court, and objected to its jurisdiction to hear or act upon the said accusation, and requested the court to dismiss the same. The court, however, denied his request, and set the matter down for hearing on the next day. Upon the application of the petitioner an alternative writ of prohibition was issued out of this court, directing the respondents to show cause why they should not refrain from further proceedings upon the said accusation. The return to the writ is in the nature of a demurrer to the application.

Section 772 of the Penal Code authorizes the superior court to entertain an accusation made under oath by a private citizen against an officer within its jurisdiction, charging him with having collected illegal fees, or with having refused or neglected to perform the official duties pertaining to his office, and, unless the accusation charges the officer with a violation of his official duty in respect to one or other of these particulars, the court has no jurisdiction in the matter. In the present case the petitioner was not accused of having neglected or refused to assess the property of the Market-Street Railway Company, for it is alleged in the accusation that he did assess it at a given amount, but that this amount was less than its actual value, and that such assessment was made "for the purpose and with the design of enabling said Market-Street Railway Company to evade taxation for the fiscal year commencing July 1, 1895." If the assessment was made with such purpose, it was not a "refusal or

neglect" to perform his official duties, but a "willful and corrupt misconduct in office," for which he might have been presented by the grand jury, under the provisions of section 758 of the Penal Code. If, on the other hand, the assessment was made in the ordinary exercise of his official duty, and without any corrupt or illegal motive, his act though pertaining to the executive department of the government was of a judicial nature, for which he is not amenable to the penal laws of the state. See *Clunie v. Siebe* (Cal.) 44 Pac. 1064. It is ordered that a peremptory writ issue as prayed for.

BEATTY, C. J., not participating.

GRIFFIN v. DINGLEY, County Clerk.
(S. F. 706.)

(Supreme Court of California. Oct. 8, 1896.)
ELECTIONS—CERTIFICATE OF NOMINATION—FILING
—LEGAL HOLIDAY—LIMITATION.

Under Pol. Code, § 1192, as amended (St. 1895, p. 303), which provides that "certificates of nomination required to be filed with the county clerks, or with the clerk or secretary of the legislative body of any city or town, shall be filed not more than fifty nor less than thirty days before the day of election, when the nomination is made by a convention," where the last day on which the certificate could be filed, ordinarily, falls on Sunday or a legal holiday, the certificate must be filed on the day before, to be in time.

In bank. Application by P. H. Griffin for a writ of mandate commanding A. S. Dingley, county clerk of Stanislaus county, to receive and file a certificate of nomination. Denied.

A. Hewel and C. A. Stonesifer, for petitioner. John E. Richards, for respondent.

PER CURIAM. The respondent is the county clerk of Stanislaus county, and on the 5th day of October, 1896, the petitioner presented to him, for filing, a certificate, duly authenticated by the proper officers, of the nomination by the county convention of the Democratic party of that county, held September 7, 1896, of certain candidates for public offices to be filled by the electors of that county at the coming general election. The respondent refused to file the same, alleging as a reason therefor that that day was a holiday, and also because the same was not presented for filing within the time required by law. The petitioner again presented the certificate to him on the 6th day of October, with the request that it be filed; but the respondent again refused to file the same, for the reason that it was not presented to him for filing within the time required by law. The present application is for a writ of mandate, commanding the respondent to receive and file the said certificate.

Section 1192 of the Political Code, as amended in 1895 (St. 1895, p. 303), provides: "Certificates of nomination required to be filed

with the county clerks, or with the clerk or secretary of the legislative body of any city or town, shall be filed not more than fifty nor less than thirty days before the day of election, when the nomination is made by a convention." It is contended by the petitioner that under this provision the 4th day of October was the last day on which the certificate could be filed, but that, as that day was Sunday, by virtue of sections 12 and 13 of the Political Code he was entitled to file it on the next day that was not a holiday, and, as the 5th day of October was a legal holiday, his presentation of the certificate to the respondent on the 6th was in time, and that the respondent should have filed it. We are of the opinion, however, that these provisions of the Political Code are inapplicable. Section 12 provides that a holiday shall be excluded when it is the last day of the time "in which" any act provided by law is to be done; and section 13 refers to an act which is appointed to be done "upon" a particular day. In the present case, however, the statute does not fix the day upon which or the time within which the certificate is to be filed, but declares that it shall be filed "not less" than 30 days before the day of election. To hold that it could be filed 28 days before the day of election would be in manifest disregard of the provisions of the statute. The application for the writ is denied.

CHAPIN v. WILLCOX, Auditor. (Sac. 114.)
(Supreme Court of California. Oct. 10, 1896.)

COUNTIES—OFFICERS—ANNUAL COMPENSATION—
PER DIEM AND MILEAGE—LIMITATION.

County Government Act 1893 (St. 1893, p. 499, § 204, subd. 15), fixing the compensation of county officers in counties of the forty-second class, provides that "supervisors shall receive seven dollars per diem, and twenty-five cents per mile in traveling to and from their respective residences to the county seat. All of which compensation in the aggregate shall not exceed four hundred dollars per annum each." Held, that no one member can draw more than \$400 compensation for all services in any one year as per diem and mileage.

Department 1. Appeal from superior court, Madera county; W. M. Conley, Judge.

Petition by one Chapin for a writ of mandate commanding one Willcox, auditor of Madera county, to issue him a warrant upon the county treasury for compensation as county supervisor. An alternative writ was issued, and defendant demurred to the petition. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

W. H. Larew and J. S. Larew, for appellant. Miles Wallace, for respondent.

HARRISON, J. The plaintiff is one of the supervisors of the county of Madera, and the defendant is the auditor of that county. On February 8, 1896, the board of supervisors allowed the account and claim of the plaintiff, in the sum of \$487.80, as a balance on

mileage as supervisor of said county, and ordered said claim paid; and the plaintiff thereupon made a demand upon the defendant, as auditor of the county, that he issue to him a warrant upon the county treasury for that amount. The defendant refused to issue the warrant, and the plaintiff filed in the superior court his affidavit and petition for a writ of mandate commanding the auditor to draw the warrant. An alternative writ was issued thereon, and, the defendant having appeared and demurred to said petition, his demurrer was sustained, and judgment entered against the plaintiff. From this judgment the plaintiff has appealed.

The determination of this case depends upon the construction of subdivision 15 of section 204 of the county government act of 1893 (St. 1893, p. 490). The first clause of said section and said subdivision are as follows: "Sec. 204. In counties of the forty-second class the county officers shall receive as compensation for the services required of them by law, or by virtue of their office, the following salaries, to wit: * * * (15) Supervisors shall receive seven dollars per diem, and twenty-five cents per mile in traveling to and from their respective residences to the county seat. All of which compensation in the aggregate shall not exceed four hundred dollars per annum each." It is contended by the appellant that the limitation of \$400 in the last sentence of the section applies only to the per diem, and that in addition thereto he is entitled to 25 cents for each mile that he has traveled in going to and from his residence to the county seat,—in the present case alleged by him to be 2,208 miles, during the years 1893 and 1894. The respondent contends, on the other hand, that the \$400 compensation allowed to members of the board of supervisors includes both per diem and mileage; that is to say, that no one member can draw more than that amount for all services in any one year, both as per diem and mileage. The provision which is made for the compensation of supervisors in counties of the forty-second class differs in its language from that made for these officers in counties of any other class, and is to be determined by a construction of the language that has been employed. In some counties supervisors receive a fixed, annual salary, without any provision for mileage, while in others mileage to a limited amount is allowed them. In some they receive a per diem, without any limitation upon its amount, and a mileage not to exceed a certain amount; and in some there is a limit upon each, while in others the limit is upon the per diem alone. Of those that receive a per diem and mileage, there is in some a limitation upon one, and in some a limitation upon the other, and in some a limit upon neither. The provision for these officers in the forty-second class differs from all the others in that the limit to the entire compensation is made definite

and precise. After determining that the basis upon which their compensation is to be fixed shall be a per diem and mileage, and fixing the amount of each of these elements, the legislature has declared that "all of which compensation in the aggregate shall not exceed four hundred dollars per annum each," thus leaving little, if any, room for construction. It would be difficult to express in more explicit language that the entire amount which a supervisor in this class of counties shall receive in any one year for the services required of him by law, or by virtue of his office, is \$400. Traveling to and from his residence to the county seat is as much a part of the services required of him as is the sitting in the council chamber of the board, and the compensation for these services has been fixed by the legislature in the foregoing language. If the legislature had merely said, "all of which compensation" shall not exceed \$400 in any one year, both the per diem and the mileage would have been included, since "all" is a term of number, which includes the several items making up the basis of the compensation; but, as if to make its purpose more clear, the legislature has added that all this compensation shall not, "in the aggregate," exceed \$400 per annum. The term "aggregate" implies a plurality of units, whose total amount it represents. It is defined in the Century Dictionary as "a sum, mass, or assemblage of particulars; a total or gross amount; any combined whole, considered with reference to its constituent parts." And in the above section these units are the per diems and the number of miles traveled, the total amount of which shall not exceed \$400 per annum. *Kirkwood v. Soto*, 87 Cal. 394, 25 Pac. 488, is inapplicable, as in that case the provision was that the superintendent of schools, in addition to his compensation, should receive the actual traveling expenses incurred by him, whereas there is no provision of that nature applicable to the appellant, nor is his claim based upon any expenses incurred by him. The judgment is affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

ELMORE v. ELMORE. (Sac. 144.)

(Supreme Court of California. Oct. 12, 1896.)

PLEADING—ALLEGATION AND PROOF—VARIANCE—MOTION FOR NONSUIT—WAIVER OF ERROR.

1. Under a complaint by the administratrix of a deceased wife against her surviving husband, alleging that he purchased certain real estate and personal property therein described with money of his wife, and as her agent and trustee, and praying a conveyance of such property, the court is not authorized to render a personal judgment against the defendant on a finding that he did not purchase such property as alleged, but that he received a certain sum of money from his wife; such finding being a variance.

2. A defendant does not waive an erroneous ruling on a motion for nonsuit by the introduction of evidence after the motion is overruled, unless, in so doing, he supplies the defects in plaintiff's case, upon which the motion was based.

3. An objection on the ground of a variance may properly be raised by motion for a nonsuit, though defendant did not object to the admission of the evidence.

Department 2. Appeal from superior court, Stanislaus county; William O. Minor, Judge.

Action by Susan B. Elmore, as administratrix of the estate of Sarah F. Elmore, deceased, against James G. Elmore. Judgment for plaintiff, and defendant appeals. Reversed.

O. O. Wright and W. N. Rutherford, for appellant. T. A. Coldwell and P. J. Hazen, for respondent.

McFARLAND, J. The court below rendered an ordinary money judgment in favor of the plaintiff, and against the defendant, for the sum of \$6,500, together with costs; and the defendant appealed from the judgment, and from an order made denying his motion for a new trial.

We think that the judgment must be reversed, and a new trial ordered, because neither the complaint nor the findings sustain the judgment entered. The cause of action, if any, established by the findings is wholly different from the one averred in the complaint. The allegata and the probata do not agree. It is averred in the complaint that the deceased, Sarah F. Elmore, was the wife of the appellant; that during her lifetime and during the coverture she received certain property from the estates of her deceased parents, which was mostly in the form of money; that she furnished this money to the appellant, as her agent and trustee to purchase lands and some personal property for her; that, in pursuance of such trust, he did purchase large tracts of land, and improved the same, with her said money, which said lands so purchased are specifically described in the complaint; that he took the conveyances of said lands in his own name; and that he to some extent mingled said moneys of the said wife with community property, so that it had become difficult to state exactly what her interest was in the lands so purchased; but that, according to the plaintiff's information and belief, at least one-half of the said described lands, and one-half of certain personal property, was bought by the appellant, and is held by him as trustee for the said deceased wife. The prayer of the complaint is for judgment that appellant account for all the purchases he had made, as aforesaid; that all the property described in the complaint be decreed to be the separate property of the said deceased wife; and that the appellant be decreed to convey to plaintiff, as administratrix of the said deceased wife, all the real property described in the complaint, and also transfer to her all the personal property described. The court found

that the said deceased wife, Sarah F. Elmore, inherited and received from the estates of her parents the sum of \$6,500. It further found, however, that she did not furnish said money, or any part thereof, to the appellant, as her agent and trustee, with which to purchase lands, and that defendant did not, as her agent and trustee, purchase any land; that the lands described in the complaint were not purchased by appellant, or held by him in trust for the use of said deceased wife; that there was no understanding or agreement that the defendant should hold the title to said lands for said Sarah as her agent and trustee; that she did not furnish appellant any money or property with the understanding or on the condition that he should invest the same in land for her; and that the personal property described in the complaint was not purchased by defendant as trustee or agent of the said Sarah, or with her funds; and that defendant does not hold the same as trustee of said Sarah. Nevertheless, the court entered a personal judgment against appellant for the said sum of \$6,500. But this was rendering judgment upon a cause of action not set up in the complaint, and not warranted by the averments of the complaint; and it, therefore, cannot be sustained either upon principle or authority. *Chetwood v. Bank* (Cal.) 45 Pac. 704; *Reed v. Norton*, 99 Cal. 617, 34 Pac. 333; *Mondran v. Goux*, 51 Cal. 151; *Tomlinson v. Monroe*, 41 Cal. 94; *Hayne*, New Trial & App. § 115, and cases there cited.

Respondent contends that appellant waived the point of a variance between the complaint and the evidence, because, having made that point in a motion for a nonsuit, he afterwards introduced evidence in the case. This position, however, is not tenable. Appellant moved for a nonsuit upon the express ground that there was no evidence tending to prove that appellant held certain lands and property which he had purchased with the separate money of the deceased wife as her trustee; and the motion for a nonsuit should have been granted. The point thus made on the motion for nonsuit was not waived by the mere fact that the appellant afterwards introduced some evidence in the case. No such rule obtains in this state. The rule upon the subject is simply this: that if, after a motion for a nonsuit for want of testimony upon any material point has been erroneously overruled, the defendant proceeds and supplies the defect by evidence which he himself introduces, then the error committed in overruling the nonsuit is cured; but if the motion for a nonsuit should have been granted, and no evidence is afterwards introduced by the defendant which changes the status of the case, then he can avail himself of the error committed in the refusing of the nonsuit. The case of *Higgins v. Ragsdale*, 83 Cal. 219, 23 Pac. 316, cited by respondent, goes only to the extent above indicated. The rule is properly stated in *Hayne*, New Trial & App. § 118, as follows: "If the motion for nonsuit be improperly denied, it may

happen that the defendant's evidence will supply the defects in plaintiff's case pointed out on the motion for nonsuit. In such case the error of denying the motion is cured." The rule is stated in several of the adjudicated cases in this state. For instance, in *Smith v. Compton*, 6 Cal. 25, the court, after saying that it was necessary to make certain proof in order to sustain the plaintiff's case, said: "This was not done in the opening, and the defendant was entitled to a judgment of nonsuit. The defendant, however, after his motion was denied, introduced evidence which enabled plaintiff to supply the defect in his case, and, by so doing, waived the objection." Again, in *Winans v. Hardenbergh*, 8 Cal. 293, the court said: "The only exception taken by appellant in the court below was to the refusal to instruct the jury, as in case of nonsuit, upon the close of plaintiff's testimony. If this were an error, it was cured by the introduction of evidence on the part of defendants which supplied every omission in plaintiff's case, and conclusively established his right to recover." So, in *Association v. Willard*, 48 Cal. 614, the court say: "The motion for a nonsuit should have been granted. The answer denies that the defendant ever ousted or ejected the plaintiff from the premises, and the plaintiff failed to prove the ouster; but the defendant afterwards supplied the defect by proving that he had remained in possession ever since the execution of the lease above mentioned. The production of that evidence cured the error." By the motion for nonsuit the appellant distinctly raised the point insisted on here, and thereby called the attention of both court and counsel to it; and therefore he is not within the rule frequently announced here that a party will not be allowed to raise an objection in this court for the first time. And, as he introduced no evidence tending to supply any omission in the evidence of the respondent, the motion for a nonsuit occupies the same position now as it did in the court below when made there.

The motion for a nonsuit was the proper method by which to raise the said question of variance. In *Hayne*, New Trial & App. § 115, it is said: "In all of the foregoing cases, except *McCord v. Seale* [56 Cal. 262], objection on account of the variance was taken in the court below, either by objecting to the admissibility of the evidence or by motion for a nonsuit. A variance may be taken advantage of in either of these modes, and the defendant is not precluded from moving for a nonsuit on the ground of variance by reason of his failure to object to the admissibility of the evidence." And the text is amply supported by the authorities cited. See *Johnson v. Moss*, 45 Cal. 515; *Farmer v. Cram*, 7 Cal. 135; *Tomlinson v. Monroe*, 41 Cal. 94; and cases cited in *Hayne*, New Trial & App. § 115. In many of the cases the defendant had introduced evidence after the denial of the motion for a nonsuit, which evidence, however, did not cure the failure of plaintiff to make out

his case. See *Farmer v. Cram*, supra. Moreover, the point under review was also raised by the specification that the court in its conclusion of law erred as follows: "The court erred in its conclusion of law which reads as follows: 'That plaintiff is entitled to a judgment against defendant for the sum of sixty-five hundred dollars and costs of suit.' On the contrary, the action is not for a money judgment, but to establish a trust in land."

The foregoing views make a new trial necessary. The court rested its judgment upon the finding that the \$6,500 received by the deceased wife from her parents' estates was used by appellant in paying off a certain mortgage, building a house, and in farming operations, and in household expenses, and that "the same was so received by defendants as the agent and trustee of said Sarah"; and we must not be understood as holding that such finding was justified by the evidence. However, this and other questions in the case need not be now considered. The judgment and order are reversed, and the cause remanded for a new trial.

We concur: TEMPLE, J.; HENSHAW, J.

MURPHY v. CLAYTON. (No. 15,914.)
(Supreme Court of California. Oct. 13, 1896.)
ADMINISTRATORS—RIGHT TO PROPERTY SOLD BY
DECEDENT.

A sale of chattels by decedent, though not accompanied by delivery, having been valid against him and his heirs, and therefore his administrator, recovery thereof by the purchaser from the administrator cannot be defeated, under Code Civ. Proc. §§ 1589, 1590, providing that, when there is a deficiency of assets in the hands of an administrator, he shall sue for, and may recover, for the benefit of creditors, property conveyed by decedent in fraud of creditors; it not appearing that the claims against the estate which had been allowed by the administrator, or are evidenced by judgment, exceed the assets in his hands. 43 Pac. 613, affirmed. Beatty, C. J., and Van Fleet, J., dissenting.

In bank. Appeal from superior court, Santa Clara county; John Reynolds, Judge.

Action by Ann Murphy against Edward W. Clayton. Judgment for defendant, and plaintiff appeals. Reversed in department (43 Pac. 613), and defendant appeals. Decision in department affirmed.

Geo. W. Lewis and J. H. Campbell, for appellant. Kittredge & Kraft, for respondent.

PER CURIAM. After due consideration of this cause in bank, we are satisfied with the conclusion reached and the opinion rendered when it was in department (43 Pac. 613); and for the reasons given in said opinion the judgment awarding the defendant the possession of the animals mentioned in the fifth finding is reversed, with directions to the superior court to enter judgment upon the findings in favor of the plaintiff for the posses-

sion of said animals, or for the value thereof as found by the court, in case a delivery thereof to the plaintiff cannot be had.

BEATTY, C. J. I dissent. Section 3440 of the Civil Code reads as follows: "Every transfer of personal property, other than a thing in action, or a ship or cargo at sea, or in a foreign port, and every lien thereon, other than a mortgage, when allowed by law, and a contract of bottomry or respondentia, is conclusively presumed, if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent and therefore void against those who are his creditors while he remains in possession, and the successors in interest of such creditors, and against any persons on whom his estate devolves in trust for the benefit of others than himself, and against purchasers and incumbrancers in good faith subsequent to the transfer." The property of a person dying intestate passes to his heirs, but it passes to them subject to the control of the probate court, and to the possession of an administrator for purposes of administration. Civ. Code, § 1384. The purposes of administration embrace the payment of expenses of administration, family allowance, and the debts of the decedent. For these purposes the administrator is vested with power to sell the estate, and to apply the proceeds. He is a trustee for the creditors. The estate of the decedent has devolved upon him in trust for their benefit. There can be no question that he comes within the very terms of the section above quoted (*Francisco v. Aguirre*, 94 Cal. 185, 29 Pac. 495), and still less that he is within the spirit and policy of the law. Up to the moment of a man's death, his creditors may secure their debts by attachment of any personal property he may have sold without delivering it to his vendee. As soon as he dies this remedy is taken away, but there is no reason why they should be deprived of all remedy; and the law which enables the administrator to retain possession of such property for the purpose of applying its proceeds, if necessary, to the payment of debts, is far more equitable, at the same time that it is less burdensome, than the law which permits an attachment in the lifetime of the vendor. But even if an administrator is not one upon whom the estate of the vendor devolves in trust for others, within the meaning of section 3440, still he represents creditors exactly as a sheriff does who seizes goods of a fraudulent vendor on execution, and he may justify upon the same grounds.

The sale of the horses in controversy here was therefore void as to the defendant, and the only question is whether he was nevertheless obliged to relinquish the possession of them on demand of the plaintiff. The con-

tention of appellant is that he could not refuse her demand unless all the facts existed which an administrator is required to aver and prove in order to maintain the action authorized by section 1589, Code Civ. Proc., for the recovery of property fraudulently conveyed by the decedent in his lifetime. But this is a conclusion which by no means follows. The law does not encourage useless litigation, and therefore does not authorize the administrator to commence an action for which there is no apparent necessity. He cannot sue to recover assets for the estate, unless it appears that there is an actual deficiency of assets. But when he has property in his hands which was in the possession of the intestate at the time of his death, and which has regularly devolved upon him,—property which, if necessary, is applicable to the purposes of administration,—it is his duty to retain the possession until it appears that it will not be needed. The burden of proof and of allegation on the question of necessity rests, and properly rests, on the party commencing the action. If the administrator, when he commences an action to recover assets, must show a necessity for their recovery, by parity of reasoning the party who seeks by an action to deprive him of assets should at least be required to show that they will not be needed for purposes of administration. And even then his action would be unnecessary, for he could obtain all the relief to which he is entitled by petition to the probate court. If he shows in that forum that he has a title to property in the hands of the administrator which is good against distributees of the estate, the court might, as in case of partial distribution, authorize the administrator to deliver it to him if it can be safely done, and if such relief could not be granted it would at least not order such property sold for purposes of administration until the other estate had been exhausted. Then upon distribution it would either be delivered to him, or he would be left free to assert his title against the distributee to whom it was allotted. In short, if such property is not needed for purposes of administration the vendee of the decedent has an ample remedy without this action; if it is needed for purposes of administration, he has no right to the property. His position with respect to such property is no better than that of an heir, with respect to unsold property of the intestate. It is his, if not needed for the payment of debts; and, like the heir, he should wait till that fact is ascertained.

Appellant contends that the answer of the defendant is not sufficient to enable him to prove his defense. The answer alleges everything that it was necessary for the defendant to prove, or for the court to find. It shows that he is administrator of Daniel J. Murphy; that the horses in controversy belonged to Murphy in his lifetime, and remained in his possession to the day of his

death. The burden of proving ownership of the horses was on the appellant. If she had proved a good title, derived from some other source than Daniel J. Murphy, the facts alleged in the answer would not have constituted a defense to the action. But when she proved, as she was obliged to do in order to make title, that the horses had belonged to Daniel J. Murphy in his lifetime, then the facts alleged in the answer and found by the court constituted a complete defense. It was no part of the defendant's case to prove that without these horses there would be a deficiency of assets.

I concur: VAN FLEET, J.

KENT et al. v. WILLIAMS et al. (Sac. 102.)
(Supreme Court of California. Oct. 14, 1896.)
LIENS—MARSHALING OF SECURITIES—VENDOR RETAINING TITLE.

1. A vendor who retains title to property sold until payment of the purchase money shall be made has an express lien thereon, which is not waived by the taking of a lien on other land as collateral security.

2. A junior mortgagee of such land may compel him to exhaust the property sold before resorting to the collateral security.

Department 2. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by D. G. Kent and G. M. Bruce against W. M. Williams and others. There was a judgment for plaintiffs, and a new trial was granted, and plaintiffs appeal. Affirmed.

Frs. E. Spencer, for appellants. H. C. Campbell and George A. Nourse, for respondents.

McFARLAND, J. Judgment was rendered for plaintiffs, but on motion of the defendant the San Francisco Savings Union a new trial was granted. From the order granting a new trial the plaintiffs appealed. The action was brought to foreclose what is alleged to be a mortgage executed by the defendant Williams to the plaintiffs upon certain property in Fresno county. The main facts in the case are these: On the 12th day of April, 1888, the plaintiffs, being the owners of certain real property in Oakland, Alameda county, made a written contract with defendant Williams by which they agreed to sell him said property for the sum of \$22,500, for which Williams gave them his note, payable on or before April 12, 1891, and plaintiffs agreed to give to said Williams a conveyance of said property upon the payment of the full amount of said note. The said written contract contains this clause: "The said party of the second part [Williams] agrees to deposit with the First National Bank of Oakland, California, a deed in escrow, in favor of said parties of the first part, of an undivided one-quarter interest in seventeen hundred and thirty acres, covering the greater portions of sections 21, 28, and 33 in township 13 south, range 23 east, in Fresno county, California, and apply the proceeds of all sales of said land to

the payment of said promissory note." Williams paid \$500 upon said note, and, by agreement of the parties, went into possession of the said property in Oakland, agreeing to pay for the use of the same \$80 a month until the note was paid. He afterwards failed to pay any other portion of the note, abandoned possession of the said property in Oakland, and became insolvent. This action is brought to enforce what plaintiffs claim to be a lien on the lands in Fresno county for the payment of said note, without any offer to first enforce any lien which they may have upon said property in Oakland. The said written contract was recorded in Fresno county, and it appears as a fact that the said deed which Williams agreed to execute was executed, and deposited with the said First National Bank in escrow, and was afterwards delivered by said bank to the plaintiffs. After the recording of said contract, but before the recording of said escrow deed, and on the 10th day of January, 1889, the defendant Williams, with others, borrowed from the defendant the San Francisco Savings Union the sum of \$16,000, and, as security therefor, executed to said Savings Union a deed of trust upon certain specifically described lands in Fresno county, which are claimed by plaintiffs to be a part of the lands agreed to be conveyed to them in said contract between them and Williams.

It does not appear upon what grounds the new trial was granted, but the respondents, in support of said order granting the new trial, contended mainly—First, that the description of the land contained in said contract is entirely too vague, indefinite, and uncertain to give any constructive notice to a subsequent incumbrancer; and, second, that in any event the plaintiffs, having a lien upon two different pieces of property, to only one of which the lien of the respondent attached, should have resorted first to that upon which they had an exclusive lien, to wit, the property in Oakland. We think that this second position is clearly tenable. The doctrine of the marshaling of assets, under which, if one creditor has a lien on two funds, and another a lien on only one of them, the former must first proceed against that upon which the latter has no lien, is not only fully established by general authority, but is also expressly declared in sections 2800 and 3433 of the Civil Code. The lien which plaintiffs had upon the property in Oakland was not waived by the taking of collateral security on the land in Fresno. Where the owner of land contracts to sell it, and to give a conveyance upon the payment of the purchase money, and retains the title in himself, he is sometimes spoken of as holding a vendor's lien, and he may proceed to sell the property for the payment of the purchase money in like manner as if he had conveyed the title. But as was said in *Avery v. Clark*, 87 Cal. 625, 25 Pac. 919: "Properly speaking, a vendor's lien does not exist until the vendor has parted with his title. So long as he retains the title, he cannot be said to have any implied lien upon the land. The se-

curity which he has then for the purchase money is created by express reservation, and cannot be impaired by any act of the vendee. This is an express lien, existing by virtue of a contract executed between the parties, and is capable of assignment and enforcement by the assignees. *Taylor v. McKinney*, 20 Cal. 618. Such a lien is open and manifest to the world, and is entirely different from the secret, invisible lien which the law implies in behalf of the vendor when he parts with the title, and which is known only to the parties to the transaction, and those to whom they may communicate the fact. For such a lien equity makes no special provision, but leaves the parties to rely upon the contract which they have executed between themselves." Therefore in the case at bar the lien which the plaintiffs reserved on the property in Oakland was not waived by taking the collateral security on the land in Fresno, and the respondent had the clear right to demand that the plaintiffs should first proceed upon their security on said Oakland property. Of course, this rule applies only where the holder of a senior security would not be prejudiced by it, but here it would be clearly inequitable to allow the plaintiffs to retain the property in Oakland, and entirely defeat the junior lien of the respondent upon the property in Fresno. The above view makes it unnecessary, for the purposes at least of this present action and the order appealed from, to consider other points argued by counsel. The order appealed from is affirmed.

We concur: HENSHAW, J.; TEMPLE, J.

CANNON v. McGREW et al. (S. F. 448.)
(Supreme Court of California. Oct. 15, 1896.)
APPEAL—REVIEW—SUFFICIENCY OF EVIDENCE—HARMLESS ERROR.

1. A finding of the trial court based on conflicting evidence will not be reviewed on appeal.
2. Exceptions based upon the rulings of the trial court as to the admission of testimony will not be considered on appeal, in the absence of anything to show that the appellant was prejudiced thereby.

Department 1. Appeal from superior court, Sonoma county; S. K. Dougherty, Judge.

Action by one Cannon against McGrew and others to restrain the obstruction of an alleged right of way. There was judgment for defendants, and plaintiff appeals. Affirmed.

C. S. Farquar, for appellant. Haskell & Meyer and D. R. Gale, for respondents.

PER CURIAM. The plaintiff is the owner of certain lands adjoining those of the defendants, and claims to have a right of way through and over the lands of the defendants from his own land to the county road. The present action was brought by him to restrain the defendants from obstructing said right of way; the plaintiff alleging in his

complaint that they threaten and intend to close and lock certain gates across the same, and prevent him from passing or repassing thereon, or in any manner using the same. The defendants in their answer deny that the plaintiff has the right of way claimed by him, or any right of way or easement over their lands, and upon the trial of this issue the court found in favor of the defendants; finding as a fact that the use of the way over the defendants' land by the plaintiff had at all times been by the permission or license of the defendants and their predecessors in interest, and had never been adverse to them. The evidence of the respective parties upon this issue was directly in conflict, and the finding of the court thereon is not open to review.

Exceptions were taken at the trial to certain rulings of the court upon the admission of evidence, but, as the evidence in respect to which these rulings were made was of such a nature that a different ruling could not have changed the result, it is unnecessary to consider whether they constituted technical error. The judgment and order are affirmed.

SPENCE v. WIDNEY et al. (L. A. 6.)¹
(Supreme Court of California. Oct. 16, 1896.)

TRUSTS—DEATH OF TRUSTEE—APPOINTMENT BY COURT—DELAY IN FULFILLMENT—WHAT CONSTITUTES ABANDONMENT—PUBLIC CHARITIES—PERFECTURES.

1. Plaintiff's testator granted lands in trust to six trustees, to be sold, etc., with the approval of any four of them, and the fund derived therefrom to be used for founding an astronomical observatory. Before anything had been done to carry out the trust, three of the trustees died. *Held*, that under Civ. Code, §§ 2288, 2289, providing that on the death of one of several co-trustees the trust survives to the others, and that the superior court in the county in which the property is situated may appoint other trustees of the trust, the trust did not terminate as impossible of fulfillment. McFarland, J., dissenting.

2. Plaintiff's testator granted land in trust to six trustees, the fund derived therefrom to be used in founding an astronomical observatory in connection with a university. Lenses were ordered, but it was found that the income was insufficient to pay for them. With the consent of the grantor the lenses were sold, and it was decided to wait until prices could be realized for the lands which would enable the trust to be accomplished. *Held*, that under the circumstances a delay of three years in taking further steps to carry out the trust was not unreasonable.

3. In such case the deed provided that the observatory should be located on Wilson's Peak, or some other suitable site on the Sierra Madre range, to be selected by the consent and approval of the grantor, who was also one of the trustees. *Held*, that the death of the grantor before any selection was made did not defeat the execution of the trust. McFarland, J., dissenting.

4. The sale of the lenses and the delay in selecting a site for the observatory cannot, in the absence of any express declaration to that effect, be construed as an abandonment of the trust. McFarland, J., dissenting.

5. A trust for the founding of an astronomical observatory in connection with a university, "to be owned, controlled, and managed by said university," will not be construed as a trust for

¹ Rehearing granted.

a private corporation, and therefore void, in the absence of anything to show whether the beneficiary is an educational institution for the benefit of the public, or conducted for mere private ends.

6. Nor will the trust be declared void as creating a perpetuity unless it appear that the beneficiary is a mere private enterprise, and not a public charity.

In bank. Appeal from superior court, Los Angeles county; J. W. McKinley, Judge.

Action by Anna M. Spence, executrix of the last will of E. F. Spence, deceased, against J. P. Widney and others, to set aside a conveyance in trust. From a judgment for plaintiff, and from an order denying a new trial, defendants appeal. Reversed.

Cochran & Williams (Henry Bleecker, of counsel), for appellants. Bicknell & Traak and Chapman & Hendrick, for respondent. Albert M. Stephens, for intervenor.

PER CURIAM. The plaintiff, as the executrix of the last will of E. F. Spence, deceased, brought this action to have canceled and set aside a certain conveyance made on January 22, 1889, by said E. F. Spence to M. M. Bovard, E. F. Spence, H. Sinsabaugh, J. P. Widney, P. M. Green, and R. M. Widney, "as trustees of an express trust," upon the ground that the conveyance was void from the beginning, and the further ground that the purposes for which it was made had been abandoned, and the trusts thereby created had become impossible of execution. The court below found the facts and gave judgment as prayed for, from which, and from an order denying a new trial, the defendants appeal.

The conveyance was of certain lots of land in the city of Los Angeles, to be held in trust as follows: "To sell and convey or mortgage the same at such time and for such price and on such terms as said second parties, or any four of them, may deem best. The proceeds to be used in purchasing and setting up in first-class working condition the best set of astronomical instruments and telescope that can be purchased with said funds, to be used and known as the 'Spence Observatory of the University of Southern California,' to be owned, controlled, and managed by said university. The rents, income, and profits of said property prior to sale shall be received and collected by M. M. Bovard, one of said trustees, and from same he shall pay taxes, insurance, and such other expenses as may occur in the care and management of said premises, and interest on any mortgage that may be placed thereon. The surplus of said income shall be the property of said M. M. Bovard for his own use and benefit for his services herein. Said observatory to be located on what is known as 'Wilson's Peak,' in the county of Los Angeles, state of California, or some other suitable site in the mountains of the Sierra Madre range, to be selected by the consent and approval of E.

F. Spence. In case said property, or the proceeds thereof, shall not be used as herein stated, the said proceeds (except the rents as hereinbefore provided) shall revert to and vest in the said grantor, or his legal representatives." The trust thus created was accepted by all of the six trustees and by the University of Southern California. On April 8, 1889, the six trustees, in writing, authorized Alvin Clark & Sons, of Boston, to contract with M. Mantolís, of Paris, for the purchase and delivery of lenses for a 40-inch telescope, at the price of 80,000 francs, to be paid as follows: 20,000 francs to be paid when the first lens should be delivered to and accepted by Clark & Sons in Boston; 20,000 francs more when the second lens should be delivered to and accepted by them; and the remaining 40,000 francs one year after the second payment is due; and it was stipulated that there should be no extra allowance for shortening the time on the work, as the trustees preferred that the work should not be hurried.

The first lens was constructed and sent on to Clark & Sons in Boston, and, for the purpose of raising money to make the first payment, the trustees borrowed from the State Loan & Trust Company of Los Angeles the sum of \$5,500, for which they gave their promissory note, and a mortgage on the trust property to secure payment of the same. Of the money so raised 20,000 francs were sent on to Paris to meet the first payment. Subsequently the second lens was completed and sent on to Clark & Sons, and a demand for the second payment was made. There was no money in the hands of the trustees to make that payment, and, to determine what should be done, Dr. J. P. Widney, who was then the president of the university, held a consultation with Mr. Spence. After discussing the matter, and considering the difficulty of then raising more money, it was agreed that the lenses were more expensive than was contemplated by the deed of trust, and that it would be better to sell them, and commence over again, and make such contract as the trust property would carry out. Accordingly, with the advice and consent of Mr. Spence, Dr. Widney notified Mr. Clark that they would not go on with those lenses, but would sell them, and purchase afterwards such lenses as the property would pay for. Shortly after this arrangement, on September 19, 1892, Mr. Spence died, and prior to his death two of the other trustees, M. M. Bovard and H. Sinsabaugh, had died. The three surviving trustees, on November 19, 1892, sold the lenses to the University of Chicago for a considerable sum over what had been expended for them, and with the money received they paid, among other things, the note and mortgage to the State Loan & Trust Company. During the lifetime of Bovard and Spence the business of the trust was managed largely by them, but mainly by Bovard. After the death of

Spence the surviving trustees continued in possession of and cared for the trust property, paying taxes and insurance, and awaiting a favorable opportunity to sell it to the best advantage before taking steps to contract for new lenses and otherwise carry out the trust. On September 7, 1893, the plaintiff commenced this action against the three surviving trustees and the University of Southern California. At that time the places of the deceased trustees had not been filled, the trust property had not been sold, and no definite site for the location of the observatory had been selected. The case was tried in March, 1894, and the court found, among other things, "that the accomplishment of the objects set forth in said trust deed had become impossible, and that said objects and purposes have long since been abandoned, and nothing whatever has been done towards the execution of the said trust for more than three years." It is upon this finding that the judgment rests. This finding is assailed as not justified by the evidence, and whether it is so justified or not is the principal question presented for decision.

1. After a careful inspection of the record, we are unable to find any evidence which, in our opinion, can be said to justify the finding that the accomplishment of the objects of the trust had become impossible. It is true that three of the six trustees were dead, and that the deed required the concurrent action of at least four. But sections 2288 and 2289 of the Civil Code provide that on the death of one of several co-trustees the trust survives to the others, and that the superior court of the county where the trust property is situated may appoint other trustees, and direct the execution of the trust. And section 2268 of the same Code provides that, where there are several co-trustees, all must unite in any act to bind the trust property, unless the declaration of trust otherwise provides. Here the deed did provide that a less number than all might act, and when it was made the grantor must be presumed to have known the law, and also that some of the trustees named might die, and, if so, that their places would be filled by the court, with power in the new board to discharge the duties imposed on the original appointees. And in the provision of the deed we see nothing to indicate that the grantor intended to or did confer upon the trustees named by him any discretionary powers of such a personal character that they could not be exercised by trustees appointed by the court. And the fact that no steps had been taken to have new trustees appointed certainly does not show that the execution of the trust had become impossible. There does not appear to have been any immediate necessity for filling the vacancies, as the three remaining trustees were able to manage and look after the property and were not then ready to sell or mortgage the same.

It is also true that the big lenses had been sold, and the trust property had not been sold,

and no new lenses had been contracted for. It appears that the lenses were sold with the consent and approval of the trustor. No definite time was fixed for the sale of the property or the erection of the observatory, and, under the circumstances shown, the delay does not seem to have been unreasonable. So, too, it is true that the observatory had never been located on Wilson's Peak, and no other site for it was ever selected "with the consent and approval of E. F. Spence," and it does not appear that the trustees had acquired any right to establish an observatory on Wilson's Peak, or on any suitable site in the mountains of the Sierra Madre range. But it does not follow that a suitable and desirable site for the observatory on Wilson's Peak may not yet be selected, and the right thereto acquired. The suggestion of counsel for respondent that there is room enough on that peak for the establishment of "one hundred and fifty to five hundred observatories" only tends to show that there can be no great difficulty in acquiring a site. So the suggestion that, in the absence of a showing to the contrary, all the land on the peak must be presumed to be government land, is no valid argument in support of respondent's position; for, if true, it would seem to be by no means impossible to acquire a site. But, assuming that the location cannot be made on Wilson's peak, still it does not follow that a suitable site cannot be selected and used on some one of the adjacent peaks. The fact that Spence died before the selection, and therefore it cannot be made with his consent and approval, will not defeat the execution of the trust. When a trust exists, and all the trustees are dead, the court will appoint other trustees, and direct the execution of the trust (section 2289, Civ. Code), and in a case like this another site may be selected by the consent and approval of the court.

2. The next question is, had the objects and purposes of the trust been abandoned? We find no evidence in the record tending to show that they had. Under our Code "a trustee must fulfill the purpose of the trust, as declared at its creation, and must follow all the directions of the trustor given at that time, except as modified by the consent of all parties interested." Section 2253, Civ. Code. And, as such trustee, he has no power to abandon a trust, except as declared therein, for he is "a general agent for the trust property," and "his acts, within the scope of his authority, bind the trust property to the same extent as the acts of an agent bind his principal" (section 2267, Id.); and every act of the trustee, in contravention of the trust, is absolutely void. Section 870, Id. "A trust cannot be revoked by the trustor after its acceptance, actual or presumed, by the trustee and beneficiaries, unless the declaration of trust reserves a power of revocation to the trustor, and in that case the power must be strictly pursued." Section 2280, Id. The law seems, therefore, to be well settled that a trustee

cannot abandon a trust without the consent of the cestui que trust, for, as said in *Perry on Trusts* (section 203, 4th Ed.): "If a person has once accepted the office, either expressly or by implication, it is conclusive; and he cannot afterwards, by disclaimer or renunciation, avoid its duties and responsibilities." Aside from the fact that the trustees had sold the large lenses which were first made, and had delayed to select a site for the location of the observatory and to contract for other lenses, there is no evidence showing that they ever intended to or did abandon the trust. On the contrary, the evidence is clear and undisputed that they had at all times intended to go ahead with the work, and were waiting only for a favorable time and circumstances to accomplish the end proposed. So, also, there is no evidence showing that the university, as beneficiary, ever consented to the abandonment of the trust. On the contrary, the only evidence introduced upon the subject is that it never did so consent, but insisted and relied upon its execution, and that when this action was commenced it employed counsel to defend it.

3. Respondent contends that the deed is void ab initio, because the trust created thereby is a mere private trust for the benefit of a corporation, and not a trust for charity. It is well established that a trust for the promotion of education or science, such as the establishment of a school or a chair in a university, is a trust for charity, as that term has been interpreted in modern jurisprudence. *Jackson v. Phillips*, 14 Allen, 539; *Perry, Trusts*, § 687; *Pom. Eq. Jur.* § 1023. This does not embrace, however, trusts for the benefit of such institutions as are strictly private, and conducted for mere private gain (*Pom. Eq. Jur.* § 1023); but the institution must be public, or for the benefit of some portion of the public (*Attorney General v. Soule*, 28 Mich. 153). In this case the trust is to establish with the proceeds of the trust property an observatory, "to be used and known as the 'Spence Observatory of the University of Southern California,' to be owned, controlled, and managed by said university." But there is an entire absence from the pleadings, and findings as well, of anything to indicate the character or purposes of the beneficiary, other than that to be inferred from its name, excepting only the fact that it is a corporation duly incorporated under the laws of the state. Whether it is a school or educational institution, and, if so, whether it is for the benefit of the public, or run for mere private ends, nowhere expressly appears. That it was such an institution as would support the trust seems to have been tacitly conceded in the court below, and the point that it is not such is made here for the first time. But, as there is nothing in the record from which the fact is made to appear, and as we are aware of no presumption for or against the competency of the beneficiary to take the use, the question of the validity of the deed in this respect cannot

be determined upon this record. The question, however, being one upon which the validity of the deed may turn, it will be the duty of the court below upon another trial to find expressly upon the fact. Since trusts are not favored in the law, the burden will be upon the party seeking to sustain the trust to show that it is within the exception of the statute.

4. The further contention that the deed is void because the accomplishment of the trust would require the creation of a perpetuity, is fully met, if the beneficiary shall be found to be a charity, by the decision in *Re Hinckley's Estate*, 58 Cal. 457, where it was held that trusts for perpetual charitable uses are not in conflict with the constitution of the state, nor with those provisions of the Civil Code which prohibit perpetuities; and, further, that perpetuities prohibited by the common law do not include trusts for charitable uses. And see *In re Robinson's Estate*, 63 Cal. 620; *People v. Cogswell* (Cal.) 45 Pac. 270.

The judgment and order are reversed, and the cause remanded for a new trial.

BEATTY, C. J., not participating.

McFARLAND, J. I dissent. I see no sufficient reason for disturbing the judgment. Waiving the point made by respondent that the alleged trust was void from the beginning because it is not taken out of the category of perpetuities by being a charity, and other points going to its intrinsic invalidity, I think that the findings that the accomplishment of the purposes of the trust has become impossible, and that said purposes have been abandoned, are just conclusions from the facts. In fact, the evidence does not present a single existing monument to mark any effort to carry out the purpose of the trust; and, so far as the accomplishment of that purpose is concerned, the situation is the same to-day as it was the day Mr. Spence executed the deed. All that the trustees have apparently done has been to collect the rents from the trust property, and take care of said property, and to make some money on the purchase and sale of a couple of lenses,—which money does not seem to be now on hand. Shortly after the execution of the deed—on April 8, 1889—the trustees authorized Clark, of Boston, to contract with a party in Paris for disks for a 40-inch telescope at a certain price, part payments to be made at different times. In order to make the first payment, the trustees mortgaged the trust property to the State Loan & Trust Company. When the second payment became due there was no money to meet it. Two lenses were then in the possession of Clark, of Boston. Nothing was done towards making the second payment. It was apparent that the trust property was not of sufficient value to carry out the scheme, which contemplated one of the largest telescopes ever made. One of the witnesses, who was a trustee and president of the university,

testified that he asked Mr. Spence if it would not be better to sell the lenses, and commence again with such a contract as the property would carry out; and that he said, "I think it would." But before his death he wrote a letter to the said witness, in which is the following: "In a conversation once had with you regarding the sale of the glass, it was my mind always that the purchasers should erect it somewhere near here. I fear that you did not so understand it. When I deeded the property, I hoped, of course, that I would have nothing more in the way of business to attend to except to designate the site. It seems now that the trustees will have trouble in raising the money to pay for the glass, something like \$18,000. I would not be satisfied with any smaller glass in connection with the university. If Raymond, Lowe, or Clark would guaranty to erect it upon some one of our peaks, I think I would favor liberal terms with either of those men. If you think none of these points are advisable, it might be well to redeem the property back to me, and I will pay the price of the glass as per contract, and await further developments or future combinations, whereby we may yet be successful in securing for the university that object which we have so long cherished." Nothing further was done before his death; and about two months after that event the three remaining trustees, or one or more of them, sold their interest in the lenses which had arrived in Boston to the Chicago University for \$9,500, and closed out the contract which Clark had made for them. With part of this money they satisfied the mortgage given to the State Loan & Trust Company; so that they then stood as they did at the beginning, except that, as they had paid only \$3,912 on the lenses, they made a profit on that transaction. The three remaining trustees have taken no further steps to carry out the purpose of the trust; they have not asked to have other trustees appointed; they have selected no site; they have, as the testimony of one of them shows, admittedly abandoned Wilson's Peak as a site, because there is no road there, and to either construct a road or to transport materials by a bridle path would be impracticable. The most that can be said on the subject in their behalf is that perhaps at some indefinite period in the future, if the trust property shall become more valuable, and Prof. Lowe shall complete a railroad to the summit of another mountain, they might possibly erect some kind of an observatory at some point on the latter mountain.

Moreover, how can this trust be now executed so as to carry out the purpose of the trustor? The clear purpose was to erect a first-class observatory. This is apparent from the language of the deed and from the acts of the parties. The trustees recognized that purpose when they entered into a contract for the purchase of lens for a 40-inch telescope,—said to be larger than any heretofore constructed; and the trustor declared that he would not be

contented with a smaller one, and suggested that the property be deeded back to him. It was found that the trust property was entirely insufficient in value to accomplish that scheme. Again, the site was to be approved by the trustor; and that is impossible, for he is dead. Furthermore, special confidence was evidently placed in the persons named as trustees, of whom the trustor himself was one, and the concurrence of four of them was necessary to important and essential acts, and particular powers were given to Trustee Bovard; but three of the trustees, including Bovard, are dead, and there are not four left.

It is contended that at least one of the difficulties caused by the death of the trustees may be obviated under section 2287 of the Civil Code, which provides that the superior court may appoint a trustee when there is a vacancy, and the declaration of trust provides no method of appointment. That section is a mere statement of the power which courts of equity have always exercised in proper cases. A court of equity will not allow a trust to fail solely for want of a trustee; that is, if the purposes of a trust and the wishes of a trustor can be carried out by the appointment of a trustee, the court will make such appointment, even though no trustee at all had ever been appointed by the trustor. But where, as in the case at bar, the trustor has himself selected the persons who are to execute the trust, and has evidently placed special personal confidence in them, with a reasonable expectation that the material parts of the trust would be executed during their lives, and no steps have been taken towards such execution, and no equitable rights have grown up under their acts, there a court will not undertake to substitute strangers for the chosen agents of the trustor. In *Re Hinckley's Estate*, supra, this court said: "If it is determined that a peculiar personal trust and confidence were intended, new trustees will not be appointed," citing authorities. "In such cases the appointment of new trustees is refused when it appears from the will that the testator intended that none but the persons by him named should be intrusted with the power." And in the case at bar all the circumstances point to a personal confidence, reposed in the persons selected to carry out the trust. The fact that no successors were provided for is itself significant, although, of course, not conclusive; but there can be no doubt that such special confidence was reposed in at least two of the trustees,—Bovard and the trustor himself,—and they are both dead. Would a court undertake to substitute strangers for these two, when there are no equities in favor of the named beneficiary, or any other person, arising out of any valuable consideration? It must be remembered that this was a purely voluntary trust, and that no complications have arisen by any attempt to execute it. Moreover, under such circumstances, where the purposes of the trust have failed, and cannot be ac-

complished according to the intent of the trustor, new trustees will not be appointed to carry out some plan other than the one which he designed. In such case the property reverts to the trustor or his estate. 1 Perry, Trusts, § 160; Easterbrooks v. Tillinghast, 5 Gray, 21; Keith v. Copeland, 138 Mass. 303. And, as we have before stated, no observatory such as the trustor contemplated can be erected, and no site can be selected in the manner provided by the deed.

Under the foregoing views, other findings assailed by appellants are immaterial. In my opinion, the judgment and order appealed from should be affirmed.

WHELAN, Sheriff, v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO. (S. F. 294.)

(Supreme Court of California. Oct. 15, 1896.)

SHERIFF—WRITTEN INSTRUCTIONS AS TO EXECUTION—RIGHT OF INSPECTION—POWER OF COURT TO ORDER.

1. A writing giving instructions to a sheriff, by the attorney for a judgment plaintiff, as to the enforcement of an execution, is not a public record, or matter in the sheriff's office, which, under Pol. Code, § 1032, is open to public inspection, but a private writing for the guidance of the sheriff, of which he is not compelled to grant an inspection to the defendant or his attorney.

2. A court has no jurisdiction to grant an order to compel a sheriff to permit a judgment defendant or his attorney to inspect the instructions given him by the attorney for the plaintiff as to the enforcement of the execution.

Department 1. Petition by Whelan, sheriff, for a writ of certiorari to the superior court of the city and county of San Francisco, and for the amendment of an order of said court. Annulled.

Reddy, Campbell & Metson, for petitioner. Osgood Putnam, for respondent.

HARRISON, J. An execution in the action of Dupuy v. Riley was placed in the hands of the petitioner, as sheriff of the city and county of San Francisco, and certain written instructions in reference thereto were given him by the attorney for the execution creditor. The attorney for the execution debtor made a demand upon the sheriff that he be allowed to inspect these instructions, and, having been refused, obtained an order from the superior court directing the petitioner, as such sheriff, to grant him an inspection thereof. The petitioner now seeks a review of this order, and that the same be annulled, on the ground that it was not within the jurisdiction of the court.

It is contended on behalf of the respondents that the court had authority to make

the order by virtue of the following provision of section 1032 of the Political Code: "The public records and other matters in the office of any officer are at all times during office hours open to the inspection of any citizen of this state." The instructions given by the attorney to the sheriff for the enforcement of a writ of execution which he delivers to the sheriff are in the nature of the private directions from a principal to his agent. The sheriff is an officer of the court for the purpose of executing its process, but in the manner of its execution he is the agent of the party who places the process in his hands, and, subject to the provisions of the statutes, is under his direction as to the mode in which it is to be executed. These directions may be oral or in writing, and are only the private directions from the attorney to that officer for his guidance in the execution of the writ. They may be accepted and acted upon by the sheriff, if given only orally, with the same effect as if they were in writing, and will be equally binding upon the party who has given them. Section 102 of the county government act (St. 1893, p. 373) provides that "no direction or authority by a party or his attorney to a sheriff in respect to the execution of process or return thereof, or to any act or omission relating thereto, is available to discharge or excuse the sheriff from a liability for neglect or misconduct, unless it is contained in a writing and signed by the attorney of the party, or by the party if he has no attorney." This provision, however, is for the protection of the sheriff, and may be demanded or waived by him. If, when charged with neglect or omission in the execution of the writ, he would excuse or discharge himself therefrom by reason of having acted under the direction of the party, he must show that such direction was given in writing, but the instruction thus given is still the private direction of the attorney. It does not by reason of being in writing become a "public record," or any other public matter, in the office of the sheriff. The "other matter" referred to in section 1032, which a citizen is entitled to inspect, is matter which is "public," and in which the whole public may have an interest. Neither is such written instruction a public writing, within the meaning of section 1892, Code Civ. Proc. These "public writings" are defined in section 1893, Id., and by section 1894 are divided into four classes, none of which includes the instructions of an attorney to a sheriff for the execution of process. Section 1889, Code Civ. Proc., declares that all other writings are private. The order is annulled.

We concur: GAROUTTE, J.; VAN FLEET, J.

BREIDENTHAL v. EDWARDS, Secretary of State.

(Supreme Court of Kansas. Oct. 27, 1896.)

ELECTIONS—WITHDRAWAL OF CANDIDATE—PRINTING OF BALLOT—SECRETARY OF STATE—DUTIES.

1. After the hearing and overruling by the tribunal provided for by section 10 of the Australian ballot law of all objections to the nomination certificate filed by authority of a state convention of a political party, the further duties of the secretary of state as to certification under section 13 of said law are ministerial only; and he has no right to challenge, and the courts have no authority to consider the motives actuating any political party convention in its course, and he should certify any proper and requisite matter duly appearing on the nomination certificate.

2. A vice presidential candidate, whose name (together with that of his associate presidential candidate) has been certified by authority of a state convention of his party as an addition to the party appellation, and who has not declined the national nomination, nor withdrawn as a candidate in Kansas, has no right, under section 8 of said Australian ballot law, to forbid such use of his name on the electoral ticket nominated by his party in this state.

(Syllabus by the Court.)

Mandamus by John W. Breidenthal, chairman of the Kansas state central committee of the People's party, against W. C. Edwards, secretary of state, to compel the certification to the county clerks of the names of the nominees for electors of president and vice president under the proper party appellation, with the names of the presidential and vice presidential candidates of the party. Peremptory writ awarded.

The following facts appear from the alternative writ of mandamus and the answer thereto: At a national convention of delegates of the People's party held in July, 1896, William J. Bryan was nominated for president, and Thomas E. Watson for vice president; that afterwards in August, 1896, a state convention of said party, held at Abilene, indorsed said national nominations, and 10 candidates were nominated as electors for president and vice president, to be voted for at the ensuing general election; that in due time and form there was filed in the office of the secretary of state a certificate, signed and verified by the presiding officer and the secretary of said convention, setting forth the names and residences of said candidates for electors, giving the name "People's Party" as the party represented by said candidates, and naming William J. Bryan and Thomas E. Watson as its candidates for president and vice president respectively, as an addition to be made to the party appellation "The People's Party"; that objections in writing to said certificate were filed, and, after due notice, were considered by the secretary of state, the auditor of state, and the attorney general, and on October 17, 1896, were decided not to be valid, and said certificate was held to be valid and effectual, and no other or further objections have been filed or considered; yet on the same day the secretary of

state received from Abe Steinberger, secretary of the Middle-of-the-Road Populist committee of the state of Kansas, a telegram in the following words and figures, to wit:

"Thompson, Ga., Oct. 16. Abe Steinberger, Topeka, Kansas: Hand this request to secretary of state. Do not certify my name on Abilene ticket to county clerks. My affidavit withdrawing my name has been mailed to you. Thomas E. Watson."

And accompanying said telegram was the affidavit of said Steinberger, as follows, to wit:

"State of Kansas, Shawnee County—ss.: I, Abe Steinberger, being duly sworn according to law, depose and say that I am the duly-authorized agent and representative in the state of Kansas of Thomas E. Watson, the Populist nominee for vice president, and that I am fully empowered and have been authorized, as evidenced by telegram filed herewith, and as such agent and representative, and with the further knowledge that the said Thomas E. Watson's refusal to permit his name to appear on such ticket, accompanied by required affidavit, has been mailed to the secretary of the state of Kansas, I hereby protest against the certification by the secretary of state of the name of the said Thomas E. Watson on the so-called "People's Party Ticket," over the names of the Bryan and Sewall electors named at the Hutchinson Democratic convention, and pretended to have been named at the Abilene People's party convention, and I request that the secretary of state omit the name of Thomas E. Watson from the heading of such ticket. A. Steinberger.

"Subscribed and sworn to before me, this 17th day of October, 1896. T. S. Stover, Assistant Secretary of State."

And on October 19, 1896, the secretary of state received by mail a notice from said Thomas E. Watson as follows, to wit:

"State of Georgia, County of McDuffie—ss.: I withdraw as candidate for vice president on ticket nominated at Abilene, Kansas, and decline to have my name used upon official ballot upon that ticket; it being placed there to deceive Populist voters to vote for Democratic electors. Thos. E. Watson.

"Sworn to and signed before me, this Oct. 16th, 1896. [Seal.] John A. Faucett, Ordinary of McDuffie County, Georgia."

The electors named in the certificate of nomination of the People's party are the same as those certified as electors of the Democratic party, whose national nominees for president and vice president are William J. Bryan and Arthur Sewall, respectively, and said electors are members of the Democratic party. It is further alleged in the answer that, if said electors are chosen, they will not vote for Thomas E. Watson for vice president, and that it is desired to use his name at the head of said ticket to mislead the voters of the state, and to induce them to vote for said electors under the belief that they were voting for electors belonging to the People's party, and who would vote for said

Thomas E. Watson for vice president if chosen. The allegations in the answer not included in the foregoing relate only to matters of law. The plaintiff moved for a peremptory writ of mandamus, notwithstanding the answer.

G. C. Clemens, for plaintiff. F. B. Dawes, Atty. Gen., and Waggener, Horton & Orr, for defendant.

MARTIN, C. J. (after stating the facts). 1. This case involves certain of the duties of the secretary of state under the Australian ballot law, being chapter 78, Sess. Laws 1893. Section 8 relates to the form of the certificate, and provides that, "in case of electors for president and vice president of the United States, the names for the candidates for president and vice president may be added to the party or political appellation." And section 14, relating to the printing of the names of the candidates under the proper party appellation or group, enacts that "the ballot shall contain no other names, except that, in case of electors for president and vice president of the United States, the names of the candidates for president and vice president may be added to the party or political organization." Section 13 reads as follows: "Not less than fifteen days before an election to fill any public office, the secretary of state shall certify to the county clerk of each county within which any of the electors may by law vote for the candidates for such office, the name and residence of each person nominated for such office, as specified in the certificates of nomination or nomination papers filed with the secretary of state." It will be observed that section 13 does not expressly provide for the certification of the names of presidential candidates, nor even of the party appellation; but, as the certification would be unintelligible without the latter, we think it, and also any proper addition of the names of presidential and vice presidential candidates, to be fairly included within the phrase "as specified in the certificates of nomination or nomination papers." In these respects a certificate of nomination is the guide to the secretary of state, and he should follow it in giving directions to the county clerk as to the making up of the official ballot. We think it plain that he has no right to omit the party appellation, nor the names of the presidential and vice presidential candidates added to the party appellation by authority of law, and properly appearing in the certificate.

The motion for a peremptory writ of mandamus notwithstanding the answer is in the nature of a demurrer, and, for the purposes of this hearing, admits every allegation of fact well pleaded in the answer. It does not admit conclusions of law, nor prophecies, nor general allegations of fraud unaccompanied by any statement of fact on which fraud is based, nor matters which the defendant has no right to plead nor the court juris-

diction to entertain. The allegation in the answer that the electors named in the certificate will not vote for Thomas E. Watson for vice president is clearly not one of fact, and the court should not be guided by the pretense of any one to the powers of divination. In such cases courts must deal with facts, not with prophecies. Besides, if these electors should be chosen, they will be under no legal obligation to support Sewall, Watson, or any other person named by a political party, but they may vote for any eligible citizen of the United States. (Article 12 of amendments to the constitution of the United States.) And neither the secretary of state nor any court may interfere with them in the performance of their duties. The charge made by the secretary of state that it is desired to use the name of Watson at the head of the People's party ticket to mislead the voters must be disregarded for several reasons: First. As to his separate official duties under this statute he is a mere ministerial officer, and not a censor of political parties, nor a guardian of the public morals, and it follows that he has no authority to make such a charge. Secondly. The only facts upon which any claim of fraud is based are that the certificate gave the party appellation as the "People's Party," and named the national candidates as an addition thereto, and then stated the names and residences of the candidates nominated by the convention as presidential electors, and these were Democrats, and the same men who were nominated for a like place by the Democratic party, but this must be held admissible, under *Simpson v. Osborn*, 52 Kan. 328, 34 Pac. 747. Thirdly. This court has no authority to investigate and pass judgment upon the motives which actuate any political party convention in its course, for this is not jurisprudence, but politics. Fourthly. Although the record does not show the nature of the objections made to the certificate before the secretary of state, the auditor of state, and the attorney general, and overruled by that tribunal on October 17, 1896, yet it is presumable that all proper matters of objection were then heard and decided. After the hearing and overruling of all objections by the tribunal provided for by section 10 of said act, it was the plain duty of the secretary of state to certify the names of the presidential and vice presidential candidates of the People's party as specified in the nomination certificate, unless the papers emanating from Watson and Steinberger relieved him from it.

2. What, if any, effect should be given to the communications and documents signed by Watson and Steinberger? Section 8 of said act provides that "any person whose name has been presented as a candidate may cause his name to be withdrawn from nomination by his request in writing, signed by him and acknowledged before an officer qualified to take acknowledgment of deeds, and

filed with the secretary of state not less than fifteen days * * * previous to the day of election, and no name so withdrawn shall be printed upon the ballot." The telegram and the affidavit of Steinberger should be disregarded, and it is doubtful if the affidavit of Watson, filed October 19th, was in due time or in proper form. The certificate of the ordinary (an officer in Georgia, nearly answering to a probate judge in Kansas) is in form a jurat, and not an acknowledgment. But, waiving these questions as to time and form, we think that the document is entirely ineffectual. Watson was not nominated by the Abilene convention, and how shall a man withdraw from a nomination which has never been conferred? That convention had no right to nominate a candidate for vice president to be voted for at the next election. It did nominate ten electors to be voted for at that election. Doubtless, any one of them might have withdrawn by complying with said section 8. A vice president is not elected at the general election held in November. He should be elected on the second Monday in January, and only 10 citizens of Kansas will have a voice in the matter. In a legal sense, the people of this state vote for no candidate for president or vice president, that duty being delegated to 10 citizens, who are authorized to use their own judgment as to the proper eligible persons to fill those high offices. Again, Mr. Watson does not attempt to decline the national nomination, nor even withdraw as a candidate in Kansas, if such a thing can be done; but he says he declines to have his name used upon a certain official ballot. He does not "withdraw from nomination," within the meaning of said section 8. No national candidate for president or vice president residing elsewhere has as much authority as the humblest voter in this state to dictate how his name shall be used on an official ballot here.

The order of the court is that the secretary of state shall forthwith duly certify to the county clerks of this state the names and residences of said nominees for electors of president and vice president, and that he add to the party appellation of the "People's Party" the name of William J. Bryan as said party's candidate for president, and the name of Thomas E. Watson as said party's candidate for vice president.

ALLEN, J., concurs.

JOHNSTON, J. (dissenting). Thomas E. Watson is endeavoring to prevent the use of his name as a candidate for vice president upon what has been designated as the "Abilene Ticket," because, as he states upon oath, it was "placed there to deceive Populist voters to vote for Democratic electors." In obedience to his request and withdrawal, the secretary of state, in certifying the names of candidates to county clerks, proposed to

omit the name of Watson from that ticket. The extraordinary remedy of mandamus has been employed to compel Watson to be a candidate upon the ticket, against his protest, and to compel the secretary of state to certify him as a candidate thereon, notwithstanding his withdrawal. It was argued that the withdrawal of Watson is informal, and, further, that he is not a candidate who can withdraw, within the meaning of our election statute. The withdrawal is not exactly formal, but it appears to be a substantial compliance with the statute. In section 8 it is provided that the request shall be in writing, signed by the candidate, and acknowledged before a competent officer. Watson's request was executed in the presence of an ordinary, a judge of one of the courts of Georgia; and at the same time, and before the same officer, Watson verified the facts stated in the withdrawal by his oath.

Is Watson a candidate, and, under our statute, is he entitled to withdraw? The nominees for president and vice president are recognized and spoken of as candidates in the same statute which authorizes the withdrawal of candidates. In sections 6 and 14 they are specifically named as candidates; and then, in section 8, it is provided that "any person whose name has been presented as a candidate may cause his name to be withdrawn from nomination by his request, in writing," etc. It will be observed that the language is general, authorizing "any person" who has been presented as a candidate to withdraw; and the high rank of the office should not preclude the candidate from availing himself of the right of withdrawal. It is true, we do not vote directly for president and vice president, but, according to the usage which has prevailed for many years, personal selections are made by the electors, with almost the same certainty that could be accomplished by a direct vote. It is well known that the preliminary steps to a national election are taken by political parties, and the candidates for president and vice president are chosen by them. After nominations are made, the adherents of the several parties in the several states put forward electors of the same political faith as the candidates, and these electors, if chosen, are in honor bound to vote for such candidates. Although there is no other obligation than that of honor resting upon electors so chosen, it is, as counsel for plaintiff remarked, impressive and noteworthy that in all our history no elector has ever violated his honor or betrayed the trust of those who elected him. It would seem to be proper, therefore, to treat them as candidates, within the statute; and the legislature of Kansas, as we have seen, has so recognized them. It is strange, indeed, if there is no way for a national candidate to retire from a ticket if his name should be placed there with a sinister purpose, and that he should be denied the right of withdrawal where his name is merely used to cast a

stigma upon him, or to defeat the principles for which he stands. Apart from the question of formality, however, and granting that there is a chance for division of opinion as to whether national nominees for president and vice president are candidates, within the meaning of the statute, I am still firmly of the opinion that the peremptory writ should not be allowed. The right to this remedy depends upon the averments of the defendant's answer. As the case was submitted, the facts stated in the answer stand confessed; and taking them to be true, as we must, the plaintiff is not entitled to the writ. It is admitted that the purpose of using Watson's name at the head of the ticket is to mislead the voters of Kansas, and induce them to vote for the electors on that ticket under the belief that they are voting for electors who would vote for Watson for vice president. It is admitted that the electors on the ticket in question are the same as those on the Democratic ticket, who have been certified as electors to vote for the Democratic nominees for president and vice president. It is further admitted that the electors so named are not members of the People's party, to which Watson belongs, but are members of the Democratic party, and, if chosen, will not vote for Thomas E. Watson for vice president of the United States. If these facts are true, the placing of Watson's name upon the ticket will be a palpable deception of the voters of the state, and a great injustice to him. Shall the secretary of state be compelled to participate in the deception and wrong, and should the solemn mandate of the court be employed to compel such participation? Mandamus is the highest judicial writ known to the law, and the court is vested with large discretion in granting or withholding it. It is not always awarded where the court has power to do so, but, in the exercise of this discretionary power, the court is controlled by considerations of justice and equity. It is fundamental in the law of mandamus that the writ never will be granted where it will prove unavailing, effect a deception, or accomplish injustice. It is clear that the court is not required to compel action that will mislead the voters of the state, or become an instrument in carrying out an injustice. One of the leading ideas in our Australian ballot law is the prevention of deception and fraud in the elections, and to obtain a free and intelligent expression of the voters. This purpose will be frustrated, and the aim of the law defeated, by the proposed writ, if the averments of the answer be true. That the statements of deception and wrong would be difficult to prove if denied is no longer a matter of concern. Proof is dispensed with by the admissions in the pleadings. Watson has attempted in good faith to withdraw. He bases his withdrawal on the fact that it will result in a deception of the voters. The secretary of state has yielded to his request; and, since it is admitted

that the certification and placing of the name on the ballot will operate to mislead and deceive voters, the court, in the exercise of a wise judicial discretion, should refuse the writ.

MYERS v. KNABE et al.

(Court of Appeals of Kansas, Southern Department, C. D. Oct. 7, 1896.)

JURY TRIAL—NEW TRIAL—OBJECTIONS TO VERDICT.

1. In an action to recover the money due upon a note, and to foreclose a mortgage to secure the same, where the validity of the note and mortgage is attacked because of the alleged insanity of one of the makers thereof, and because of the duress of the other maker, either party is entitled to a jury trial as a matter of right.

2. If the trial judge does not approve of the verdict of the jury, he must set it aside and grant a new trial. This requirement is so well established by the decisions of our supreme court that it leaves no discretion with the trial judge, but is a mandatory duty imposed upon him.

(Syllabus by the Court.)

Error from district court, Greenwood county; C. M. Shinn, Judge.

Action by S. E. Myers against George Knabe and others. Judgment for defendants. Plaintiff brings error. Reversed.

This action was brought in the district court of Elk county, Kan., to foreclose a real-estate mortgage of \$1,540, executed by George Knabe and wife to S. E. Myers, as part of the purchase price of the land mortgaged. The defense was that, at the time of the execution of the note and mortgage, said George Knabe was insane, and that at such time said Myers knew that said Knabe was insane, and falsely and fraudulently represented to said Knabe that the land was well worth the sum of \$2,500, when as a matter of fact it was not worth the sum of \$1,200, all of which the said Myers well knew; and the defense of the defendant Susan Knabe was that she was the wife of said George Knabe, who was at the time of the execution of the note and mortgage insane, and that she was compelled to execute the said note and mortgage by reason of the threats of said George Knabe that, if she refused to do so, he would take her life. Upon the first trial of this action, the jury found a verdict for the defendant. The case was taken to the supreme court, and the judgment reversed (see *Myers v. Knabe*, 51 Kan. 720, 33 Pac. 602); and the case was remanded to the district court of Elk county, Kan. In the meantime, A. M. Jackson, the attorney for the defendant, having been elected judge of the district court, a change of venue was granted to Greenwood county, Kan., where a trial was had, which resulted in a verdict for the defendants, which said verdict, on motion of plaintiff, was set aside, and a new trial granted, which resulted in another verdict for the defendants.

Plaintiff filed a motion for judgment in his

favor in said action, notwithstanding the general verdict and special findings, and also a motion for a new trial, which said motions were by the court overruled; and, in ruling upon said motions, the court used the following language, to wit: "By the Court: I am unable to agree with counsel for plaintiff that the court would be justified in rendering a judgment in favor of the plaintiff notwithstanding the general verdict of the jury. Section 266 of the Code of Civil Procedure provides that 'issues of fact arising in actions for the recovery of money, or of specific real or personal property, shall be tried by a jury unless a jury trial is waived or a reference be ordered as herein provided.' An action on a note or mortgage, I think, is an action for the recovery of money; and I think it is substantially different from a suit in equity under the old practice to foreclose a mortgagor's equity of redemption. I believe that in this state, in an action of that kind, every party has a right to a trial by jury, and that the court must render a judgment upon the verdict of the jury unless, for sufficient cause, the verdict is set aside and a new trial granted. For that reason, the motion for judgment is overruled. I have concluded to overrule the motion for a new trial in this case, not that my judgment coincides with that of the jury, for it does not. The evidence possibly warranted the jury in finding that George Knabe was of unsound mind when he executed the note and mortgage, but I think that a decided preponderance of the evidence was to the effect that plaintiff, Myers, had no knowledge of Knabe's insanity, and had no knowledge that would have put a man of ordinary prudence on inquiry. In fact, I find it difficult to find in the record much evidence except the evidence of Henry Knabe that even tends to prove that the plaintiff, Myers, had any knowledge whatever of defendant's insanity. Henry Knabe, the brother of the mortgagor, testified that Myers told him in the spring of 1887 that he (Myers) knew the first time he saw Knabe that he was insane; but I am unable to believe that Henry Knabe testified the truth relative to his conversation with Myers. It is hardly probable that the holder of a mortgage of \$1,540, which he intended to enforce, would tell the brother of the mortgagor, after the mortgagor had been adjudged insane, that he knew the first time he saw the mortgagor, and before he executed the mortgage, that the mortgagor was not right in his mind. Besides, there is no evidence tending to prove that there was anything in the appearance of George Knabe when he first met Myers from which Myers could know that he was of unsound mind. Moreover, two trials of this action were had before Henry Knabe was called as a witness; and it is a little remarkable that this witness, a brother of the mortgagor, and who had been active in trying to get a compromise, should not be called to give this testimony, so important if believed by the jury, until the third trial of the cause, and after the supreme court had said that it was difficult to

find any evidence in the record of the former trial to prove that Myers had any notice of Knabe's insanity. Counsel for the defendants, in their argument to the jury, devoted considerable time to the discussion of the fact that Myers, Cook, Knabe, and wife went to Howard to get an abstract, and to Scott's office the day the note and mortgage were signed, and seemed to discover something very important and sinister in that fact. Now, in view of the fact that Myers had agreed to sell, and Knabe had agreed to buy, the land, and the price and terms of payment—in fact, all the terms and conditions of the contract—had been agreed upon before they went to Howard or to Scott's office, I am unable to discover from the evidence, as I was unable to discover from the arguments of counsel, just what that important and sinister meaning was. Counsel who closed the argument for defendants drew tears from the eyes of several of the jurors by his effective and pathetic appeal for 'this worse than widow, these more than orphans'; and I think this is a case in which the jury, through sympathy for a woman and children, returned a verdict that is not supported by the evidence. Yet, notwithstanding the fact that my judgment does not approve of the verdict of the jury, I think it my duty to overrule the motion for a new trial for the following reason: The evidence is largely by depositions, and I saw nothing in the appearance, manner, or demeanor of the witnesses who testified orally at this trial of the case that would materially aid in weighing their testimony, so that the supreme court can determine the sufficiency of the evidence as well as this court. Three successive juries have returned verdicts in favor of the defendants. The evidence introduced in this trial as to Myers' knowledge is substantially the same as at the last trial, except that relating to the verdict of the jury in the probate court of Elk county, all of which was incompetent, but it was admitted without objection. My judgment did not approve the verdict at the last term, and I granted a new trial. Subsequent consideration of the evidence introduced at that trial, and hearing the case tried at this term, did not change my views; and it is not probable that upon the same evidence I will change my views in the future. If retried, it is probable the case will be tried upon substantially the same evidence and with the same result; and, if I continue to set aside verdicts so long as my judgment does not concur with that of the jury, there will be no end to litigation while I remain on the bench. If I overrule this motion, the supreme court can determine the sufficiency of the evidence, and at the same time determine whether this court committed any material errors in its rulings during the course of the trial or in its instructions to the jury, and, if it confirms this judgment, end the litigation at once, or, if it reverses this judgment, so determine the law of the case as speedily to end the litigation. The motion for a new trial is overruled." From the orders and

judgment of the court, the plaintiff brings the case here for review.

L. Scott and Clogston & Fuller, for plaintiff in error. R. H. Nichols, for defendants in error.

DENNISON, J. (after stating the facts). The court did not err in overruling the motion of plaintiff below for judgment. This was an action for the recovery of money and the foreclosure of a mortgage, in which the validity of both the note and mortgage was attacked. Either party was entitled to a jury trial as a matter of right, and the court must either render judgment upon the verdict of the jury, or he must set it aside, and grant a new trial. In the remarks of the trial judge in passing upon the motion for a new trial, the judge states that his judgment does not coincide with that of the jury. The judge also says: "I think this is a case in which the jury, through sympathy for the woman and children, returned a verdict that is not supported by the evidence; yet, notwithstanding the fact that my judgment does not approve of the verdict of the jury, I think it my duty to overrule the motion for a new trial. * * * My judgment did not approve the verdict at the last term, and I granted a new trial. Subsequent consideration of the evidence introduced at that trial, and hearing the case tried at this term, did not change my views; and it is not probable that upon the same evidence I will change my views in the future." If the trial judge does not approve of the verdict of the jury, he must set it aside, and grant a new trial. This requirement is so well established by the decisions of our supreme court that it leaves no discretion with the trial judge, but is a mandatory duty imposed upon him. See *Richolson v. Freeman*, 56 Kan. 463, 43 Pac. 772. In the case of *Railroad Co. v. Ryan*, 49 Kan. 12, 50 Pac. 100, *Horton, C. J.*, in delivering the opinion, says: "It has been the unvarying decision of this court to permit no verdict to stand unless both the jury and the court trying the case could, within the rules prescribed, approve the same. When the judgment of the trial judge tells him the verdict is wrong, whether from mistake or prejudice or other cause, no duty is more imperative than that of setting it aside, and remanding the questions at issue to another jury. While the case is before the jury for their consideration, the jury are the exclusive judges of all questions of fact; but, when the matter comes before the court upon a motion for a new trial, it then becomes the duty of the trial judge to determine whether the verdict is erroneous. He must be controlled by his own judgment, and not by that of the jury. * * * He must approve or disapprove the verdict. If he approves, he may overrule the motion for a new trial. If he disapproves, he should set it aside, and permit another jury to pass upon the facts." The judgment of the district court is reversed, and the cause remanded for a new trial. All the judges concurring.

FIRST NAT. BANK OF OKARCHE et al.
v. TEAT.

(Supreme Court of Oklahoma. Sept. 4, 1896.)

CHATTEL MORTGAGE — RIGHTS OF MORTGAGEE —
POSSESSION.

An instruction by the court below that if the defendant had a valid and subsisting mortgage on the property in dispute at the time he took possession of it, and had reasonable grounds to believe, and did believe in good faith, that his security was impaired by the loss of any of the property, or on account of a depreciation in its value, and for such reasons deemed himself unsafe, then he might rightfully take possession of the mortgaged property, although the debt was not due, provided he could do so without any breach of the peace, or could obtain peaceable possession of the same, but that he would have no right to resort to force or stealth or fraud to obtain such possession against the consent of the mortgagor, but would be required to resort to his action at law to secure the same, is not erroneous. Such an instruction denies the arbitrary right of the mortgagee to take possession of the mortgaged property without a reasonable ground therefor, and further relegates him to his legal remedy as against force, violence, or fraud.

(Syllabus by the Court.)

Error from district court, Canadian county; before Justice John H. Burford.

Action brought by Daniel Teat against the First National Bank of Okarche and Julius Loosen to recover possession of certain personal property and for damages for its detention. Judgment for the plaintiff. Defendants below bring error. Judgment of the lower court affirmed.

J. H. Warren and W. H. Grigsby, for plaintiffs in error. W. H. Criley, for defendant in error.

SCOTT, J. Plaintiff in error held a chattel mortgage on certain personal property of defendant in error to secure a certain sum of money, the property being left in the possession of mortgagor. Among other things, the mortgage contained a clause that, if the mortgagee at any time deemed himself insecure, he should have the right to take possession of the property covered by the mortgage, and dispose of it as specified therein. Plaintiff in error, claiming that he deemed himself insecure, took possession of the property, without the consent of the defendant in error, and in such a manner as, to say the least, to constitute a civil trespass. The court below charged the jury that "if the defendant [plaintiff in error] has a valid and subsisting mortgage on the property in dispute at the time he took possession of it, and he had reasonable grounds to believe, and did, in good faith, believe, that his security was impaired by the loss of any of the property, or on account of a depreciation in its value, and from such reasons he deemed himself unsafe, then he might rightfully take possession of the mortgaged property, although the debt was not due, provided he could do so without any breach of the peace, or could obtain

peaceable possession of the same; but he would have no right to resort to force or stealth or fraud to obtain such possession against the consent of the mortgagor, but would be required to resort to his action at law to secure same." Verdict and judgment below for defendant in error.

The foregoing charge of the court involves two propositions, the correctness of which is presented for our consideration: (1) The construction of these words in the mortgage: "If the mortgagee shall at any time deem himself insecure without assigning any reason therefor, * * * it should be lawful for him to take said property wherever the same may be found," etc. (2) What action the mortgagee might lawfully take in securing possession of said property should he become entitled to same by the terms of the mortgage. We think the court correctly stated the law of the case in this instruction on both propositions. The instruction denies the arbitrary right of a mortgagee to take possession of mortgaged property without a reasonable ground therefor, which is a protection of the law, due to this class of debtors, and further relegates the mortgagee to his legal remedy as against force, violence, or fraud. The judgment of the court below is affirmed. It is so ordered. All the justices concurring.

COOPER et ux. v. BANK OF INDIAN TERRITORY.

(Supreme Court of Oklahoma. Sept. 4, 1896.)

NOTE OF MARRIED WOMAN—VALIDITY—EXTENSION—ATTORNEY'S FEE.

1. The statute of this territory which provides, "either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which either might, if unmarried," empowers the wife to join with her husband in making a promissory note for his own debt or obligation, and she is bound thereby.

2. The wife may also bind herself by the provisions of a promissory note signed by herself and her husband, giving to the legal holder of the note the right to extend the time at the request of any one of the signers.

3. A 10 per cent. attorney's fee for bringing suit upon a note, and to foreclose a mortgage securing the same, where the note which is set out in the mortgage expressly stipulates for such fee, is not excessive.

(Syllabus by the Court.)

Error to district court, Logan county; before Justice Frank Dale.

Action by the Bank of Indian Territory against W. S. Cooper and Alma L. Cooper upon a promissory note and mortgage. Judgment for the plaintiff for the sum of \$760, and attorney's fee of \$76, and the foreclosure of the mortgage, from which the defendants appeal. Affirmed.

Baker & De Bois, for plaintiffs in error. Asp, Shartel & Cottingham, for defendant in error.

BIERER, J. The Bank of Indian Territory brought its action in the district court of Lo-

gan county upon a promissory note of W. S. Cooper and Alma L. Cooper, his wife, and to foreclose a real-estate mortgage to secure the note. The note provided for an extension of time being made at the request of any one of the signers thereof, and a 10 per cent. attorney's fee in case the same should be placed in the hands of an attorney for collection. The defendants demurred to the petition, which was overruled, and they then answered that W. S. Cooper and Alma S. Cooper were husband and wife, and that the debt for which the note was executed was wholly the debt of the husband, and that the clause providing for an extension of time was not binding on Alma L. Cooper. The plaintiff moved for judgment on the pleadings, which was sustained, and judgment rendered for the amount due on the note, 10 per cent. attorney's fee, and the foreclosure of the mortgage. And the cause is brought here on error to review this judgment.

Although W. S. Cooper joins in this appeal, there was no objection raised to the correctness of the judgment below as to him, but the entire complaint is made by Alma L. Cooper; and her principal contention is that, as she was the wife of W. S. Cooper, and as the debt for which the note was given and the mortgage to secure the same was made was entirely the debt of W. S. Cooper, she cannot be bound by her contract to pay the sum promised by her in this note, and that a personal judgment cannot be rendered against her.

Our statute on the subject of husband and wife (section 2908 of the Oklahoma Statutes of 1893) provides: "Either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which either might, if unmarried, subject, in transactions between themselves, to the general rules which control the actions of persons occupying confidential relations with each other as defined by the title on trusts." This is a California statute, which was adopted into the laws of the territory of Dakota, and adopted from that territory into the laws of this territory, and which has been retained as a part of the laws of the states of North and South Dakota, and has been frequently construed. In case of *Good v. Moulton*, 67 Cal. 536, 8 Pac. 65, the trial court had given this instruction: "If the jury believe from the evidence that the note sued on and introduced in evidence was executed by 'Mrs. Lina Moulton for the accommodation of D. L. Moulton merely, and without consideration, and that at the time she was a married woman, and that the plaintiff knew such facts, then he cannot recover.'" The court held: "This was error. In this state a married woman may enter into any engagement or transaction respecting property which she might if unmarried. Section 154, Civ. Code. A promissory note is an engagement respecting property which a married woman may make, though it can be enforced only as against her separate property. *Marlow v. Barlow*, 53 Cal. 456; *Alexander v. Bouton*, 55 Cal. 13. If Mrs. Moulton had been unmarried she could have

made a promissory note for the accommodation of her father without receiving any consideration for so doing, and the note so made, in the hands of one who received it for value, would, beyond question, have been valid and binding upon her, though the holder knew how and why it was made. But the fact that she was married does not at all change the rule or limit her power in this respect." The California construction placed upon this statute is followed, and the case of *Good v. Moulton* quoted from and approved in the state of North Dakota in the case of *Mortgage Co. v. Stevens*, 55 N. W. 579. In this case the court said: "This statute is very broad in its language. It is true that the contract must be one respecting property, but we cannot assent to the view that it must relate to the married woman's separate property. It would have been easy to have said so in express terms, had such been the purpose of the lawmaking power. When the legislature has established the single and simple test that the contract must be one respecting property generally, we have no right to amend the law, and thereby inject into the act a further limitation which will exclude many contracts respecting property. To add another limitation by interpretation would ignore the drift of legislation on the subject of the rights and liabilities of married women." The state of South Dakota has also given to this statute the same construction as is given to it in the states of California and North Dakota. See *Mortgage Co. v. Bradley* (S. D.) 55 N. W. 1108; *Granger v. Roll* (S. D.) 62 N. W. 970. These several constructions of this statute of these three states are clear, positive, and uniform, and we are cited to the decisions of no state which, if it has the same statute, has given it a different construction; and as these constructions harmonize, and give to the statute the obvious intention of the legislature, we can see no reason why the courts of this territory should depart from it. It would be an idle waste of time for us to review in this opinion the cases cited by counsel for plaintiff in error from the supreme courts of Michigan, Indiana, and Arkansas, in their attempt to show that a different construction from that to which we hold should be placed upon the statute in question. The very first reading of the statutes on which those decisions are based shows that they are not, in language, point, or purpose, even similar to our statute. This statute, which the plaintiff in error asks us to construe against the right of Alma L. Cooper to bind herself by her contract, has substantially placed the wife on an equality with the husband in making property contracts. She can make them to the same extent, and with the same force and validity, that the husband can. And of course this carries with it the same duty and the same obligation to carry out and perform these contracts. For us to say that she cannot be required to perform these contracts would, for all future cases, at least, be to say that she has not the power to make them, for no sane person would enter into a contract with one

whom the courts would say could not be required to perform it. Contracts are effectual only as they create binding obligations, and obligations are binding only where they can be enforced. We would be taking away a substantial right of the married women of this territory, if we gave to this statute the construction asked for. And this we are prohibited from doing by section 2978 which provides: "From and after the passage of this act, woman shall retain the same legal existence and legal personality after marriage as before marriage, and shall receive the same protection of all her rights as a woman, which her husband does as a man; and for any injury sustained to her reputation, person, property, character or any natural right, she shall have the same right to appeal in her own name alone to the courts of law or equity for redress and protection that her husband has to appeal in his own name alone: provided, that this act shall not confer upon the wife a right to vote or hold office, except as is otherwise provided by law." And by section 773: "All persons are capable of contracting, except minors, persons of unsound mind, and persons deprived of civil rights." And, without any definition of the words, "all persons" would include married women as well as single women or men. But our statute (section 2676) has expressly defined the word "person" to include, not only "human beings," but corporate entities. And the exception in the statute of all persons who are capable of contracting does not exclude married women from making contracts. By section 2971 the wife is given the power to hold property, real or personal, as a joint tenant or tenant in common with her husband, and to dispose of the same without the consent of her husband. She is given by these various statutes the power to acquire and hold real and personal property, and to convey the same, and to make contracts either with her husband or other persons, and the right to be protected in her legal existence and personality to the same extent as a man. These rights conferred upon the married woman by our legislation cannot be enforced unless upon her is imposed the corresponding liability and duty of honestly performing her contracts, for a right without a liability is little regarded, and of little consequence. We cannot give to the statute the construction asked for by the plaintiff in error. To do so would not only be to disregard the opinions in the well-considered cases of the supreme courts which we have cited, where the same statute was construed, but would be declaring that this territory has taken a step backward in the course of modern legislation, which a fair construction of our statutes would not warrant us in saying the legislature has done. The judgment of the court holding binding that part of the contract contained in the note, to permit either party to extend the time for the payment of the note, and to pay 10 per cent. attorney's fees in case of enforced collection, was only giving effect to the contract itself. There could hardly be any question as to the excessiveness of the attor-

ney's fee, when the amount adjudged was expressly stipulated for by the parties themselves. The judgment of the court below is affirmed. All the justices concurring. DALE, C. J., not sitting.

ELLISON et al. v. BEANNABIA.

(Supreme Court of Oklahoma. Sept. 4, 1896.)

APPEAL—FINDINGS OF FACT—CONCLUSIVENESS—CANCELLATION OF CONVEYANCE—RESTITUTION OF BENEFITS—WITNESSES—LEADING QUESTIONS—SPECIAL JUDGE—PRESUMPTION OF JURISDICTION.

1. The rule is here adopted, as in other territories and states which have the same practice act, that a finding of fact by the court, in a case which is tried to it, is equivalent to a verdict by a jury; and if there is testimony to support the material allegations of the petition this court will not disturb the finding and judgment, even though the appellate court might think, upon an examination of the evidence, that the finding of fact should have been otherwise, unless the findings of fact made by the trial court were manifestly erroneous.

2. When a plaintiff comes into this court seeking the cancellation of a conveyance to land, which had been procured from him by fraud, and it appears in the evidence that he has received something of value in the transaction, the restitution of the valuable thing will not be required, before granting relief to the plaintiff, if it appears that the consideration was given for one thing, when in fact it appears that, by the fraudulent representations of the defendant, it was given for another thing.

3. When the purposes of justice plainly require it, the court may permit a party to put leading questions to his own witness. The power is discretionary with the court, to be regulated by the circumstances of each case.

4. In a civil case, in which the judge who presides is not a judge who is regularly assigned to the judicial district, but is sitting under a special assignment, it will be presumed that he has been properly assigned and designated under the law, and had jurisdiction to hear the cause, in the absence from the record of any copy of the order of his assignment to try the cause, and to preside at the trial thereof.

(Syllabus by the Court.)

Error to district court, Canadian county; before Justice Frank Dale.

Action by Peter Beannabia against Robert R. Ellison and Mary E. Ellison to cancel a deed. From a judgment for plaintiff, defendants bring error. Affirmed.

Blake & Blake, for plaintiffs in error. Dille & Schmoock, for defendant in error.

MCATREE, J. The petition in this case was filed upon the 26th day of September, 1894. An amended petition was thereafter filed upon the 14th day of November, 1894, which alleged that the plaintiff (defendant in error here) was a Mexican by birth, over 65 years of age, illiterate, being unable to either read, write, speak, or understand the English language; that for a series of years immediately preceding the 3d day of September, 1894, he was in the employment of the defendant Robert R. Ellison, doing daily labor; that Ellison is an American by birth, speaks, writes, and understands the English language, and the business ways and habits of

the people of this country, and, confiding and believing in the honesty, integrity, and business capacity of Ellison, and that he would fairly deal with the plaintiff, the plaintiff intrusted all his business affairs to the defendant Ellison, and that prior to said date plaintiff made homestead entry and final proof of the S. E. $\frac{1}{4}$ of section 18, township 12 N., of range 8 W., of the Indian meridian, Canadian county, this territory; that on and just prior to September 3, 1894, the defendant procured the plaintiff to execute a warranty deed conveying said land to him (the defendant), by representing that it was necessary for him (the plaintiff) to execute a paper relating to his homestead and final proof; that said representations were false and fraudulent, and by means of them the defendant procured the plaintiff to execute the said warranty deed, without consideration, and that the plaintiff was wholly deceived as to the character and effect of said paper, and did not discover the nature of the transaction until the 22d day of September, 1894, when he immediately demanded a reconveyance of the premises, and a return and cancellation of the deed which he had been thus fraudulently induced to execute. Plaintiff demanded an order of the court for a cancellation of the deed, and for proper relief. The defendants answered, denying generally for a first defense, and for a second defense alleging that the plaintiff sold the land described in the warranty deed referred to, for a consideration, knowing well at the time he signed the same what its nature and purport were. The reply of the plaintiff put in issue the affirmative allegations of the answer. The cause was tried upon the 9th day of March, 1895, before the Honorable Frank Dale, then presiding in the district court of Canadian county; the record showing, "The cause was submitted to the court for trial without the intervention of a jury." Interpreters were sworn, and the testimony of the plaintiff taken through them. The testimony of a number of witnesses called for both the plaintiff and the defendants was taken. Upon the conclusion of the taking of the testimony the court made general findings of fact to the effect that "the court finds against the defendants, and in favor of the plaintiff," and that "the deed, * * * and the execution thereof, were procured from him [the plaintiff], by the defendants, without his knowledge or consent, by the means and as alleged in the petition," and "adjudged the said conveyance to be illegal and void; that the same be canceled, and the plaintiff have costs."

The defendants bring the case here upon assignments of error, that (1) the petition does not state facts sufficient to constitute a cause of action; that (2) the court erred in overruling the motion for a new trial; (3) that the judgment of the lower court is contrary to law; and (4) that the territorial district court of Canadian county, and the Honorable Frank Dale, judge presiding at the time of

the trial of the cause, had no jurisdiction to render a judgment therein at the time that the said judgment was so rendered. Upon these assignments of error it is argued by the plaintiffs in error that the findings and judgment were contrary to law, and not justified by the evidence, and that the appellate court should examine the evidence, and reverse the finding of the district court upon the facts therein shown, and make a finding consistent with the weight of the evidence, which it is claimed greatly preponderates in favor of the defendants (plaintiffs in error here). In compliance with this request, we have carefully read the evidence in the case. Testimony was produced to show that the plaintiff, Beannabia, was a Mexican by birth, 65 years of age, could neither read nor write the English language, had known the defendant since 1891, and had worked for him three years, and "had all of his confidence in him," and during that time Ellison, the defendant, had, on account of his (Beannabia's) trust and confidence in him, directed his affairs; that he executed the deed at the request of Ellison; "that he signed it ignorant, because he was just as ignorant as the day which has come for him to die," and that he made his mark to the deed because Mr. Ellison requested him to do so, thinking at the time when he "pushed the pen" that he was signing his final receipt for his land; that he thought at the time he made his mark to the deed that he was doing some act that would get him his homestead, and believed so until he tried to rent the land to one Bruce Richardson, when he found out from Richardson that he had executed a conveyance of the land. Beannabia further testified that "he never received two thousand dollars in money, or any other consideration, for executing the deed"; that all the money that he got to pay for the building of the house on his land was gotten by the "sweat of his work"; and that he had tried to get a settlement for his work from Ellison, but was unable to do so. The plaintiff further testified that he did not know what a deed was, nor how to convey real estate; that defendant had possession of his papers, which he would not permit him to see; and that Ellison had told him that the deed to which he made his mark had to be sent to Oklahoma City, to the land office. The deed was acknowledged by Beannabia before the register of deeds of Canadian county, in the presence of the defendant. There was testimony to show that the register of deeds, Mr. Rider, did not understand Spanish, and that Ellison interpreted for him, and that he (Rider) did not explain to the plaintiff what kind of an instrument he was signing, and did not know, except from what Ellison told him, whether Beannabia had any information whatever on the subject. A number of witnesses were produced on each side, some of whom, including the defendant, flatly contradicted the plaintiff. It will be seen, however, from the points of the testi-

mony here enumerated, that all of the allegations of the amended petition, upon which the case was tried, are supported by evidence.

Under the Code of Civil Procedure, the court now hears oral testimony in chancery cases, and, like a jury, considers the witnesses, observes their intelligence and capacity, their fairness or bias, their manner and characteristics, and has thus opportunities for judging of the value of the testimony, such as this court cannot have. The rule is therefore here adopted, as in other states which have the same practice act, that a finding of fact by the court is equivalent to a verdict by a jury; and, if there is testimony to support the material allegations of the petition, this court cannot disturb the finding and judgment, even though the finding of fact by the trial court might be contrary to the judgment of the appellate court. *Beaubien v. Hindman*, 37 Kan. 227, 15 Pac. 184; *Mulhall v. Mulhall* (Okl.) 41 Pac. 577; *Ruth v. Ford*, 9 Kan. 17; *Beal v. Coddling*, 32 Kan. 107, 4 Pac. 180; *Railway Co. v. Kunkel*, 17 Kan. 145; *Walker v. Manufacturing Co.*, 8 Kan. 307; *Garcia y Perea v. Barela* (N. M.) 27 Pac. 507.

It is contended by the plaintiffs in error that, while nearly all of the indebtedness which is alleged by the plaintiffs in error to have constituted the consideration for the conveyance of the land consisted of an indebtedness which existed prior to the time that the contract for the conveyance was made, yet an additional consideration for the transfer was given by Ellison at the time of the conveyance, and accepted and retained by Beannabia. The finding and judgment of the court below included a finding that the conveyance, as executed, was procured by fraud, and that the additional consideration referred to was not a consideration for any contract which Beannabia understood that he was making, and that, if such additional consideration was in fact given, it was understood by Beannabia to be a consideration for some other thing, and not a consideration for the conveyance of the land. The conclusion of the court was that the sale was not made, that plaintiff and defendants never agreed together, and that plaintiff was induced to sign the deed, not knowing it to be a deed, through false representations. Under such circumstances, we do not understand the rule to be that the plaintiff must first make restitution, before asking for a cancellation of the fraudulent instrument. The rule does not apply to cases where a party holds out that he gives consideration for one thing, and by fraud obtains an agreement that it was given for another thing. *Mullen v. Railroad Co.*, 34 Am. Rep. 349.

After a number of questions had been asked of Beannabia through the interpreters, the court found that "direct questions should be asked the witness," and "counsel for the plaintiff was ordered by the court to frame

his questions in a direct manner, so that the witness may better understand the same, and the interpreter be better able to interpret the same into the Mexican language." Thereupon the further examination of Beannabla was conducted by means of leading questions, to which the defendants objected. The rule stated by Greenleaf is that "where, from the nature of the case, the mind of the witness cannot be directed to the subject of inquiry without a particular specification of it, leading questions may be asked," and that "it is within the discretion of the judge, at the trial, under the particular circumstances, to permit leading questions to be put to one's own witness"; and that "this discretionary power to vary the general rule is to be exercised only so far as the purposes of justice plainly require it, and is to be regulated by the circumstances of each case." 1 Greenl. Ev. § 435, and note, citing *Moody v. Rowell*, 17 Pick. 498, and other cases. It is said in *Com. v. Galavan*, 9 Allen, 271, that "the presiding judge may, of course, interrogate the witness in any form and to any extent he may deem important to the ends of justice." We think the permission to ask leading questions in the case was one for the discretion of the presiding judge.

No objection was made at the time of the trial that the honorable judge who presided had no jurisdiction to render the judgment therein at the time that the judgment was rendered. The objection appears first in the petition in error, and finds no support in the record. The organic act provides that the supreme court shall define said judicial districts, and shall fix the times and places at each county seat in each district where the district court shall be held, and designate the judge who shall preside therein. No copy of the order designating the judge who shall preside therein has been furnished in the record. In the absence of a copy of the order, we must presume that the judge who presided was properly appointed and designated under the law, and had jurisdiction to hear the cause. The judgment of the court below will be affirmed. All the justices concur, except DALE, O. J., who presided at the trial below.

BAXTER, Marshal, v. THOMAS et al.

(Supreme Court of Oklahoma. Sept. 4, 1896.)

CONSTITUTIONAL LAW—HABEAS CORPUS—JURISDICTION OF DISTRICT COURTS.

Where a city ordinance requires the payment of an occupation tax by all persons in said city engaged in selling or offering for sale goods, wares, and merchandise, and provided a fine and imprisonment for a violation thereof, *held*, that one who was engaged in soliciting the sale of goods on behalf of an individual or firm doing business in another state was not amenable to said ordinance; that as to such person it is a regulation of commerce among the states, and unconstitutional, as in violation of the provisions of the constitution of the United States

granting to congress the power to make such regulations. Where such person is imprisoned, charged with the violation of such ordinance, such imprisonment involves a federal question, and the district court, sitting as and with the powers of a circuit or district court of the United States, has jurisdiction to discharge from such imprisonment upon habeas corpus.

(Syllabus by the Court.)

Appeal from district court, Logan county; before Justice Frank Dale.

Action by Jay Thomas and F. M. Cabiness for a writ of habeas corpus against William H. Baxter, marshal of the city of Guthrie. From an order discharging petitioners, defendant appeals. Affirmed.

Bayard T. Hainer, for appellant. Francis J. Lynch, for appellees.

TARSNEY, J. On the 7th day of May, 1895, appellees filed their petition in the district court of Logan county, Hon. Frank Dale, district judge, sitting with the powers of a federal court, praying a writ of habeas corpus, and setting forth in the petition therefor that said appellees were restrained of their liberty in violation of the constitution of the United States, and in violation of the laws of the territory of Oklahoma; that such unlawful imprisonment consisted in that the petitioners were arrested under and by virtue of a complaint and warrant in and issued from the police court of the city of Guthrie, charging the petitioners with selling goods, wares, and merchandise without having first procured from the authorities of the said city a license in accordance with the terms of an alleged ordinance of said city, and that such illegal and unlawful imprisonment consists in the restraint of said petitioners of their liberty by one William Baxter, marshal of said city, holding them by virtue of an alleged complaint, warrant, and commitment from said police court; that the petitioner Thomas is a resident of the city of Wichita, in the state of Kansas; that the petitioner Cabiness is a resident of the city of Perry, Okl. T.; that petitioners are traveling salesmen for one William S. Buck, a merchant doing business in the city of Topeka, state of Kansas; that petitioners are representatives and soliciting agents of said William S. Buck; that petitioners go from place to place in said city of Guthrie, and carry with them samples of goods, wares, and merchandise kept for sale by their principal, said William S. Buck, in the said city of Topeka; that petitioners go from place to place in said city of Guthrie, show these samples to parties in said city for their examination, and, if a citizen of Guthrie desires to purchase or arrange for the purchase of the article of similar kind and character kept for sale by the said Buck, petitioners take orders of such customers in writing, and forward the same to said William S. Buck, in said city of Topeka; that, if said Buck approves of said order, the goods so ordered as aforesaid are shipped from the city of Topeka, Kan., to petitioners, or to some

agent of said Buck, or by means of common carriers, and said goods are delivered by one of the agents or carriers aforesaid to the customer pursuant to the order theretofore taken; that upon the receipt of said goods, so delivered, the customer arranges with the said house in Topeka for the payment and settlement thereof; that petitioners, while engaged as aforesaid, and not otherwise, were arrested, charged with the violation of a certain ordinance of the city of Guthrie; that the business in which petitioners were so engaged was wholly interstate commerce business; that petitioners did not own the samples that they carried about with them, and had no right, claim, title, or interest in the same; that they did not sell goods, wares, or merchandise within the city of Guthrie, and did not sell or offer for sale the samples they carried with them; that they make no direct sales themselves; that they do not carry or expose goods for sale; that at the time of taking orders as aforesaid the goods with which said orders have been filled were in the city of Topeka, state of Kansas. To the petition thus filed the said William H. Baxter, as marshal of the city of Guthrie, filed a demurrer, stating for reasons: First, that said application did not state facts sufficient to constitute a cause of action; second, that the court had no jurisdiction of the subject-matter of the action. This demurrer was by the court overruled, whereupon said Baxter made return and answer to the application for said writ of habeas corpus and to said writ, setting up therein that he detains the said Thomas and said Cabiness by virtue of a complaint duly filed in the police court of the city of Guthrie, wherein the said Thomas and the said Cabiness were charged with selling goods, wares, and merchandise in the city of Guthrie before taking out and paying an occupation or license tax as required by section 1 of Ordinance 236 of the said city of Guthrie; and, further, that he detains said Thomas and Cabiness by virtue of two warrants of commitment duly issued by one G. C. McCord, a court of competent jurisdiction in and for the city of Guthrie, Okl. T.; and, further, that said petitioner Thomas, on or about the 30th day of April, 1895, came to the city of Guthrie with a stock of goods valued at about \$500, consisting of rugs, curtains, and sundry other articles of merchandise, and opened up a room or store in a building situated in said city of Guthrie, where said stock of goods or merchandise were distributed, and that said Thomas sold and offered to sell and distribute said goods in the city of Guthrie, and did deliver to various persons in said city articles from said stock of goods in value of \$150 or \$200 since the 30th day of April, 1895. Copies of the complaint, warrants of arrest and commitment were attached to said return, the said warrants of commitment reciting that the said petitioners respectively were brought before the said G. C. McCord, police judge of the city of Guthrie, upon the 8th day of May,

1895, upon the charge of selling goods without taking out a license tax as required by section 1 of Ordinance 236; that, after full trials upon said charge, the said petitioners were found guilty of said charge, and as a punishment therefor it was ordered by the court that each pay to the city of Guthrie a fine of \$25, with costs of suit, amounting in each case to \$10.15, and that each of said petitioners be confined in the jail at the city of Guthrie until said fine and costs be paid. To this return petitioners filed a replication denying each and every allegation of new matter in respondent's answer made. Afterwards, on the 10th day of May, 1895, the issues in said cause coming on to be heard in said court, the petitioners testified to all the facts stated and set forth in their said petition. The respondent offered no testimony. The court found that the arrest of said petitioners was unlawful, that the imprisonment and detention of said prisoners was unlawful, and directed their discharge. To the findings and conclusions and order of the court the respondent duly excepted, filed a motion for a new trial, which motion being overruled, respondent excepted, and duly appealed to this court.

The only question for our consideration in this case is, was the business in which the petitioners were engaged interstate commerce business? If so, the city of Guthrie could not impose a tax upon persons engaged therein, and any ordinance which might have been enacted by said city requiring the payment of a business or occupation tax by those engaged in business in said city would not have been valid as against said petitioners, and could not be enforced against them, and any proceedings against said petitioners because of their failure or refusal to pay such occupation tax would have been without warrant of law and void, and any imprisonment of the petitioners on account of such failure to pay such tax would be illegal, and would entitle them to discharge therefrom by habeas corpus. If the business in which said petitioners was engaged, and for which they were arrested and restrained of their liberty, was interstate commerce business, then a federal question was involved in the proceedings against them to enforce said act, and the court below, sitting with the powers of federal, circuit, and district courts, had jurisdiction to hear and determine the application for habeas corpus. The facts set forth in the petitioners' application for habeas corpus descriptive of the business in which they were engaged, its character, and the methods of its transaction, were not only admitted by the demurrer, but fully shown and proven in every particular by the testimony of the two petitioners, and were not controverted in any particular by the respondent. Were, then, the petitioners, at the time of their arrest and imprisonment, engaged in interstate commerce business, and was that the business for which

they were arrested and deprived of their liberty? That business which is within the protection and under the regulation of the constitution and laws of the United States relating to interstate commerce has been so often defined, and the prohibition against interference therewith by states or municipalities has been so often declared, that there ought not to be any controversy over the proposition involved in this case. Section 8, art. 1, of the federal constitution provides as follows: "Congress alone shall have power to regulate commerce with foreign nations and among the several states and Indian tribes." For the purpose of this provision, territories are included in the word "state." What then, constitutes interstate commerce? In *Robbins v. Taxing Dist.*, 120 U. S. 494, 7 Sup. Ct. 594, the court says: "In view of these fundamental principles, which are to govern our decision, we may approach the question submitted to us in the present case, and inquire whether it is competent for a state to levy a tax or impose any other restriction upon the citizens or inhabitants of other states for selling or seeking to sell their goods in such state before they are introduced therein. Do not such restrictions affect the very foundation of interstate trade? How is a manufacturer or a merchant of one state to sell his goods in another state without in some way obtaining orders therefor? Must he be compelled to send them at a venture, without knowing whether there is any demand for them? In these cases, then, what shall the merchant or manufacturer do who wishes to sell his goods in other states? Must he sit still in his factory or warehouse, and wait for the people of those states to come to him? This would be a silly and a ruinous proceeding. The only other way, and the one, perhaps, which most extensively prevails, is to obtain orders from persons residing or doing business in those other states. But how is the merchant or manufacturer to secure such orders? If he may be taxed by such states for doing so, who shall limit the tax? It may amount to prohibition. To say that such a tax is not a burden upon interstate commerce, is to speak at least unadvisedly, and without due attention to the truth of things." Again, the court in that case says: "Interstate commerce cannot be taxed at all, even though the same amount of tax be levied on domestic commerce, or that which is carried on solely within the state. The negotiation and sale of the goods which are in another state for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce." The rule of this case has been so frequently affirmed and universally acknowledged that the citation of the authorities here would serve no useful purpose. Does the case at bar come within that rule? We think there can be no question but that it does. The undisputed facts show that the petitioners were traveling

solicitors for William S. Buck, a merchant doing business in the city of Topeka, in the state of Kansas; that they carried with them samples of goods, wares, and merchandise kept for sale by their principal; that they did not own or have any interest in their samples; that they did not sell or offer to sell any of the samples of goods which they had with them. That they went from place to place exhibiting their samples, and, if a prospective purchaser so desired, he signed a printed order, which the petitioner forwarded to his principal in Kansas; that, if the principal approved the order, the goods were wrapped and marked and forwarded to the petitioner for delivery; that at the time the samples were shown the purchaser the goods with which the order was to be filled were in the state of Kansas. We think the case is on all fours with *Robbins v. Taxing Dist.*, and that that case is conclusive of this. We find no error, therefore, in this record, and the judgment of the court below is affirmed. All the judges concur.

DARLINGTON-MILLER LUMBER CO. v. LOBITZ.

(Supreme Court of Oklahoma. Sept. 4, 1896.)

APPEAL—FINDINGS OF FACT—CONCLUSIVENESS—MECHANIC'S LIEN—RIGHTS OF SUB-CONTRACTOR.

1. When special findings of fact are made by the trial court, to whom the case is submitted without a jury, such findings will not be reversed here, unless they are without evidence to support them upon some material point, but they will be treated as conclusive in this court upon all disputed questions of fact.

2. Where the owner of property makes a contract with a builder to erect a building and to furnish lumber therefor, and such contractor purchases the lumber himself, but fails to pay for the same, the contractor is alone responsible; and no lien attaches to the building, or land upon which it has been erected, in favor of the creditor.

(Syllabus by the Court.)

Error to district court, Noble county; before Justice A. G. C. Blerer.

Action by the Darlington-Miller Lumber Company against James B. Lobitz. From a judgment for defendant, plaintiff brings error. Affirmed.

H. R. Thurston, for plaintiff in error. Morgan & Pancoast, for defendant in error.

McATEE, J. This was a suit brought in the district court of Noble county by the plaintiff in error (plaintiff below) to obtain a judgment for \$208.43, with interest, and for the enforcement of a mechanic's lien upon lots 19 and 20 in block 10 in the city of Perry, and a dwelling house thereon. The plaintiff alleged that it had furnished a bill of lumber to the defendant, at his special instance and request, which was used for the construction of the dwelling house referred to, upon the express agreement that the plaintiff was to have a lien upon the real estate. The defendant

filed his answer and cross petition, in which he alleged that he had entered into a contract with the plaintiff, by a Mr. Wermer, who undertook to contract for it, and one Parker, by the terms of which the plaintiff and Parker agreed with the defendant, for \$700, to erect and construct for defendant a frame building, according to certain plans and specifications, and that the said building was to be done in a workmanlike manner, and in every respect in conformity with the plans and specifications; that the plaintiff and Parker had failed to comply with the terms of the contract; that the material used was inferior, and the workmanship defective; and that the defendant had been damaged thereby in the sum of \$200, but that he paid the full contract price to the said parties,—and thereupon demanded judgment for his damages, against the plaintiff, in the sum of \$200 and costs. The case was tried to the court, and upon the request of plaintiff the court made special findings of fact and conclusions of law as follows: "The court finds as facts in this case that on the 16th day of January, 1894, the defendant, James M. Lobitz, made a written contract with F. A. Parker and the Darlington-Miller Lumber Company; the contract, so far as purports to have been made by the Darlington-Miller Company, whereby Parker and the Darlington-Miller Company were to erect and complete a residence for the defendant, James Lobitz, for the sum of seven hundred dollars; that Mr. Wermer, in signing this contract for the Darlington-Miller Lumber Company, had no right, power, or authority to make the contract for the Darlington-Miller Lumber Company to erect and complete the residence; that under and by virtue of this contract, and subsequently thereto, there was furnished to F. A. Parker, for the erection of the building mentioned in the contract, the lumber mentioned in plaintiff's itemized account attached to its petition; that no contract whatever was ever made by Mr. Lobitz, defendant, for the purchase of the lumber sued on, and the defendant never agreed with the Darlington-Miller Lumber Company to purchase or pay for the same." And thereupon the court made the following conclusion of law: "The court finds, as a matter of law, that the defendant, James Lobitz, is not indebted in any sum to the Darlington-Miller Company on account of the purchase of material that went into the building referred to in the petition of the plaintiff." To the findings of fact and conclusion of law the plaintiff in error excepted, making numerous assignments of error, which are argued in the briefs upon two propositions, to wit: (1) That the findings of fact are not warranted by the evidence; and (2) that they do not justify the conclusion of law drawn from them.

Upon the first proposition it has been repeatedly held that the special findings of fact made by the court below are conclusive here upon all doubtful and undisputed questions of

fact. *Crane v. Chouteau*, 20 Kan. 288; *Gibbs v. Gibbs*, 18 Kan. 419; *Stout v. Townsend*, 32 Kan. 423, 4 Pac. 805. It was alleged in the pleadings and shown in the evidence that the plaintiff had renounced the written contract referred to, and denied the authority of Mr. Wermer to execute such a contract in its behalf; and, as appears in the special findings of fact, this contention was sustained by the court. The contract was therefore set aside, and there was evidence to show that the contract for the erection of the building had been made by the defendant with Parker, who had procured the Darlington-Miller Lumber Company to sign the written contract referred to by Mr. Wermer as a guarantor to the defendant that the contract would be executed as made; that Parker had only procured from the defendant the contract for the erection of the house upon condition that the Darlington-Miller Lumber Company would undertake the contract with him, or guaranty its performance; and that outside of the written contract, which was at the trial renounced and denied by the plaintiff here, the agreement and contract had been made by the defendant with Parker only. Undoubtedly the plaintiff renounced the written contract, and denied the liability, and availed itself of its legal exemption from such liability, in order to escape any liability in this cause for damages sought for in the cross petition of the defendant. But in escaping such liability it also forfeited its right, if any, to recover against the defendant upon any claim as for a mechanic's lien. The statutes provide (section 4527, St. Okl. 1893), that "Any person who shall, under contract with the owner of any tract or piece of land, or with the trustee, agent, * * * furnish material for the erection, alteration or repair of any building, improvement or structure thereon, * * * shall have a lien upon the whole of said piece or tract of land, the building and appurtenances, in the manner herein provided, for the amount due," etc. Upon the finding of the court that "no contract whatever was made with Lobitz, defendant," and the statute being peremptory, in order to entitle the plaintiff to a lien the contract must be made with the owner or his agent, the conclusion of the court was correct,—that the defendant, James Lobitz, is not indebted in any sum to the Darlington-Miller Lumber Company on account of the purchase of material that went into the building referred to. It cannot be set up that Parker was the agent for the defendant. He was an independent contractor, who agreed with the defendant to furnish the lumber and erect the building; and no lien can attach in favor of the plaintiff upon the property in which the lumber was used, in the absence of an agreement with the owner for its purchase. *Weaver v. Sells*, 10 Kan. 609; *Clark v. Hall*, 1d. 81. The judgment of the lower court is therefore affirmed. All the justices concur, except BLEBER, J., who presided below.

NOBLE v. ATCHISON, T. & S. F. R. CO.
et al.

(Supreme Court of Oklahoma. Sept. 4, 1896.)

CARRIERS—STOPPAGE AT STATIONS—EJECTION OF PASSENGER—PLEADING—VARIANCE.

1. In the absence of statutory provisions to the contrary, a railroad company has a right to adopt regulations providing that one or a part of its regular trains of passenger cars, running regularly upon its road, shall not stop at certain designated stations or places. And the duty is imposed upon one proposing to travel as a passenger on such road to inform himself whether, under the regulations of the company, the train upon which he takes passage stops at the station or place to which he is going; and in the absence of such statutory provision, and such regulation having been made upon the road, a passenger who holds a ticket for a station at which that train does not stop, and who is unwilling to ride to a station at which the train does stop, and to pay for such additional ride, may, in a proper manner, be removed from such train.

2. Under the facts shown in this case, in order to entitle the plaintiff to recover upon the ground that he was misled or misinformed by the agent of the company, or that the defendants, by said agent, had made a special arrangement with him, by which he had a right to have the train which he entered, and upon which he took passage, stop and let him off at a station which the regulations of the company provided that that train should not stop at, it must have been made clearly to appear that it was the intention of the plaintiff to take the through train from Galveston to Chicago, which, by the regulations of the company, did not stop at the station to which he had bought his ticket, and where he intended to go, and that it was not his intention to wait an hour later and take the local train, which, under the regulations of the company, did stop at Lawrie, and that at the time the agent of the company knew that such was the intention of the plaintiff in error, and that the agent consented to this arrangement, and agreed that the regulations of the company should be suspended in order to suit this proposition and purpose of the plaintiff in error; and it must also specifically and clearly appear that the plaintiff in error acted upon the agreement thus intentionally and knowingly made between the agent of the company and himself, and that the plaintiff was at the time in the exercise of due care in making this agreement.

3. Under our system of code pleading, the petition must state the facts upon which the plaintiff relies for his recovery, and he cannot seek to recover upon a petition alleging a cause of action sounding in tort by proof of a breach of a contract, express or implied.

(Syllabus by the Court.)

Error to district court, Logan county; before Justice Frank Dale.

Action by Owen P. Noble against the Atchison, Topeka & Santa Fé Railroad Company and Joseph W. Reinhart, John J. McCook, and Joseph C. Wilson, receivers of said company, to recover damages for ejection from a train. From a judgment for defendants, plaintiff brings error. Affirmed.

Baker & De Bois, for plaintiff in error. Henry E. Asp, John W. Shartel, and J. R. Cottingham, for defendants in error.

McATEE, J. The petition of the plaintiff in error (plaintiff below) was filed in the district court of Logan county on the 14th day of August, 1894, and declared that the plain-

tiff on the 4th day of August, 1894, bought a ticket from the ticket agent of the defendant company at Guthrie, O. T., authorizing him, as a passenger, to ride over the road and in the cars of the defendants from the city of Guthrie to Lawrie, a point upon said line of railroad, and that as such passenger the plaintiff in error entered the cars of the defendants in error, and took his seat therein; yet said defendant company, by its agents and servants, disregarding its duty as such common carriers of passengers, before the cars of the said defendant company had reached the said town of Lawrie, and between the city of Guthrie and the town of Lawrie, at a point on the line of said road where there was no depot or place that had been used for the purpose of receiving and discharging passengers, stopped its train, and wrongfully and unlawfully forced and expelled the plaintiff from the cars of the said defendants, and refused to the plaintiff permission to further ride in the cars of the defendant company, and left the plaintiff there without having completed his journey, whereby he was greatly delayed in his business, and other wrongs then and there wrongfully, forcibly, and unlawfully did to said plaintiff, to his damage in the sum of \$5,000. The defendants filed an answer of general denial, and, for a second defense, alleged that the train on which the plaintiff took passage was a through passenger train, known as "Train No. 406," which, according to the rules and regulations of the defendants, was not scheduled to stop at the station of Lawrie; that the plaintiff was not entitled to ride as a passenger from the city of Guthrie to the station of Lawrie on said train; that the defendant company had other good and sufficient trains which ran between these points, and which did stop at that station, one of which left Guthrie within one hour of the time of the departure of train No. 406; that the plaintiff was notified by the conductor in charge of the train, between said stations, that he could not get off of said train at said station of Lawrie, and requested the plaintiff to pay 25 cents additional fare to the station of Mulhall, the nearest station where the train was scheduled to stop, and notified the plaintiff that unless such fare was paid the said conductor would be compelled to stop the train and eject the plaintiff therefrom; that the said plaintiff refused to pay such additional fare, and continued to insist on having the train stop at Lawrie, and remained upon the train, and was a trespasser thereon, until the train was stopped and plaintiff requested to leave the train, which he did, with the assistance of the conductor and other officers, without violence or force. To this answer a reply of general denial was filed. The case was tried on May 2, 1895, by a jury, and evidence was adduced to show that on the morning of the 4th of August, 1894, the plaintiff in error applied to the ticket agent at the railroad station in the

city of Guthrie for a ticket to Lawrie. It was in evidence that as soon as the train came in the plaintiff in error boarded it for his point of destination, and before reaching said point, and between the city of Guthrie and the town of Lawrie, the plaintiff in error tendered his ticket to the conductor, who demanded his fare, and was then, for the first time, informed that the train was not scheduled to stop at Lawrie, the point of plaintiff's destination. The plaintiff in error declined to pay additional fare to the station of Mulhall, the first station at which that train was scheduled to stop, and thereupon the conductor stopped the train and put him off about 1 or 1½ miles south of Lawrie. It was shown by the evidence that the train in question was a through express train from Galveston to Chicago; that it was not scheduled, by the rules of the company, to stop at small stations, and that the station of Lawrie was merely a way station, of no importance, and that there were only one or two houses at that point; and that there was kept in stock at the time, by the defendant company, printed folders containing full information as to the train schedule, for the use of the traveling public, which could be had at the ticket office upon application. It was shown that the train in question left the station of Guthrie at 5:55 a. m., and that there were two other trains in service daily which stopped at said station of Lawrie, one of which left Guthrie at 7 o'clock a. m. The defendant's office at Guthrie was open at all hours of the day for the sale of tickets to any point or station. Upon the close of the evidence the court, on the motion of the defendant, directed the jury to return a verdict for the defendants, to which the plaintiff in error excepted, and brings the case here.

The petition states a case in tort. In the absence of statutory provisions to the contrary, a railroad company has a right to adopt a regulation providing that one of its regular trains of passenger cars, or a part of them, running regularly upon its road, shall not stop at certain designated stations. And the duty is imposed upon one proposing to travel as a passenger on such road to inform himself whether the train upon which he takes passage stops at the station or place to which he is going, according to the regulations of the company. This is well settled in numerous cases. And in the absence of such statutory provision, and such regulation having been made upon the road, a passenger who holds a ticket for a station at which that train does not stop, and who is unwilling to ride to a station at which such train does stop, and to pay for such additional ride, may, in the proper manner, be removed from such train. *Railroad Co. v. Bartram*, 11 Ohio St. 457; *Railroad Co. v. Gants*, 38 Kan. 617, 17 Pac. 54; *Pennsylvania Co. v. Wentz*, 37 Ohio St. 337; *Railway Co. v. Applewhite*, 52 Ind. 540; *Railway Co. v. Swartout*, 67 Ind. 567; *Railroad Co. v. Randolph*,

53 Ill. 510; *Railroad Co. v. Cameron*, 14 C. C. A. 358, 66 Fed. 709; *Cheney v. Railroad Co.*, 11 Metc. (Mass.) 121. The necessary information could have been had from the agent of the defendant company when the ticket was procured. It was not shown that the plaintiff sought to inform himself, or to make inquiry, as to whether the train upon which he proposed to take passage would stop at the station of Lawrie or not, as it was incumbent upon him to do.

It is, however, argued by the plaintiff in error that he was misled or misinformed by the agent, or that a special agreement was made by the defendant company, through its agent, by which he was to be put off at the station of Lawrie. This contention is based upon the evidence, that: "I went to the ticket window, and asked the agent how long before the north-bound passenger was due, and he said, 'Eight or ten minutes.' Said I, 'Will you please let me have a ticket for Lawrie?' And that was all the conversation that passed. He sold me the ticket, and I paid for it." Upon this evidence it is contended that, even if the plaintiff in error has not made out a case in tort, he is yet entitled to recover, for the reason that the railroad company, through its agent, by misleading and misinforming the plaintiff in error, waived its right to carry the plaintiff in error past the station of Lawrie without stopping, and its regulations governing the running of its trains, in consideration of the purchase money for the ticket then sold, or else that it especially agreed with the plaintiff in error to stop and let him off at that station, and that it is liable because of its failure to keep such agreement, and that it is estopped from setting up its regulations as a defense. In order to sustain this contention, it is necessary that it should clearly appear in the evidence that it was the intention of the plaintiff to take the through train from Galveston, then due in 8 or 10 minutes, which, by the regulations of the company, did not stop at Lawrie, and that it was not his intention to wait from that time (5:55 a. m.) until 7 a. m., an hour later, and take the local train, which, by the regulations of the company, did stop at Lawrie, and that at the time the agent of the company knew that such was the intention of the plaintiff in error, and that the said agent consented to this arrangement, and that the regulations of the company should be waived to suit this proposition and purpose of the plaintiff in error; and it must also specifically and clearly have appeared that the plaintiff in error acted upon the agreement thus intentionally and knowingly made between the agent of the company and himself. It must also have appeared that the plaintiff was himself in the exercise of due care in making this agreement, and that he had taken pains to inform himself that the through passenger train which he did take did or did not, under the regulations of the company, stop at Lawrie,

and that the agent of the defendant company was fully aware and knew, by what transpired between them at the time, that it was the intention of the plaintiff in error to take the said through passenger train, and that he (the agent) understood it to be agreed upon between them that that train should stop at the station of Lawrie. *Owen v. Slatter*, 26 Ala. 547; *Bank v. Todd*, 47 Conn. 217; *Maxwell v. Bridge Co.*, 46 Mich. 278, 9 N. W. 410; *Canning v. Harlan*, 50 Mich. 320, 15 N. W. 492; *Gillett v. Insurance Co.* (Kan. Sup.) 36 Pac. 52; *Irvin v. Railway Co.*, 92 Ill. 110. The facts necessary to establish the right of recovery upon this hypothesis do not appear. The evidence does not sustain the conclusion sought for. And we hold, as a matter of law, that there was no evidence to go to the jury upon the proposition that any such implied or special agreement was made with the agent as is here contended for. And if, indeed, we could hold otherwise, and could find that the conversation had by the plaintiff in error with the ticket agent was evidence to go to the jury to sustain the proposition that an implied contract existed between the plaintiff and defendant, by virtue of misrepresentations made by the agent of the defendant, or that a special contract existed between the parties by reason of such conversation, yet such evidence was not admissible under the petition. No allegation is made in the petition that the plaintiff was misinformed by the agent of the defendant, nor is any recovery sought upon the special contract arising out of an agreement alleged to have been made with the agent whereby the company's regulations should be waived for the benefit of the plaintiff in error. The petition makes out a simple case in tort, arising upon the purchase of the ticket by the plaintiff for the town of Lawrie, and his wrongful expulsion from the cars of the defendants, and the injury suffered thereby, upon which allegations, as has been seen, the plaintiff is not entitled to recover. No principle is better settled, under the code pleading, than that the petition must state facts upon which the plaintiff relies for recovery, and it will not do to seek to recover upon a petition alleging a cause of action sounding in tort, by proof of the breach of a contract, express or implied. *Abb. Tr. Brief Pl.* § 1027; *Wilson v. Live-Stock Co.*, 153 U. S. 39, 14 Sup. Ct. 783; *De Bolt v. Railroad Co.* (Mo. Sup.) 27 S. W. 575; *Miller v. Hirschberg* (Or.) 40 Pac. 506; *Wilkinson v. Railroad Co.* (Fla.) 17 South. 71; *Peay v. Salt Lake City* (Utah) 40 Pac. 206.

The evidence which was adduced for the purpose of showing that the agent of the defendant had misled the plaintiff, or had made a special contract with him, was admitted over the objection and exception of the defendant in error. Upon the motion of the defendant to the court to direct the jury to return a verdict for the defendant, this

testimony was properly disregarded. The action of the district court in directing a verdict for the defendant is approved and affirmed.

ANDREW v. KENNEDY.

(Supreme Court of Oklahoma. Sept. 4, 1896.)

STATUTE OF LIMITATIONS—ACKNOWLEDGMENT OF EXISTING LIABILITY.

In order to revive a cause of action which has been barred by the statute of limitations under that provision of the statute which provides that an action may be brought within the period prescribed by the statute when there has been "an acknowledgment of an existing liability" in writing, the writing must be such as to show that the party admits or recognizes the debt or claim as one upon which he is still liable and bound for its satisfaction; and a letter written by the maker of two notes to the holder thereof, in which the maker of the two notes writes of a matter of "business" between them, and offers to give his own note, payable one year hence, for a sum less than one-half of the original liabilities, is not sufficient to remove the bar of the statute.

(Syllabus by the Court.)

Error from probate court, Payne county.

Action brought by Kennedy on January 12, 1895, in the probate court of Payne county, against Andrew, upon two promissory notes,—the one for \$62, dated September 24, 1887; the other for \$87, dated October 21, 1887,—due, respectively, 30 and 60 days from date, and each bearing 12 per cent. per annum interest from maturity. The plaintiff claimed that the following letter relieved the notes from the bar which would otherwise have been created by the five-years statute of limitations: "Stillwater, Ok., Dec. 29, 1894. Dear Friend Mr. Kennedy: I will Drop you a Few Lines to night in Regard to our Business. I want to say to you That we are in trouble here now For we got our Court house Burnt up here night Before last and it Through me in Bad Shape The same as the Rest of the county officers. We had no vault and Everything was Burnt But a few Books But the most important one were Burnt and all of the Register of Deeds Books were burnt and you can see that it through the County in Bad Shape. Now I want to say to you about our Business i have not got no money now nor wont have For some Time and i want to get That Thing off my mind Some time now i will make you a note for One Hundred \$100.00 payable in one Year and i will get the money by that Time and pay you and Less have it settled. I have Been hard up all of the Time so i could not do anything Of course you will loose But i Cant Pay every Thing and Live if i had the money i would pay the cash But i have not got I have a wife and a Baby to Take care of Now I will do this and see that it is Paid if You want to. Please Let me no and so instruct Fred Hunt. Yours, R. N. Andrew, Under-Sheriff." On trial on March 5, 1895, judg-

ment was rendered for plaintiff for \$281.37 and costs. From this judgment, defendant appeals. Reversed.

Geo. P. Uhl, for plaintiff in error. F. C. Hunt, for defendant in error.

BIERER, J. (after stating the facts). The question involved in this case is as to whether or not the letter set out in the above statement of the case, and which was written by defendant below to plaintiff on December 29, 1894, was such an "acknowledgment of an existing indebtedness" as would remove the bar of the statute of limitations as applied to the notes sued on. The statute is admitted to have run against the notes, and the action barred, unless this letter brings the cause within section 3896, which is as follows: "In any case founded on contract, when any part of the principal or interest shall have been paid, or an acknowledgment of an existing liability, debt or claim, or any promise to pay the same, shall have been made, an action may be brought in such case within the period prescribed for the same, after such payment, acknowledgment or promise; but such acknowledgment or promise must be in writing, signed by the party to be charged thereby." The sole and simple question is, is this letter "an acknowledgment of an existing liability, debt, or claim," as applied to the notes held by plaintiff, and which were signed by defendant? If it is, the judgment of the court below is correct. If it is not, the judgment is wrong. This letter does not in any way refer to either of the notes sued on. The plaintiff, however, sought to show by parol testimony that the letter referred to the notes upon which plaintiff brought his action. It is not necessary for us to determine in this case whether parol testimony can be resorted to to prove that a statement made in writing, which acknowledges "an existing liability," refers to a particular note. If that part of plaintiff's difficulty were overcome, the letter could not be held to be "an acknowledgment of an existing liability, debt, or claim," for the simple reason that the letter, in no part of it, makes any such acknowledgment. It is claimed by defendant in error that the word "business," used in the letter, referred to the notes, and by this expression they were recognized as an existing claim. If it is true that the language means that the notes were recognized as existing, it cannot be held that it referred to the notes as existing liabilities of Andrew's. The notes had long since been barred by the statute of limitations; yet they were a matter of "business" between them, because, from the tenor of the letter and what we gather from the case, the notes were in the hands of Fred Hunt, plaintiff's attorney, for collection. But recognizing and admitting the fact that the notes were a matter of business between them would amount to nothing more than an admission by Andrew that they would be, as they have been, the subject of a lawsuit between them if Kennedy persisted in his demands for settlement of the notes in full, and Andrew continued to refuse payment on those

terms. And surely this would not be an acknowledgment that the notes were "an existing liability," where they were, in fact, no liability at all without a direct or otherwise clear admission of their binding force upon Andrew. It is not every communication between an alleged debtor and an alleged creditor that recognizes an alleged claim as "an existing liability." They may have conferences, either oral or in writing, without there being any acknowledgment or denial of the claims of either of the parties. The most that can be said of this letter, even if it referred to these notes, is that Andrew acknowledged that these notes, many years past barred, were still held by Kennedy, and were in the hands of his attorney for collection, and that he then proposed, as a compromise of the claimed indebtedness of \$281.37, to give his note for the sum of \$100, payable one year hence. We can hardly regard that as a substantial acknowledgment of a present existing indebtedness. It is claimed, however, by defendant in error, that "the letter from Andrew to Kennedy fully discloses the writer's willingness to pay the debt," and that this "debt" referred to the notes in the suit. The willingness of Andrew to pay the debt did not refer to an existing one, but to one that he was willing should exist if Kennedy accepted his proposition; that is, he was willing to pay the \$100 at the end of the year, but he expressed no desire to recognize or meet the two notes in any other way. The letter is a mere offer to compromise, and is no such plain and direct "acknowledgment of an existing liability" as would take these notes out of the operation of the statute of limitations. Our statute of limitations was adopted from Kansas, and the construction placed upon the statute in that state prior to its adoption here is the construction that must be placed upon it here. The statute in question has been many times applied to cases before the supreme court of that state, and the rule enunciated definitely stated. In the case of *Green v. Goble*, 7 Kan. 297, it was held that a new note and mortgage, which were signed in pursuance to a previous arrangement, which was, however, never consummated, cannot be used as evidence of an acknowledgment of an existing debt. In the case of *Hanson v. Towle*, 19 Kan. 273, letters much stronger than the one in the case at bar were held not to have been "an acknowledgment of an existing liability." The meaning of the statute is stated in the language of Mr. Justice Brewer thus: "A mere reference to the indebtedness, although consistent with its existing validity, and implying no disposition to question its binding obligation, or a suggestion of some action in reference to it, is not such an 'acknowledgment' as is contemplated by the statute. This must be an unqualified and direct admission of a present subsisting debt on which the party is liable, and which he is willing to pay." In *Elder v. Dyer*, 26 Kan. 604, Mr. Justice Valentine, speaking for the court, stated what would revive a debt or claim under this statute in this language: "Anything that will indicate that the party making the acknowledgment ad-

mits that he is still liable on the claim, that he is still bound for its satisfaction, and that he is still held for its liquidation and payment, is sufficient to revive the debt or claim; and there is no necessity that there should also be a promise to pay the same, either express or implied." It will be observed that this language of the court omitted the words, "and which he is willing to pay," as used by Mr. Justice Brewer in *Hanson v. Towle*, in stating the elements of an acknowledgment of the existence of an obligation; and Justice Brewer, in the *Elder v. Dyer* Case, took occasion to expressly modify the language used in the case of *Hanson v. Towle*, and to state that the words "and which he is willing to pay" did not correctly state the law, and that such a willingness was not an essential part of the admission of an existing liability in order to revive the debt. In the case of *Gragg v. Barnes*, 4 Pac. 276, the supreme court of Kansas held that the making of a subsequent note for the amount of the original note and interest, which note was made on condition that the maker, who was surety on the first note, should bring suit against the principal on the first note, and should apply the property which it was supposed he could obtain by the action as a credit on the last note, and to assign to the holder of the last note the judgment which he should get against the principal on the first note, was not an acknowledgment of an existing liability on the first note. In this case Mr. Justice Horron, speaking for the court on the question, said: "In the case of *Hanson v. Towle*, 19 Kan. 273, it was held that to prevent the running of the statute of limitations upon an indebtedness there must be an unqualified and direct admission of a present subsisting debt on which the party is liable. This part of the opinion has never been changed or modified, and is the law of the state to-day. *Elder v. Dyer*, 28 Kan. 404." The only other Kansas case cited by defendant in error (and no other can have any bearing on the question) is *Pracht v. McNee*, 40 Kan. 1, 18 Pac. 925. That case is no support to the claim of counsel in this case. In that case *Pracht*, the debtor, within five years before the action was brought, and while "the note was in full force and effect," wrote the following postal card to *McNee*, the holder of the note on which judgment was rendered: "James McNee, Cottonwood Falls. I will turn you over farmers' notes for the note you hold against me,—the Figa note. Let me hear from you. F. Pracht." This was a written admission by the debtor that the party addressed held a particular note that was then in full force and a binding obligation on the writer of the card. In the case at bar the letter did not acknowledge that the notes were an existing obligation, and, if it has reference to them, they did not, in fact, exist as liabilities, for they were barred by the statute. The court below erred in holding that the letter of Andrew was an "acknowledgment of an existing liability" to Kennedy upon the notes sued on, and that they were thereby relieved from the bar of the statute. The judge-

ment of the court below must be reversed at the costs of defendant in error, with directions to sustain the motion of defendant in error for a new trial. All the justices concurring.

STEWART v. TERRITORY ex rel. WOODS, County Attorney.

(Supreme Court of Oklahoma. Sept. 4, 1896.)

MANDAMUS—REMEDY AT LAW.

The writ of mandamus will not be awarded when the relator has a plain and adequate remedy at law. The writ of mandamus is one of the extraordinary remedies resorted to in cases where the usual modes of procedure cannot furnish the desired relief. *Collet v. Allison*, 25 Pac. 516, 1 Okl. 42.

(Syllabus by the Court.)

Appeal from district court, Oklahoma county; before Justice A. G. C. Bierer.

This is a proceeding in mandamus, commenced in the district court of Oklahoma county by the territory of Oklahoma ex rel. J. H. Woods, county attorney, to compel S. A. Stewart to pay to the county certain moneys collected by S. A. Stewart, as probate judge, for issuing and recording marriage licenses. Defendant below demurred to the petition, which demurrer was by the court overruled, and judgment awarded as prayed for in the writ. The opinion states the facts. Defendant appeals. Reversed.

S. A. Stewart, J. Milton, and Asp, Shartel & Cottingham, for appellant. J. H. Woods and J. L. Brown, for appellee.

DALE, O. J. April 20, 1894, J. H. Woods, county attorney of Oklahoma county, on the relation of the territory of Oklahoma, filed a petition for mandamus in the district court of Oklahoma county against S. A. Stewart. In substance, the petition states that Stewart was on the 23d day of February, 1891; the duly elected and qualified probate judge of Oklahoma county and territory of Oklahoma; that during his continuance in office he issued and recorded marriage licenses, for which services, under the law, he collected the sum of \$1,280; that said Stewart admits the issuance and recording of such licenses, and the collection by him of the moneys, and that he has not paid any part thereof into the county treasury of the county; and that he claims the right to retain said money, under the law, for his services as such probate judge. The defendant below demurred to the petition upon the ground—first, that the petition failed to state a cause of action; and, second, for the reason that the law did not require him to turn over to the county treasury the money referred to in the petition. The matter was heard by the court, and, from an examination of the record, it does not appear that the first ground alleged in the demurrer was seriously urged in the court below, but that the case was decided upon the question

raised as to whether the law required the probate judge to pay the moneys collected from such sources into the county treasury, or whether he might keep the same to compensate him for his services performed in the issuing and recording of marriage licenses. In this court, by brief, counsel urge that mandamus will not lie in a case of this character, that the plaintiff below had an adequate remedy at law, and that the demurrer should have been sustained upon the ground that the petition failed to state a cause of action.

Under the law of this territory, as found in section 717, art. 33, c. 66, Code Civ. Proc., it is found that this writ may not be issued in any case where there is a plain and adequate remedy in the ordinary course of the law. This same statute, in effect, was passed upon by the supreme court of this territory in *Collet v. Allison*, 1 Okl. 42, 25 Pac. 516; and, in the opinion filed in that case, Justice Clark, speaking for the court, said: "The statute further provides that this writ may not be issued in any case where there is a plain and adequate remedy in the ordinary course of the law. This is the general rule recognized by all the courts. Not only does the petition fail to negative the idea that the plaintiff has any other mode of redress, but it is apparent that she has an adequate legal remedy by an action at law against the defendant." The statute which we now have is adopted from Kansas, and is the same, in effect, which has always been in force in that state. In *State v. McCrillus*, 4 Kan. 250, it was held that: "The law is that this writ shall not be issued when there is a plain and adequate remedy in the ordinary course of law. The facts show that the money is now in the hands of the treasurer; that it is due the relator, and he refused to pay it over. Is there not a plain and adequate remedy in the ordinary course of the law? An action against the treasurer on his bond is as plain a remedy as a suit upon a note, against a delinquent debtor. And if, as was suggested by counsel on both sides, the question of the validity of the bond is to be raised, such an action is a more appropriate one to try that question than is afforded by this writ." Again, in *State v. Stockwell*, 7 Kan. 98, it is held: "The writ of mandamus is an extraordinary remedy, to be resorted to whenever there is no other appropriate remedy. It will not be issued in any case where the applicant has a plain and adequate remedy, in the ordinary course of the law, for his supposed injury." In *State v. Bridgman*, 8 Kan. 458, it was held that "mandamus is not a fit or appropriate remedy to enforce an ordinary bailee to execute the terms of the bailment." And in that case it was claimed that a county treasurer was holding money arising from the sale of bonds, and that a portion of the money was due the relator, which the treasurer refused to pay. It was held that a suit upon

the bond of the treasurer afforded an ample remedy. In *Evans v. Thomas*, 32 Kan. 469, 4 Pac. 833, the court said: "Writs of mandamus are not allowed to parties in any case as a mere matter of course. They are allowed only when parties have rights to enforce, and then only when they have no other plain and adequate remedy in the ordinary course of the law, and only when justice would be likely to be defeated or frustrated unless the writ of mandamus be allowed." This case was followed by *State v. Hannon*, 38 Kan. 593, 17 Pac. 185, wherein the court stated the law thus: "All that is sought by the proceedings is to enforce the payment of the salaries and claims of officers and servants of the city. Their claims are not unlike those due from the city to any ordinary creditor, and hence there is no occasion to invoke the extraordinary aid of the courts by mandamus. Mandamus is one of the extraordinary writs, and is never issued when there is a plain and adequate remedy in the ordinary course of the law." Upon the same subject, *High, Extr. Rem. § 341*, states, "In conformity with the general rule, it is held that mandamus will not lie to municipal authorities, requiring them to pay salaries which are due from the corporation to its officers; a salary being regarded as an indebtedness of the corporation, which may be enforced by action in assumpsit, and mandamus is not designed as a remedy for the collection of debts." So, too, *Merrill, Mand. § 67*, has stated the proposition as follows: "This writ was designed only to meet emergencies,—to prevent a failure of justice. The courts intend that it shall be reserved for extraordinary occasions, and require litigants to use all available means to obtain the enforcement of their rights before they apply to the court for the assistance of this writ."

In the case under consideration the sole purpose for which the writ is prayed is to collect what it is claimed is due from the probate judge to the county. Probate judges, under our law, are required to give bonds for the faithful performance of their duty, and for the purpose of securing to any person who may be interested any funds which may come into their possession by virtue of their office. The petition in the case fails to show that there is any reason whatever to believe that any loss will accrue to the county in case they are put to their remedy at law, and we can see no good reason why this extraordinary power of the court should be invoked. By this decision we do not intend to hold that no case may arise wherein the court would not be justified in using this prerogative writ for the purpose of compelling an officer to surrender money which came into his possession by virtue of his office. Many cases might arise where a successor in office could not properly administer the functions of the office unless the money which belonged to the office

was surrendered to the successor, together with all other things pertaining to the office. But in the case under consideration we think the petitioner has failed to show any reason why he may not go to his action at law, and secure to the county everything which might be secured by the remedy invoked, and it also appears that there is a disputed question between the parties as to the liability of the defendant below to the county by reason of having collected this money. That question should be considered in an action brought upon the bond, where the defendant may have a full opportunity of being heard. The judgment of the lower court is reversed, and the cause remanded, with directions to dismiss the same.

BIERER, J., having presided at the trial of the cause in the court below, not sitting. The other justices concurred.

MILLIKAN v. BOOTH.

(Supreme Court of Oklahoma. Sept. 4, 1896.)

DEFAULT—WHAT CONSTITUTES—WITNESSES—RIGHT TO CROSS-EXAMINE—PREJUDICIAL ERROR—PRESUMPTION.

1. A party is not in default so long as he has a pleading on file which makes an issue in the case that requires proof on the part of the opposite party in order to entitle him to recover.

2. The right of cross-examination is a substantial right of each party to the cause, and a party cannot be deprived of it because, where an issue of fact was joined, he failed to appear at the time the cause was called for trial, and a default was entered against him; but on appearing during the trial, and at the close of the testimony of a witness, he had an absolute right to cross-examine the witness, a refusal of which is reversible error.

3. And where a party is improperly refused the right of cross-examination of a witness, it will be presumed that the rights of the party have been prejudiced thereby.

(Syllabus by the Court.)

Appeal from district court, Logan county; before Justice Frank Dale.

Action by William R. Booth against E. G. Millikan. Judgment for plaintiff. Defendant appeals. Reversed.

Huston & Huston, for plaintiff in error. T. H. Soward and Harper S. Cunningham, for defendant in error.

BIERER, J. The first error assigned for a reversal of the judgment below was in the refusal of the court to permit counsel for defendant to cross-examine the witnesses for the plaintiff in the hearing of said cause. It appears from the record that the plaintiff brought his action to recover judgment against the defendant for the sum of \$483.33, which he claimed was due him by reason of certain advancements of money made by the plaintiff to the defendant for the purpose of being used in buying, selling, trading, and trafficking in real estate in the city of Guthrie, Okla., and which money the plaintiff alleges

the defendant had invested in certain real estate in said city for the benefit of the plaintiff and defendant, and that the plaintiff's share of such investment was the amount sued for. The defendant, to this petition, filed a general denial, and also subsequent paragraphs admitting that he had received \$100 from the plaintiff, but alleging that he had fully paid the same to the plaintiff; and also setting up a counterclaim, and praying judgment against the plaintiff for the sum of \$35. The case was called for trial on the 11th day of April, 1894, and the plaintiff was placed upon the witness stand as a witness in his own behalf. It appears from the record that at the conclusion of the plaintiff's testimony the defendant's attorney, who was present, demanded the right to cross-examine the plaintiff, but was refused, because it was then 9:30 o'clock, and because at 9 o'clock the case was called and the defendant called three times, and, not appearing, was declared to be in default. To this refusal of the court to permit the defendant to make an examination of the plaintiff the defendant duly excepted, and also moved for new trial upon this ground, and on the ground that the judgment was for a larger amount than set up or prayed for in the petition.

The only question necessary for our consideration is, did the court err in refusing to permit the cross-examination of the plaintiff? The reason assigned for such refusal was that, the attorney for the defendant having failed to appear at the time the case was called for trial, a default was entered. The record shows, however, that the defendant had joined issue with the plaintiff upon his petition, and that his answer was not stricken from the files, but remained on file. Under this condition of the case the defendant could not be defaulted. Of course, although issue was joined, the court might have proceeded with the trial without waiting for the defendant or his counsel; but if his counsel made appearance at any time during the trial he would have the right to proceed with the trial, at whatever stage he then appeared in it, the same as if he had appeared at the commencement of the trial; and his only loss could be such advantages on the trial as he might have been able to gain by being present at the proceedings as far as they had then gone. It is well settled that after an issue is joined default cannot be taken against a defendant for his failure to appear when the cause is called for trial. 5 Am. & Eng. Enc. Law, 496. In the case of Moore v. Moore, 68 Ind. 152, an issue had been joined in the case, and at the calling of the case for trial the defendant failed to appear, and was defaulted. The court held: "This is erroneous. The answer in denial had not been withdrawn. A judgment cannot be taken against a defendant by default if there is an answer in bar in the record upon which issue is taken." In the case of Manufacturing Co. v. Caven, 53 Ind. 258, it was claimed that the court erred in proceed-

ing with the cause when it was reached, in the absence of the defendant or his attorneys, without calling and defaulting the defendant. The court said: "The failure of the defendants to appear upon the trial did not operate to withdraw their pleadings. The issues joined had to be tried and found for the plaintiff before he became entitled to judgment. The appellants claim, as we gather from their brief, that it was irregular thus to submit the cause for trial without having called and defaulted them, and that they had not in any manner waived their right to a trial by jury. The defendants could not have been defaulted as long as their pleadings were on file, and there was no error in proceeding with the trial without the formality of calling them." There are numerous other cases holding that a party cannot be defaulted after he has made his answer, and while his answer remains on file. *Maddox v. Pulliam*, 5 Blackf. 205; *Railroad Co. v. Marchand*, 5 Iowa, 468; *Arbuckle v. Bowman*, 6 Iowa, 70; *Bank v. Newberry*, 7 Iowa, 4; *Levi v. Monroe*, 11 Iowa, 453; *Knaebel v. Slaughter* (N. M.) 34 Pac. 198. The refusal of the court to permit the cross-examination of the plaintiff was such error as requires a reversal of the cause. The cross-examination of a witness is a substantial right which every party to an action has, and its refusal will be presumed by the court to prejudice the rights of the party. In the case of *Martin v. Elden*, 32 Ohio St. 282, it is said: "The importance of the right of full cross-examination of an adverse witness can scarcely be overestimated. As a test of the accuracy, truthfulness, and credibility of the testimony, it is invaluable. It is the clear right of a party cross-examining to elicit suppressed facts which weaken or qualify the case of the party examining in chief or support the case of the cross-examining party. *Pow. Ev.* 380. 'In any view, the right of cross-examination extends to all matters connected with the *res gestæ*.' *Whart. Ev.* § 529. A witness may be cross-examined as to his examination in chief in all its bearings, and as to whatever goes to explain or modify what he has stated in his examination in chief. *Wilson v. Wagar*, 28 Mich. 452." Further on in the opinion it is said: "It is claimed, however, that the judgment in question cannot be, for that reason, reversed, because it is not shown what the plaintiffs in error expected or offered to prove by way of answers to the questions propounded on cross-examination. But we think this rule can have no proper application to the cross-examination of a witness. * * * Where a witness, on his examination in chief, testifies to important facts in favor of the party calling him, we think prejudice to the adverse party should be presumed to arise from the denial of the right to a fair and proper cross-examination. And for the error of the court below in denial of this right its judgment will be reversed." Now, in the case at bar, the record shows that the principal evidence on which this large

judgment was rendered—it being almost \$200 more than the amount which the plaintiff claimed and asked for in his petition—was the evidence of the plaintiff himself, and who was sought to be cross-examined. This error demands a reversal of the judgment of the court below, and it will be so done, and a new trial ordered, at the costs of the plaintiff in error. All the justices concurring, except DALE, C. J., not sitting.

PARLIN & ORENDORFF CO. v. SCHRAM et al.

(Supreme Court of Oklahoma. Sept. 4, 1896.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—JURISDICTION OF PROBATE COURT.

1. An instrument assigning the personal property of an individual to another for the benefit of the former's creditors vests the district court with jurisdiction of the trust estate.

2. The probate court has no jurisdiction to render a judgment declaring an assignment, under our statute, null and void. *Smith v. Kaufman*, 41 Pac. 722, 3 Okl. 568. *Blerer and Taraney, JJ.*, dissenting.

(Syllabus by the Court.)

Error from probate court, Canadian county.

Action by the Parlin & Orendorff Company against Sidney Schram and W. N. Thomas. From an order dissolving an attachment, plaintiff brings error. Affirmed.

F. E. Gillett and M. D. Libby, for plaintiff in error. W. H. Grigsby, for defendants in error.

DALE, C. J. January 15, 1895, the Parlin & Orendorff Company filed a petition in the probate court of Canadian county praying judgment in the sum of \$982.27 against Sidney Schram and a partner, whose name it was alleged was unknown, as partners doing business as S. Schram & Co. The suit was instituted upon a contract between the parties to the action, by the terms of which the Parlin & Orendorff Company placed in the possession of S. Schram & Co. certain farm implements, which the latter were to sell, under an arrangement that the title to the goods was not to pass from the Parlin & Orendorff Company until the goods were by Schram & Co. sold, and when sold the proceeds of the sale of the same, whether cash, notes, or book accounts, were to be held by Schram & Co. as agent of the Parlin & Orendorff Company until the obligations of Schram & Co. under the contract should be paid. Under this contract the Parlin & Orendorff Company supplied goods to Schram & Co. to the amount in value of \$1,448.56, and at the beginning of this action in the court below there was still due from Schram & Co. to the Parlin & Orendorff Company \$982.27. At the commencement of the action an attachment affidavit was filed by plaintiff below, and an attachment levied upon the stock of goods formerly in the possession of the

defendant in the action. The grounds alleged in the affidavit are, in substance, that the defendant had, with intent to cheat, injure, and defraud plaintiff, converted to his own use, and the use of the partners composing said firm, all of the cash, notes, and accounts arising from the sale of said goods (referring to the goods furnished under the contract as above set forth), and had refused to deliver the same upon demand, and had fraudulently contracted the debt and incurred the obligation for which the action was brought, and had property and rights in action, which were concealed, and was about to transfer the property for the purpose of placing it beyond the reach of creditors, and had so transferred property with the intent to hinder and delay it in the collection of its debt. The attachment writ was duly issued and levied upon a stock of goods located at Yukon, and formerly in the possession of the defendant. January 21, 1895, one W. N. Thomas served notice upon the sheriff that he claimed the goods attached, by virtue of a deed of assignment executed to him on January 7, 1895, by Sidney Schram, and a demand was made for such goods. Thomas applied for and was granted leave to file his interplea in the action instituted by the Parlin & Orendorff Company, and, by such interplea, showed that on January 7, 1895, Sidney Schram executed to him a deed of assignment of all his personal property (Schram having no real estate), and in such deed assigned the property attached, and that he had accepted the trust; that, at the time of the execution of such deed, Schram was insolvent; that the deed was filed for record January 7, 1895; that on the 19th day of January he qualified as assignee before the Honorable John H. Burford, judge of the district court of Canadian county; that his bond had been duly approved by said judge; that, at the date of the assignment, Sidney Schram was the sole owner of the goods and other personal property; that the suit of the plaintiff below, upon which the attachment was instituted and levied, was subsequent to the deed of assignment, and at a time when he (Thomas) was the owner, as trustee, of the property levied upon; that the sheriff wrongfully holds the same, and thereby obstructs and retards the proper administration of the trust. The assignee prayed dissolution of the attachment, and damages in the sum of \$500 for the wrongful levy thereof. At the same time Sidney Schram filed an answer to the attachment, denying the grounds as set forth therein, and stating further that S. Schram & Co., as alleged in the plaintiff's petition, was in fact none other than Sidney Schram; that no partnership in fact ever existed; that he (Sidney Schram) owned all of the property held under the firm name of S. Schram & Co.; also admitted the deed of assignment, and said that he had transferred all of his property to W. N. Thomas by such deed. The defendant, Sidney Schram, and the inter-

pleader, W. N. Thomas, assignee, joined in a motion to discharge the attachment; and the case was by the probate court duly heard, and the attachment sustained as to S. Schram. The court held that the deed of assignment was a valid assignment of the property of Sidney Schram, and transferred such property to Thomas before the attachment was levied thereon; and the court directed the sheriff to return possession of the property to Thomas, and ordered the attachment dissolved, on the motion of said Thomas. To reverse the order dissolving the attachment on motion of Thomas, assignee, the case is brought to this court, and the errors assigned all go to the one question of the correctness of the ruling of the trial court in dissolving the attachment.

The deed of assignment from Sidney Schram is as follows:

"This deed of assignment, this day executed by and between Sidney Schram, of Yukon, Canadian county, and territory of Oklahoma, assignor and grantor, of the first part, and W. N. Thomas, of same place, assignee and grantee, of the second part, witnesseth, that whereas, the party of the first part is insolvent, and unable to pay his debts in full as they fall due, and desiring that his creditors shall be equally and fairly dealt with, he hereby sells, conveys, and assigns to the party of the second part all his estate and property, of any description whatsoever, and wherever situated, to have and to hold in trust for the use and benefit of all my creditors, and to dispose of and apply the same to and for the benefit of my creditors, according to law. I have reserved nothing from the operation of this assignment, except such things and items of property as are exempt by law to me as the head of a family and citizen of Oklahoma. Given under my hand and seal this January 7, 1895. Sidney Schram. [Seal.]

"I, Sidney Schram, do acknowledge the above and foregoing instrument of writing to be my voluntary act and deed. Signed and acknowledged in my presence this 7th day of January, 1895. W. J. Clark, County Clerk. [Seal.]"

Also appears the certificate of Charles Rider, register of deeds, showing that the above instrument was filed for record in the office of register of deeds of Canadian county on January 7, 1895, and an indorsement upon the back of the instrument as follows:

"I accept the within trust. January 7, 1895. W. N. Thomas."

In the court below the case was tried upon the attachment affidavit of the plaintiff, the interplea of Thomas, assignee, and denial by Schram of the grounds set forth in the attachment affidavit, and the reply of the plaintiff below to the interplea, denying the validity of the assignment.

Since the case and the briefs were filed in this court, an examination of the brief of appellee discloses that by agreement there is

inserted in writing, after the conclusion of the printed matter, an amendment wherein it is alleged that the probate court of Canadian county had no jurisdiction of the subject-matter of the action; citing *Smith v. Kaufman*, 41 Pac. 722, 3 Okl. 568: "Objection to the jurisdiction of the court, which goes to the power of the court over the subject-matter, may be raised at any stage of the proceedings." *Twine v. Carey*, 2 Okl. 249, 37 Pac. 1096. In *Myers v. Berry*, 3 Okl. 612, 41 Pac. 580, this court has also stated the rule thus: "When the court has no jurisdiction of the subject-matter, either party to the suit may avail himself of the objection at any stage of the proceedings; and, whenever the court takes jurisdiction of the subject-matter, it will, of its own motion, or when its attention is called to the fact, refuse to proceed further, and dismiss the case." And in the last case cited it is held that the objection upon jurisdictional grounds may be taken on appeal, after judgment, by a party in whose favor the judgment is rendered. And, without citing further authorities, it may be said that the rule is well settled that an objection may be taken for the first time in the supreme court to the jurisdiction of the court in which the action was originally instituted, and if such objection be good the appeal will be dismissed. *Smith v. Kaufman*, supra, was a case where the validity of a deed of assignment was called in question in the probate court by an affidavit of garnishment. It was sought thereby to compel an assignee to account for moneys received by him in the administration of his trust. It was alleged that the party garnished had not been legally appointed assignee, and the party procuring the garnishment asked that the assignment be declared null and void. The assignee demurred to the jurisdiction of the court over such matter. The demurrer was overruled. This court reversed the decision of the probate court, and, by Justice Scott, said: "With respect to the question of the assignment made by Newkirk to Smith, and the legal effect and validity of said assignment, from aught that appears in the record and transcript, the action taken and the steps pursued in perfecting the assignment of property appear on their face to be perfectly regular, and so far in conformity with the requirements of the statute as to make it a legal and valid assignment, and to vest the district court of 'K' county with full control over the action of the assignee, and of the funds which came into his hands as such assignee; and we do not think that the probate court had any power or authority in this collateral proceeding to take cognizance of, or exercise jurisdiction over, the subject of the assignment, and certainly, under the allegations of the pleadings of the plaintiffs, and in the light of the evidence introduced, the court had no power or authority to declare such assignment null and void. This could only have

been done by direct action in the district court, having for its object the annulment of the assignment itself; and so long as no direct steps had been taken in the proper court, impeaching the validity of the assignment, the probate court had no power to order a diversion of the funds in the hands of the assignee, and the payment of one creditor to the exclusion of others. And hence the court committed error in entering up judgment against the assignee, Smith, and requiring him to pay the money into that court."

The decision here quoted from seems to have been fully authorized by our statute which vests the district court of the territory only with jurisdiction in cases of assignments for the benefit of creditors. A portion of section 16 of chapter 5 of our statutes, entitled "Assignments," reads as follows: "After the lapse of six months from the date of filing his bond, the assignee, on motion of any one of the creditors, with ten days' notice, accompanied by an affidavit of the creditor, his agent or attorney, setting forth his claim and the amount thereof, and that no account has been filed within six months, may be ordered by the court, or by the judge thereof, at any place in his judicial district, to render an account of his proceedings, within a given time, to be fixed by the court, or the judge thereof, not to exceed fifteen days. All proceedings under this chapter shall be subject to the order and supervision of the judge of the district court of the county in which such assignment was made, and such judge may, from time to time, in his discretion, on the petition of one or more of his creditors, by order, citation, attachment or otherwise, require any assignee or assignees to render accounts and file reports of his or their proceedings and of the conditions of such trust estate, and may order or decree distribution thereof; and such judge may, in his discretion, for cause shown, remove any assignee or assignees and appoint another or others instead, who shall give such bond as the judge, in view of the conditions and value of the estate, may direct, and such order or removal and appointment shall in terms transfer to such new assignee or assignees all the trust estate, real, personal and mixed, and may be recorded in the deed records in the office of register of deeds of any county wherein any real estate affected by the assignment may be situated. And such judge may by order, which may be enforced as upon proceedings for contempt, compel the assignee or assignees removed, to deliver all property, money, choses in action, book-accounts and vouchers, to the assignee or assignees so appointed, and to make, execute and deliver to such new assignee or assignees such deeds, assignments and transfers as such judge may deem proper, and to render a full account and report of all matters connected with such trust estate. * * * And further in the same section it is provided that an assignee may

apply to a judge of the district court for a discharge, and that the judge may discharge him if he finds he shall be entitled thereto. The language of this section is such as to leave no doubt of the intention of the legislature. It is the purpose of the law to make assignees for the benefit of creditors wholly dependent upon the orders of the judge of the district court, and the trust assumed by an assignee can only be properly exercised when done in accordance with such orders. If, then, in the case under consideration, the object of the proceedings in attachment was to set aside entirely, or in any manner to affect the trust accepted under, the deed of assignment, the probate court had no jurisdiction of the subject-matter. By his interplea, Thomas showed that at the time the attachment was run he was, by virtue of the assignment, duly acknowledged, the assignee in possession of the property attached; that he had in good faith accepted the trust, and qualified under the law as assignee; and, further, that the judge of the district court had approved his bond. The time for the filing of the inventory had not yet expired, but he averred in his interplea that it was in preparation. The validity of the assignment was attacked by the answer of the plaintiff below to this interplea of Thomas, and it seemed to be the theory in the trial of the case that, if the assignment was not fraudulent and set aside, the attachment of the plaintiff would not avail him. As we view the law, the probate court had no jurisdiction to declare the assignment void unless, upon its face, the instrument purporting to assign the property of Schram was absolutely void. The judge of the district court had already acquired complete jurisdiction under the law of assignments, if the instrument itself was not a void instrument, which is the claim made by the appellants. Section 5 of chapter 5, *supra*, states what the character of the instrument must be which shall assign the property of one person to another for the benefit of the former's creditors, and is as follows: "Sec. 5. An assignment for the benefit of creditors must be in writing, subscribed by the assignor, or by his agent thereto authorized by writing. It must be acknowledged, or approved and certified, in the mode prescribed by sections 10 and 11 of this chapter." The legislature attempted to adopt the Dakota assignment law, but through the error of the compilers of the statute, or for some other reason, sections 10 and 11 of our law on assignments do not in any manner refer to the acknowledgment of a deed or instrument of assignment, but simply to the recording thereof, and the filing of an inventory; and it is contended by appellants that the acknowledgment of the instrument was fatally defective because neither in conformity with the assignment laws of the state of Dakota, nor of the laws relating to the recording of deeds in this territory. However that may be,—and upon

that question we do not now pass,—whether the instrument by which the property attached was properly acknowledged or not, it is clear that the same is not void upon its face. The statute requires that an assignment for the benefit of creditors must be in writing, subscribed by the assignor, or by his agent thereto authorized in writing, and must be acknowledged or approved and certified. All of these requirements have been fully complied with, unless it may be in the acknowledgment, and in that there was an evident attempt at compliance with the law. The assignment must stand until it is judicially found that in the acknowledgment there was some error, or not a sufficient compliance with the law which would make the assignment illegal. This matter could only be determined in a direct attack, and in the form created by law for the purpose of trying the question. As before stated, in order for the attachment to succeed it was necessary for the probate court to hold the assignment void. Inasmuch as the instrument assigning the property was not void upon its face, it is not subject to a collateral attack in this manner, but can only be set aside in a proper proceeding in the district court. This case comes squarely within the principle laid down in *Smith v. Kaufman, supra*, and the judgment of the lower court must be affirmed.

BIERER, J. Justice TARSNEY and I concur in affirming the judgment in this case, but believe that it should be done upon the merits of the case, and not upon the ground of want of jurisdiction in the probate court. In our judgment, that question has no place in this cause, and we do not assent to what is said on that subject.

DARLINGTON-MILLER LUMBER CO. v. HALL.

(Supreme Court of Oklahoma. Sept. 4, 1896.)

PROBATE COURT SITTING AS A JUSTICE OF THE PEACE—APPEAL—DISMISSAL.

A party appealing from a judgment of a probate court, sitting as a justice of the peace, may dismiss such appeal at any time before the commencement of the trial in the district court, without the consent of the other party; and upon such dismissal the judgment of the probate court is restored, and has the same force and effect as though no appeal had been taken. It is error for the district court to refuse to permit such appeal to be dismissed, and to proceed thereafter with the trial of the cause upon the merits.

(Syllabus by the Court.)

Appeal from district court, Logan county.

Action by the Darlington-Miller Lumber Company against A. S. Hall. Judgment in the probate court for plaintiff, and defendant appeals to the district court. From the judgment therein, defendant appeals. Reversed.

H. R. Thurston, for appellant. Keaton & Cotteral, for appellee.

TARSNEY, J. Action commenced in the probate court of Logan county by the appellee to recover of the appellant a balance of \$68.59 on account for lumber sold and delivered. Appellant answered in said cause setting up a counterclaim, asking that the same be set off against the claim of the appellee, and for judgment over for \$13.21. Judgment in the probate court for the plaintiff therein for \$1 and costs. Appealed to the district court of Logan county by the defendant. Motion in the district court, filed by appellant herein, to dismiss his appeal in said cause, which motion was on April 18, 1894, sustained, and by order of the district court the appeal was dismissed. Thereafter, on the 2d day of July, 1894, appellee herein filed his motion to vacate the order dismissing said appeal, and thereafter, on the 1st day of September, 1894, said motion was by the court considered and sustained, to which ruling of the court the appellant duly excepted. Afterwards, on the 23d day of October, 1896, the appellant herein filed his motion to dismiss said appeal, which motion was on the same day overruled. On said day the cause was tried in the district court upon the merits, the appellant herein having first, by leave of the court, filed therein an amended answer setting up the fact that subsequent to the order of said court dismissing said appeal, and prior to the order of the court setting aside said order of dismissal, appellant had paid to the clerk of said court the amount of said judgment, together with all costs accrued therein. And the said court rendered judgment in said cause in favor of the appellee herein, and against the appellant, for the sum of \$80.17, and \$8.07 attorney's fees, and for costs of suit. The appellant duly excepted, and has brought the case to this court by appeal.

The only error complained of or question raised by the appellant in this court arises out of the action of the district court, in reinstating said cause after sustaining the motion to dismiss the appeal therein. Counsel for appellant contends that the appellant, having taken the appeal from the judgment of the probate court, had the right to control said appeal, and might dismiss the same without the consent of the other party to such appeal. We think this contention must be sustained. We have been cited to but one authority by counsel for either party in this cause which bears upon the issue presented, namely, the case of *Railroad Co. v. Hammond*, 25 Kan. 203, which is directly in point. In that case Mr. Justice Brewer says: "Without noticing any further matters in the record, we are clearly of opinion that the court erred in overruling this motion. [A motion by appellant to dismiss his appeal, taken from the judgment of a justice of the peace.] A party who takes an appeal can withdraw it at any time before the commencement of the trial, and probably at any time before final submission of the case. Generally, it is true, in legal proceedings, that a moving party may

abandon his proceedings at any time before the final submission. An appeal is simply the proceeding of one party, the appellant. It is as much under his control as the prosecution of an original action is under the control of the plaintiff." And in that case the court held that it was error on the part of the district court to refuse to permit the appellant to dismiss his appeal. In *Bacon v. Lawrence*, 26 Ill. 53, it was held that an appellant in a case appealed from a justice court to the circuit court had an undoubted right to dismiss his appeal. The court says: "If the appellee is not satisfied with the judgment of the justice or the peace, he should himself have taken an appeal. By not doing so he acquiesced in that judgment, and must now be content with it. Taking an appeal by one party does not deprive the other of the right to do the same thing." In *The Delta v. Walker*, 24 Ill. 286, Mr. Justice Breese says: "Upon the remaining point, that the court refused to allow the appellant to dismiss his appeal, we have this to say: that as a general rule a party can dismiss his appeal, but the motion must be made at a proper time. In this case the parties had proceeded to trial before the court, and a full investigation was had, and the court had found its verdict. Subsequently the defendant entered his motion for a new trial, which was overruled, at which stage the appellant moved to dismiss his appeal. We think some discretionary power in such a case should vest in a court to allow or disallow such a motion at such a stage of the proceedings." And in *Latham's and Deming's Appeals*, 9 Wall. 145, the syllabus of the case is, "An appellant has a right to have his appeal dismissed, notwithstanding the opposition of the other side." Counsel for appellee has cited us to a number of cases decided by the supreme court of Missouri, to the effect that when an appeal is taken from the judgment of a justice the perfecting of the appeal divests the judgment of its legal effect; that the appellate court becomes possessed of the cause, and must enter a judgment of its own, disregarding the evidence before the justice, and the rulings of the justice. The statutes of Missouri upon which these decisions are based is entirely dissimilar to that under which the appeal was taken from the probate court in the case at bar; the statute of Missouri providing that where the appeal is dismissed the judgment of the justice shall be affirmed by the circuit court, and thereupon such judgment becomes a judgment of the circuit court, and is enforced therein. We are clearly of the opinion that the district court erred in sustaining the motion of the appellee to reinstate said cause after the appeal had been dismissed, and in refusing to sustain the second motion of appellant for leave to dismiss his appeal, and in proceeding thereafter with the trial of said cause, and rendering a judgment therein. For the reasons stated the judgment of the district court will be reversed, with instructions to

the court below to sustain the motion of appellant, and dismiss the appeal from the judgment of the probate court. All concur in the judgment.

PITTMAN v. CITY OF EL RENO.

(Supreme Court of Oklahoma. Sept. 4, 1896.)

DEFECTIVE SIDEWALK—CONTRIBUTORY NEGLIGENCE.—DEMURRER TO EVIDENCE.

1. If a person knows there is a dangerous place in a sidewalk, and he attempts to use the walk, and, in consequence of the darkness of the night, or by reason of weakened eyesight, he is unable to accurately determine the exact location of the point of danger, he has no reason to complain of any injury he may sustain by reason of the fact that he was unable to cross the dangerous place in safety.

2. Under the Code of 1890, in an action brought, founded on a claim of damages, by reason of injury received on account of a defect in the sidewalk, where, at the conclusion of the testimony for the plaintiff, the defendant tendered a demurrer, and where, under the facts as established by plaintiff's evidence, it clearly appeared that the plaintiff was guilty of contributory negligence, *held*, that it was the duty of the judge of the trial court to say, as a matter of law, whether or not, under the conceded facts, the plaintiff was guilty of contributory negligence; and further *held* that, where such facts showed contributory negligence, it was the duty of the trial judge to sustain the demurrer.

Scott, J., dissenting.

(*Syllabus by the Court.*)

Defendant in error filed its petition for a rehearing, and the same was granted at the June sitting of this term. The material facts are stated in the former opinion (37 Pac. 851) and in this opinion. Former opinion reversed.

Forrest & Guan, E. E. Blake, and W. H. Criley, for plaintiff in error. D. W. Talbot, John L. Dille, and John Schmook, Jr., for defendant in error.

DALL, C. J. Upon petition for rehearing the proposition is forcibly presented that this court, in its former opinion, failed to reach a correct conclusion upon the primary question involved in this case. This case arose under the Code of 1890. At the conclusion of the plaintiff's testimony the defendant filed a demurrer, and tendered all the evidence. The trial court sustained such demurrer, and the sole question before us is the ruling upon the demurrer. The facts as set forth in the former opinion are correct, and, summarized, may be stated as follows: The plaintiff in error resided in the city of El Reno, and at the time of the accident was 74 years old. Six months prior to the date when he received the injury, he was walking by the place where he was injured, saw the dangerous character of the walk, and called attention to such danger, and pointed it out to his companion as a place where a man was likely to step into and kill himself. He saw the defect almost every day from the time he first noticed it until he was afterwards injured. It was dark at the time of the accident. His eyesight was

dim. The dangerous place extended across the full width of the sidewalk. At the time of the accident he had in mind the defective place in the walk, its exact location, and its dangerous condition, and was watching for such defective place at the time the injury was received. The defect in the sidewalk consisted in an offset in the walk of about 10 inches, and a space of 8 or 10 inches, at the place where the lower abutted on the upper walk, was open,—not covered by a board. To use the language of the plaintiff will best show the condition of the sidewalk and the exact manner in which the injury occurred: "There was an offset in the sidewalk there of probably some ten inches, and down here, at the lower part, there was about eight inches without a board. I caught the low board with my toe, and, missing the high board, it being a dark night, and me watching for it, it being after night, and the light shining through the doors and windows, I could not see it, knowing that the place was there, and stepping clear over it. I caught the low part with my toe, which, threw the whole of my body back on the calf of my leg, and which crushed the calf of my leg." And in another place he says: "The light shining out of the doors and windows there, making the streets dark in some places and in other places making it light, and I was looking for that place there, as I knew where it was, but happened to miss it, and I stepped clear over it." Further on in his testimony, after stating when and under what circumstances he first obtained a knowledge of the condition of the dangerous character of the sidewalk, the following questions and answers were asked and given: "Q. When did you next see that place? A. I moved to the town on the 20th or 21st of March, 1892. Q. When did you next see this hole? A. Every day. Q. You passed along there every day? A. Yes, sir; I passed there every day. I cannot say I passed it every day, but practically every day. Q. You always noticed it as you went along? A. Yes, sir. Q. You knew, all of this time, the condition of the sidewalk? A. Certainly, and I was watching for it the very night I got hurt."

The extracts here set forth will convey a clear understanding of the question brought before the trial court raised on the demurrer: As a proposition of law, was the plaintiff guilty of such contributory negligence as to prevent his recovery? Upon the demurrer being interposed, it then devolved upon the court to announce the law as applicable to all the facts established, or reasonably inferable from the facts proved. Negligence is a mixed question of law and fact. When the evidence is conflicting, the question of fact should be submitted to the jury; but where there is no dispute as to the fact, it is then a question of law for the court. *City of Indianapolis v. Cook*, 99 Ind. 14; *Town of Gosport v. Evans*, 112 Ind. 133, 13 N. E. 256. The court was therefore bound to determine, as a matter of law, raised by the demurrer,

whether or not the plaintiff per se was guilty of contributory negligence. The law of negligence, it may be safely stated, is a proposition which gives the court more trouble in accurately defining than does any other question in the realm of the law. In almost every case where damages are sought from a municipality, or other corporation, for personal injuries received, the defense is contributory negligence. In general, it may be stated that the term "contributory negligence" is well understood, but in the application of the law to a given state of facts great difficulty is experienced. In almost all cases we find the facts and the law so closely intermingled that it frequently becomes very hard to determine when the questions involved are matters of fact for a jury or questions of law for the court. And perhaps it is well to say that, while general principles may be applied from which legal conclusions may be drawn, yet each case involving the question of contributory negligence must be determined in the light of the facts and circumstances surrounding that particular case. The authorities are very numerous, and so much at variance that it would be unprofitable to attempt to classify or review them. But, inasmuch as the Code of 1890 came from Indiana, and our climatic and other conditions are somewhat similar, we have given the law, as announced by the supreme court of that state, great weight. Very many cases have been decided in that state wherein the law of contributory negligence was involved. The first case which we note is *President, etc., v. Dusoncatt*, 2 Ind. 586, wherein the court lays down the following rule: "If a person knows there is an obstruction in a street, and he attempts to pass the place, when, in consequence of the darkness of the night, or the rise of water over the street, he cannot see the obstruction, he has no reason to complain of the injury he may receive on that occasion. He takes the risk in such case upon himself,"—citing *Farnum v. Town of Concord*, 2 N. H. 392. In *Bruker v. Town of Covington*, 69 Ind. 33, the rule is further discussed upon instructions given to the jury by the trial court, which instructions read as follows: "(1) If the plaintiff knew the opening in the cellar way was in the sidewalk, and he attempted to pass the place where it was, when, in consequence of the darkness of the night, he could not see it, he has no legal reason to complain of the injury he received on account of the fact that the opening or cellar way was there. In such case he must be treated as having taken the risk upon himself, and this, too, although at the time the fact of the existence of the opening was not present to the plaintiff's mind. (2) If the cellar way was an open one, and the plaintiff knew its location, and that it was an open one in the sidewalk, he must be held to know that there was danger of falling in it when passing the place on a dark night, and he cannot recover if, with

knowledge of the existence of the opening described in the complaint, he attempted to pass it on a dark night, and in such attempt was injured by falling into it." The court approved the instructions as given, and stated that it was unquestionably the law, and cite the language above quoted in *President, etc., v. Dusoncatt*, supra, and say: "That case has been approved in principle and followed by this court in numerous cases, and the rule recognized by it as to contributory negligence may be regarded as the settled law of this state." And the opinion concludes as follows: "To sustain the defense in this case, it was sufficient to show that the plaintiff had knowledge of the obstruction. Having such knowledge, it was for the plaintiff to judge for himself as to the dangerous character of the obstruction, and take the risk accordingly, if he runs upon it." A large number of cases are cited in support of the doctrine announced in the decision. In *Railway Co. v. Brannagan*, 75 Ind. 490, with reference to this subject, this language is used: "It is the duty of the plaintiff to prove, and the right of the defendant, who is charged with negligence causing an injury, that he should prove, by satisfactory evidence, that he did not contribute to the injury by any negligence on his part. This proof, in some form, constitutes a part of the plaintiff's case,"—and concludes by saying: "It is unnecessary, however, to multiply citations, for the rule has been long and firmly settled in this state that the evidence must show that the plaintiff, in actions to recover for an injury resulting from negligence of another, was himself free from contributory negligence." In *City of Indianapolis v. Cook*, 99 Ind. 10, we have a case very similar to the one under consideration. The facts, as found by the court, are as follows: "In the sidewalk in front of the premises of Reichwein, on Market street, in the city of Indianapolis, there was a water box, six by seven and one-half inches in size, and extending one and a quarter inches above the level of the sidewalk. The appellee stumbled and fell over said water box on the night of December 30, 1881, receiving the injuries complained of in the present action. At the time of the accident it was dark, and raining, and difficult for the appellee to see the water box. She was at that time well acquainted with the condition and situation of the water box, having for about sixty days prior thereto passed over the part of the sidewalk where it was located as often as two or three times each day." And upon such a state of facts the court concludes: "From the nature of the obstruction in question, with the appellee's knowledge of its condition and situation, it is manifest that, with ordinary care, she might have passed it, either to the right or to the left, or stepped over it, with safety. It seems that it was not so dark but that she could see the water box; but, if the darkness had been ever so

great, care in providing a light, or in walking, would have avoided stumbling and falling over the alleged obstruction. We think that this was a case where knowledge, such as was possessed by appellee, of the existence of the defect or obstruction in the sidewalk, which caused the injury, was conclusive of contributory negligence." Voluminous citations are given by the court in support of the position taken in that case. In *Town of Gosport v. Evans*, 112 Ind. 133, 13 N. E. 256, the question of what in law constitutes contributory negligence is discussed, and this statement of Lord Ellenborough in *Butterfield v. Forrester*, 11 East, 60, is quoted with approval: "A party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he do not himself use common and ordinary caution to be in the right. Two things must concur to support this action: an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff." In discussing the rule as above quoted, the court says: "This rule, stated in different language, has been consistently and uniformly declared and adhered to by appellate courts in every common-law jurisdiction;" citing *Beach*, *Contrib. Neg.* §§ 7, 77, and a number of cases. Following this, in the same opinion, the court further says: "One who knows of the dangerous obstruction in the street or sidewalk, and yet attempts to pass it, when, on account of darkness or other hindering causes, he cannot see so as to avoid it, takes the risk upon himself. For a much greater reason does he take the risk upon himself if, seeing an obstruction, and knowing its dangerous character, he deliberately goes into or upon it, when he was under no compulsion to go, or might have avoided by going around." Numerous other cases will be found in Indiana which support this doctrine announced in the quotations above set out from the supreme court of that state. In *Horton v. Inhabitants of Ipswich*, 12 Cush. 488, the rule is announced as follows: "The real point is, not whether the plaintiff was chargeable with any negligence in making his way over the road, after he had entered upon it; but whether he knew, or had reason to believe, that the road was dangerous when he entered on it, or before he reached any dangerous place. If so, he could not, in the exercise of ordinary prudence, proceed, and take his chance, and, if he should actually sustain damage, look to the town for indemnity." In *City of Erie v. Magill*, 101 Pa. St. 616, we find the same doctrine adhered to. To the same effect are *Parkhill v. Town of Brighton*, 61 Iowa, 103, 15 N. W. 853; *Corlett v. City of Leavenworth*, 27 Kan. 673; *Schaeffer v. City of Sandusky*, 33 Ohio St. 246; *Durkin v. City of Troy*, 61 Barb. 437; *City of Centalla v. Krouse*, 64 Ill. 19. Many other decisions from different states may be found holding to the same rule, and that this is

the general doctrine throughout this country will not be seriously questioned. There are numerous cases, however,—and we do not intend to question their soundness,—which hold that, because one has knowledge of a dangerous place in a sidewalk or highway, he is not bound to forego travel upon such sidewalk or highway. The doctrine to be deduced from such decisions is well stated in *Buesching v. Gaslight Co.*, 12 Cent. Law J. 273, by the supreme court of Missouri, as follows: "No person is required to abandon a convenient or accustomed route of travel in a city, because of dangerous excavations near the highway, unless the use of the way under such circumstances would be inconsistent with the exercise of reasonable and ordinary care;" citing *Smith v. City of St. Joseph*, 45 Mo. 440, and other cases. This language is quoted with approval in *Wilson v. Road Co.*, 83 Ind. 326. The following from 2 *Thomp. Neg.* p. 1203, § 52, would appear to embody the essence of the doctrine contended for by appellant: "Knowledge of a defect existing in the highway is not, in general, conclusive evidence of negligence in attempting to pass it. One injured upon a street he knew to be dangerous, need not show that he exercised extraordinary care while upon such street. A fortiori, he is not obliged to keep off from such street altogether. One may proceed if it is consistent with reasonable care to do so; and this is generally a question for the jury, depending upon the nature of the obstruction, or the insufficiency of the highway, and all the surrounding circumstances."

We will not enter into a discussion of the doctrine of comparative negligence, as such doctrine has, except in one or two jurisdictions, been completely set aside. It has been well said that the law "has no scales to determine in such cases whose wrongdoing weighed most in the compound that occasioned the mischief." But we find many of the cases which are cited in support of the right of a person to travel over a dangerous highway with knowledge of such danger, and, if injury results, obtaining damages therefor, to approach very closely the uncertain and irresponsible law of comparative negligence. In fact, it is almost impossible, in many of the cases, to define the exact place where the doctrine of contributory negligence leaves off and comparative negligence begins. The distinctions are sometimes drawn so fine that they lose much of their force. Under the Indiana Code, in order for the plaintiff to have stated a good cause of action against the defendant, it was necessary that the complaint must show by direct averments, or by the facts stated, that the plaintiff was without fault, and not guilty of contributory negligence. *Wilson v. Road Co.*, supra. This being true, it follows, in order to make a prima facie case, it was incumbent upon the appellant not only to show the injury, and that it was caused by the negligence of the city, but it also devolved upon

him to prove that he did not in any manner contribute by his own negligence to the injury received. In this regard the rule under the Code of 1890 was not the same as established in many of the states. As grouped by *Thomp. Trials*, § 1679, it is found that the rule that the burden of proof is upon the plaintiff to establish the absence of contributory negligence before he has established his case has been adopted in Massachusetts, Maine, Iowa, Illinois, Connecticut, Mississippi, Michigan, and Indiana. The states holding to the view that contributory negligence is a matter of defense are Pennsylvania, Missouri, Wisconsin, Kentucky, Maryland, Kansas, Alabama, Minnesota, New Jersey, California. In the other states the rule does not appear to have been well settled. In examining the authorities upon the question raised on the demurrer, it is well to keep in mind this rule as above announced. In states where the burden of proving contributory negligence is upon the defendant, such question not being necessarily involved in the plaintiff's case, it followed that a demurrer to plaintiff's evidence could not ordinarily be sustained. But where the contrary rule prevails, and the plaintiff has the burden of proving in his case in chief the absence of contributory negligence, then, upon demurrer, the court is bound to say whether or not, upon the state of facts established by the plaintiff, he has made a *prima facie* case. And the extent to which plaintiff is required to go in making his case has an important bearing in many of the decisions where the question of sustaining or overruling a demurrer is involved; but even in those states where it is held that the burden is upon the defendant, and where it is not incumbent on the plaintiff in the first instance to show that he was free from negligence or in the exercise of ordinary care at the time of receiving the injury complained of. It is said: "If, however, it appears, without any conflict of evidence, from the plaintiff's own case, or from the cross-examination of his witnesses, that he was guilty of negligence approximately contributing to produce the injury, it would be the duty of the court to take the case from the jury by declaring, as a matter of law, that the plaintiff cannot recover." *Buesching v. Gaslight Co.*, 73 Mo. 219; *Milburn v. Railroad Co.*, 86 Mo. 104. And in *Butterfield v. Forrester*, supra, it was stated: "But there are many cases where the facts are undoubted and unequivocal, and where the inference of carelessness arising thereupon is one which all fair-minded persons would draw. In all such cases the court may decide it as a question of law."

From these premises we deduce the following propositions:

First. In the case under consideration it was the duty of the plaintiff to establish in his case in chief the fact that he was not guilty of contributing in any manner to the injury received.

Second. When the demurrer was presented,

it was the duty of the trial judge to say, as a matter of law, whether or not the plaintiff did so contribute to the injury.

Third. The court should, in passing upon this question, concede all facts established, or reasonably inferable from the evidence, as being conclusively proved in favor of the plaintiff.

Giving to the established facts the view most favorable to plaintiff, what do we find? He was an old man, with dim eyesight. He had a thorough knowledge of a place in the sidewalk which he states was so bad that it was likely to cause the death of a person who might inadvertently step into it. He knew that such danger extended the full width of the walk, and that he could not pass along such walk without encountering it. With this knowledge in mind, he started, after dark, without providing himself with any means of accurately ascertaining the exact time when he would reach the dangerous place, to walk along the street where that identical danger point obstructed his path. The only light was what might flash through the store windows, and this was uncertain. He was looking for the danger, expected to meet it, and, by reason of insufficient light, happened to miss it a little, and received the injury. Did he act in this matter as an ordinarily prudent man would under such circumstances? Would a prudent man, at his age, and with his condition of eyesight, have hazarded his life so recklessly? Surely no sane man in the exercise of ordinary prudence would have attempted to cross over a place which he thought dangerous to life and limb without taking more precautions than did the plaintiff; and the law does not absolve a person under these circumstances, who only exercises ordinary prudence. It demands at his hands something more than this. When a person travels along a highway which he knows to be dangerous, the law is not satisfied unless he uses care commensurate with the danger about to be encountered. The law does not require too much when it asks an old man, with weakened eyesight, about to travel upon the highway which he thinks is dangerous to life and limb, to provide himself with a lantern to guide his footsteps; and in doing this it simply compels a person to use reasonable means to protect himself. Had the plaintiff below so provided himself, in all probability the injury would not have happened, but in case of injury he would then have been in a position to have claimed that he was injured while in the exercise of care commensurate with the danger to which he exposed himself. As applied to the case under consideration, the language used in the case of *President, etc., v. Dunsont*, supra, is clearly applicable: "If a person knows there is an obstruction in a street, and he attempts to pass the place, when, in consequence of the darkness of the night, or other hindering causes, he cannot see the obstruction and runs upon it, he has no reason to complain of the injury he may sustain. In such a case he

takes the risk upon himself." This language was approved in *Braker v. Town of Covington*, supra, and in other cases heretofore cited in this opinion, and we are now of the opinion that the conclusion heretofore reached by this court was erroneous. The judgment heretofore rendered in this case is vacated, and the judgment of the court below upon the demurrer is sustained.

SCOTT, J., dissenting.

ATCHISON, T. & S. F. R. CO. et al. v.
CHAMBERLAIN.

(Supreme Court of Oklahoma. Sept. 4, 1896.)

EXEMPLARY DAMAGES—WHEN ALLOWED—INSTRUCTIONS—SPECIAL QUESTIONS.

1. Exemplary, punitive, or vindictive damages will not be awarded unless there is proof going to show a wrongful purpose or reckless indifference of consequences, oppression, insult, rudeness, caprice, willfulness, or other causes of aggravation in the act or omission causing the injury, or because the injury was inflicted maliciously, wantonly, or under circumstances of contumely or indignity, or because the circumstances show a reckless indifference to duty, and to the security of the lives and limbs of persons, or their property, from which malice might well be inferred, or imputed to the defendant.

2. An instruction to the jury, directing them that they may "assess such additional sum as they may see proper, under all the circumstances, as exemplary damages, against the defendant, for the wrongs complained of in the complaint," if they find that such damages resulted from the carelessness and negligence of the defendant, and without fault on the part of the plaintiff, and which does not explain to the jury upon what conditions negligence would have entitled the plaintiff to damages, is erroneous.

3. Upon an instruction given by the trial court to the jury, that, in addition to compensation for actual damages, they may, if they see proper, also assess an amount for punitive or exemplary damages, it is error in the trial court to reject special interrogatories requested by the defendant from the jury, requiring them to state what amounts they find as actual damages, and what amount they assess as punitive damages.

(Syllabus by the Court.)

Error to district court, Cleveland county, before Justice Henry W. Scott.

Action by Hester Ellen Chamberlain against the Atchison, Topeka & Santa Fé Railroad Company and Aldace F. Walker and others, receivers of said company. From a judgment for plaintiff, defendants bring error. Reversed.

The defendant in error, as plaintiff, on the 1st day of March, 1893, filed her complaint in the district court of Cleveland county against the Atchison, Topeka & Santa Fé Railroad Company, claiming that on the 2d day of September, 1891, she purchased a ticket at Purcell, in the Indian Territory, entitling her to a passage to the station of Moore, in this territory; that she boarded the train in the nighttime, and that the conductor, upon taking up her ticket, and before arriving at the station of Norman, informed

her that the train on which she was riding did not stop at Moore, and that she would be required to get off at Norman; that she got off at Norman, and that at the time she so alighted it was nighttime, and very dark; that by reason of the negligence of the defendant, in the failure of its employees to assist her to alight from said train, and by reason of the company's failure to provide lights for the accommodation and safety of the plaintiff, and by reason of the rough, inhuman, and negligent conduct of the employees of the defendant, and the darkness of the night, the plaintiff, in alighting from the cars of the defendant, received injuries to her person from which she lingered for a long period of time, and which caused her great mental and bodily suffering, to her damage in the sum of \$10,000. The plaintiff afterwards, and on the 24th day of April, 1894, amended her complaint; alleging that she purchased her ticket at Ft. Worth, Tex., and that the plaintiff was free from fault in alighting from the train. The amended complaint also described the injuries with some particularity, alleging that the injury received was the dislocation of her ankle joint. On April 26, 1894, the defendants filed their answer to the amended complaint; specifically denying all the allegations of the complaint, alleging that the injury was the result of the plaintiff's own negligence, in carelessly walking off the train without looking where she was going, by reason of which she stumbled and fell. On the 2d day of May, 1894, the plaintiff replied to the second paragraph of the answer, which charged that the injury was the result of the plaintiff's own negligence, by a general denial. The case was tried on the last-named day. The testimony shows that on the 2d day of September, 1891, in the evening, the plaintiff bought a ticket from Ft. Worth, Tex., to Moore, Okl.; that she got on the train at Ft. Worth; that after passing Purcell, and before reaching Norman, the conductor looked at her ticket, and informed her that she would have to get off at Norman,—that the train on which she was riding did not stop at Moore; and that when she arrived at Norman she got off the train, and in getting off she fell somewhere between the platform of the car and the platform of the station, by which she received the injuries complained of. This occurred about half past 4 in the morning. There was a difference in the testimony as to the exact manner in which the plaintiff received her injuries, and as to whether the platform was properly lighted. On May 2, 1894, the jury returned a verdict for the plaintiff in the sum of \$1,000. A motion for a new trial was duly made and overruled, and the defendants bring the case here.

Henry E. Asp, John W. Shartel, and J. R. Cottingham, for plaintiffs in error. W. R. Asher, for defendant in error.

McATHE, J. (after stating the facts). Various assignments of error are argued in the briefs upon two propositions, to wit: (1) That the court erred in its instructions to the jury, and in excluding and refusing to submit to the jury certain requests for special findings of fact, as to the question of the right of the jury in this case, on the evidence, to estimate exemplary or punitive damages in their verdict; and (2) that the evidence was insufficient to uphold a recovery in the case. The court gave to the jury the following instructions: "(3) You are further instructed that, if you find for the plaintiff, it is your privilege to find any sum which, in your judgment, will compensate the plaintiff for injuries sustained, not exceeding the amount claimed; and in arriving at your verdict, if you find for the plaintiff, it is your duty to take into consideration the extent of the injury, and the amount you think will fairly compensate the plaintiff for such injury, considering her station in life, the condition she was in at the time she was injured, and her condition since that time, and her condition at the present time, as you see her on the stand;" and: "(19) If you find from the evidence that the injury complained of resulted from the carelessness and negligence of the defendant, and without fault of the plaintiff, then it will be your duty to assess her damages in such sum as will compensate her for the pain and anguish you may find she has suffered; and you may assess such additional sum as you may think proper, under all the circumstances, as exemplary damages, against said defendant, for the wrongs complained of in the complaint." The court refused to submit to the jury the following questions of fact: "(22) If you find for the plaintiff, state what amount you find as actual damages." "(27) If you find for the plaintiff, state what amount you assess as punitive damages." To these rulings of the court, exceptions were duly made and preserved.

The doctrine of compensatory relief for actual damages sustained is as stated in instruction No. 3; and the jury are instructed, in instruction No. 19, that if they find that the injury complained of resulted from the carelessness and negligence of the defendant, and without fault of the plaintiff, they may assess exemplary damages against the defendant. The doctrine of exemplary damages, as stated by Judge Seymour D. Thompson in his work on *Carriers of Passengers*, is as follows: "Exemplary, punitive, or vindictive damages, sometimes called 'smart money,' are only awarded in cases where there is an element of either fraud, malice, or such a degree of negligence as indicates a reckless indifference to consequences, oppression, insult, rudeness, caprice, willfulness, or other causes of aggravation in the act or omission causing the injury." *Thomp. Carr. Pass.* p. 573, § 27. It is stated in *Field, Dam.* as follows: "The general rule in reference to exemplary or punitive damages is that wherever the injury complained of has been inflicted maliciously or wantonly, or with circumstances of contumely or indignity, the jury

are not limited to simple compensation for the wrong done, but may give the party injured exemplary damages; and malice implies, not merely the doing of an unlawful and injurious act, but that it was conceived in the spirit of mischief, or of criminal indifference to civil obligations and the rights of others." *Field, Dam.* § 83, p. 90. And again, in section 84: "In cases of gross negligence,—and especially so gross as to reasonably imply malice,—or where, from the entire want of care, or great indifference to the persons or property of others, malice will be imputed, the weight of authority would seem to authorize the assessment of exemplary or punitive damages as a matter of law; but, to entitle the plaintiff to recover exemplary damages, the negligence should be so flagrant and culpable, or the circumstances of the case show such a reckless indifference to duty and to the security of the lives and limbs of persons or their property, from which malice may be inferred, or imputed to the defendant." The doctrine as here stated by these eminent text writers is based upon a multitude of authorities, including a uniform course of decisions by the supreme court of the United States, as well as by the supreme courts of many of the states of the Union. It is said in *Railway Co. v. Prentice*, 147 U. S. 101, 13 Sup. Ct. 261, that exemplary damages will be awarded if the defendant "has acted wantonly or oppressively, or with such malice as implies a spirit of mischief, or criminal indifference to civil obligations. But such guilty intention on the part of the defendant is required, in order to charge him with exemplary or punitive damages." The feature of gross negligence is therefore not comprehended as a ground of exemplary damages by the supreme court of the United States, unless it be shown that it has proceeded from such conduct as is wanton or oppressive, or with such malice as implies a spirit of mischief, or criminal indifference to civil obligations. The doctrine as stated by Judge Thompson and Mr. Field is fully borne out in *Mayor v. Frobe* (W. Va.) 22 S. E. 58, and *Railway Co. v. Ames*, 91 U. S. 489, in which the supreme court of the United States adopts the view of the highest English courts,—that there is no intelligible distinction between ordinary and gross negligence, and that only compensatory damages will be allowed unless there is "proof of a wrongful purpose, which may take a case out of the rule, as an exceptional one." *Franz v. Hiltbrand*, 45 Mo. 124; *Graham v. Railroad Co.*, 66 Mo. 541. *Railroad Co. v. Lipscomb* (Va.) 17 S. E. 812. It is again declared by the supreme court of the United States, in *Railway Co. v. Arms*, 91 U. S. 495, that in order to allow exemplary damages "there must have been some willful misconduct, or that entire want of care which would raise the presumption of conscious indifference to consequences." It is contended, however, that a different doctrine prevails in the state of Kansas. We have examined the Kansas authorities carefully, and do not find that they bear out any other view than that

which is here stated to be the doctrine enunciated by the supreme court of the United States, as well as the prevailing doctrine of the supreme courts of the various states. It is held in *Railroad Co. v. Rice*, 38 Kan. 404, 16 Pac. 817, "If that mistake was due to such reckless indifference to the rights of a passenger on the part of the conductor as established gross negligence, amounting to wantonness, and the jury so found, they might find exemplary damages." And again, in *West v. Telegraph Co.*, 39 Kan. 93, 17 Pac. 807, that "If there was such a gross negligence * * * as to indicate wantonness, or a malicious purpose, then the plaintiff would be entitled to exemplary damages."

Adopting the views here expressed, and repeatedly announced in various forms by courts of commanding authority, if the instruction given upon this subject in this case is to be sustained it must be sustained because of proof "of wrongful purpose," or "of reckless indifference to consequences, oppression, insult, rudeness, caprice, willfulness, or other causes of aggravation in the act or omission causing the injury," or because of injuries "inflicted maliciously or wantonly, or under circumstances of contumely or indignity," or because they showed a reckless indifference to duty, and to the security of the lives and limbs of persons or their property, from which malice may well be inferred, or imputed to the defendant. The testimony disclosed that while, in this case, the train arrived at the station at Norman while it was yet dark, the plaintiff was assisted from the train by the brakeman, who carried her child; that the car was provided with railings on each side of the steps leading from the platform, which the plaintiff did not use. Her testimony was: "I did not take hold of the railings. I wasn't very careful." The testimony was conflicting as to whether the brakeman had a light on his arm, or not, while he stood upon the platform of the depot waiting for her to descend, having himself carried out the child in advance. There was no other light upon the platform nearer than the window of the ticket office. It had been raining, and the platform and steps of the car, upon which the plaintiff slipped, were wet. We cannot hold that while the plaintiff failed to use such means as were provided for her safety, and while she admitted that she "wasn't very careful" herself, such a case has been made out, under the law, as would entitle her to exemplary damages. The plaintiff must herself have been in the exercise of due care, which does not appear. We think there was no testimony to warrant such damages, and that the instructions, in the form given, should not have been presented to the jury. We are also of the opinion that, if given, the court should have explained to the jury upon what conditions negligence or gross negligence would have entitled the plaintiff to exemplary damages. *Winstead v. Hulme*, 32 Kan. 508, 4 Pac. 994; *Railroad Co. v. McGinnis* (Kan. Sup.) 26 Pac. 453.

It is, however, argued in the brief of the defendant in error that the verdict was not ex-

cessive, even upon the third instruction of the court, which states the law of compensatory damages. But the verdict and judgment cannot be sustained upon this consideration, even if we could conclude that the damages were not excessive, or compensation for actual injuries received, since, upon the instructions, as given to the jury, they were permitted to assess exemplary damages; and it is impossible to disavow that part of the amount of the verdict was, in the estimation of the jury, compensatory, and that part thereof was assessed as exemplary damages. And it is therefore, also, apparent that special interrogatories numbered 22 and 27 should have been given to the jury, by which they were requested, if they found for the plaintiff, to discriminate and state what amount they found as actual damages, and what part thereof they assessed as punitive damages. The case is therefore reversed, and remanded for a new trial. All the justices concur, except SCOTT, J., who sat below.

PROCTOR v. STUART.

(Supreme Court of Oklahoma. Sept. 4, 1896.)

MANDATORY INJUNCTION.

Where A. filed a homestead entry for a tract of land on May 7, 1889, and B. settled upon the same tract on May 8, 1889, and on May 17, 1889, institutes contest in the local land office, charging A. with being disqualified to enter the land by reason of having entered upon and occupied a portion of the lands thrown open to settlement by the president's proclamation dated March 23, 1889, prior to April 22d, and subsequent to March 2d, of said year, and A. suffers B. to continue his settlement upon and improvement of the land for a period of five years, without objection, *held*, that a mandatory injunction will not lie to remove B. from the land in dispute pending the final determination of the contest between the parties.

(Syllabus by the Court.)

Appeal from district court, Oklahoma county; before Justice Henry W. Scott.

Action by Alice Stuart against Calvin Proctor. From an order awarding a mandatory injunction, defendant appeals. Reversed.

J. Milton, for plaintiff in error. J. H. Everest, for defendant in error.

DALE, C. J. The appellee, Alice Stuart, commenced an action in the district court of Oklahoma county against Calvin Proctor on March 5, 1894, asking for a mandatory injunction against Proctor to compel him to cease interfering with her possession of the N. E. $\frac{1}{4}$ of section 27, township 13 N., range 1 W. It appears from the record that Stuart filed her homestead entry for the tract of land above described on May 7, 1889, and Proctor, on May 17th, same year, filed a contest against the entry of Stuart, alleging as grounds therefor that she (Stuart) was disqualified from entering lands in Oklahoma by reason of having been in the territory prior to April 22, 1889, and subsequent to March 2, 1889; that, while Proctor claims to

have settled upon the land with his family on April 24, 1889, yet the report of the referee before whom the case was heard finds that his actual settlement upon the land was made on May 8th, one day after Stuart filed her homestead entry therefor; and also in his findings of facts the referee reports that Stuart has resided upon the land continuously since May 1, 1889, and since said date has made numerous and valuable improvements thereon; that Proctor has, since his said settlement, continued to reside upon and has improved the land by building a log house, breaking and cultivating about 17 acres of land, and that he has fenced about 25 acres thereof for a pasture. It also appears that about 40 acres of the tract has never been cultivated or improved by either Stuart or Proctor; that during all of the time intervening between the date of the filing of the contest and the present time, such contest has been pending either in the local land office or the department of the Interior at Washington, some of the decisions being in favor of the contestant and others in favor of the contestee. At the date this suit was instituted such contest was undetermined. The referee does not show in his report that Stuart ever in any way objected to Proctor's residence upon or improvement of the land prior to the commencement of her injunction suit. The referee concluded as a matter of law that Proctor was a mere trespasser upon the land, and that Stuart, by virtue of her filing, was entitled to the possession of the entire premises, and the court approved his report, and by its judgment awarded a mandatory injunction, ordering Proctor to cease trespassing upon the land, excepting that he was allowed 30 days to remove any improvements and the personal property he had upon the premises. From this order the defendant below appeals, and the sole question for this court to pass upon is whether or not the lower court erred in awarding the mandatory injunction prayed for.

That such injunction will lie in proper cases to preserve to a homestead entryman his right of possession in the land covered by his filing is well settled by the decisions of this court. *Sproat v. Durland*, 2 Okl. 24, 35 Pac. 682, 886; *Reaves v. Oliver*, 3 Okl. 62, 41 Pac. 353; *Woodruff v. Wallace*, 3 Okl. 355, 41 Pac. 857. And in this connection it may be well to note that other states have also held to a similar view. *Improvement Co. v. Winsor* (Wash.) 36 Pac. 441; *Lee v. Watson* (Mont.) 28 Pac. 1077; *Jackson v. Jackson*, 17 Or. 110, 19 Pac. 847; *Wood v. Murray* (Iowa) 52 N. W. 356. But all of these decisions are based upon a state of facts wholly different from those in the case under consideration. In *Sproat v. Durland*, supra, an injunction was awarded against a contestant who claimed settlement upon the tract of land subsequent four years in point of time to that of Durland, and which settlement by Sproat was attempted against the vigorous protests of

Durland by the purchase of the improvements of a person who had been the adverse party to Durland in a contest proceeding pending to determine the question of title in the land. The court held, under such circumstances, that Sproat was a mere trespasser, and that he could not, under such conditions, be permitted to claim a settler's right to reside upon and control in part the possession of the land. *Reaves v. Oliver*, supra, is a case where Oliver, the successful contestant, had, after five years' litigation, secured the cancellation of a homestead entry, and, after being awarded the preference right of entry, by virtue of his contest, one Reaves attempted to maintain a settlement upon the land, the claim of Reaves in his contest being that he settled upon the land previous to the date of the cancellation of the entry, which cancellation was the result of Oliver's contest, and the further allegation that the contest of Oliver was collusive and fraudulent. This court held that Reaves had no legal right of occupancy in the land, either by virtue of his settlement, made years after the land had been segregated by a homestead filing; neither had he any status as a settler against Oliver, who was objecting and protesting against such settlement. The case of *Woodruff v. Wallace*, supra, involves a somewhat different question. Wallace filed a contest against Woodruff, the entryman, and secured the cancellation of the homestead filing of Woodruff. The land department had closed the case, holding that Woodruff was disqualified to make a homestead entry. Wallace filed his entry for the land in dispute, and Woodruff refused to give possession. The court held that mandatory injunction would lie, as there was no adequate remedy at law whereby Wallace could be protected in his rights as a settler upon the land. The cases above cited from the different states which have passed upon this question are similar to the case of *Sproat v. Durland*, supra. The case we are now considering differs very widely in essential particulars from those heretofore presented. Both parties to this action have maintained settlements and homes upon the land from about the date when the country opened to settlers until the present time; both have made valuable and permanent improvements thereon; and it does not appear from the report of the referee that Stuart objected in any manner to the occupancy and improvement of Proctor until the institution of this action in the court below. It would seem that they have lived upon the same tract in peace, and no showing of acts of aggression or harassment upon the part of Proctor is attempted. Stuart has been very slow in proceeding to dispossess her adversary, and no reason is shown therefor. Under the pleadings and findings of the referee, Stuart appears to have waited until Proctor had improved a portion of the land before attempting to dispossess him. She does not need the land Proctor has for her own use,

as there is 40 acres still remaining of the tract, which she could occupy and improve if she so desired. Under these circumstances, her application has in it nothing which should appeal to a court of equity. She has suffered Proctor to remain in undisturbed possession of the tract of land from the date of her filing until she instituted this action,—a period of nearly five years; and a court of equity should be slow to assist by its speedy process of injunction a party who is so dilatory in asking its relief. In speaking of mandatory injunctions, Pomeroy, in volume 3, § 1359, states the rule as follows: "Where, on the final hearing in a case of nuisance, or interference with easements, or continued trespass analogous to nuisance, the relief is granted compelling the defendant to remove his obstructions or erections, and to restore the plaintiff to his original condition, and thereby to end the wrong, the remedy is in fact an ordinary decree for an abatement, and is in no proper sense an injunction of any kind. But in these and similar cases the preliminary injunction, while purporting simply to restrain the wrong, and while negative in its terms, may be so framed that it restrains the defendant from permitting his previous wrongful act to operate, and therefore virtually compels him to undo it by removing the obstructions or erections and by restoring the plaintiff to his former condition. Such an injunction is termed 'mandatory,' and resembles in its effect the restorative interdict of the Roman law. It is used where the injury is immediate and pressing, and irreparable, and clearly established by the proofs, and not acquiesced in by the plaintiff. . . . The rule is fully established, at least by the English decisions, and is not controverted by American authority, that in such cases, where the facts are clearly established, and the injury is real, and the plaintiff acted promptly upon his acquiring knowledge of defendant's proceeding, a preliminary mandatory injunction may be granted, although the act complained of was fully completed before the suit was commenced. It should be observed, however, that no other equitable remedy is more liable to be defeated by acquiescence, or by delay on the plaintiff's part from which acquiescence may be inferred." And in a note to the same section this language is also used: "Where the injunction is sought to compel the removal of structures, walls, buildings, and the like, if the plaintiff knowingly permit the defendant to go on and incur considerable further expenditure of money before he makes objection, he will generally lose his right to the somewhat special remedy of a mandatory injunction." This doctrine, with numerous citations in support thereof, is also found in section 42, volume 1, Beach, *Inf.*, and upon this the author says: "A party may forfeit his right to an injunction by sleeping on his rights, and allowing a grievance to continue for a long time. An injunction will be re-

fused to complainant who has intentionally delayed his application until he has obtained an inequitable advantage of the defendant." In support of this principle may be cited *Orne v. Friedenberg*, 143 Pa. St. 487, 22 Atl. 832, in which opinion the court said: "If there is anything well settled in equity, it is that a chancellor will not extend the aid of an injunction where a party has slept for a long time upon his rights. This is the recognized rule in England and in this country." In volume 2, § 1020, *Spell*, *Extr. Relief*, is found the same principle, with citations of adjudicated cases in support thereof. The cases in this court wherein relief has been granted by a mandatory injunction are those only where no adequate remedy at law could be invoked, or where the law's delay would greatly prejudice the rights of a plaintiff. In no case should this action obtain where the party invoking it has knowingly permitted the alleged wrong to continue for such a time that the granting of an injunction would work an injustice against a defendant. In the case under consideration Proctor has been permitted to build him a home, and make valuable improvements upon the land in dispute to the extent of \$500, as shown by the report of the referee. He has been engaged for five years in so doing, and all the time with the full knowledge of Stuart; and under the peculiar circumstances of this case the granting of an injunction against him which would dispossess him of his improvements and drive him from the land would be an inequitable act, and one from which no benefits would accrue to Stuart. If, after the title to this land shall have been settled in the department having jurisdiction thereof, Stuart is successful in obtaining such title, the injunction would properly lie to give to her that possession which cannot be obtained by a speedy process under the laws of this territory; but until such time we are of the opinion that Proctor should not be disturbed in such portion of the land as he has reduced to his own possession by the expenditure of his own labor and money. The judgment of the court below is reversed, and cause remanded, with instructions to render judgment in accordance with this opinion.

SCOTT, J., having presided at the trial in the court below, not sitting; the other justices concurring.

CHURCHILL v. CHOCTAW RY. CO.

(Supreme Court of Oklahoma. Sept. 4, 1896.)

RAILROADS—GRANT OF RIGHT OF WAY—CONSTRUCTION—HOMESTEAD.

1. An act of congress investing and empowering a railway company with the right of way of locating, constructing, owning, equipping, operating, using, and maintaining a railway through and over public land, and providing that said company is authorized to take and use, for all purposes of a railroad, a right of way over said public land, is a present, absolute grant.

2. A homestead settlement subsequent to such an act is subject to the rights of the railway company, although the line of the road was not definitely located until after the entry, and the settler cannot recover for damages necessarily occasioned by the building of the railway under said act.

(Syllabus by the Court.)

Error from district court, Canadian county; before Justice John H. Burford.

Action by David A. Churchill against the Choctaw Railway Company for injunction. From a judgment for defendant, plaintiff brings error. Affirmed.

M. W. Noffsinger and P. S. Nagle, for plaintiff in error. J. W. McCloud, for defendant in error.

SCOTT, J. On the 17th day of July, 1890, the plaintiff filed a petition before Hon. A. J. Seay, then judge of the Second judicial district of Oklahoma territory, alleging that the defendant company, under and by virtue of an act of congress approved February 18, 1888, and as amended February 13, 1889, was constructing a railroad across the S. E. $\frac{1}{4}$ of section 18, township 12 N., of range 5 E. of the Indian meridian, in Canadian county, Okl. T., which land the plaintiff had filed upon as a homestead on the 30th day of April, 1889, and was still occupying the same as a homestead. The petition further alleged that there was no statutory enactment, either territorial or federal, in force in Oklahoma territory, by which the damages by said railroad could be ascertained or adjusted, and no law or procedure by which railroads could be made to pay for their right of way, and the plaintiff therefore prayed for an injunction restraining the defendant from constructing the railroad until just and full compensation could be made to the plaintiff for the right of way. The judge of the court on the 21st day of July, 1890, granted an order of injunction until the further order of the court, or until the defendant company should deposit with the clerk of the court the sum of \$350. The order provided further that the plaintiff should, on or before the second regular term of court in said county after said date, bring his suit for damages against said railroad company, or the order of injunction would become inoperative, and the defendant should be entitled to withdraw the deposit. On the 10th day of October, 1890, the defendant filed a motion to vacate the injunction, for the following reasons: (1) That the petition did not state facts sufficient to authorize the issuing of the same; (2) the facts and allegations set forth in the petition upon which said injunction was granted were untrue; (3) that since the granting of said injunction the plaintiff had commenced proceedings to recover damages for the right of way in controversy in that case, under the provisions of chapter 16 of the Compiled Statutes of Nebraska in force in said state November 1, 1889, entitled "Corporations"; (4) that no bond or undertaking had been given in said case by the plaintiff. On the 10th of Novem-

ber, 1892, the defendant company also demurred to the petition upon the ground that the petition did not state facts sufficient to constitute a cause of action against the defendant. On the 13th day of December, 1892, in open court, before the Honorable John H. Burford, as judge of the court, after full argument, the said motion of the defendant to dissolve the injunction was sustained; and, the plaintiff refusing to amend his complaint or further plead, judgment was rendered for the defendant, from which judgment plaintiff has appealed to this court.

By act of congress approved February 18, 1888, the Choctaw Coal & Railway Company, defendant in error, was granted a right of way through the Choctaw Indian Nation. Section 1 of said act provided that "the Choctaw Coal and Railway Company be, and the same is hereby, invested and empowered with the right of locating, constructing, owning, equipping, operating, using, and maintaining a railway and telegraph and telephone line through the Indian Territory." Section 2 of said act provided "that said corporation is authorized to take and use for all purposes of a railroad, a right of way one hundred feet in width through said Indian Territory, and to take and use a strip of land two hundred feet in width, with a length of three thousand feet in addition to right of way for stations, for every ten miles of road, with the right to use said additional ground, where there are heavy cuts or fills as may be necessary for the constructing and maintenance of the road-bed, not exceeding one hundred feet in width on each side of said right of way." By act of February 13, 1889, the first section of the aforesaid act was amended so as to make the provisions of said act, including the grant of the right of way, extend from a point in the Choctaw Nation to a point on the Southern Kansas Railway between the two Canadian rivers, in the northwestern part of what was then known as the "Indian Territory." This act, in sections 3 and 5, contained certain provisions for compensation to the Indians for the right of way to their lands so taken, both as a nation and as individual occupants. By the act of congress of March 2, 1889, a large portion of said Indian Territory between the two Canadian rivers, hitherto occupied by the Seminoles,—the Indian title having been extinguished,—was made a part of the public domain, subject to homestead entry, by proclamation of the president. This act, however, expressly reserved rights of way and depot ground theretofore granted to railway companies through said territory. In said territory, thrown open to settlement, by proclamation of the president, under this act, is situated the land described in the petition of plaintiff in error, as plaintiff below, on which he made homestead entry April 30, 1889. Afterwards, on July 13, 1889, the defendant railway company filed with the secretary of the interior a map of its survey, as required by the aforesaid act, conferring its charter powers, and

showing its route over the homestead entry of plaintiff in error, which map or plat was approved by the secretary of the interior, in the following language: "Approved as to that portion of the line of road hereon that passes over public land, and subject to the provision of the act of congress approved February 18th, 1888." Plaintiff in error further claimed and alleged in his petition below that the defendant company "was claiming, and has commenced to appropriate a right of way over, the tract in dispute, where the plaintiff has the following improvements, to wit, a dwelling house, stable, hen house, an earth-covered cave, shade, fruit, and ornamental trees, and about sixty acres in corn, over the protest of plaintiff, and without condemning, or paying any compensation therefor."

The only issue presented by the pleading is, did the acts of congress aforesaid vest in the defendant company, absolutely in present, the right of way for railway purposes through the territory mentioned, or did they merely authorize the said company to acquire a vested title to such right of way on the performance of certain conditions in said acts mentioned, one of which was the filing of its map or plat with the secretary of the interior? If the former be the correct view, then plaintiff in error's homestead entry, being subsequent to the said acts of congress, was subordinate to the rights conferred on said company thereby, and plaintiff in error could not legally deny to defendant company the right to locate its line over this land without compensation. But, if the latter view of the law be correct, then plaintiff in error stated a cause of action in his petition, and is entitled to have the judgment below reversed. Counsel for both parties have filed exceedingly able briefs, showing great zeal and careful research on either side. We are of opinion that this question must be decided in favor of the view maintained by defendant in error,—that the grant of a right of way to defendant in error by the act of February 18, 1888, as amended February 13, 1889, was a "present, absolute grant," subject to certain conditions subsequent, in that part of the said territory remaining under Indian occupancy, and, so far as they were applicable in that part, thrown open to settlement. This is the construction given to that act by the supreme court of Oklahoma in the celebrated case of *U. S. v. Choctaw, O. & G. R. Co.*, 3 Okl. 404, 41 Pac. 729, which affirmed the judgment of Justice Scott, sitting in chambers, in said cause, in the Third judicial district, involving a temporary writ of injunction. Almost identically the same question was decided, after thorough and exhaustive investigation, by the supreme court of the United States, in *Railroad Co. v. Baldwin*, 103 U. S. 426. The following statement by the court shows that the contention of Baldwin in that case was precisely the same as the contention of Churchill in this: "This was an action by

the plaintiff, under the laws of Nebraska, to recover of the St. Joseph & Denver Railway Company, or its successor in interest, damages for entering upon his land in that state, and appropriating, in the construction of its road, a strip of land two hundred feet in width and two hundred rods in length. The company claimed a right of way over the land of that width, under the act of congress of July 23, 1860, etc. * * * When the grant of congress was made, the land claimed by the plaintiff was vacant and unoccupied land of the United States; but the line of road over it was not definitely located until October, 1871. He (Baldwin) acquired whatever rights he possesses in October, 1869. The defendant contends that the plaintiff took the land subject to its right of way. He contends that the grant of the right of way took effect only from the date at which the company filed its maps designating the route with the secretary of the interior." In the opinion based on these facts the court, speaking of the grant of the right of way, say: "It is a present, absolute grant, subject to no conditions except those necessarily implied, such as that the road shall be constructed and used for the purpose designated. Nor is there anything in the policy of the government with respect to the public lands which would call for any qualification of the terms. * * * The right of way for the whole distance of the proposed route was a very important part of the aid given. If the company could be compelled to purchase its right of way over any section that might be occupied in advance of its location, very serious obstacles would often be imposed to the progress of the road. For any loss of lands by settlement or reservation, other lands are given, but for the loss of the right of way by these means no compensation is provided, nor could any be given by the substitution of another route." Counsel for plaintiff in error in this case contends with much plausibility of argument that the grant of the right of way to the railway company being general, and the future location uncertain, and plaintiff in error having in good faith settled upon and improved the land in question before the defendant in error's line was definitely located, it would be essentially unjust for defendant in error to be now permitted to take his land and destroy his improvements without compensation; that such would be contrary to the liberal policy and purposes of the government in opening up the country to settlement. It must be remembered, however, that all persons are affected with notice of existing laws, and the constructions placed upon them by the supreme court, and that, prior to the time when plaintiff in error secured his homestead entry and made his improvements on the land in question, statutes similar to that we are now considering had been enacted, and had received a construction by the supreme court exactly opposite

to that contended for herein by him. Whatever view might be taken of the question by the court, were it raised now for the first time, and were we without a precedent for our guidance, it is not necessary now for us to consider. The identical argument made by counsel was made before the supreme court of the United States in the Baldwin Case. In that case it is further said: "The uncertainty as to the ultimate location of the line of the road is recognized throughout the act, and where any qualification is intended in the operation of the grant of lands, from this circumstance, it is designated. Had a similar qualification upon the absolute grant of the right of way been intended, it can hardly be doubted that it would have been expressed. The fact that none is expressed is conclusive that none exists." It is our opinion, from reading that act itself, and from precedent, that the act of congress of February 18, 1888, as amended by the act of February 13, 1889, was a present, absolute grant of the right of way to the Choctaw Coal & Railway Company through the then Indian Territory, and had priority over the rights of a homestead entryman under the act of March 2, 1889. The railroad company had the right to locate its line over what, in its judgment, was "the most feasible and practicable route"; and, if the line thus located passed over the land of the plaintiff in error, it is a hardship from which the courts cannot legally give him relief. The following are further authorities in point: *Bybee v. Railway Co.*, 139 U. S. 663, 11 Sup. Ct. 641; *Railway Co. v. Barney*, 113 U. S. 626, 5 Sup. Ct. 606; *Railway Co. v. Douglas Co.*, 31 Fed. 540; *Railway Co. v. Dyer*, 1 Sawy. 641, Fed. Cas. No. 2,552. The judgment of the court below is therefore affirmed. All the justices concurring.

WHALEY v. CHOCTAW RY. CO.

(Supreme Court of Oklahoma. Sept. 4, 1896.)

RAILROADS—GRANT OF RIGHT OF WAY—CONSTRUCTION—HOMESTEADS.

1. An act of congress investing and empowering a railway company with the right of way of locating, constructing, owning, equipping, operating, using, and maintaining a railway through and over public land, and providing that said company is authorized to take and use for all purposes of a railroad a right of way over said public land, is a present, absolute grant.

2. A homestead settlement subsequent to such an act is subject to the rights of the railway company, although the line of the road was not definitely located until after the entry, and the settler cannot recover for damages occasioned by the building of the railway under said act. *Churchill v. Railway Co.* (Okl.) 46 Pac. 503, followed.

(Syllabus by the Court.)

Error from district court, Canadian county; before Justice J. H. Burford.

Action by J. H. Whaley against the Choctaw Railway Company for injunction. From

a judgment for defendant, plaintiff brings error. Affirmed.

M. W. Noffsinger, for plaintiff in error. J. W. McLoud, for defendant in error.

SCOTT, J. This is an injunction proceeding, and is identical with the case of *Churchill v. Railway Co.* (heretofore decided by this court) 46 Pac. 503. The reasoning in that case is applicable here, and the determination should be the same. The decision in the case mentioned is based upon that of *U. S. v. Choctaw, O. & G. R. Co.*, 3 Okl. 404, 41 Pac. 729, and the accepted precedents of the country. Whaley, the plaintiff in error, is a homestead entryman, but made the same subsequent to the act of congress of February 18, 1888, granting a right of way to the Choctaw Coal & Railway Company, and consequently subject to the said right of way, though the line of road was not definitely located until after the entry, and the settler cannot recover damages occasioned by the building of said railway under said act. The judgment of the court below will be affirmed. All the justices concurring.

McCOOK et al. v. BRYAN.

(Supreme Court of Oklahoma. Sept. 4, 1896.)

RAILROADS—DUTY TO FENCE—ACTION FOR STOCK KILLED—PLEADING.

1. There is no obligation in common law upon a railroad company to fence its track. It has the right to enjoy its right of way free from intrusion or trespass, like other occupants and owners of real estate, except as provided by statute.

2. When the statute provides that when the owner of any tract of land abutting upon a railroad shall construct a good and sufficient fence about such tract of land on all sides except along the side abutting against such railroad, and when such owner of such tract of land shall have completed his portion of the fence about such proposed inclosure, he shall give notice of its completion to the railroad company upon whose line said tract is situated, and that, if such railroad company shall neglect or refuse to comply with the requirements of the act, such railroad company shall be liable for all damages accruing by reason of such neglect or refusal, it is held that such railroad company is not liable for damages for the killing of stock by its locomotives and upon its track, unless it is shown in the pleading, and is also proven in evidence, that the claimant for damages is an abutting owner, and that he has constructed his fence and given the notice required in the act, and that the railroad company has neglected to comply with the requirements of the statute.

3. In this territory an action for damages against a railroad company for injuries sustained by cattle upon the right of way of such railroad company is founded upon statute and upon specific conditions, and the conditions must be shown in the pleading and appear in the evidence in order to entitle the plaintiff to recover.

(Syllabus by the Court.)

Error to probate court, Noble county.

Action by Charles W. B. Bryan against John J. McCook and others, receivers of the Atchison, Topeka & Santa Fe Railroad Com-

pany. From a judgment for plaintiff, defendants bring error. Reversed.

Henry E. Asp, John W. Shartel, and J. R. Ottingham, for plaintiffs in error.

McATEE, J. In this case, the plaintiff below (defendant in error here) filed his petition in the probate court of Logan county on the 12th day of September, 1894, in which he alleged that the defendant was at various times therein specified operating a railroad, and, with its engines and cars which it was operating, ran against and killed several head of live stock belonging to the plaintiff in error, of the value of \$363; that the place where the stock were on defendant's road was not fenced, nor was it at a crossing over the same; that he made demand for payment therefor upon the defendant, which was refused, and for which he now seeks to recover in this action. The defendant answered by a general denial, and, at the commencement of the trial, objected "to the introduction of any testimony, for the reason that the petition did not state facts sufficient to constitute a cause of action in favor of the plaintiff and against the defendant," which objection was overruled, and excepted to by the defendant. The plaintiff thereupon introduced his testimony upon the following points only, namely: That the plaintiff was the owner of the animals set out in the petition; that, at the time stated in the petition, the animals were killed by the locomotive of the defendant; that the road was not fenced; and that the animals were of the value claimed in the petition. The defendants demurred to the evidence, upon the ground that the facts proved did not establish any cause of action; which demurrer was overruled, and excepted to, and verdict returned, and judgment entered in favor of the plaintiff for the amount claimed. A motion for a new trial was also overruled. The assignments of error are that (1) the court erred in overruling the objection of the plaintiffs in error to the introduction of testimony under the petition; and (2) in overruling the defendants' demurrer to the evidence; and (3) in overruling the motion for a new trial.

At the common law, the plaintiffs in error were entitled to exclusive possession of the road and right of way. They are entitled, like all owners and occupants of real estate, to the exclusive possession and enjoyment of their premises. They are entitled to be free from intrusion or trespass. They are under no obligation to fence or keep safe the property of adjoining proprietors, but, on the contrary, it is their legal right to enjoy their premises exclusively. They would at common law be entitled to claim damages if cattle should wander upon their unfenced track, and they should suffer damage thereby. The owner was under no obligation to fence, and he was entitled to exemption from disturbance, and to require that the owner

of adjoining land should restrain his cattle. *Railroad Co. v. Harter*, 38 Ind. 558; *Railroad Co. v. Baugh*, 14 Ill. 212; *Williams v. Railroad Co.*, 5 Ind. 111; *Hurd v. Railroad Co.*, 25 Vt. 122; *Wood, Ry. Law*, p. 1543. If, therefore, the plaintiff is entitled to relief, it must be by virtue of the statute. The provision on the subject is found in the Statutes of Oklahoma of 1893, in section 1047, providing that:

"§ 46. Whenever the owner of any tract of land abutting against any railroad within this territory shall desire to enclose any such tract of land for pasturage or other purposes, and shall construct a good and sufficient fence about said tract of land on all sides except along the side abutting against such railroad, it shall be the duty of such railroad company to construct a good and sufficient fence * * * on the side of such tract or lot so far as the same extends along the line of such railroad, and to maintain the same in good repair and condition until released therefrom by the owner of said tract, or until the owner of said tract shall have ceased to maintain in good repair and condition for the term of one year his portion of the fence around such enclosure."

"(1048) § 47. Whenever the owner of any tract of land shall have completed his portion of the fence about such proposed enclosure, he shall give written notice of its completion to the railroad company upon whose line said tract is situated; * * * and it shall be the duty of the railroad company to construct and complete its portion of such fence within sixty days after the service of such notice."

"(1049) § 48. If any railroad company shall neglect or refuse to comply with any of the requirements of this act, it shall be lawful for the owner of such tract to construct or repair the fence along the line of such railroad, and the railroad company shall be liable to the owner thereof, to an amount not exceeding one dollar and twenty-five cents per rod, to be recovered in a civil action; and such railroad company shall be liable for all damages accruing by reason of such neglect or refusal."

The modification of the common law here made is for the benefit of the "owner of any tract of land abutting against any line of railroad" only; and it is provided in his behalf only upon condition that he shall first construct a good and sufficient fence about said tract of land on "all sides except along the side abutting against such railroad," and "shall give written notice of its completion to the railroad company." It thereupon becomes the duty of the railroad company to construct and complete a line of fence along the said tract of land abutting on said railroad. If the railroad company neglects or refuses to comply with the requirements of the act, it becomes liable for all damages accruing by reason of such neglect or refusal. There is no other liability upon the railroad

company except as is provided in the statute, and, as is apparent, this liability exists only upon the conditions stated. These conditions are conditions precedent to a recovery. They must appear in the pleading, and be proven in the evidence. They are not set up in the declaration in this case. The plaintiff has not alleged that he had made an inclosure; nor has he given a written notice, as required by the statute; nor is it alleged that the railroad company had neglected or refused to comply with the requirements of the act; nor do these facts appear in the evidence. They are prerequisites to the right of recovery, and, as conditions precedent, they must be pleaded and proven affirmatively by the plaintiff as conditions precedent to his right of recovery, which has not been done in this case. *Railroad Co. v. Carter*, 20 Ill. 391; *Railroad Co. v. Brown*, 23 Ill. 94; *Comstock v. Railroad Co.*, 32 Iowa, 376; *Bates v. Railroad Co.*, 74 Mo. 60; *Williams v. Railroad Co.*, Id. 453; *Wood, Ry. Law*, p. 1548; 2 *Smith, Lead. Cas.* 184; *Williams v. Railroad Co.*, 2 Mich. 261; and cases cited above. Judgment reversed, and cause dismissed. All the justices concur.

MOSELY v. SOUTHERN MANUF'G CO.
(Supreme Court of Oklahoma. Sept. 4, 1896.)

JUDGMENT—ENTRY AGAINST DECEDENT—VALIDITY
—VACATION—PROCEDURE.

1. Where a court of general jurisdiction, or a court which has acquired full jurisdiction in attachment proceedings over the cause and over the parties, renders a judgment for or against a party after the death of such party, the judgment is not for that reason void. If the personal representatives of the deceased party be not made parties to the action before judgment, the judgment will be irregular and erroneous; but, until reversed or vacated by appropriate proceedings, it will be valid. Such judgment is not void, but only voidable.

2. Sections 238, 586, 588, Code Civ. Proc. (St. 1893), provide the procedure for vacating a judgment irregularly rendered in an attachment suit by reason of the death of the defendant after service and before judgment, and where the personal representatives of the deceased had not been made parties to the action; and a petition for injunction by an administrator to restrain proceedings on such judgment, which does not set forth the judgment, the grounds to vacate or modify it, and the defense to the action, does not state facts sufficient to constitute a cause of action, and is demurrable.

(Syllabus by the Court.)

Error from district court, Cleveland county; before Justice Henry W. Scott.

Action by one Mosely, administrator of S. E. Blake, deceased, against the Southern Manufacturing Company, for injunction. From a judgment for defendant, plaintiff brings error. Affirmed.

Hocker & Woods and Fisher & Hennessey, for plaintiff in error. Botsford & Brewer, for defendant in error.

TARSNEY, J. This action was commenced in the district court of Cleveland county to restrain the enforcement of a judgment previously rendered in said court in proceedings in attachment. Plaintiff in error is the administrator of S. E. Blake, deceased. The facts stated in the petition are: That previous to the commencement of this action the defendant in error had, in the lifetime of the said S. E. Blake, who was a nonresident of the territory, commenced an action in said district court by attachment. That, prior to the commencement of said attachment proceedings, other attachment suits had been commenced against said Blake by other parties. That a stock of merchandise belonging to said Blake had been seized under such attachments, and under an order of the judge, in vacation, the goods were sold, and the proceeds (\$950) brought into court. Pending these proceedings in the other attachment cases, defendant in error brought its suit in attachment against Blake, and a judgment was rendered therein in favor of the defendant in error, and that the money so in the hands of the court should be applied to the payment of the judgments of the respective attaching creditors. Constructive service in the attachment proceedings instituted by defendant in error against said Blake was regular and complete. That after such service, but before the rendition of judgment in favor of defendant in error, in such attachment proceedings, the defendant therein (Blake) died. And this cause was commenced to enjoin the enforcement of the judgment in attachment on the grounds that, the defendant in said attachment having died before the rendition of the judgment therein, the court had no jurisdiction to render said judgment, and that the said judgment and the proceedings thereunder were void. To the petition in this cause, defendant herein demurred on the ground that said petition did not state facts sufficient to constitute a cause of action. Said demurrer was by the court below sustained, and plaintiff in error, excepting, moved for a new trial, which motion for a new trial being overruled by the court, plaintiff in error, having excepted by petition in error, brings the cause to this court for review.

Whether the judgment in the attachment proceedings against Blake was void or only voidable for irregularity, on account of its being rendered after his death, a proceeding in equity, by injunction, to restrain the enforcement of such a judgment, is not the proper proceeding for relief. This proceeding seems to be founded upon two theories: (1) That the death of Blake dissolved the attachment, and (2) that the judgment is void in the attachment proceeding, because it is alleged that Blake died before the judgment was entered up. The decided weight of authority, as well as the better reason, is to the effect that an attachment is not dissolved by death unless some statute expressly so declares. *Mitchell v. Schoonover* (Or.) 17 Pac. 367; *More v. Thayer*, 10 Barb. 258; *Perkins' Heirs v. Nor-*

vell, 6 Humph. 151; Kennedy v. Raguet, 1 Bay, 484; Holman v. Fisher, 49 Miss. 472; White v. Heavner, 7 W. Va. 324. The decided weight of authority seems to be to the effect that if a court of general jurisdiction, or a court which has acquired full jurisdiction over the cause and over the parties, renders a judgment for or against a party after the death of said party, the judgment is not for that reason void. It may be erroneous, but, until reversed by some appropriate proceeding, it is valid. Reid v. Holmes, 127 Mass. 326; Mitchell v. Schoonover, supra; Tapley v. Martin, 118 Mass. 275; Kelley v. Riley, 106 Mass. 339; Tapley v. Goodsell, 122 Mass. 176. In Case v. Ribell, 1 J. J. Marsh. 29, it was held that such a judgment was not void, but erroneous; that the error consisted of matters of fact which, not appearing on the record, the court could not notice; and that the same was to be corrected by writ of error coram vobis. Yapple v. Titus, 41 Pa. St. 195; Hayes v. Shaw, 20 Minn. 405 (Gil. 355). Mr. Freeman, in his work on Judgments (volume 1, p. 276), says: "That there should, at some time during its progress, be living parties to both sides of an action, we think indispensable; and that no sort of jurisdiction can be obtained against one who is dead, when suit was commenced against him as a defendant, or in his name as a plaintiff, and that no judicial record can be made which will estop those claiming under him from showing that he died before the action was begun, and that a judgment for or against him must necessarily be void. * * * On the other hand, if an action is begun by and against living parties, over whom the court obtained jurisdiction, and some of them subsequently die, it is not thereby deprived of its jurisdiction; and, while it ought not to proceed to judgment without making the representatives or successors in interest of the deceased party parties to the action, yet if it does so proceed its action is irregular merely, and its judgment is not void." See cases cited in note to above. Section 238 of our Code of Civil Procedure (St. 1893) provides: "From the time of the issuing of the order of attachment, the court shall be deemed to have acquired jurisdiction and to have control of all subsequent proceedings under the attachment; and if, after the issuing of the order, the defendant, being a person, should die, or a corporation, and its charter should expire by limitation, forfeiture or otherwise, the proceedings shall be carried on; but in all such cases, other than where the defendant was a foreign corporation, his legal representatives shall be made parties to the action." And section 586 of said Code provides: "The district court shall have power to vacate or modify its own judgments or orders, at or after the term at which such judgment or order was made; * * * sixth, for the death of one of the parties before the judgment in the action." And section 588 of said Code provides: "The proceedings to vacate or modify the judgment or order on the grounds mentioned

in subdivisions four, five, six, seven, eight, and nine of section 586, shall be by petition verified by affidavit setting forth the judgment or order, the grounds to vacate or modify and the defense to the action, if the party applying was defendant. On such petition a summons shall issue and be served as in the commencement of an action." These various provisions clearly provide the procedure for the correction of the irregularity of a judgment rendered after the death of the party against whom such judgment was rendered, and clearly contemplate that the petition therefor shall set forth the judgment or order, as well as the grounds for vacating the same, and the defense to the action. The proceeding thus provided for precludes a proceeding by injunction to restrain the enforcement of such judgment without affording to the plaintiff in such attachment proceedings an opportunity to maintain his action, and to correct the irregularity in such judgment. As the petition of plaintiff in error in this cause did not state the substantial facts required to be stated by the provisions of the above section, such petition would not warrant the relief prayed for, and the action of the court below in sustaining a demurrer thereto was without error. The judgment of the court below will therefore be affirmed.

HANSING v. TERRITORY.

(Supreme Court of Oklahoma. Sept. 4, 1896.)
CRIMINAL LAW—DELIBERATION OF JURY—MAY
TAKE ONLY CERTAIN ARTICLES.

Section 5237 of the Statutes of 1893 provides that the jury, upon retiring for deliberation, may take with them all papers which have been received in evidence in the cause, or copies of such parts of public records or private documents given in evidence as ought not, in the opinion of the court, to be taken from the person having them in possession. This being the only statutory provision upon this subject, it was error for the trial court to permit the jury to take with them to their jury room, and to have the same in their possession in the jury room while deliberating, the Winchester rifle used by defendant, and the revolver used by his co-defendant, John Keefer, and the hat worn by the deceased, John A. Perkins, at the time of the affray, with the bullet holes in it.

(Syllabus by the Court.)

Error to district court, Logan county; before Justice Frank Dale.

Prosecution by indictment against Richard Hansing in the district court of Logan county for the crime of murder. He was convicted of the crime of manslaughter in the first degree, and sentenced to a term of six years in the penitentiary at Lansing, Kan. The defendant below brings error. The facts are stated in the opinion. Reversed.

George Gardner, for plaintiff in error.
Huston & Huston, for the Territory.

SCOTT, J. In the month of February, 1895, the plaintiff in error was prosecuted in the district court of Logan county, Okl. T.,

for the crime of murder in the first degree, and on the 28th day of February, 1895, the jury returned a verdict against him for manslaughter in the first degree. On the 9th day of May, 1895, the motion for a new trial was overruled, and plaintiff in error was sentenced to confinement in the penitentiary at Lansing, Kan., for a term of six years, and he prosecutes this appeal to reverse said judgment.

On page 347 of the record we find the following statement: "At the conclusion of the case, and after the court had instructed the jury, and when the jury retired to deliberate of their verdict, the court, over the objection of the defendant, permitted the jury to take with them to their jury room, and to have the same in their possession in the jury room while deliberating, the Winchester rifle used by defendant, and the revolver used by his co-defendant, John Keefer, and the hat worn by the deceased, John A. Perkins, at the time of the affray, with bullet holes in it; and to which action of the court the defendant duly excepted at the time." It further appears by the testimony of jurors on pages 357 and 362 of the record that the jury, after retiring, made a number of experiments with said instruments and hat. The only statute we have affecting the question is section 5237, which reads as follows: "Upon retiring for deliberation, the jury may take with them all papers which have been received in evidence in the cause, or copies of such parts of public records or private documents, given in evidence, as ought not, in the opinion of the court, to be taken from the person having them in possession." It is hardly necessary to quote authority to show that the language of this article does not embrace such articles as were admitted by the court to the jury room in this case. Those articles were certainly not "copies" of any "public record" or "private documents." Neither are they "papers" in any sense of the term. Such a construction would do violence to language. We are further of the opinion that, in the absence of statutory authority, the trial court could not legally, over the objection of defendant, permit such articles to be taken to the jury room, to be experimented with by the jury in the defendant's absence. What the authority of the court might be when the defendant failed to object or expressly consented, whether such a proceeding can be waived by the defendant in a felony case, especially a capital case, we need not discuss here. The principle is well stated by Mr. Wharton in his *Criminal Evidence*: "As we have seen, it is one of the necessary incidents of bringing into court instruments by which an act is alleged to have been done, that such instruments should be tested in court. It is only when this is done by the jury, after retiring, when the parties have no opportunity to revise the process, that objection can be made." See, also, authority cited in the text. This principle has been

followed with practical unanimity by courts of last resort. See *M'Coy v. State* (Ga.) 3 S. E. 770; *State v. Sanders*, 68 Mo. 202; *Jumpert v. People*, 21 Ill. 374; *State v. Justus* (Or.) 8 Pac. 337, also in several Texas cases. Besides, it appears that in this case the evidence is very conflicting. On the main point in dispute—that is, whether the defendant crossed over the road and fired on the deceased from the gate post, as claimed by the prosecution—the large number of witnesses favor the defendant. And while we might not regard the testimony as preponderating so strongly in favor of the defendant as to require us to set aside the verdict on that account alone, yet it trespasses narrowly on that border, and furnishes a strong reason for more careful scrutiny of the means by which the jury might have been, and probably were, influenced to reach their verdict. It appears by the testimony of two of the jurors that the jury, after retiring, in the defendant's absence, made a number of experiments with the gun and hat, for the purpose of testing the accuracy of the testimony of the different witnesses on that point; showing that the jury received light to enable them to reach a conclusion from a foreign and forbidden source. It is our opinion, therefore, that the judgment of the lower court should be reversed for the double reason: First, that forbidden articles were permitted to go to the jury, over defendant's objection, which of itself would be sufficient to require a reversal, though no injury be shown to have resulted from it; and, second, because it appears probable that defendant's cause was in part prejudiced by such action. The judgment below is therefore reversed, and the cause remanded for a new trial. All the justices concurring, except DALE, C. J., who presided below.

CITY OF EL RENO v. CULLINANE et al.
(Supreme Court of Oklahoma. Sept. 4, 1896.)
BOND—CONDITION—PENALTY—LIQUIDATED DAMAGES.

Whenever a party binds himself in a fixed sum for the performance or nonperformance of something, without stating whether such fixed sum is intended as a penalty or as liquidated damages, and without regard to the magnitude or the number of any breaches that may occur, or the amount of damages that may ensue, and the contract is such that it may be partially performed and partially violated, such fixed sum must be considered as a penalty, and not as liquidated damages.

(Syllabus by the Court.)

Error from district court, Canadian county; before Justice John H. Burford.

Action on a bond for damages by the city of El Reno against John R. Cullinane and his bondsmen for failure to construct an electric light plant and to maintain the same as required by the conditions of the said bond. Judgment for the defendants below. The facts are stated in the opinion. Plain-

tiff brings error. Judgment of the lower court affirmed.

John I. Dille and John Schmook, Jr., for plaintiff in error. J. H. Warren and Baxter & Severy, for defendants in error.

SCOTT, J. On the 1st day of May, 1893, at the request of the defendant John R. Cullinane, the city of El Reno passed an ordinance granting to said Cullinane and his associates the right to construct and maintain an electric light plant in the city of El Reno. It is provided in said ordinance that said Cullinane shall within 15 days accept the terms of the same, and execute a bond in the sum of \$1,000 for the faithful performance of his part of the terms of the ordinance. It is alleged in the petition that within said time from the passage of the ordinance said Cullinane accepted the terms of said ordinance and executed said bond. The conditions of said bond are as follows: "Now, therefore, if the said John R. Cullinane, his associates, assigns, or executors, shall within ninety days from the passage of said ordinance commence the construction of the electric light plant herein provided for in the said city of El Reno, and shall complete the same within three months from the expiration of the said ninety days, having the same in condition to supply electricity for light, heat, and power, as provided in said ordinance, then this bond shall be null and void; otherwise to be and remain in full force and effect." It is further alleged in the petition and admitted in the answer that said Cullinane and his associates have wholly failed and refused to construct said plant and to maintain the same. Plaintiff moved for judgment on the pleadings, which was overruled by the court, and subsequently made a motion for a new trial, which was also overruled. These two rulings are assigned as error, and present but one question to this court. Plaintiff in error makes the issue in this case purely one of damages. The petition in the district court is framed, and the case conducted, on that theory.

We see no essential difference in principle between this case and that of Kelley v. Seay, 3 Okl. 527, 41 Pac. 615. If any difference, the rule therein laid down would apply with greater force to the present case. In this case the bond is in the ordinary form of a penal bond or obligation. In such case the presumption is very strong that the parties intended the sum named in the bond as a penalty, and not as liquidated damages; because, if they intended it as liquidated damages, it is so easy for them to say so. And if we insist that they intended it as liquidated damages, when they did not say so, we find them guilty of a serious oversight. I should require very potent circumstances to change that presumption. The intention of the parties to liquidate the damages must be so obvious as to force us to the conclu-

sion that the failure to so state in the bond was clearly an oversight. Nilson v. Town of Jonesboro (Ark.) 20 S. W. 1093; also Kelley v. Seay, 3 Okl. 527, 41 Pac. 615; Heatwole v. Gorrell, 35 Kan. 693, 12 Pac. 135, and authorities cited. The rule laid down in Heatwole v. Gorrell we think applicable to this case,—that: "Whenever a party binds himself in a fixed sum for the performance or nonperformance of something, without stating whether such fixed sum is intended as a penalty or as liquidated damages, and without regard to the magnitude or the number of any breaches that may occur, or the amount of damages that may ensue, and the contract is such that it may be partially performed and partially violated, such fixed sum must be considered as a penalty, and not as liquidated damages." The bond in the case at bar has two conditions,—one that the work shall be begun by a certain day, the other that the work shall be completed by a certain day. These conditions seem very unequal. It is difficult to see how more than nominal damages could result from a breach of the former, while a breach of the latter might, under certain circumstances, result in very heavy damages. In case the former condition alone had been broken, and the other complied with by a completion of the work in the prescribed time, it would be unconscionable to allow \$1,000 as liquidated damages; and this is a powerful argument in support of the presumption that the parties did not intend the sum named as liquidated damages. Indeed, so far as the record shows, no actual damages whatever have been suffered by the public, or by the city in its corporate capacity. Therefore we see no reason why this question should not be controlled by our statutes (sections 2853 and 2854); so, even if the bond had expressly fixed the sum as liquidated damages. But counsel for plaintiff in error advances a rather novel argument in favor of his claim for liquidated damages; that is, that the city of El Reno, being a public corporation, and having suffered no damage in its corporate capacity, could recover only such damages as might have accrued to the general public, and that being admitted uncertain, indefinite, and incapable of computation, it must therefore be presumed that the sum named in the bond was intended as liquidated damages. With due respect to the learned counsel who advanced it, we think this proposition proves too much. If it is impossible to estimate by any known rule the damages suffered by the public on breach of the conditions of the bond, it would be equally impossible for the same reason to ascertain whether the public had suffered any actual damages at all. In such case we see no ground for indulging the presumption that the parties intended the sum named as liquidated damages, when they failed to say so in the bond. Before such presumption can be indulged in, the right to actual dam-

ages to some amount must be unquestioned. Then, if those damages are difficult of computation, the presumption may be resorted to. The judgment of the court below is affirmed. All the justices concurring.

DIEBOLD SAFE & LOCK CO. v. HOLT.

(Supreme Court of Oklahoma. Sept. 4, 1896.)

**SALE—IMPROPER SHIPMENT—LIABILITY OF SELLER
—EXPERT EVIDENCE—TENDER—PLEADING
—AMENDMENT—CONTINUANCE.**

1. The defendant contracted with the plaintiff for the purchase of a fireproof safe, agreeing to "deliver the safe on board the cars at Canton, Ohio." Evidence was adduced to show that the plaintiff had crated and fastened the safe upon the side of the car upon which it was placed for shipment, near and opposite to an iron bolt or bolts protruding from the side of the car, and that upon reaching Wharton, in this territory, to which it was shipped, it was found that the safe had been perforated and damaged by friction against the bolts referred to. *Held*, that the plaintiff was responsible for the careful and proper shipment of the safe, and that, if it was negligent in this particular, it was responsible for the damage occasioned thereby.

2. Upon the question of what amount of damages has been done to a fireproof safe by the holes punched in it during transportation, the testimony of witnesses who have had several years' experience in buying, selling, and dealing in and using safes of a similar character, is properly admitted.

3. A pleading which declares that "the defendant tendered the plaintiff the sum of seventy-two dollars in full of all amounts due under the contract at the time of the commencement of the suit, which amount the plaintiff refused to have, and at all times refused to accept," and this allegation not having been demurred or objected to, is a sufficient allegation of tender, under which facts may be adduced; and, the evidence having been produced showing that the tender was made as alleged, the judgment of the court will not be reversed because the pleading failed to state that the amount of the tender was now brought into court, and that the defendant was still ready to pay the amount of the tender.

4. Under the Statutes of 1890, upon an amended answer, in which an entirely new defense is set up and the issue changed, it is not error for the court to refuse to continue the case upon the application of the plaintiff, in the absence of an affidavit showing good cause therefor.

(Syllabus by the Court.)

Error to district court, Payne county; before Justice Frank Dale.

Action by the Diebold Safe & Lock Company against M. W. J. Holt. From a judgment for plaintiff for a less sum than that demanded, plaintiff brings error. Affirmed.

This was a suit brought in the district court of Payne county, to recover the amount claimed by the plaintiff in error to be due upon a contract made with the defendant in error, at Stillwater, Okl., on the 25th day of May, 1892, by which the defendant in error ordered the plaintiff in error, a corporation located at Canton, in the state of Ohio, to ship to him, "on September 1, 1892, unless ordered sooner, one of your number 33 fireproof safes. * * * For this safe, delivered on board of cars at

Canton, Ohio, I will pay you two hundred and twenty-five dollars, less freight to Wharton, Cherokee Strip, I. T., and my 117,700 steel-lined Hall safe, delivered at Wharton depot, above amount to be as follows: Freight and my Hall safe upon arrival; balance to be in twelve notes, equally divided, due, respectively, every thirty days, beginning the date from arrival of the safe at Wharton, and seven per cent. interest per annum. * * * This order is given subject to your approval; and, in consideration of the above price, we hereby agree not to countermand this order until a reasonable time has been given for such approval, but to receive and pay for the same as above stated. No agreement of any kind not stated in this order shall become a part of this contract. M. W. J. Holt, Stillwater." The plaintiff in error accepted the order, and at once notified the defendant of its approval, and on the 1st day of September, 1892, in compliance with the contract, placed on board of the cars at Canton, Ohio, a fireproof safe, conforming to the order, and billed to Wharton, Cherokee Strip, I. T. Upon being notified of the arrival of the safe at Wharton station, the defendant in error delivered to the plaintiff his No. 117,700 steel-lined safe there, and paid freight on the new safe then received under the contract, amounting to about \$50, and took it to Stillwater, a distance of about 25 miles from the railroad. When received from the railroad company, it was found to be in a damaged condition, caused by coming in contact with the end of a bolt on the inside of the freight car upon which the safe was shipped, and which bolt was the ordinary bolt used in joining the framework of the freight car together. The defendant refused to comply further with the contract, and declined to make any further payment of the notes or interest as provided therein. Suit was brought by the plaintiff in error against the defendant in error to secure the balance of payments upon the 14th day of January, 1893. The defendant, by answer filed upon November 18th in the cause, admitted the contract for the safe, and declared that, under the terms of the contract, it was the duty of the plaintiff to place the safe on board the cars in the city of Canton, Ohio, and then and there to so box, crate, and load it upon the cars that it might be carried safely, and without damage, from the city of Canton to the station of Wharton, in the Cherokee Strip. The answer of the defendant then proceeded in narrative form to set forth that plaintiff had manufactured and loaded the safe on the cars at Canton; that the loading was carelessly and negligently done, by reason of the fact that the plaintiff had firmly blocked and fastened it in contact with an iron bolt or projecting piece of iron, so that, while in transit, it had constantly come in contact with the iron bolt, and was greatly damaged. The answer set forth the absence of ordinary or reasonable care on the part of the plaintiff, and the distance of the station of Wharton to the town of Stillwater, by reason of which the defendant in error had no means of knowledge of the damaged condi-

tion of the safe until its arrival and unloading and delivery to him at his place of business, in the city of Stillwater. The defendant thereupon declared that upon receiving the safe, and finding it in the condition described, he had "immediately refused to accept the said safe, and so notified the plaintiffs, and has ever since refused to accept the said safe under said contract, and has repeatedly requested the plaintiffs to remove the said safe and change said contract." The defendant thereupon denied that he was indebted to the plaintiff upon said contract in the sum of \$225, or any other sum. Thereafter the cause came on for trial, upon the 22d day of May, 1894, before the judge and a jury. After about half the testimony had been produced in the case, the defendant applied to the court for leave to file an amended answer, and was given leave to do so by the court, over the objection of the plaintiff. The defendant thereupon forthwith filed his amended answer, in this: "That he admits the acceptance of the safe therein mentioned, subject to a deduction from the purchase price of the amount of damage occasioned to said safe by the fault and negligence of plaintiff; that by reason of the injury and damage to said safe, as in defendant's answer set forth, said safe was and is reduced in value to the sum of two hundred dollars, of which fact the defendant notified plaintiff before bringing the action, for the amount of which sum the defendant is entitled to credit upon the purchase price of the safe; that, at the time of the commencement of this action, there was nothing whatever due plaintiff upon the contract sued upon; that, prior to the commencement of the action, defendant tendered to plaintiff the sum of seventy-two dollars in full of all amounts due under the contract at the time of the commencement of the suit, which amount the plaintiff refused to have and at all times refused to accept." To the filing of this amendment to the answer the plaintiff objected, because he was not prepared to meet the change "in the issue, and would require time to take plaintiff's evidence in Ohio by a deposition," which objection was overruled by the court, and defendant was allowed to file the amended answer. The plaintiff thereupon excepted, and asked for a continuance to take proof for plaintiff in Ohio upon the issues as changed by the amendment, which the court also overruled, and which ruling was duly excepted to. The taking of testimony thereupon proceeded, and the jury rendered a verdict in behalf of the plaintiff for the sum of \$72.56, against the defendant.

George P. Uhl, for plaintiff in error. R. A. Lowery and Maher & Holt, for defendant in error.

McATEE, J. (after stating the facts). It is contended by the plaintiff in error that, under the provision of the contract that the plaintiff was to "deliver the safe on board the cars at Canton, Ohio," the plaintiff dischar-

ged his whole duty by placing the safe on board the cars, and that it was not required of it to properly fasten the safe on the cars, for that would require the plaintiff to do something not stated in the contract, and that the contract provides that "no agreement of any kind not stated in this order shall become a part of this contract." Evidence was adduced tending to show that the safe, upon being placed upon the cars by the plaintiff, was crated and fastened opposite and near a bolt or bolts which protruded from the side of the car, and that by rubbing against this bolt or bolts the holes were produced, during the transit of the safe, which constituted the damage complained of. The court instructed the jury upon this point that: "(5) If you find from the evidence in this case that the plaintiff agreed to place this safe upon the cars at its factory, and took upon itself the burden of so placing the safe upon the car, and loading it therein, and preparing it for shipment, and if you further find that the plaintiff was negligent in placing the safe in the car, and by reason of such negligence the safe was injured while in transit from the factory to Wharton, then and in that case the plaintiff would be liable for such damage as occurred by reason of the failure of the plaintiff to properly load the safe for shipment from its factory to the place where it was to be delivered, at Wharton. (6) If you find from the evidence that the plaintiff undertook to load this safe, then it was the duty of the plaintiff to so place that safe in the car, and so protect it from injury, as would be ordinarily sufficient protection to insure its safe transit, but would not be liable for any injury to the safe occurring out of any accident which might happen to the railway cars or company of track over which this safe was being carried, but would be liable for such injury as resulted by reason of its being improperly placed in the car, to insure its proper and safe passage from its factory to the station of Wharton. (7) If you find from the evidence in this case that this safe was loaded in the car at a point near one end of the car, and adjacent to bolts projecting from the end of the car, and by reason of such fact the safe in question was injured, then and in that event the plaintiff would be liable for the loss. * * * " We think there was no error here. The proper loading of the safe was the duty of the plaintiff, and not of the defendant, who resided too far from the point of delivery to either inspect the thing ordered or the method of its delivery. It was the duty of the plaintiff to place the safe on board the cars in a proper manner, and the evidence shows that the plaintiff did undertake the duty of packing or storing the safe, and, in doing so, it was incumbent upon it to do so in such a manner as that the storing itself would not be the cause or lead to injury.

It is again argued by the plaintiff that im-

proper testimony was admitted upon the measure of damages, inasmuch as the witnesses Knauss, Swiler, Stowe, and the defendant himself were sworn as experts, not having shown the proper qualifications. Knauss testified that he had had two years' experience in buying, selling, and handling fireproof safes, and that he thought "one hundred dollars would be small enough for the damages. A safe that has been damaged is depreciated in value to a great extent, and sometimes is almost unsalable." Swiler testified that he had been in the hardware business 25 years, and had been buying and selling fireproof safes for 23 or 24 years; that he had examined the safe in question, and "didn't think the safe would answer as a fireproof safe in the condition it was in, for the reason that the filling must be kept airtight, and the saltpeter, if it is left open, will evaporate if the air gets into it"; and that "the damages, I would state, would not be less than seventy-five dollars," and does not think that it could be sold for that much less than cost. Stowe testified that he had handled burglar and fireproof safes for 11 years, during which time he "had used, handled, bought, and sold them"; that he had examined the safe in question, and thought its market price was "damaged nearly one-half what the safe was worth"; while the defendant's testimony was that he had been in the jewelry business about eight years, and had during that time used five different safes, and that he didn't "think that the safe was worth over half of what it was before the holes were punched in it." We think this testimony was competent and proper to be admitted to the jury.

It is contended by the plaintiff in error that the tender set up in the amendment to the answer was insufficient. To this it must be said that no objection was made to the form of the tender at the time it was made, and that the allegation in the amendment was sufficient to admit the testimony on that point, a part of which was produced in the cross-examination of the defendant upon the question proposed by the counsel for the plaintiff: "Do you remember about what time that was, Mr. Holt, that you made that tender? I remember the tender being made. I know I came to your place of business, and I think you offered me— I think it was all over one hundred dollars. Is that correct?" "A. It was the amount, two hundred and twenty-five dollars, less the freight charge and one hundred dollars, which would make it seventy-five dollars, I think." No objection was made by counsel for plaintiff in error to any insufficiency in the pleading of the tender at the time of the trial. It was too late to take advantage of it for the first time after judgment.

It is contended by the plaintiff in error that the filing of the amended answer during the trial, by leave of the court, completely changed the issue in the case, and that a new

defense was set up, entitling the defendant to a continuance upon application to the court. The case was tried under the Code of Civil Procedure of 1890, which provides that (section 4433, p. 819), "no cause shall be delayed by reason of an amendment, excepting only the time to make up the issues, but upon good cause shown by affidavit of the party or his attorney asking such delay." Section 4434 provides that "the affidavit shall show distinctly in what respect the party asking for the delay has been prejudiced in his preparation for trial by the amendment." No such affidavit was filed by the plaintiff, nor was there any error in refusing to delay the cause by reason of the amendment to the answer. We find no error in the case, and judgment of the court below will be affirmed. All the justices concur, except DALE, C. J., who presided in the case below.

BEACH v. BEACH.

(Supreme Court of Oklahoma. Sept. 4, 1896.)

DIVORCE—EXTREME CRUELTY—WHAT CONSTITUTES
—JURISDICTION—RESIDENCE—SUFFICIENCY.

1. That cruelty which is contemplated by the law as being ground of divorce is the cruelty which renders cohabitation intolerable, which destroys the concord, the harmony, and affection of the parties, and renders unsafe the actual existence of the marital relation. The cruelty contemplated by the law must operate upon the husband or wife while living in the relation of husband and wife. It is not upon the individual distinct from the relation that it must operate, but upon the individual while he or she is without fault, and in the proper discharge of the duties which the relation of marriage imposes. Therefore, when a husband wrongfully and without fault on the part of the wife abandoned her, in an action for divorce by the husband, charging extreme cruelty, consisting in accusations made by the wife, in letters written by her to the husband and others, accusing him of criminal intimacy with other women, it appeared that such accusations were made, and letters written, subsequent to such abandonment, and while the parties were living separate and apart, and not sustaining the relation of husband and wife, *held*, that such accusations under such conditions do not constitute extreme cruelty, to authorize a divorce under the statutes of this territory.

2. Where a husband has wrongfully driven his wife from home, without any fault on her part has cast her off, or has himself, without fault upon her part, wrongfully abandoned her, he cannot be permitted to have the bonds of matrimony dissolved upon his complaint charging the wife with extreme cruelty, consisting only in words accusing him of wrongdoing, where such accusations are shown to have been made only after such abandonment, and while the parties, by reason of the wrongful conduct of the husband, were not living together as husband and wife. Courts will not hold a deserted and abandoned wife to that degree of prudential conduct that she might be held to if under the protection and care of a loving husband, performing the duties and obligations imposed upon him by the status of marriage.

3. At the common law, to authorize a court to proceed to a separation on the grounds of cruelty, there must have been either actual violence committed, which endangered life, limb, or health, or there must have been a rea-

sonable apprehension of such violence. The element of mental suffering, distress, or injury, unaccompanied by violence or an apprehension of violence, was entirely excluded; but the doctrine is now established that, without physical violence, acts or conduct which, operating upon the mind, and, through the mind, upon the physical system, produce bodily hurt, may constitute cause for divorce. With reference to acts of physical violence, the rule has always been that a reasonable apprehension of bodily hurt was sufficient; but where the conduct complained of operates primarily upon the mind, producing mental pain, it is not sufficient that there should be simply danger that such conduct, thus operating through the mental faculties, may produce injury to the physical system or bodily hurt; but it must be shown that such in fact is the effect, or, at the least, that such effect may be reasonably apprehended as the result, of the conduct.

4. Where the cruelty complained of consists of accusations of infidelity or other violations of marital obligations made by the wife against the husband, though they may not be true, yet, if they were not made from malevolent motives, or through hatred and spite, but were made in good faith, if the wife had reasonable cause for believing that they were true, and they were made for the purpose of inducing the husband to abandon such supposed course of wrongdoing, and to return to a proper observance of his marital obligations, they would not constitute extreme cruelty, to justify a dissolution of the marriage. A wife has a right to bring to the attention of her husband that which she has heard and which she believes concerning his misconduct, if she does so with a proper purpose and in a proper spirit; and it is his duty, if he be innocent, to endeavor to convince her of her error. Husband and wife are bound to greater efforts for reconciliation, for removing misapprehension, for allaying quarrels, and smoothing the road to concord, than are people in any other relation of life. The marriage status is not a mere contract status, in which each of the parties may be justified in demanding the strict letter of the bond. It is the status of the law operating upon the weaknesses as well as the strength of human nature, and will not be dissolved except for grave and substantial causes.

5. The plaintiff in an action for divorce must have been an actual resident in good faith of the territory for 90 days next preceding the filing of the petition, and a resident of the county in which the action is brought at the time the petition is filed. Such residence is a jurisdictional fact, that must be alleged and proven by the plaintiff, and must affirmatively appear in the record. Jurisdiction of the subject-matter cannot be acquired by waiver or consent. Not only the courts look at the matter of jurisdiction without the question being raised by the parties, but in every case they are bound to inquire whether the facts presented give jurisdiction.

6. Where the plaintiff, who was a lawyer and an author of legal text-books, came to the territory from the city of New York, where he had a lucrative practice and large income, and had been present in the territory only during the period which the statute required to precede the application, remaining the greater part of the time in a county other than the one in which the action is brought, coming to the county in which the action is brought for the first time on the day preceding the filing of the petition, leaving said county on the same or next day, returning for one or two days to attend the hearing of a motion for alimony in the cause, departing immediately, and not again returning until the morning of the day the cause is tried upon its merits; when it is shown that for the remainder of the time pending the action he is absent from the territory, and regularly engaged in business elsewhere; where

he testified that one object of his coming to the territory was to procure a divorce, and the facts in the record do not show him to have had any other object; when he brought with him, only such personal effects as were necessary for one traveling from place to place or sojourning, where he made no endeavor to establish any business, and had no friends, relatives, or kindred in the territory or county where the action was brought, or any ties of business or of other nature to bring or keep him there,—notwithstanding that he may swear to the contrary, the presumption is great, if not conclusive, that his only purpose in coming to the territory and to the county where his action was brought was to obtain a divorce, and that he was not a resident in good faith of the territory or of such county. It follows that the court trying the cause did not have jurisdiction, and that its proceedings were a nullity.

(Syllabus by the Court.)

Appeal from district court, Cleveland county; before Justice Scott.

Action by Charles F. Beach, Jr., against Anne M. Beach. From a judgment for plaintiff, defendant appeals. Reversed.

J. W. McLoud, for plaintiff in error. Green & Strang, for defendant in error.

TARSNEY, J. This is an action for divorce, commenced by the defendant in error, Charles F. Beach, Jr., against the plaintiff in error, Anne M. Beach, in the district court for Cleveland county. The petition was filed on the 6th day of April, 1895. The petition was based upon the statutory grounds of extreme cruelty and neglect of duty. There is no specific allegation contained in the petition, or any evidence of neglect of duty; and the allegation relating to extreme cruelty charges such extreme cruelty to consist of accusations made by the plaintiff in error, orally and in writing, to the defendant in error, and by letters written by her to third parties, falsely and maliciously accusing the plaintiff of criminal intimacy with various women. The parties were duly married on the 26th day of December, 1882, in the city of New York, and continued to live together as husband and wife from that date until the latter part of August, 1893. The petition charges that during the winter of 1888 and 1889 the said defendant, without any cause or justification whatever, and solely for the purpose and with the intent to injure, degrade, and ruin the plaintiff, began falsely and maliciously to accuse the plaintiff of criminal intimacy with various women, and has continued such false and malicious charges at frequent intervals to the present time, evincing an unreasoning and morbidly jealous disposition upon her part, which has increased in virulence to the present time; that during the said period of time the said defendant has frequently made false and malicious charges of such criminal conduct on the part of and against plaintiff, both to the plaintiff and divers other persons; that she has at various times and in divers places annoyed, humiliated, and distressed the plaintiff, and rendered his life a burden, by persistent spy-

ing upon, pursuing, and watching him, and thereby creating the impression that the plaintiff was and is a wrongdoer; that, in pursuance of said course of conduct, the defendant has, within the two years last past, written and sent through the mail, to various persons, divers libelous and obscene letters, falsely and maliciously charging the plaintiff and the persons to whom the said letters were addressed, and other persons, with criminal intimacy. The defendant duly appeared, and filed her answer in the action, which answer specifically denied all the material allegations of the plaintiff's petition, and further set forth that on or about September, 1893, the plaintiff, without just cause or provocation, willfully abandoned the defendant, refused further to live with her as her husband, left her without means of support for herself and family, she having four children by a former husband, and one, then about 4½ years old, by the plaintiff; and that plaintiff, from the time of his abandonment to the commencement of said action, had only for a short time contributed anything towards the support of said defendant or her said family. The cause was tried in the district court for Cleveland county on the 27th day of June, 1895, and judgment was rendered therein on the 29th day of said month, in favor of the plaintiff, and against the defendant. The court found that the allegations in plaintiff's petition were true, and that plaintiff was entitled to the relief prayed for in his petition; that the defendant had been guilty of extreme cruelty towards the plaintiff; and the court entered a decree dissolving the marriage theretofore existing between the parties. It was further ordered by the court that the plaintiff pay to the defendant, as and for alimony in said cause, the sum of \$5,000, in installments, specifically directed in the decree. On the same day, the plaintiff in error filed a motion for new trial, setting forth 12 causes. The twelfth cause sufficiently sets forth the issues presented by this record which it is necessary for us to review here, and is as follows: "Twelfth. Because the plaintiff failed to prove that he was an actual, bona fide resident of the territory of Oklahoma, and had been for ninety days prior to the commencement of said action; failed to prove that he was a bona fide resident of Cleveland county at the commencement of said action; and failed to prove any legal grounds for a divorce; and said decree is contrary to law, and contrary to the evidence, and not supported by sufficient evidence." This motion was on the same day overruled by the court below, and the cause is duly brought to this court for review.

It appears from the record in this cause that the parties were duly and legally married on the 26th day of December, 1882, in the city of New York, in the state of New York, by a minister of the Presbyterian Church, and that they continued to live to-

gether as husband and wife until about August, 1893; that during that time there was born to them one child, a daughter, at the time of the trial below about 5½ years old; that for the next 3 years ensuing the marriage the parties resided at Louisville, Ky., where the plaintiff was engaged in teaching school and practicing law; that they then removed to the city of New York, where the plaintiff continued to practice law, and was also engaged in writing numerous legal textbooks; that he was successful and prosperous in his business, and there is no claim upon the part of either of the parties that their marital relations were not of the most pleasant and satisfactory character until some time in 1888 or 1889, when plaintiff claims that the defendant commenced the course of conduct complained of. The parties continued to live together as husband and wife until on or about the 28th day of September, 1893, when it is conceded the defendant in error abandoned the plaintiff in error, and further refused to live with her as her husband.

The burden of proof was on the defendant in error to show that he was entitled to have the marriage dissolved. He must clearly establish by a preponderance of proof the facts upon which he relies to establish the legal cause for annulling the marriage. There is no testimony whatever in the record to show neglect of marital duty upon the part of the plaintiff in error, except such as may be deemed to bear upon the charge of extreme cruelty. The only facts claimed by the defendant in error to be proven, establishing extreme cruelty, consist of accusations on the part of the plaintiff in error that the defendant in error had been guilty of marital infidelity by criminal intimacy with other women. The only testimony tending to establish the fact that plaintiff in error had made such accusations prior to the abandonment of the plaintiff in error by defendant in error in September, 1893, is the testimony of the defendant in error. He testifies that her conduct towards him was the occasion of his separation from her or abandonment of her at that date; that such conduct consisted substantially in her making false and malicious charges of marital infidelity; that such course of conduct on her part began either late in 1888 or in the beginning of 1889; that numberless charges of that kind were made from time to time from that date until the commencement of the action; that such charges related to himself in connection with various women; that he had several times talked with her about the matter of these charges, and protested against them, and protested that it would be impossible for him to live with her as her husband if that course of conduct continued; that it was that course of conduct on her part persisted in that caused him to separate from her; that she threatened to go, and did go, to his clients, his partner, and other

friends, and made these charges, and thereby injured him in his business; that these threats to injure him in his business were made for the first time in the summer or fall of 1893; that plaintiff in error, at various times and divers places, humiliated and distressed the defendant in error, and rendered life a burden to him, by persistently spying and watching, thereby creating the impression that he was guilty of wrongdoing; that this conduct on the part of his wife injured his health, destroyed his business mind, and distressed him beyond any power of expression, put him in a shape so that he could not sleep, and practically broke down his whole system; that, by reason of the facts stated, he became seriously embarrassed in his finances, became indebted in an amount he could not pay, and thereby his peace of mind was ruined; that she further threatened to make statements, and did in point of fact make statements, that he was financially embarrassed, that his credit was gone, and thereby did injure his credit. No letters or other writings by the plaintiff in error are introduced corroborating the testimony of defendant in error as to any of these alleged acts or misconduct on the part of his wife antedating the separation of September, 1893; nor does any other witness corroborate his testimony in these particulars. On the other hand, the plaintiff in error testifies that she did not know that they ever had any quarrels until the summer of 1893; that up to that time he was a very devoted and affectionate husband; that she loved him dearly, and that he always seemed to love her; that he never liked to be away from home; that, when compelled to be absent by business, he always wished that she might go with him; at home he was very devoted, and that she went with him a great deal on his business trips; that it was their custom during the summer for herself and children to reside in the mountains of New York; that he used to come quite frequently to see them, sometimes once in two weeks, sometimes oftener; that, when they were at a nearer point to the city, he came up every week; that he wrote frequently, and very affectionate letters; that this state of their affections and conduct towards each other continued up to the time of his abandonment of her; that, for a year or two years prior to their separation, she thought Mr. Beach grew more loving and lover-like; that the last winter before the separation was a particularly pleasant winter; that they entertained their friends a great deal that winter; that the first breach in the relations between them was late in the summer of 1893; that, about the beginning of June, she, with her family, went away, as usual, to spend the summer; that there were no differences at that time between them; that she went expecting to return in the fall, as usual, and took her children with her; that Mr. Beach visited them just before the 4th of July, and

stayed over that holiday; that her aunt and mother, who were residing with them on that occasion, mentioned to her how fond he seemed to be of her; that was at Stafford, N. Y.; that she remained there until the 1st of August, then went to Prospect Hotel, at Catskill; that Mr. Beach went there, and remained there with them the whole month of August, going away, perhaps, a day or two at a time; that, while there, Mr. Beach met a Mrs. Driscoll, a very attractive woman, and became very much infatuated with her. She states that there and then the first differences arose between them; that the first quarrel or friction in their married life originated there, at that time. She testifies: "I never charged him with infidelity with Mrs. Driscoll. I merely thought he was in love with her, and it caused me great mental distress. I talked with him, of course, somewhat about it. When I left him in the mountains, I left him very heavy-hearted. I knew he was very much attracted to her, and naturally, after we got to Stafford, I noticed a change in his letters at once. They were unlike any letters I ever received, and, while he did not speak of anything in particular, I knew there was something wrong. After I had been there several weeks, I took a trip to the city, to see him. He put me off, and acted indifferently, and made me go right back. The following Thursday, the 28th of September, I got the letter from him, which is filed in my answer, in which he says he can no longer live with me." Charlotte E. Van Loan, a sister of the defendant, testified: That she had lived with Mr. and Mrs. Beach the greater part of the time for the last ten years, in their immediate family, especially during the last six years, and up to the very last month they were together. That during all that time they were a very devoted couple. She never saw any discord at any time, nor anything but the most loving feelings on both sides. They seemed to be a very happy couple. She never heard any complaint during that time on Mr. Beach's part against Mrs. Beach, or from Mrs. Beach against Mr. Beach, not once. That she first heard of trouble between them late in December of 1893. She never knew of any complaint being made by Mrs. Beach against Mr. Beach for attentions to other women until after the separation, and in December, 1893; and then, only as to the one woman. That that was the first time she ever heard of any complaint on either side. Samuel D. Van Loan, a brother of the defendant, a clergyman, testified on behalf of the defendant that he was living in the city of New York from 1889 to 1892; that he saw the plaintiff and defendant on an average about once a week, and took dinner there usually in the evening,—spent the evenings there during the whole of that period; that during that time the most amicable relations existed between the parties; that the manner of the parties towards each other was

more like that of a newly-married couple than people married for years; it was extremely affectionate and loving; that there were no signs of discord of any kind; that he never heard either of them make any complaint of the other; that he never saw any signs that Mr. Beach was discontented with Mrs. Beach in any way; that he never heard Mrs. Beach say anything about Mr. Beach's fondness for any other woman; that he never heard of any trouble between them until the middle of the winter of 1893 and 1894; that he was with Mrs. Beach in the fall of 1893 and winter; knew that Mr. Beach was not then living with his wife, but never until some time in the winter late learned the reason therefor; that he suspected something was wrong between the parties, because Mrs. Beach was very much depressed, did not seem to eat or sleep naturally; that witness supposed it was merely worry about business matters; that she made no complaint or explanation of her troubles until some time in January. Margaret C. Ballou, a witness for the defendant, an intimate friend of the family, and fully corroborating the previous witnesses as to the relations existing between the parties prior to the separation of September, 1893, testified that as late as February and March, 1893, the defendant in error, in conversation with witness had stated that Mrs. Beach was the most amiable woman he had ever known; that he was constantly talking to witness about his wife, and saying many admiring things about her; that, in the presence of witness, he would frequently kiss his wife, and tell her how much he loved her; that he never spoke to the witness concerning his wife in any other manner than in admiration and with affection, praising her ability, her devotion, and her housekeeping qualities; that the first she heard of any trouble between the parties was about the 1st of October, 1893; that Mr. Beach telephoned witness to know if he could come up and see her, and have a talk with her; that he came, and told witness that he was going to sell out his household furniture, and that he was to separate from his wife; that he told witness, in the most matter of fact way, that he had made up his mind to separate from his wife; that witness told him she thought he must be either insane or his mind deranged in some way; that it was a terrible shock to her; that plaintiff gave no reason whatever, except that he said, or tried to say, that it was impossible to get along with her; he did not say why; witness tried to draw from him some reason, and he was unable to give any; that the witness talked with plaintiff two hours at that time, and he made no complaint that his wife had accused him of infidelity or any other offense. On cross-examination, the witness stated that in their conversation she said to plaintiff, "Charlie, have you no consideration for honor in this matter?" He

answered, "No; none whatever." Witness testified that she believed, if plaintiff had any grounds for complaint at that time, by reason of their family acquaintances and immediate friendship he would have told her with the utmost frankness of the fact. Further, on cross-examination, she said: "I say under oath that Mr. Beach was as happy and contented a man in his married life as the majority of married men are. I have had him up there to my house, and talked with him hours long, after this trouble. I have done everything I could to bring them together. Mrs. Beach wrote him letter after letter. She implored him on her knees to come back to her. In my presence she wept tears after tears,—millions of them. She implored him to come back and live with her, if only for public opinion's sake." Witness testified that she said to the defendant in error, "Charlie, there is a woman in the case;" that he simply laughed, and said, "Oh, you know a great deal too much, Mrs. Ballou." "He never denied it. I accused him of a woman the first time, and he laughed, and said, 'Oh, you know too much; I won't even deny it.'" The testimony of defendant and these other witnesses for the defense as to the general character of the relations existing between the parties, and their conduct towards each other, prior to the separation, tending to show that their relations were more than ordinarily amicable, kind, and affectionate, and that there were no quarrels or contentions, or apparent cause for quarrels or contentions, between them prior to such separation, is further corroborated by the testimony of John M. Saunders, a son of the plaintiff in error by a former marriage, who was a member of the family, and by Bridget Murphy, for many years, and up to the very day of the separation, a domestic in the family.

We must conclude from this record that there has been a total failure on the part of the defendant in error to establish by a preponderance of testimony his allegations that prior to the 28th day of September, 1893, when he abandoned the plaintiff in error, there had been any friction in their domestic relations, or that they had quarreled, and his home been made uncomfortable to him, or his domestic peace disturbed, or that he had suffered any mental anguish, pain, discomfort, or loss on account of any accusations made against him by his wife, or any charges made by her that he had failed in his marital obligations, or had been intimate in an improper sense with other women, or that she had interfered with his business, and caused him loss or damage by reason of any accusations. We cannot believe from the weight of the testimony in this cause that any such accusations had been made, or even thought of, by the wife, until immediately preceding her abandonment. The burden of proof was upon the defendant in error to establish these charges.

The overwhelming preponderance of the testimony is that they were groundless. If more was needed to induce this conclusion, we find it in the express declaration of the defendant in error himself, in a letter which is a part of the record, written by him to his wife on the 28th day of September, 1893, announcing his purpose to no longer live with her as her husband. Said letter is as follows: "New York, Wednesday, —, 189—. [This blank is supplied by other testimony in the record, and fixes the date of this letter as of September 28, 1893.] Anne: These are, as Shakespeare says, 'some of the saddest words that ever blotted paper.' I have nerved myself this evening to write you a confession,—to tell you what for many a long day has been in my heart, and which I ought to have told you long ago. I have struggled against it, but it is here, and a fact, and I cannot longer deceive myself or you. I am wholly unworthy of your love. I never realized it so much until the past few weeks, when you have written me those beautiful and touching letters, which have only served to emphasize my heartlessness and wrongdoing. I am very guilty, and have done you a grievous wrong. I do not love you any longer as a husband should love his wife. I feel very tender of you, and very sorry, sorry for you; but there is in my heart no response to the tender, loving things you have lately said and written to me, and I will not longer go on in the wretched mockery of trying to make you think I care for you in a lover-like way, when I do not. You have worn out all my love. It is not all or greatly my fault that my heart has wandered away from you. You have not been sympathetic of my higher and better self. You care nothing for my intellectual life, and I have been as lonely in my own home—bed and dinners and chairs aside—as though I had been in the desert. My love for you is dead. I will not mark you with a counterfeit. We can never live together again. It would be a shameful travesty on a husband's love for me to consent to it. Let us separate, and each go our way in peace, without making each other's life more miserable than otherwise it would be. I shall always care for you, and minister of my substance to your wants, but your husband I can never be again. I am no more responsible for the impulses and emotions of my heart than I am for the recurring of the tides. After a great heart struggle and a long consideration, I am sending these sad lines. I have only one last word of request for you: Don't tell your dear children of what this letter contains. Don't poison Amy and Alice—my two dear daughters, both equal in my heart's love—against me. Let Amy, dear heart, love me as much as ever, as her 'dear papa'; and teach Alice to love me better than she does now. Don't tell the boys. Don't tell any one. And now, my own dear girl, think as kindly of me as you can, and understand somehow the heartache that goes with this letter. Don't think that I cast

you off. I will care for you and the children. This of course. Don't try to see me. That will only make the sore bleed the more. When the house is rented, I will go out, and you can come and get all your things, and I will take care of what is left. When time has done its work in healing the wound these cruel lines will give you, I will come and see you and the children, and we shall do all we can to make the future comfortable and happy. Don't worry for me. I have never been worthy of your love. I am not worthy of it now. Don't ask me for more. God bless you and comfort you. God keep you always in the peace and happiness you so well deserve. Charles F. Beach, Jr." This letter must be held to completely exonerate the plaintiff in error from any charges alleged which antedate its writing. Were the testimony of defendant in error true, that prior to that time his wife had accused him of infidelity, had published it to others, had, in her anger thereat, endeavored to destroy his business and injure him in other respects, and such conduct on her part was the cause of his abandonment of her, that fact would have been stated in this letter. Had he any excuse for such abandonment, he would have, at least, attempted to deceive himself into a justification of his contemplated act, if he could not deceive others. He would have used these accusations,—these complaints of hers; the fact that they had made his life miserable and had destroyed the peace and concord of his marital relations. He would have sought to justify himself for the act he was about to commit by throwing some of the blame upon her. But this letter is not a letter of accusation. There is not within its lines the suggestion of a fault committed by her. "I have nerved myself this evening to write you a confession. * * * I am unworthy of your love. * * * I have never realized it until the past few weeks. * * * Your letters have only served to emphasize my heartlessness and wrongdoing. * * * I do not love you any longer as a husband should love his wife. * * * I am very guilty, and have done you a grievous wrong. * * * I feel very tender of you, and very sorry, sorry for you; but there is in my heart no response to the tender, loving things you have lately said and written to me. * * * My heart has wandered away from you." And why? Because she had been accusing him of crimes he had not committed? Because she had charged him with infidelity to his marriage vow, thus doing him a wrong,—the greatest of wrongs to a sensitive nature? No; these are not charged here as an excuse. The only suggestion of fault upon her part is that she "cared nothing for his intellectual life." Had the charge he now asserts been true, would he have closed that letter, "God keep you always in the peace and happiness you so well deserve"? However this letter might be characterized, it cannot be construed as justifying the defendant in error for abandoning his wife on the grounds of the charges contained in his

petition in this cause. It is a complete refutation of such charges so far as they relate to the period when these parties dwelt together as husband and wife, and, placed side by side with his testimony in this cause, does not show him to be entitled to that degree of credit which would authorize a court to take his uncorroborated testimony against the testimony of a half dozen witnesses, who, at least, have not furnished the substantial data for their own impeachment. We must therefore conclude that, if accusations of infidelity were made by the wife against the husband, they were made subsequent to her abandonment by him.

Certain letters are introduced in evidence by the defendant in error, as also the deposition of one George Gascolgne, to prove such accusations made by the wife subsequent to her abandonment. The defendant in error testified that she had written defamatory, scandalous, and obscene letters, and that she had attempted to spy upon his movements. And the witness Gascolgne, who was a private secretary for defendant in error, a boy of 21 or 22 years of age at the time of the occurrences, testified that, in his capacity of secretary, he often visited the home of the parties; that some time in 1893 he observed for the first time that there was a breach in the domestic relations of the parties, and since that time they have, to his knowledge, lived very unhappily; that they have been living apart; that one day witness called at the house, shortly before the separation; that plaintiff in error then told him that Mr. Beach had not treated her well; that "about the summer of 1893 I called, in accordance with her request, one afternoon, at the Hotel Endicott, where I met Mrs. Beach and a familiar friend of hers, a Mrs. Ballou, and they talked to me about Mr. Beach the whole afternoon. She stated to me that Mr. Beach had admitted to her that he had been intimate with other women. Mrs. Beach requested me to keep her informed as to certain of Mr. Beach's matters without his knowledge. At this particular time Mrs. Beach made these positive statements: That Mr. Beach told her he had been intimate with other women; that he was at that moment traveling about the country with a woman; and that she believed he was crazy." It may as well be here stated as elsewhere that this testimony of Gascolgne is directly contradicted by both Mrs. Beach and Mrs. Ballou so far as it relates to any accusation upon the part of Mrs. Beach that her husband had been criminally intimate with other women; and it would appear from the testimony that the witness Gascolgne was mistaken as to the time of the interview at the Hotel Endicott; that it was not prior to the separation, but subsequent. This is not only shown by the direct testimony of Mrs. Ballou and Mrs. Beach, but it is shown by the fact that Mrs. Beach was not at the Hotel Endicott until she was taken there by Mrs. Ballou, after she had been abandoned by her husband, and that

the abandonment occurred in September, and the letter to the witness Gascolgne from Mrs. Beach, requesting him to call at the hotel, was dated November 10th. This letter referred to by witness does not bear out the theory that Mrs. Beach desired to employ the witness Gascolgne as a spy upon the movements of her husband, or that there was any improper motive or purpose on her part in writing it, or in her desire to meet him. The letter is as follows: "1022 Lexington Avenue, Nov. 10, 1893. My Dear George: You don't know what a comfort it is to me to know that you are with Mr. Beach. I know you like him, and are loyal to him; but you can be my friend without any disloyalty to him, for you know how fond I am of him, in spite of the wrongs he would do me. I should not, I suppose, have taken you into my confidence, only there seemed to be no other way to get news of him. He will not write to me about himself, and I must know, or I cannot stand it. I told Mr. Beach what you had said about staying with him, because you liked him. It pleased him very much. George, I cannot tell you how much I thank you for your promise to write to me, and tell me the things I want to know. I want to know how he is in health and spirits, how his business prospers, and anything you think I would like to know. Tell me how often he gets letters from New Orleans. George, if we could only save him from making this terrible mistake! He is on the road to ruin, unless he can be made to see the wrong he is doing both himself and me. I am a little stronger, but I do not know how long it will last. I am so unhappy. Write me whenever you have anything to tell me that you know I would wish to hear. I hope you do not think it too much trouble. Sincerely, your friend, A. M. Beach."

The other letters claimed by counsel for defendant in error to be incriminating, and to substantiate the charge of cruelty, are four in number,—one dated July 22, 1894, addressed to Mrs. N. A. Van Loan, the sister-in-law of the plaintiff in error; one addressed to the defendant in error; one to Mr. Charles Driscoll; and one to the Binghampton Wagon Company, the employer of said Driscoll,—all written by the plaintiff in error. Mrs. Van Loan, although the sister-in-law of the plaintiff in error, is one of the women with whom defendant in error alleges his wife charged him with criminal intimacy. Her husband, Mr. Van Loan, was at the time the letter was written confined in an 'nsane asylum. Mrs. Beach had visited him. He was her brother. On her return from the insane asylum, she wrote the letter to her sister-in-law, from which, passing over certain preliminaries, and speaking of her brother's condition, we quote as follows: "Now, if you still care for John, and desire his recovery, I think you can do him more good than any one, for I think his love for you is now the cause of his insanity. The relations you have had with Charles has caused him great mental distress,

and, when he heard that he had separated from me, he at once came to the conclusion that you were the cause of it, and his mind could bear the strain no longer. You possibly may think the same thing. So, if it is any comfort for you to know it, you are not in the slightest degree responsible, only so far as such clandestine intimacies serve to win a husband's love from his wife. Another woman, whom we met at Prospect last summer, and with whom he became so infatuated that he wanted to get rid of me, and she was to get rid of her husband, and they had a well-defined plan to marry each other. She has recognized her own folly, and gone back to her husband. Charlie tried to get a divorce from me, but has failed. * * * I am very thankful that I knew nothing of his relations with you until after our separation. I never dreamed of it, although I had hints and insinuations which I would never listen to. I believed that my husband loved me with all his heart. He seemed devoted to me. We never had a word about any woman, least of all you; yet I believe he told Lando that I made him miserable with my jealousy, and so on. That is not in the least true. He never gave me cause for jealousy that I knew of, and I was one of the happiest women on earth, for I loved and trusted my husband implicitly. I did not dream that he would take advantage of the unprotected condition of my brother's wife, or that she would for one moment listen or respond to such advances. Now, I am not going to reproach you, for it is a thing of the past, I hope; and I suppose, if it had not been you, it would have been some other woman; and you must now suffer remorse enough without any adding to it, for I don't think you are a woman to do wrong and not suffer for it in the end. You must have known you were doing wrong when I knew nothing of it, and when you thought Charlie was in love with you, and sought your society for no good purpose. He told me after your separation that he had been going out with a married woman all the winter before; that he had been criminally intimate with her; that he did not care for her, but had a good time. Of course, he did not tell me her name, but I suppose now you were the woman; only I hope he said what was not true when he said you were both unfaithful to your marriage vows. I don't believe that part of it. I believe you were imprudent and wrong, but not criminal. * * * Keep yourself pure in thought and action for the sake of your future, for your dear children's sake. Never be ashamed to look into their pure little eyes. Never do anything to disgrace your motherhood. I say this with no personal feeling or spirit of censure. I have no ill will towards you. I only feel sorry for my heart for it all, for your sake, for John's sake. The blame rests mostly with Charlie, I know. I have suffered too much, have been too utterly broken-hearted, to have any place for petty feelings

of any kind. I have only pity in my heart for your trouble, sorry for the mistake that has grown out of your trouble, and the hope that it may do you no harm, and that you may have a happier future than I can look forward to. Now that Charlie has lost this woman, it is just possible he may write to you again, and seek to renew his relations with you. I hardly think that possible, but, if he does, don't, I beg you, answer or have anything to do with him, for the sake of your reputation. * * * If your imprudence has really done this thing, does it not teach us that wrong brings its own punishment? Now, Minnie, don't fret about the past, but take up the burden of life again, as I shall have also to do, and do the very best you can. Do what is right from day to day, and God will comfort you and help you, and give you happiness yet. Affectionately, Anne." The letter to her husband dated August 16, 1894, so far as it relates to the petition in this cause, is as follows: " * * * I speak now from no personal feeling, but for your own protection, to warn you, so that it may be a guide to your conduct in the future. I think of you only as Alice's father, and I do not want certain things ever to come to her ears; and because of what you have done for Amy, and been to her in the past, I do not want her to think too badly of you. I know now of your relations with my brother's wife. I have known it only within a few weeks, and I suppose she must be the woman you told me of. It has caused John's insanity, I feel sure. I did not intend to speak of it to you. I did not expect to write to you again, but, knowing that you were seen in her home lately, I naturally concluded you were seeking to renew those relations, and, for Alice's sake, I beg of you not to be seen with her again. It is too unnatural, too disgraceful, to think of. There are enough women in the world. Don't come so near our doors. Who would have thought you would have turned out to be such a sensual libertine. Intellectual men seem fitted for better things. Can this be your real nature, or how have you gone so wrong? I have just had a letter from a lawyer in New York, who says to me: 'Learning that you are in quest of evidence to procure a divorce from your husband, Chas. F. Beach, Jr., I beg the liberty of addressing you. I have eyewitness evidence of responsible parties which will secure you an absolute divorce upon statutory grounds without any difficulty. If I can be of any assistance to you, kindly advise me by return mail, and I will be pleased to communicate with you. Awaiting your reply, I beg to subscribe myself.' (I suppose it must be from a lawyer, although it does not say so.) I withhold the name of the lawyer, but this is the second one who has written to me offering me his service. Of course, I know they are men of no repute, who are looking out for such things all the time, but it shows the notoriety you are getting. The first one I paid no attention

to. This one I thought at first to turn over to Mr. Thacher to answer, but I dislike to let him know anything more about you. It is a queer thing to ask of you, but should I answer it or let it go? I shall not need his assistance if I ever want to get a divorce, but I should think it better to let him know our differences had been adjusted. Surely, such things must do you harm in a business way, and that is now of interest to me. Why can't you lead a decent life? I want to believe your love for Amy and Alice is pure and sincere, but you cannot expect to lead the life of a libertine, and at the same time enjoy the love and society of two such pure little souls. Such love, such companionship, ought to satisfy any man. You cannot have both. Make up your mind either to lead a decent life, or give up your children. I inclose Alice's letter. Anne M. Beach." The third was addressed to Charles Driscoll, was simply a request to let the writer know where his headquarters were that winter, and whether he would be in New York state, in the neighborhood of Kingston, in the near future, stating that the writer would like to see him on a matter that concerned them both, and would meet him at Kingston at any time; signed, "A. M. Beach." The fourth was a letter to the Binghampton Wagon Company, asking them to inform the plaintiff in error whether Charles Driscoll was in their employ, and where he made his headquarters when not traveling, and stating that she had sent a letter to him in care of Columbus Buggy Company, which they informed her was forwarded to him in care of Binghampton Wagon Company. She further stated that she desired to communicate with him, and would be obliged if they would give her any information concerning him that would help her to do so.

This was all the correspondence relied upon to establish the accusations of criminal intimacy, which it was contended would establish the charge of extreme cruelty. These letters were all written subsequent to the abandonment of the plaintiff in error by the defendant in error, and while they were living separate and apart. The question presents itself here, upon the threshold of this branch of the case, if these letters sustained the charge that plaintiff in error had accused the defendant in error of criminal intimacy with other women, and if such allegations constituted the extreme cruelty contemplated by the law as a cause for divorce, should they be held to constitute such cause for divorce when written while the marriage relation was not subsisting in fact? That cruelty which is contemplated by the law as being ground of divorce is the cruelty which renders marital cohabitation intolerable, which destroys the concord, the harmony, and affection of the parties, and renders unsafe the actual existence of such marital relations. Can it therefore be said that that can be destroyed or rendered intolerable that does not exist? The defend-

ant in error in this cause had, before these letters were written, withdrawn from that status which the law establishes for the married relation. He had himself, as far as it was in his power, and as actual fact, dissolved the marriage. These accusations upon her part, if established, could not affect, then, the pleasure or happiness which it was his right to enjoy under the relationship of husband and wife, because he had himself abandoned whatever of contentment and happiness there might have been in that relation. The cruelty contemplated by the law must operate upon the husband or wife while living in the relation of husband and wife. It is not upon the individual distinct from the relation that it must operate, but upon the individual while he or she is without fault, and in the proper discharge of the duties which the relation of marriage imposes.

We do not think a case can be found in the books where a husband has wrongfully driven his wife from home, without any fault upon her part, has cast her off, or has himself, without fault upon her part, wrongfully deserted or abandoned her, and then been permitted to have the bonds of matrimony dissolved upon his complaint of cruelty upon her part, consisting only in words of accusation. A plaintiff in divorce is not only required to prove such wrongs committed by the respondent as constitute a legal cause of divorce, but he must also allege and prove that he is himself without fault; that, from the time of the marriage to the commencement of such proceedings, he has at all times faithfully performed all of his marital duties and obligations towards the defendant. Mr. Bishop, in his work on Marriage, Divorce, and Separation (section 343), quoting from Lord Stowell, says: "The doctrine has its foundation in reason and propriety. It would be hard if a man could complain of a breach of a contract which he has violated; if he could complain of an injury when he is open to a charge of the same nature. It is not unfit, if he who is the guardian of the purity of his own house has converted it into a brothel, that he should not be allowed to complain of the pollution which he himself has introduced; if he who has first violated his marriage vows should be barred of his remedy. The parties may live together, and find sources of mutual forgiveness in the humiliation of mutual guilt. They are suitable and proper companions." The same author (section 344 of the same work) says: "Though thus the defense of recrimination is shown to have come to us legitimately and from a high source, this historical view is of little consequence, for the doctrine adheres and is firmly fixed in our common-law and equity system of jurisprudence. A view adequate to our present elucidation is that, extending through our entire law, yet variously modified according to the particular issue, there is a rule which forbids redress to one for an injury done him by another if himself in the wrong about the same thing

whereof he complains; and it will not avail the plaintiff that he is less in fault than the defendant. He must come into court, as the expression is, with clean hands."

It being made to appear conclusively by this record that, from the date of the marriage to the date of the abandonment of plaintiff in error by the defendant in error (a period of 11 years), the relations of the parties had been more than ordinarily amicable and proper, and that such abandonment was wholly the fault of the defendant in error, this court will not hold the deserted and abandoned wife to that degree of prudential conduct that she might be held to if under the protection and care of a loving husband, performing the duties and obligations imposed upon him by the status of marriage. We think, therefore, that if the charge in the petition that plaintiff in error had accused defendant in error of infidelity to his marriage vows by criminal intimacy with other women were clearly established, when it appears that such accusations were made while the parties were living apart, because of the wrongful abandonment by the defendant in error, such accusations would not constitute that cruelty contemplated by the laws of this territory as a cause of divorce. But, waiving the proposition that that which would constitute cruelty while the parties were living together as husband and wife would not constitute cruelty where they were living separate and apart, we will consider the case as presented by counsel for defendant in error, and inquire whether the proof in this case shows such cruelty as is contemplated by the law, even though the parties were living together when the letters complained of were written. What is the meaning of the term "extreme cruelty" under our statutes? And what will constitute a case justifying a dissolution of the bonds of marriage for that cause? It is much more difficult to determine what will constitute extreme cruelty within this statute than it is to determine what will not. No exact definition of this phrase is found in the books. Under the practice in England and nearly all the states of this Union, the issues in divorce cases are tried by the court, without the intervention of a jury, and the conclusions are necessarily always a combination of both law and fact. No two cases hardly ever corresponding, or being in all respects similar, the adjudications, although numerous, have not yet evolved any definite and distinct definition of what constitutes extreme cruelty, although cruelty has, since the foundation of divorce procedure, been recognized as a cause for the dissolution of marriage. Mr. Bishop, in his work on Marriage, Divorce, and Separation (sections 1530 and 1531), says: "Widely known as this matrimonial offense is, and much as it has been considered by the courts, they have been cautious about giving it an affirmative definition. Lord Stowell, Sir John Nicholl, and Dr. Lushington severally declined such defining, deeming it more safe not to travel

much beyond negative descriptions. Some of our own judges have been of the same mind." Section 1531. "Cruelty is not unfrequently said to be any actual violence endangering life, limb, or health, or conduct creating a reasonable apprehension of such violence, but there are forms of physical injury involving no violence, actual or apprehended; and we shall see that one of these is equally legal cruelty. Moreover, the danger must be adequately serious."

To approximate an understanding of the latitude and meaning of this phrase as now applied in our statute, we must consider the history, development, and evolution of the law. The case of *Evans v. Evans*, 4 Eng. Enc. R. 810, decided by Lord Stowell in 1790, has by all courts been considered as the most able exposition of the law relating to cruelty as a cause of divorce in England at that time, and as correctly embodying the doctrine then laid down by the courts, and may be thus stated: There must have been either actual violence committed, attended with danger to life, limb, or health, or there must have been a reasonable apprehension of such violence. The element of mental suffering, distress, or injury was entirely excluded. The eminent judge in *Evans v. Evans* says: "What is cruelty in the present case it is hardly necessary for me to define, because the facts here complained of are such as fall within the most restricted definition of cruelty. They affect not only the comfort, but they affect the health and even the life of the party. I shall therefore decline the task of laying down a direct definition. This, however, must be understood: that it is the duty of courts, and consequently the inclination of courts, to keep the rule extremely strict. The causes must be grave and weighty, and such as show an absolute impossibility that the duties of the married life can be discharged. * * * What falls short of this is with great caution to be admitted. * * * What merely wounds the mental feelings is in few cases to be admitted when not accompanied with bodily injury, either actual or menaced. * * * Still less is it cruelty where it wounds, not the natural feelings, but the acquired feelings, arising from particular rank and station, for the court has no scale of sensibilities by which it can gauge the quantum of injury done and felt; and therefore, though the court will not absolutely exclude considerations of that sort when they are stated merely as matter of aggravation, yet they cannot constitute cruelty where it would not otherwise have existed. * * * In the older cases of this sort which I have had an opportunity of looking into, I have observed that the danger of life, limb, or health is usually inserted as the ground upon which the court has proceeded to a separation. The court has never been driven off this ground. I have heard no one case cited in which the court has granted a divorce without proof given of a reasonable apprehension of bodily hurt." Mr. Bishop (section 1534), after citing

the case of *Evans v. Evans*, and the rule therein stated, says: "Within this rule, most of our statutes authorizing divorce for cruelty are interpreted to mean simply and only the cruelty which in England was ground for divorce from bed and board when our country was settled." And then the learned author adds (section 1547): "In England and most of our states the doctrine, to which not an exception could easily be found, is abundantly established that the apprehended harm must be bodily, including detriment to health, in distinction from what is endured only by the mind, or mere mental suffering."

The strict doctrine laid down by the English courts, and for a long time followed by nearly all the courts of this country, has undergone some material modifications, and its harshness has in some degree been abated, not only by adjudication, but by legislative enactment; and now it may be considered as established, not only by the courts of this country, but also those of England, that the offense of cruelty may be committed without physical violence, by means of acts operating upon the mind, but not to the extent of eliminating the element of physical hurt, but on the theory that injury to the mind may and does result through mental operation upon the physical structure. Mr. Bishop (section 1549), commenting upon the old rule of the English courts, says: "In explanation of this rule, it is admitted that mental pain may be heavier and harder to bear than bodily, and that an ill-disposed husband can create in an affectionate and sensitive wife more misery by force of conduct addressed only to the mind than if, in fits of anger, he were to inflict occasional blows upon her. To this objection the answer from the bench is that in such a case the court has no scale of sensibilities by which it can gauge the quantum of injury done and felt; according where-to, the rule rests, not on justice, but on the difficulty of making proof, and the lack of judicial discernment,—not the firmest foundation for a practice of withholding what justice confessedly demands, in cases where the proof does not fail, and there is no judicial doubt of what the effect should be. Yet under our doctrine of *stare decisis*, with no help from a statute, a practitioner could not expect his court to overturn what has thus for ages been established in our unwritten law, while at the same time he might hope that gradually the stream of adjudication may be so deflected as to wear away something from the border." This aid which the learned author hoped might be obtained to wear away the restrictions of the common law has been extended, and in many of our states, not only cruelty as defined by the courts is now made a cause of divorce, but in addition thereto, and to meet the objection of narrowness in the common-law rule, a new cause of divorce has been created, viz. indignities which rendered the condition of the opposite party in the marital relation

intolerable; and under these statutes it is held that mental suffering resulting from such indignities may alone be sufficient to warrant the divorce. Even without such statutes, many of our courts have modified the rule of the common law, and hold that the words "cruelty" or "extreme cruelty" embrace acts which, operating upon the mind, and, through the mind, upon the physical system, producing bodily hurt, may constitute cause for divorce. The rule is stated by Bishop (section 1563) thus: "Under more enlightened physiological views, the legal doctrine has become settled, it is believed, every where, that conduct which produces pain of mind is legal cruelty; so that whenever, operating either alone or in combination with something else, it creates a danger to the physical health, a divorce for it or the combination will be justifiable." We think the rule as thus stated is broader than is justified. With reference to acts of physical violence, the rule has always been that a reasonable apprehension of bodily hurt was sufficient; but where the conduct complained of operates primarily upon the mind, producing mental pain, it is not sufficient that there should be simply danger that such conduct, thus operating through the mental faculties, may produce injury to the physical system or bodily hurt, but it must be shown that such is in fact the effect, or, at least, that such effect may be reasonably apprehended as the result of the conduct. In a well-considered case, the Pennsylvania court of common pleas employed the following language: "A husband may, by a course of humiliating insults and annoyances, practiced in the various forms which ingenious malice could readily devise, eventually destroy the life or health of his wife, although such conduct may be unaccompanied by violence, positive or threatened. The courts intervene to dissolve the marriage bond under this head, for the conservation of the life or health of the wife, endangered by the treatment of the husband. The cruelty is judged by its effects, not solely from the means by which those effects are produced. To hold absolutely that the wife has no legal protection against any means short of these which he may resort to, and which may destroy her life or health, is to invite such a system of infliction by the indemnity given the wrongdoer. The more rational application of the doctrine of cruelty is to consider a course of marital unkindness with reference to the effect it must necessarily produce on the life or health of the wife, and, if it has been such as to injure either, to regard it as true legal cruelty. * * * This idea, expressed axiomatically, would be no less than the assertion of this principle: that, whatever form marital ill treatment assumes, if a continuity of it involves the life or health of the wife, it is legal cruelty." *Butler v. Butler*, 1 Para. Eq. Cas. 329-344.

The authorities are too numerous to require

citation which hold that no one single act operating mentally is sufficient to constitute cruelty justifying divorce, but that there must be a continuity of such conduct, and many, if not the great majority of, authorities hold that such conduct must be shown to have been induced by malevolence, hatred, or spite; and it is certainly consonant with sound reasoning that if the cruelty complained of consists of accusations of infidelity or other violations of marital obligations, though they may not be true, yet, if such accusations were not made from malevolent motives, or through hatred and spite, but were made in good faith, and based upon conditions which rendered their truthfulness seemingly apparent or probable, and if the party making such accusations, though they were not founded upon truth or fact, yet had reasonable grounds for believing that they were true, and they were made for the purpose of inducing the party accused to abandon the course of wrongdoing, and to return to proper observance of marital obligations, then they would not and ought not to be held to constitute cruelty to justify a dissolution of the marriage.

Applying these rules to the case at bar, we cannot find that the letters addressed by the plaintiff in error to the defendant in error and others, charging him with misconduct, were written with a malevolent spirit, or through hatred or spite. They breathe in their very language the opposite. They appear to have been written with the motive and purpose of endeavoring to reclaim him from a course of error and wrongdoing, and to bring him back to an observance of his marital obligations. They were written under conditions of great provocation, and apparently were from belief in the truth of the accusations made. For 11 years the parties had lived together as husband and wife, with more apparent concord and happiness than is usually the lot of married people. No clouds had appeared to darken the horizon of their married life until, in August, 1893, the wife, whether rightfully and wrongfully, became impressed with the conviction that her husband had become infatuated with another woman. Within a little more than a month from that time, the husband, without cause, without attempting to assign any cause, but, on the contrary, in the strongest terms stating that there was no cause save his own faults, abandoned the wife and family, without making suitable provision for them. The wife, knowing of no other cause for such conduct upon the part of her husband, might well be excused attributing his actions to his infatuation for the woman under whose influences he had so recently apparently fallen. In her distress of mind, under these circumstances, not wanting to believe in the truth, which to her was reasonably apparent, but desiring to recall him to duty if he was innocent, wrote to him and to Mrs. Van Loan of the things that were distressing her. Was

this that criminal cruelty which the law punishes by the most cruel of sentences,—the dissolution of the most important of all human relations? We think not, especially as we find nothing in this record to show that the defendant in error ever took any steps, even the slightest, to disabuse his wife of any error, if error she was in, concerning his conduct. To hold what is contended for in this case would be to shut the door against reconciliation where estrangement and separation had resulted from misinformation and error of fact. The wife had a right to bring to the attention of her husband that which she herself heard or believed concerning his misconduct, if she did so with a proper purpose and in a proper spirit; and it was his duty to have endeavored, if he was innocent, to convince her of her error. Husband and wife are bound to greater efforts for reconciliation, for removing misapprehension, for allaying quarrels, and smoothing the road to concord, than are people in other relations of life. The marriage status is not a mere contract status, in which each may be justified in demanding the strict letter of the bond, and from which each may withdraw at pleasure. It is a status of the law, operating upon the weaknesses as well as the strength of human nature, and will not be dissolved except for grave and substantial causes.

The defendant in error alleges, and claims to have proven, that the conduct of the wife as to him amounted to extreme cruelty; that, because of these accusations made by her, he was subjected to great mental pain and suffering; and that thereby his physical system was affected, and his bodily health impaired. This fact it was necessary that he should allege and prove, in addition to proving the innocence of his own conduct. Does this record show such proof? We submit that it would be an extremely sensitive nature that could be so wounded and injured, and to such a degree, by the letters shown in this record, that cohabitation with the plaintiff in error, though for 11 years affording contentment and happiness, could no longer be endured, and that life thereafter would be made unendurable, and bodily health be destroyed. Does this record show in the defendant in error such delicate sensibilities? The record shows that though, during the last year prior to his abandonment of his wife, his income had exceeded \$15,000, he has contributed since such abandonment, for the support of his abandoned wife and child, but a little upward of \$700, and that for many months he has not contributed one cent; nor has he in many months even sought to visit his own child. The record shows that, long before these letters or any of them were written, he had endeavored, by means and methods not justified by law, to free himself from the bonds of this marriage; to induce the plaintiff in error to procure a divorce from him, upon proofs that he was to furnish of his own wrongdoing. On the 10th day of November, 1893, the defendant in error addressed and mailed to plain-

tiff in error the following letter: "New York, Nov. 10, 1893. Dear Anne: The inclosure is what I have in mind to propose to you. I am willing—more than willing—to modify it in any way I can to meet your views. Please consider it with care, and, when I am up at the end of the month, we will talk of it. I have looked the law up carefully, and it is all in proper legal shape; but it will be right for you, if you desire to do so, to consult a lawyer about it, after we talk it over, and before you sign any papers. This secures you the life insurance in case of my death, and gives you an education for Mark, and a maintenance for Amy and all of you, and makes it enforceable against me, as a matter of law." In this letter was the following inclosure: "In consideration of your retaining a lawyer, to be named by me, to obtain a divorce for you from me, and of your swearing to a complaint in the action (all the allegations of which shall be true), and of your intrusting the control of the action to me, and of your maintaining absolute secrecy until the decree is rendered, and then stating only that a divorce had been had (which may include showing a certified copy of the decree to any one you please), and of your good faith in thus facilitating a legal divorce, I will upon my part procure the divorce for you in a legal manner, and at my own costs and expense, without any publicity, and will, upon the retainer and verification of the complaint as aforesaid, and the surrender and cancellation of the agreement, execute and deliver to you a deed of separation in due legal form, binding myself to you and to a trustee, to be named by you, as follows." Then follow numerous provisions relating to financial settlements between the parties.

Some courts have mildly criticised Lord Stowell's expression in *Evans v. Evans* that "the court has no scale of sensibilities by which it can gauge the quantum of injury done and felt" by mental pain and distress; but certainly no court will ever criticise us for saying that we have no scale by which we can properly gauge the sensibilities of one who could write such a document as the foregoing. It must be borne in mind that the defendant in error is one reputed learned in the law, who has acquired a reputation as a legal text writer, who has contributed to the legal literature of the country many works. He might well be assumed to know the law and its ethics. He might well be assumed to know that that document contained a proposition which could only be construed as an intended fraud upon the courts and the law, and the prostitution of his position as an official of the court. Stripped to its disgusting nakedness, when we consider that in New York the only ground for absolute divorce is adultery, it amounted to the plain proposition that he would draft against himself a complaint in divorce charging himself with adultery. It states expressly that the allegations of such complaint shall be true; retains for himself the control of the action against himself; promises to procure the di-

vorice for her against himself at his own costs and expense, and without publicity; and, for this privilege, he is willing to pay large considerations in money. In any light we may view this document, it shows the writer to be possessed of moral sensibilities that we cannot think are of the delicate and sensitive nature his complaint implies. Either he was the libertine which his wife suspected him to be, or he was willing to falsely accuse himself of being such, and have his wife swear to it as a fact. The excuse, or rather the explanation, which defendant in error gives of this remarkable document, is that it was not contemplated that the divorce therein considered was to be obtained in the state of New York, and consequently it did not follow that the complaint was to charge the crime of adultery. It seems to us that this explanation does not explain, but deepens, the complications with which defendant in error had surrounded himself; for the record shows that for many years the plaintiff in error has been, and still is, a bona fide resident of the state of New York. To bring the action for divorce which defendant in error was endeavoring to undertake in any other state than New York would require that the wife should swear in her complaint that she was a resident of such state; so that the conclusion is that if it was not contemplated that the proceedings should be brought in the state of New York, and charge defendant in error with adultery, it was contemplated that the action should be brought in some other state, upon some other sufficient cause, but that the wife should commit the crime of perjury in swearing that she was a resident of such state. This record is pregnant with facts showing the real character of the moral make-up of defendant in error. On the 28th day of September, 1893, he abandoned his wife in New York, and on the 8th day of May, 1894, filed in the probate court in and for "P" county (now Noble), in this territory, a petition for divorce; that when summons was issued therein and served upon the defendant in that action, she commenced proceedings in the supreme court of the state of New York, by injunction, to restrain defendant in error from prosecuting such divorce proceeding in this territory, alleging as the principal ground for said injunction that the defendant in error had willfully sworn falsely in his complaint therein, stating that he was in good faith a resident of this territory at that time, and had been such for 90 days prior to the filing of his complaint therein; that, before such action was brought to trial in New York, an agreement was entered into by the parties, and the proceedings for divorce in this territory and the injunction proceedings in New York were dismissed, and a deed of separation and maintenance was entered into and executed by the parties. The record shows that during all the time defendant in error claimed to have been a resident of this territory prior to the commencement of such divorce proceedings, in 1894, and pending such proceedings, he was a bona fide resident of the city of New York,

was regularly living at hotels in that city, had a regular office, and was there actively engaged in the practice of law. Notwithstanding the defendant in error has testified in this cause that the course of conduct of which he complains against the defendant had injured his health, destroyed his business mind, distressed him beyond any power of description, put him in a shape so that he could not sleep, and practically broken down his whole system, impaired his ability to transact business, this court, under the light of all the conditions shown in this record, even should it be inclined in another case to hold such facts as are complained of against the plaintiff in error to constitute cruelty per se, would yet require this testimony to be corroborated in some measure before we could take it as established.

We hold that this record does not show, or even tend to show, that the defendant in error was without fault during the existence of the marriage relations between himself and the plaintiff in error. We also hold that this record does not show that the plaintiff in error was guilty of extreme cruelty towards the defendant in error; that the great weight of the evidence was against the finding of the court below; "that the said defendant was guilty of extreme cruelty towards the said plaintiff, without any fault so far as the plaintiff was concerned, during the existence of the marriage relations between the plaintiff and the defendant." Therefore the court erred in so finding, and in entering judgment in favor of the defendant in error. As this conclusion would only operate to reverse the judgment of the court below, and remand the cause for a new trial, we are required to examine the remaining point presented by the record, to wit, that as to the jurisdiction of the district court for Cleveland county to hear said cause, and enter judgment therein.

It is contended by counsel for plaintiff in error that defendant in error was not a resident of Cleveland county at the time of the commencement of this action, and had not been an actual resident in good faith in the territory for 90 days next preceding the filing of the petition; that, therefore, the court below had no jurisdiction in the action; and that its proceedings were a nullity. Section 4544 of the Statutes of Oklahoma of 1893 is as follows: "The plaintiff in an action for divorce must have been an actual resident, in good faith, of the territory, for ninety days next preceding the filing of the petition, and a resident of the county in which the action is brought at the time the petition is filed." And section 3928 of said Statutes reads: "An action for divorce must be brought in the county of which the plaintiff is an actual resident at the time of filing the petition." Counsel for defendant in error contend that "a general appearance and answer to the merits is a waiver of the question of jurisdiction. Residence is a jurisdictional fact, and was improperly raised by the defendant below. By her general appearance

and answer, and her personal appearance at the trial, she conceded the jurisdiction of the court, and is estopped from raising it now,"—citing Brown, Jur. § 50. This proposition is untenable in the sense that it is attempted to be here applied. Counsel lose sight of the fact that jurisdiction partakes of two natures,—one over the subject-matter of the controversy; the other over the parties. If the court does not possess the legal power to decide the question involved, then jurisdiction cannot be acquired by consent. Brown, Jur. § 47. The very section cited by counsel for plaintiff as an authority for that proposition is to the contrary. It says: "While jurisdiction over the subject-matter cannot be waived, because the defendant cannot confer power upon the court it does not possess, any matter relating to service of process or form of pleading that could have been taken advantage of by special demurrer, any question that could have been presented by appeal or argument in proper assignment of error, may be waived." Brown, Jur. § 50. It is not necessary that the defendant shall have raised the question of jurisdiction presented in this case. Such jurisdiction depended upon the facts necessary to be alleged and proven by the plaintiff. Not only the courts look at the matter of jurisdiction, but in every case they are bound to inquire whether the facts as presented to them give them jurisdiction. *Myers v. Berry*, 8 Okl. 612, 41 Pac. 580; *Wells, Jur. § 62*.

It would scarcely be asserted that jurisdiction could, by consent, be conferred upon courts of admiralty to try an indictment, or that in the federal circuit courts, where jurisdiction depends upon the citizenship of the parties, jurisdiction could be conferred by consent or waiver. If the defendant in error, at the time of the filing of his petition in this cause, had not been an actual resident in good faith in the territory for 90 days next preceding the filing of said petition, and an actual resident of the county of Cleveland at the time the petition was filed, then the court had no jurisdiction, and its proceedings were a nullity; and the fact of such residence must affirmatively appear in the record. Was, then, the plaintiff in error a "resident," within the meaning of the statute? The defendant in error, in his testimony in the cause, stated that his place of residence was Norman, Okl. T.; that he had been a resident of Oklahoma territory about six months, and of Cleveland county since about the 1st of April, 1895. The facts appearing from this record show that the defendant came to this territory about the last of December, 1894, or first of January, 1895; that he stopped at Perry a part of the time, perhaps the greater part of the time until the 5th of April, occupying a furnished room there, and taking his meals at other places; that during a portion of that time he was absent from the territory, attending to business. He testifies that one object in his coming to the territory

was to procure a divorce. The facts do not show him to have had any other object. He had no other business, and did not endeavor to establish any other business. He was by profession a lawyer and an author of legal text-books; yet he left his library in New York, and did not form or attempt to form any relationship with the practice of the law in this territory, or to acquire any property, or to make any investments, which might show any intent to permanently identify him with the territory. He had no relation or kindred living here. He brought with him only such personal effects as were necessary to one traveling from place to place, or making a short sojourn. We cannot be expected to believe that one whose income from the practice of the law and from authorship amounted to \$15,000 per annum would expect to better his condition financially or intellectually, and obtain greater remuneration in the practice of the law, or find more facilities and aids to legal authorship, in Perry or Norman than in the city of New York. In his testimony upon the trial, he claimed that his residence in the territory commenced about the 1st of January, 1895, thus repudiating any claim to having been a bona fide resident of the territory in 1894, although in July of that year proceedings were pending in the probate court of "P" county upon his petition for divorce, in which he had sworn that he was then, and for months had been, a resident in good faith of this territory, and of that county. The record shows that on the 5th day of April, 1895, defendant in error went to Norman, in Cleveland county; that that was the first time he had ever been in that county; that on the next day he filed the petition in this cause for divorce; that the same day, after filing said petition, or the next day, he left the county; that he returned there on the 31st of May, to attend the court in the hearing of a motion for alimony in the cause; that he stayed until the next day, and left upon the first train after the motion was heard; that he did not return to the county again until 1 o'clock of the morning of the day the cause was heard upon its merits; that, during the time said cause was pending, he was absent from the territory, at various places, the most of the time at Indianapolis, regularly attending to business in which he was interested. From this record we are not satisfied that the defendant in error came to this territory with the intention of making it his permanent home, or with the intention of becoming a resident in good faith, or that he had any other purpose in going to Cleveland county except to institute and prosecute his action for divorce. The conditions surrounding his actually being in the county and territory, and the facts stated as to his profession and business; the disparity between the facilities for conducting the same in New York or some other large city and those at Norman, in this new territory; the fact that he had no friends,

relatives, or acquaintances in Cleveland county, or any ties of a business or other nature to bring or keep him there, with his declaration that one of the purposes of his coming was to obtain a divorce,—all raise the presumption, almost conclusive, that that was his sole purpose, and that he did not in good faith intend to become a resident of that county. This, supplemented and strengthened by his own testimony that he was considering the shipping of his library, then stored in New York, not to Norman, in Cleveland county, but to Perry, in Noble county, shows that it was not his intention to become a bona fide resident of Cleveland county.

The case of *Winship v. Winship*, 16 N. J. Eq. 107, states what we conceive to be the sound principles of law governing this proposition. In that case, the husband, who was defendant, was living in Jersey City, in adultery with another woman. The wife, who was complainant, testified that, when she commenced her suit, she was living in Jersey City. She had formerly lived in the city of New York. She brought her trunks over to Jersey City, and commenced living there, some time before the commencement of the suit. In this case Mr. Chancellor Green states the law applicable as follows: "Admit that the complainant, with her trunks, reached her lodgings in Jersey City a day or a week before the bill was filed; does that constitute a residence in this state, within the meaning of the act of the legislature? I do not think that she was either an inhabitant or a resident of this state, within the meaning of the act concerning divorces. The legislature did not design to invite the commission of lewdness within the state, nor to hold out inducements to the citizens of other states to abandon the appropriate forum for the adjudication of their wrongs, and seek redress in our courts. I do not believe they designed to subject the soil of the state to such pollution, or her courts of judicature to such degradation. I know that the language of the statute is very broad, and may in its terms embrace the cause now under consideration; but I nevertheless think that the legislature was legislating for the citizens of this state, not for others. The subject is one of grave importance, and is daily assuming a more serious aspect. At this hour a large portion of the divorces asked for in this court are by citizens of other states, who come into this state for the mere purpose of obtaining a divorce, and often in evasion of their own laws. There is too much reason to apprehend collusion of parties in actions of divorce in regard to the establishment of a domicile, as well as with respect to the procedure. Conflict of jurisdiction, injury to morals, reproach of our law, oppression and fraud, as well as obloquy to the judicature which must administer the law, are the evident consequences which must follow from the influx of parties from other states to obtain

a dissolution of marriage here, in opposition to the rule of their own law." And in *Whitcomb v. Whitcomb*, 46 Iowa, 437, the plaintiff, who owned a farm in Bremer county, leased the same for the year 1872; reserved one room in the dwelling house, where he kept some household goods, his wife being absent in the state of New York, where she had been for several months. A portion of the time after the month of July, 1872, he was at Shell Rock, Butler county, where witnesses testify that he was engaged in the brewery business, in which he had a half interest. They state generally that his residence was there in the fall and summer of 1872. He stated to one of the witnesses that he was staying at Shell Rock in order to claim a residence, that he might procure a divorce. He did commence an action for divorce in Butler county while he was staying at Shell Rock, and a decree was rendered therein December 4, 1872. In that case, on appeal, the court said: "We think the evidence in this case, instead of showing a fixed habitation at Shell Rock, only shows it was a temporary abiding place, selected as an aid in procuring a divorce, and that the commencement of the suit in Butler county was an attempt to impose jurisdiction upon the court in that county which it did not possess." And the court in that case cites with approval the case of *Hinds v. Hinds*, 1 Iowa, 36, wherein Mr. Justice Wright says: "A legal residence, not an actual residence alone, but such a residence as that, when a man leaves it temporarily or on business, he has an intention of returning to, and which, when he has returned to, becomes and is de facto and de jure his domicile,—his residence. There must be a fixed habitation, with no intention of removing therefrom." See, also, *Neff v. Beauchamp* (Iowa) 36 N. W. 905; *Gourlay v. Gourlay* (R. I.) 10 Atl. 592. Bishop, in his work on Marriage, Divorce, and Separation (volume 2, p. 105), says: "The true view probably is that the law and proofs of domicile are the same in divorce causes as in others; but, in the actual course of things, the temptation for litigants to practice frauds on courts and juries as to their domicile is so great, and the successful frauds are so numerous, that the constantly awakened vigilance which necessarily attends these hearings will often refuse to be convinced by evidence which would be accepted as ample in causes of a different sort." In a Massachusetts case Chief Justice Shaw says: "The presumption is violent, if not conclusive, that the husband went to Indiana in order to obtain a divorce. Even if he had other objects in view, if this was one,—and his acting upon that is strong proof that it was,—it would be within the statute." *Shannon v. Shannon*, 4 Allen, 134. "If a person is applying for a divorce in a state where he has been present only during the period which a statute has required to precede the appli-

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cation, if the delictum he relies upon would not authorize this remedy in the state from whence he came, and if he left behind land, houses, friends, and business, while he has none in the new state, one will not readily believe that in good faith he has changed his domicile, though he swears to the change. Observers will set him down as an adventurer, away from home, endeavoring by a false representation to get from a cheated court a worthless writing in the form of a divorce decree, wherewith to deceive some unsuspecting woman into a polygamous marriage with him." *Bish. Mar., Div. & Sep.* § 103.

Counsel for defendant in error cites, in opposition to the doctrine of these cases, *Colburn v. Colburn*, 70 Mich. 648, 38 N. W. 607. In that case the wife, who was defendant, deserted her husband in New York, in November, 1882, and continued to reside in that state, and was residing there at the time of the proceedings for divorce in Michigan. The complainant came to Michigan in July, 1884, and commenced his action for divorce on the 4th day of August, 1885; the statute of Michigan requiring one year's residence. The complainant testified that he came to Michigan with the intention of permanently residing in that state; that his main purpose in choosing Michigan as his home was to procure a divorce from his wife, as desertion was not a cause for divorce in New York. He left no property in New York, and had none except what he had earned since he came to Michigan. The court said: "We think the evidence clearly shows that the complainant is a good-faith resident of the state. If so, it is clearly immaterial what motives influenced him in coming here. And, certainly, the fact that he moved here because he was satisfied with our laws, or wished to receive the benefits of them, should not be used against him to bar him of his rights under those laws." It will be noted that in that case, though the evidence showed that his purpose in coming to the state was to obtain a divorce, yet the evidence showed him to be, independent of that, in good faith a resident, and the court simply held that the original purpose he had in coming would not destroy a residence otherwise established in good faith. The case of *Carpenter v. Carpenter*, 30 Kan. 712, 2 Pac. 122, cited by counsel for defendant in error, is not analogous. In that case the complainant, while a bona fide resident of Neosho county, Kan., was appointed collector of internal revenue of the United States for the district of Kansas. The office of such collector was required to be held in the city of Leavenworth, Leavenworth county, Kan.; and the duties of the office required the plaintiff's presence in Leavenworth city nearly all the time. The plaintiff went to Leavenworth, and remained there about five years, but at no time had any intention of changing his residence, but at all times considered Chanute, Neosho county,

his legal place of residence, continued to vote there, and intended to return to Chanute whenever he should cease to hold his office. The court held that the district court of Neosho county had jurisdiction to hear and determine the action of divorce; that the plaintiff was at the time of the commencement of his action an actual resident of Neosho county, Kan., within the meaning of sections 54 and 640 of the Civil Code; that those sections contemplated the actual and permanent residence of a party, and not necessarily the temporary and official residence which a party may adopt during the time of his holding a federal position. A different principle was involved in that case from the one at bar. The case of *Albee v. Albee* (Ill. Sup.) 31 N. E. 153, 158, shows a suit by husband for desertion; that the plaintiff came to the state two years before he began suit, and with the intention, as he swore, of becoming a resident; and he testified that such has been his intention ever since. The fact that during said time, and particularly during the first year, he was absent most of the time, on visits to his former home, in another state, where his parents resided, was held insufficient to show that he was not a resident of the state for a year before the suit. The decision in that case, while holding that in the particular case the complainant had been a legal resident, yet sustains the principle of the New Jersey case and others cited *supra*, the court using this language: "We are unable to concur with the appellate court in its conclusion that the evidence fails to show that the complainant was a resident of this state for one year next prior to the filing of the present bill. While there are various circumstances surrounding the case tending to awaken a strong suspicion that his residence here was merely colorable, that his only purpose in coming to this state was to apply to one of our courts for a divorce, and that he came with no bona fide intention of establishing a residence in this state, still we are of the opinion that the effect of the evidence in this record is to prove, at least *prima facie*, that for one year prior to the time of the filing of the present bill his legal residence was in Illinois."

We must therefore conclude that the defendant in error was not a resident of this territory in good faith for 90 days preceding the filing of his petition in this cause, and that he was not a resident of Cleveland county at the time said petition was filed; that the court below had no jurisdiction of the action; and that its proceedings were a nullity.

An unenviable fame has already attached to this territory by reason of the inducements which her laws have in the past offered for obtaining a dissolution of the status of marriage. The liberality of the law has been taken advantage of, and has been abused. A large portion of the di-

vorces asked for in our courts were brought by citizens of other states, who came into this territory for the mere purpose of obtaining a divorce, and imposed upon the courts by perjury and fraud, not only as to the facts of residence, but also with respect to the procedure; thus occasioning injury to morals, reproach to the law, as well as obloquy to the judiciary which must administer the laws. This court, as a conservator of society, of the family, upon which society is founded, of the morals of the people, of the good name and fame of the territory, owe it to all these that the laws shall not be administered with such laxity and disregard to the intention of the lawmakers as to bring reproach and dishonor upon the people of the territory, and upon their judiciary.

For the reasons stated herein, the judgment of the court below is reversed, and this cause dismissed. All the judges concur, except SCOTT, J., who tried the cause below, not sitting.

STATE *ex rel.* RUSSELL *et al.* v. TOOKER,
County Clerk.

(Supreme Court of Montana. Oct. 22, 1896.)

ELECTIONS—NOMINATIONS—VALIDITY—POLITICAL
CONVENTIONS—EQUITY DECREE—RE-
LIEF NOT PRAYED FOR.

1. A petition filed with the county clerk and recorder, nominating certain persons for offices as candidates of a certain political party, does not entitle such persons to be placed on the official ballot.

2. A certificate filed with the county clerk and recorder, purporting to certify to the nominations of the persons whose names appear therein as by the county central committee of the Silver Republican party, no convention of which had ever delegated such power to a committee, does not entitle the alleged candidates to a place on the official ballot.

3. In a suit to enjoin the county clerk from placing on the official ballot the names of certain persons as candidates of the Silver Republican party,—the certificate of nomination filed with the clerk purporting to be that of a county convention of said party,—it appeared that the alleged candidates were nominated at a meeting participated in by less than 50 members of the "Silver Republican Club," which had some 400 members; that most of the persons nominated at this meeting were not Silver Republicans, but men who had already been nominated by various other parties; that no primaries were held, no delegates chosen, no call for a convention made, nor any notice thereof given, other than information of the club's proceedings, published in a daily paper as news items, and a statement on a banner that the club met every Wednesday night; that the chairman who presided at the meeting and signed the certificate of nomination did not know till after it was filed that the meeting was a convention, but supposed it was merely a meeting of the club. *Held*, that such meeting was not a party convention, within Pol. Code, § 1310, defining a convention as "an organized assemblage of electors or delegates representing a political party or principle," and authorizing such convention to nominate candidates for public office; and hence the names on the certificate were not entitled to a place on the official ballot.

4. The judgment in equity cases is not controlled by the prayer for relief.

Action by the state of Montana, on the relation of E. C. Russell and others, to restrain John S. Tooker, county clerk and recorder, from placing the names of certain persons on the official ballot as candidates for public office. Injunction granted.

E. D. Weed and Oliver T. Crane, for relator. T. C. Bach, E. C. Boon, and J. W. Kinsey, for respondent.

DE WITT, J. This action is brought in this court to restrain the county clerk and recorder of Lewis and Clarke county from printing on the official ballot to be voted at the next election the names of certain persons as candidates of the Silver Republican party, which names were certified to the county clerk as of persons having been nominated as candidates of that party by methods which relator asserts are illegal. Objections are made by respondent's counsel to the form of this action. It is argued by relator, however, that the action is properly brought, under the authority of *Chumaseo v. Potts*, 2 Mont. 242, *Territory v. Potts*, 3 Mont. 304, and other later decisions of this court. If the action is not properly brought, and upon investigation we should be obliged to so hold, the result would be that a new proceeding must be commenced in order to obtain a judgment on the merits. The same remarks apply to five other election ballot cases which are now (October 22d) before us, and the hearing of which has occupied us all of the last four days. These are cases of great public interest. Counsel inform us that the ballots must be published tomorrow, and that there is barely time to print them. For these reasons we shall approve the form of the actions pro forma, but shall not consider this decision as to this matter of practice binding in the future, if the question shall be at any time fully argued, and we have time to deliberately consider it. Public policy and public interest demand an immediate decision of this case on the merits, and justify us in thus passing the question of practice.

It was attempted to get the names of a certain list of persons upon the official ballot of Lewis and Clarke county by three different methods:

First. A petition was filed with the respondent clerk and recorder nominating these persons for their respective offices as candidates of the Silver Republican party. The nominations could not be made by this method, and the procedure did not entitle these persons to be placed upon the official ticket as candidates of the Silver Republican party. *State v. Rotwitt* (Mont.) 46 Pac. 370.

Second. A certificate was filed nominating these same persons, and purporting to certify their nomination as by the county central committee of the Silver Republican party. But no convention of the Silver Republican

party had ever delegated this power to a committee. *State v. Benton*, 13 Mont. 306, 34 Pac. 301. This committee, therefore, had no power delegated to them from the convention of their party. There was some attempt to show that this committee derived this power by delegation from the chairman of the state central committee of the Silver Republican party to the member of that committee in and for the county of Lewis and Clarke, and from that member to the county central committee of the Silver Republican party. Testimony was taken by us upon disputed questions of fact, and, among other things, the chairman of the state committee testified that he did not delegate to the member of Lewis and Clarke county the power to nominate a county ticket, nor did he consider that he had power to delegate such authority in local affairs. This disposes of the alleged nomination by petition and by the central committee. They are each wholly invalid.

Third. A certificate was filed nominating these same persons, purporting upon its face to be that of a county convention of the Silver Republican party. Upon this alleged certificate respondent's counsel relies. The question, then, remains for decision whether the alleged county convention purporting to nominate these persons, was in fact a convention of the Silver Republican party of the county of Lewis and Clarke. Upon this question evidence was taken.

We think that the only question before us is whether these persons are entitled to go upon the ballot as party nominees; that is, as candidates of the Silver Republican party. *State v. Rotwitt*, supra. The question of their going upon the ballot as Independents, or as non-party candidates, we do not think is before us. Every fact in the pleadings and evidence contradicts any suggestion that any one pretended that these persons were Independents or nonparty candidates. There is not a syllable in the testimony to indicate that the persons endeavoring to make these nominations ever intended to attempt to place their candidates upon the ballot as Independents. The question, then, remains, did a party convention nominate these people? Section 1310 of the Political Code is as follows: "Any convention or primary meeting held for the purpose of making nominations to public office, or the number of electors required in this chapter, may nominate candidates for public office to be filled by election in the state. A convention or primary meeting within the meaning of this chapter is an organized assemblage of electors or delegates representing a political party or principle." We are of opinion that the only reasonable view of the evidence is that these alleged candidates were nominated simply by a political club in the city of Helena, county of Lewis and Clarke, called the "Republican Silver Club." We have before us the minutes of the club, and the

evidence of persons and members who were present at the proceedings. It is perfectly apparent that the club, in acting, was not a convention representing the Silver Republican party; nor, indeed, did those persons participating in the proceedings consider themselves a convention. There is not a minute of a convention. The minutes are all of the Silver Republican Club. To be sure, witnesses on the stand make statements that the Silver Republican Club of Helena and the Silver Republican party were one and the same thing; but we look beyond bare statements and forms of speech, and endeavor to arrive at the real substance of the proceedings. We find that the officers acted as officers of the club, and did not pretend to be officers of a convention. No primaries were ever held. No call for a convention was ever made, nor was any person ever elected as a delegate to a convention, and no notice was given that a convention was to be held. It is in evidence that a daily newspaper in Helena published as news items the proceedings and intentions of this club, but these were simply narrations by a newspaper reporter, and published as news. To pretend that such news items were notices of a convention seems to us to reach the point of absurdity. It is claimed that a banner was strung across the street, which gave notice; but the banner was an ordinary political one, giving the name of the club, and stating that it met every Wednesday evening. It is a very violent stretch of imagination to pretend to call this a notice of a convention. To construe the proceedings of this club as a convention is contrary to all ideas of political conventions among the American people. The Silver Republican party, it was stated in the evidence, was a wing of the Republican party. If it were a wing, it naturally inherited the political practices of the Republican party. No one pretends that the Republican party had any such usages or customs, or ever held conventions in any such manner as this. Upon this question the evidence of the presiding officer of the club, Mr. Reece, is interesting. It was he who signed as chairman the certificate of nomination. After his signature appear these words: "Chairman and Presiding Officer of Said Convention or Organized Assemblage of Electors of the Silver Republican Party. Business: Land attorney. Business address: Helena, Montana." This signature was shown to the witness, and he testified that he did not know what he signed; that Mr. Kinsley asked him to sign it; that he did so hurriedly, as he was leaving his office. This question was asked: "Had you any idea that evening, during the whole process of the meeting, that it was anything else than a meeting of the Silver Republican Club?" Answer: "My understanding was that it was a meeting of the Silver Republican Club." Question: "When did you first know that it was called a convention?" Answer: "After the certificate was filed." He stated further

that he did not believe he was presiding over a convention, and that he did not know that any was called. In reply to a question by one of the justices, he said: "I did understand it was a certificate; that these persons were the nominees of the Silver Republicans; but I did not understand that I presided over a Silver Republican convention." This testimony, let it be remembered, was that of the presiding officer of the club, and the officer who signed the certificate of nomination filed with the county clerk. And we are asked to call this sort of a proceeding a party county convention. We decline to do so. No matter with what force some of the members of the club assert that the club and the party were the same thing, still, when we reach the real substance of the whole proceeding, it seems to us wholly absurd to contend that this proceeding was a convention. Furthermore, it appears that the Silver Republican Club has some 400 members. These proceedings were participated in by 30 to 50 members. It is claimed that this was the action of a political party. We have evidence before us of what the Silver Republican party is claimed to be, and what are a so-called Silver Republican's political principles. These principles are stated by witnesses to be simply that a Silver Republican is one who has been a Republican, and who indorses the whole of the national Republican platform of 1896, except the financial plank; and as to the financial question his position is the advocacy of the free and unlimited coinage of silver at the ratio of 16 to 1 by the United States, independent of any other nation. Such is the evidence before us, and such, for the purposes of this case, must be considered the fact. We do not pretend to deny the right of a political party in convention assembled to nominate a ticket composed of members of its own party, and also those of other parties, but we think the natural presumption from history is that, as a rule, political conventions nominate candidates from the ranks of their own party. But the alleged convention in this case nominated a ticket composed of Republicans, Silver Republicans, Democrats, and Populists. A very large majority of this ticket—that is to say, a majority of 16 to 8—was of men other than Silver Republicans, and of men already in nomination upon the Republican, Democratic, and Populist county tickets. We are of opinion, therefore, that this is additional evidence tending to show that the assembly which nominated the persons in question was not a convention of the Silver Republican party. Let it be remembered that we do not question the right of a convention to make such nominations if they please; but when the question in controversy is whether or not an assemblage was a convention, the fact that it has done that which is wholly contrary to the history of political conventions is some evidence against the claim of the assemblage to be a convention; for when it nominates a vast ma-

jority of its candidates from among the ranks of its enemies, it is doing that which is at least extraordinary as convention action.

The respondent's counsel earnestly argue that any number of men, however small, may organize a political party. This will not be denied at this time or place. But that is not the question for consideration. The question here is whether or not a political party held a convention. We have stated above our reasons for holding that the evidence shows that this was not a convention under the statute, or under the usages or customs of political parties. It must be remembered that this is an action in equity, and that this court is sitting as an equity court. It is our duty to arrive at the real substance of things. These cases must each stand upon their own facts,—a doctrine to which we gave particular emphasis in *Stackpole v. Hallahan*, 16 Mont. 40, 40 Pac. 80. Regarding the real facts of this case as they have been presented to us by the pleadings and by the evidence, we cannot, in any equity or good conscience, concede that the assemblage which nominated these persons was in any sense a county convention of the Silver Republican party. It seems to have been sought by the respondent to show by the evidence which the counsel introduced that the alleged convention under consideration was a parallel to the state convention, which convention, representing all the electors of the state, deliberately and formally divided itself into two conventions, which two conventions each then proceeded to nominate presidential electors and a congressman. The facts in regard to the state convention were introduced in evidence. But, without discussing them at any length at this time, we will leave them with the remark that the facts in regard to the state convention are very widely distinguished from the proceedings of the assemblage which nominated these persons under consideration. The judgment in equity cases is not controlled by the prayer for relief. *Davis v. Davis*, 9 Mont. 268, 23 Pac. 715; *Kleinschmidt v. Steele*, 15 Mont. 188, 38 Pac. 827. We are of opinion that the facts shown entitle the plaintiff to an injunction restraining the county clerk and recorder from placing upon the official ballot, as candidates of the Silver Republican party, all those persons named in the pretended certificate of nomination signed by F. L. Reece as chairman, and W. J. McHaffie as secretary; and also such persons as pretended to be nominated by petition of electors, and by certificate of the Silver Republican party central committee,—that is to say, all those persons who were named in said three certificates, copies of which are annexed to relator's complaint as exhibits. Let the writ of injunction therefore be made perpetual to the foregoing effect.

PEMBERTON, C. J., and HUNT, J., concur.

STATE ex rel. METCALF v. JOHNSON,
County Clerk.

(Supreme Court of Montana. Oct. 22, 1896.)
POLITICAL PARTY—ORGANIZATION—WHAT CONSTITUTES A CONVENTION.

1. Electors assembled by personal invitation, and representing but one-fourth the precincts in one county, organized as a political party by the election of chairman and secretary, and appointment of committees. The assembly then proceeded as a county convention, and nominated a county ticket. The county convention adjourned sine die, and the same electors immediately proceeded to hold a state convention. No call for a state convention was ever given; no delegates to the state convention were ever elected by any county convention; no credentials as such were ever given; no notice was attempted to be published of a state gathering of the new party; and no delegates other than those who first assembled, and who sat as a county convention, participated. Held that, within the statutory rule that a convention must be an organized assemblage of electors or delegates representing a political party or principle, there was neither a county nor state convention with authority to nominate candidates.

2. Whether there has been a convention with authority to nominate candidates is, under conditions of fact, one that must be determined by applying the statute law of the state.

Petition by Elmer H. Metcalf for an injunction to restrain Charles Q. Johnson, county clerk and recorder of Silver Bow county, from printing on the official ballot for that county the nominees of the Citizens' Silver party. Temporary writ of injunction made permanent.

Thompson Campbell, for relator. F. T. McBride, L. J. Hamilton, and J. F. Forbis, for respondent.

HUNT, J. The petitioner asks for an injunction to restrain the county clerk of Silver Bow county from printing upon the official ballot for that county the nominees of the Citizens' Silver party as they appear by the certificates on file with the county clerk of Silver Bow county. Answer was filed, and testimony heard by this court. The facts in evidence before us are these: On October 1, 1896, at 8 o'clock p. m., there assembled at the council chamber of the City Hall at Butte a gathering of 20 or 30 persons, electors of Silver Bow county, Mont. These persons met in response to invitations extended by Mr. J. A. Baker and several others. The exact circumstances under which they came together were detailed by Mr. Baker as follows: "Question. Do you know whether there was any call made for this meeting? Answer. The manner in which this call was made was from hand to hand and from mouth to mouth. Q. By whom? A. By the electors of Silver Bow county. Q. When was this call given? A. Several days before the meeting; two days, perhaps three. Q. Don't you know? A. I do not know. Q. You participated? A. I did. I invited people perhaps three or four days before the meeting was called. I invited gentlemen whom I knew to be in sympathy with the principles of the financial plank of the party. Q. Were any notices given to any other counties, or electors of any other

counties, to come in and participate? A. No, sir. Q. You did not? A. No, sir. Q. Do you know whether anybody else gave any notice? A. No, sir; I do not know. Q. Don't you know that they did not? A. Well, I can't say. Q. Was there any notice published in the papers? A. No, sir. Q. Now, when you did assemble, how did you determine as to who had a right in the meeting? A. The gentlemen who did assemble were supposed to be gentlemen who were invited to the meeting, and were electors of that party." When thus assembled, Mr. William Thompson was elected as temporary chairman, and Mr. J. A. Baker temporary secretary. These gentlemen were made permanent officers. Then the gathering appointed several committees, and thereafter at once organized itself into a political party to be known as the "Citizens' Silver Party,"—"the beginning," testified the secretary, "of a new national party." Directly after this important epoch in the history of this new national organization, and without pursuing the common ceremony of a call for a convention, it proceeded as a "county convention" to consider the report of a committee recommending nominations for candidates for district court judges and county officers of Silver Bow county. The report of the committee recommending certain names was adopted, and a complete ticket nominated forthwith by acclamation. The county ticket so nominated was identical with the Republican county ticket, or "Auditorium ticket," and which we are not asked to disturb. No resolutions or platform was adopted, "it appearing," the minutes recite, "to the convention, from statements made in the convention, that a state convention of the Citizens' Silver party had been called to meet on October 1, 1896, at the council chamber, City Hall, Butte, at eight o'clock p. m. of that day, and that the electors and delegates to that convention were ready to meet upon the adjournment of the county convention, and that the said state convention would probably adopt resolutions setting forth the principles of the party. It was therefore the sense of the convention that the county convention should not adopt any resolutions as a county convention, but would be bound by such resolutions as the state convention should adopt as a declaration of its principles." The "county convention" then adjourned sine die. Then at once followed a "state convention of the Citizens' Silver party." Mr. McMillan was chairman, Mr. Baker secretary. The same gentlemen who had composed the county convention made up the so-called "state convention"; that is to say, the persons composing the county convention simply assumed to act in a different capacity. Only one roll of delegates was kept for both conventions. It showed 21 names of persons as present. The body nominated Hon. Martin Maginnis, Henry L. Frank, and Daniel Brown, Esqs., as presidential electors, and voted to leave the balance of the state ticket blank. Resolutions favoring free coinage of silver by the United States independently of any other nation were adopted, and the "state convention" adjourned.

No call for a state convention was ever given; no delegates to the state convention were ever elected by any county convention; no credentials were ever given to any such delegates by any one; no notice throughout the state, or any county in it, was attempted to be published by way of notice of a state gathering of this new party; and no delegates, other than the 21 persons already referred to, participated. The whole history of the party covered one short evening. It originated one minute, convened as a county convention the next, convened as a state convention the next, then promulgated its principles, and adjourned. We doubt if political history records the undertaking of another so vast a work as this in so brief a time!

But, now that the facts are subjected to the severe test of impartial judicial investigation, we find them wholly insufficient to sustain the action of the assemblage either in attempting to nominate county or state officials, and we are satisfied by all the evidence that the real object of the nomination of the Citizens' Silver ticket was to place the Republican nominees beneath the Democratic electoral ticket. Let us grant that a new national party was organized. Yet, even so, how can a few individuals, coming from but one-fourth of the voting precincts of one county, without any notice to the electors of the state, organize a state convention representing such an organized party and its principles? The very underlying principle of convention organization is in representation. This principle pervades every political system in our form of popular government. It was recognized in May, 1787, when the federal system was revised by the Philadelphia convention of delegates from the states at the outset of the government, and has steadily grown to be a common form of giving expression to the choice of the people by whom delegates are usually chosen. As political parties have grown and become the medium of declarations of principles of electors, so the convention system has become a common part of political machinery as the means of putting candidates before the people. National party conventions have nominated presidential candidates since 1832. Somewhat recently, in the growth of electoral reform, legislation has come to recognize the existence of political party conventions; and the statutes of many states, including those of Montana, have briefly put in definite form the rule that a convention is an organized assemblage of electors or delegates representing a political party or principle. This definition cannot be separated into wholly independent, divisible parts. The assemblage must not only be an organized one, but the electors as well must, when so organized, represent a political party or principle. Thus a convention must be a representative body. Now, if we are right in this reasoning, this representation is of electors of the party to whom the candidates of the convention are to be submitted for election to office. And this

representation must be what the statute implies,—a gathering of electors springing from the electors who compose a political party or adhere to a political principle. If such electors fail or decline to send delegates to the convention, or if the delegates sent disagree or act unwisely, then other matters may arise; but there can be no representation without the presence of electors fairly representing the party, or without some opportunity having been given to the electors to say whether or not they desire their party or principle to be represented. This was the doctrine of the *Woody Case*, 46 Pac. 370, and is now reaffirmed. Here, in this case, we find an attempted state convention of an organized party, made up of a few persons, without credentials, voluntarily coming from but nine precincts of one county in a great state, and no attempt at giving to the electors of the party in other precincts or counties a chance to participate in the assemblage! The whole theory of representation, as fairly intended by the law, was entirely ignored. The vigorous authority of the electors of the party was lacking, and, unless relief is granted in such cases, the voters of the state who are members of an existing political party may be confronted with a ballot containing the names of persons in whose nomination they had no opportunity whatever to take part by delegate representation. We cannot assent to such a method as a convention nomination of candidates. A political convention is to a certain extent a law unto itself, and the right to assemble in convention is one that must be always upheld; but whether there has been a convention with authority to nominate candidates is, under conditions of fact, one that must be determined by applying the statute law of the state. The duty of the court, therefore, in this case is to subject the methods employed to form a convention to such examination as any other case properly presented to a court would be. We have done so, and our conclusion is that there was no state convention held, and the writ must issue as prayed for.

These views apply to the so-called "county convention." The electors of the new party in Silver Bow county had no fair notice of any convention, and no opportunity to be represented by delegates, and were not represented, except by a few projectors of the new party. The action of the body, therefore, as a county convention, cannot be sustained, and it must be nullified.

All questions of practice are passed. *State v. Tooker* (Mont.) 46 Pac. 530. Let the writ of injunction issued enjoining the county clerk from putting the so-called "Citizens' Silver Ticket" upon the official ballot be made permanent.

As it appears to the court that the secretary of state has certified the Citizens' Silver party electoral ticket to all of the county clerks throughout the state, the attorney general is hereby directed to notify each and every coun-

ty clerk of this decision, and to order them to omit the said ticket from the official ballots of their respective counties.

PEMBERTON, C. J., and DE WITT, J., concur.

MADDOX (GADDIS, Intervener) v. TAGUE et al.

(Supreme Court of Montana. Oct. 19, 1896.)

RES JUDICATA—REVIEW ON APPEAL—CONFLICTING EVIDENCE—CHATTEL MORTGAGE FORECLOSURE—SALE ON CREDIT—AUTHORITY OF SHERIFF—MOTION TO STRIKE—OBJECTIONS TO EVIDENCE.

1. The ruling on appeal is not *res judicata* on a second trial as to a state of material facts newly in evidence.

2. The findings of a jury on a substantial conflict of evidence will not be disturbed.

3. A sheriff to whom a chattel mortgage is delivered for the purpose of executing the power of sale therein is authorized to sell only for cash, and the mortgagee is not bound by a sale on credit under an arrangement made by his agent and the sheriff and bidder, without the knowledge, consent, or subsequent ratification of such mortgagee. 22 Pac. 386, 9 Mont. 126, affirmed.

4. A motion to strike out a portion of the replication on the ground that it is a departure from the complaint is properly overruled if it fails to show in what the alleged departure consists.

5. Objections to evidence are properly overruled unless they state the grounds on which they are made.

Appeal from district court, Meagher county; Frank Henry, Judge.

Action by Fletcher Maddox against E. H. Tague (administrator of the estate of William Rader, deceased) and others for the recovery of money. One William Gaddis was allowed to intervene, and from a judgment in favor of plaintiff and said intervener, and from an order denying a new trial, defendants appeal. Affirmed.

The plaintiff, Maddox, and intervener, Gaddis, obtained a judgment in this case in the year 1888. That judgment was affirmed by the territorial supreme court. 9 Mont. 126, 22 Pac. 386. On writ of error from the supreme court of the United States, the judgment of the territorial supreme court was reversed. On mandate from the United States supreme court to us, a new trial was ordered in the district court of the state. For the history of the case up to the time of the second trial, see 9 Mont. 126, 22 Pac. 386, and 150 U. S. 123, 14 Sup. Ct. 46. On the second trial in the district court verdict and judgment were also for plaintiff and intervener. Defendants' motion for a new trial was denied. The appeal now is from the judgment and that order. On the second trial the defendants, as in the first, had the burden of proof. On this trial the testimony of the defendants was not stricken out as it was on the first, but it went to the jury along with the testimony of the plaintiff and the intervener; and, under instructions of the court, the facts thus testified to were passed upon by the jury. When the second trial took place, defendant Rader was dead, and Tague, his ad-

ministrator, was substituted, and now appears as defendant and appellant. The other defendants are sureties on Rader's official bond as sheriff. There is a complaint by the plaintiff and also by the intervenor; and, as remarked in appellants' brief, they are substantially alike. Appellants also say that the intervenor's case must stand or fall with the judgment entered in favor of plaintiff. We will therefore consider the complaint of plaintiff alone. That pleading alleges the fact of Rader being sheriff of Meagher county, and his giving his official bond with the defendants other than him as sureties; that on August 9, 1887, plaintiff gave Rader a chattel mortgage executed by P. D. Kinyon to secure the plaintiff in the sum of \$7,313 and interest, and Gaddis in the sum of \$3,000 with interest; that plaintiff directed said Rader to seize the property described in the mortgage and sell the same, etc.; that Rader between August 9 and 30, 1887, seized and advertised the property, to wit, horses, and between August 30th and September 5th sold a large quantity of the horses for \$10,735, and on September 5th released the balance of the property unsold, to said Kinyon, upon the payment by Kinyon to him of a sum of money which, with the \$10,735 aforesaid, was sufficient to satisfy the mortgage, with interest and costs; that on September 5, 1887, there was due to plaintiff \$7,043, with interest, making \$8,187; that on September 15th Rader paid to plaintiff \$2,872.31, leaving a balance of \$5,314.69; that plaintiff demanded payment of this sum, and defendant Rader, contrary to the obligations of his bond, refused said payment. Judgment was demanded for said sum. For answer the defendants denied that Rader had received the sum of \$10,735, or any greater sum than \$3,390.65. Further answering, they allege that 142 horses, mares, and colts were bid off and knocked down to one A. B. Kier for \$8,096.50, and that in pursuance to instructions from the mortgagees, and according to an agreement then made between the mortgagees and Kier whereby Kier was to pay Rader, and did pay him, \$1,752.15, and was to have five days in which to pay the balance, Rader to retain the horses, mares, and colts until full payment was made, and, in event of Kier's failure to pay, the said sum of \$1,752.15 was to become forfeited to the use of the mortgagees, and the horses to be retained by Rader on account of the mortgagees, the said Rader did retain said \$1,752.15, and did pay the same to the mortgagees, said sum being part of that which he paid over to the mortgagees, and that Rader retained in custody the 142 horses subject to the order of the mortgagees; that afterwards Rader notified the mortgagees of Kier's failure to pay the balance and that the horses were held subject to their order, and that, the mortgagees failing to direct the disposition of the horses, Rader tendered them to the mortgagees, and that they refused to receive them, and that Rader holds the same subject to the orders of the mortgagees; that on September 5th Kinyon, the mortgagor, tendered and paid

to Rader \$2,459.20, the balance due on the mortgage, and demanded the return of the property unsold; that Rader returned to Kinyon said unsold property and paid to the mortgagees the said sum of \$2,459.20. These are the material allegations of the answer. Plaintiff, in replication, admitted that at the sale 142 head of horses were bid off and knocked down to said Kier for \$8,096.50, but denied that this was done pursuant to instructions from the mortgagees or according to any agreement as set forth in the answer, or that any such agreement was made between them and Kier, or that they ever agreed that Kier was to have any time in which to pay for the horses, or that in event of his failure to pay they were to be retained by Rader on account of the mortgagees. Denied that Rader retained the horses subject to the order of the mortgagees, but held them under his own control for the purpose of enabling Kier to pay the balance of \$8,096.50, and that this Rader did, pursuant to an agreement between him and Kier, at his own risk for a period of 30 days. Denied that Rader notified the mortgagees that the horses were held subject to their orders, or that he tendered the horses, but on the contrary alleged that Rader retained the horses to enable Kier to pay the balance, and assisted Kier in efforts to raise the money for that purpose; that thereafter the sheriff sold many of the horses to other persons; and that thereafter he delivered a portion of the horses to his co-defendants, who sold some of them and divided between themselves some \$1,500. The replication admits that Rader paid to plaintiff the sum of \$3,192.93, and to Gaddis \$1,591.57, but avers that when that money was received plaintiff was not informed by Rader that the deposit of \$1,752.15 made by Kier was embraced in said sum of \$3,192.93, and that when plaintiff received said sum he had no knowledge that the payment embraced the \$1,752.15 alleged to have been forfeited, as set up in the answer, and that the payment of \$3,192.93 by Rader to him was not intended or understood as a transfer of the money alleged to have been deposited as a forfeiture, but was a payment on account upon the sum that Kier was then owing plaintiff. Upon these pleadings the case was tried and evidence introduced on both sides. Verdict and judgment were for the plaintiff and the intervenor.

Cullen & Toole, H. G. McIntire, and Max Waterman, for appellants. Toole & Wallace, H. E. Thompson, and Carpenter & Carpenter, for respondents.

DE WITT, J. (after stating the facts). The gist of appellants' contention is that the decision of the United States supreme court was the law of the case for the district court, and now for this court, and that the law of the case, as they understand it, was disregarded by the district court in various rulings, to which they duly excepted, and which they have reserved for review in

this appeal. We will start more clearly if we first define what is our understanding of the decision by the supreme court of the United States as the law of the case. On the first trial all the testimony offered by the defendants was excluded from consideration, and judgment was rendered by the court in favor of plaintiff and intervenor. 9 Mont., at page 134, 22 Pac. 386. In this condition the case came before the United States supreme court. That court said that, therefore, it would be assumed by them that the facts were as this excluded testimony tended to prove they were. 150 U. S., at page 130, 14 Sup. Ct. 46. There was therefore no rebutting testimony by plaintiff or intervenor to be considered by the supreme court. But upon this second trial there was rebutting testimony. The proffered testimony of the defendants was not taken to be the facts. All the testimony went to the jury. They passed upon all the facts. Furthermore, this testimony thus before the district court, and before us now, discloses facts, or evidence tending to prove facts, that were not before the court on the other appeal. As to a new state of facts, or a state of material facts newly in evidence, the former decision of the court is not the law of the case. *Creighton v. Hershfield*, 2 Mont. 169; *Daniels v. Insurance Co.*, Id. 500; *Palmer v. Murray*, 8 Mont. 174, 19 Pac. 553; *Kelley v. Cable Co.*, 8 Mont. 440, 20 Pac. 669; *Davenport v. Kleinschmidt*, 8 Mont. 467, 20 Pac. 823; *Hayne*, New Trial & App. § 291. The United States supreme court did not hold, in its opinion, that there was no completed sale made by Rader to Kler. It is said in the opinion that no completed sale was made, but this is obiter, for the court after making that remark leaves the subject with this language: "But it is unnecessary to pursue any inquiry in this direction, for upon a very clear rule of law the mortgagees are estopped from maintaining this action." 150 U. S., at page 130, 14 Sup. Ct. 47. The decision of the supreme court was in fact based upon the opinion of that tribunal that the receipt by Maddox of \$1,752.15 was a ratification by him of the alleged acts of his agent, Smith, and that Maddox was estopped to deny the authority of Smith. But even this view was hedged by the supreme court when they say in the opinion: "It may be that this case turns somewhat on whether the sheriff and plaintiffs understood and intended that the payment of this money was in fact a transfer by him to them of the deposit, or merely a payment on account; but, even if this be so, the question was one of fact to be settled by the jury, and should not have been disposed of by striking out all the testimony, and withdrawing the case from the jury." 150 U. S. 131, 14 Sup. Ct. 47. This, as the supreme court says, was a question of fact for the jury to determine. It was taken from the jury by the action of the court on the first trial. It was not tak-

en from the jury on the second trial, but was submitted with appropriate instructions. Therefore, by the opinion of the supreme court of the United States, three questions seem to us to have been left open for the second trial, viz.: First, whether Rader treated the transaction as a completed sale; second, whether Maddox received the deposit of said \$1,752.15, he and the sheriff understanding that it was intended that the payment of this money was in fact a transfer to him of the deposit, or merely a payment on account; and, third, whether Maddox received this \$1,752.15 along with the other money paid to him by Rader with knowledge of an agreement between his agent, Smith, and Rader and Kler such as is set out in defendants' answer,—that is to say, the alleged agreement that Kler's deposit on the horses bid in by him, and the horses, should be forfeited to the mortgagees in case full payment were not made. These questions were submitted to the jury by appropriate instructions. In treating these questions left open by the decision of the United States supreme court, it is necessary to first inquire whether the defendants made out their defense set up in their answer, and to understand clearly just what that alleged defense was. As it appears by the answer it was this, namely, that the agreement made at the time of the sale between Rader, sheriff, Kler, bidder, and Smith, mortgagee's agent, was that, in the event of Kler's failure to pay the balance on his bid, the \$1,752.15 already paid in by him to the sheriff should be forfeited to the mortgagees, and that the horses should be retained by Rader on account of the mortgagees. They then further contend that as Rader paid the \$1,752.15 to Maddox, and tendered to Maddox the horses, and as Maddox accepted the money, although he refused the horses, this was a ratification by Maddox of the agreement pleaded in the answer and claimed to have been proven, and that, therefore, under the law of the case as decided by the United States supreme court, the ratification by Maddox, and his estoppel, are established. Appellants state in their brief that this, their affirmative defense, was fully established. They do not recite the testimony which they claim establishes that defense, but they refer to the pages of the transcript at which they claim is found such testimony. But an examination of this testimony referred to, and the other testimony in the case, does not, in our opinion, sustain the appellants' contention. This testimony does not fully establish their position. Indeed, if there is not a preponderance of the testimony against them, as it seems to us there is, there is at least a wholly substantial conflict in the evidence on this point. The respondents claim that the evidence, instead of proving an agreement between Rader, Kler, and Smith, as set up in the answer, does in fact prove another agreement, to wit, that, instead of

the \$1,752.15 and the horses knocked off to Kler to be forfeited to the mortgagees, the agreement was that the money should be forfeited to the sheriff, and that the sheriff should retain the horses himself, and that the money was so taken by the sheriff to cover the expenses of a resale of the horses, and that the horses were to be retained for the purpose of reselling them. We think there is ample testimony, and indeed probably a preponderance of it, to the effect that the agreement was as claimed by the respondents. There being at least a substantial conflict of testimony upon this point, the finding of the jury cannot be disturbed on this ground. And it is, therefore, for the purposes of this review, not true that the defense set up by the appellants was fully established. We have examined the evidence upon this point with care, and while some of it is indefinite, and while, perhaps, there are some contradictions, there is ample evidence to the effect that Smith, the agent of Maddox, did not agree that the money should be forfeited to Maddox, or that the horses should be held by the sheriff for him, but on the contrary the most that Smith ever did as the agent of Maddox was to consent that the sheriff should receive the money to cover the expenses of a resale, and should himself hold the horses for that purpose. We stop to note here that Rader himself treated the transaction with Kler as a completed sale, for he proceeded to accept from Kinyon, the mortgagor, a sum of money which, together with the amounts already bid on the horses, made an amount sufficient to pay the whole mortgage debt. Upon receiving this money from Kinyon he released to Kinyon all the horses unsold, and paid to Maddox the amount of money which he had collected, less the costs and expenses of making the sale. Rader's construction of that transaction seems to us perfectly clear.

We then come to the question of what, if anything, Maddox ratified by receiving from the sheriff a part payment in the sum of \$3,192.93. Maddox did not commit any act of ratification by receiving any of the horses which had been struck off to Kler, for he refused to accept them. We must bear in mind that appellants contend that Maddox thus ratified what they claim in their answers were the acts of his agent Smith, but, as observed above, the testimony did not establish that the acts of the agent, Smith, were those which appellants contend they were; that is to say, there was not an agreement between Rader, Smith, and Kinyon that the money paid by Kler should be forfeited to Maddox, and the horses retained on account of Maddox. It is then claimed by respondents that Maddox, in receiving the money, could not ratify an agreement which was not made by his agent. It is not established by the evidence that Maddox received the money with the understanding that he received it under the agreement set

up in appellants' answer. The intention and understanding with which he received this money was a material fact in the case, as said in the United States supreme court in its decision, and that question was submitted, as we think properly, to the jury. We do not say that the evidence was all with the respondents on these matters, but it is certainly the fact that there was substantial testimony to sustain the verdict of the jury in these respects. It is not necessary to trace this question in its various phases, as it was raised upon the trial. This statement of our conclusion is sufficient to cover the point wherever it appears in the record.

There is another matter as to the law of the case upon this appeal. It is the law of the case, as declared by this court (9 Mont. 126, 22 Pac. 386), that, by the delivery of the mortgage to the sheriff for the purposes of selling the property, he had authority to sell only for cash. This law of the case is not disturbed by the decision of the United States supreme court. Therefore, whatever Smith, as Maddox's agent, may have done in agreeing, or attempting to agree, to any kind of a sale other than for cash, was beyond his authority as agent. The appellants rely upon Maddox's ratification; that is to say, a ratification of that which they claim was the nature of Smith's acts. But Smith's acts in the premises, as shown by evidence sufficient to sustain the verdict, were materially other than appellants claim they were. Therefore, if Smith agreed to that which he had no authority to agree to, he did not in any event agree to that which appellants claim he did, and therefore Maddox did not ratify such claimed agreement, because he could not ratify that which Smith had not performed. Maddox is therefore not estopped. This disposes of the gist and main contention in the case.

The appellants contend that there was a departure in the pleading between the complaint and the replication. We are not of the opinion that there was any departure. But the manner in which this question was raised was by a motion to strike out a portion of the replication for the alleged reason that it was a departure from the complaint, but the motion does not pretend to point out in what the departure consisted. Under the general principles applicable to motions and the pointing out the grounds of the same, we are of opinion that the district court was justified in ignoring the motion, which did not in any way indicate the grounds of the same.

There were a very great many objections to testimony. In overruling these objections, appellants contend that the court erred. Almost all of the objections can be considered as properly overruled, because they do not point out the grounds upon which appellants objected. *State v. Black*, 15 Mont. 148 38 Pac. 674, with cases there cited. It may be that some immaterial testimony was al-

lowed in the case, and possibly some testimony that was incompetent, but as to all of it we are of opinion either that the objection was not sufficiently made, or, in the cases where it may have been sufficiently made, there was no error which was sufficiently prejudicial to justify us in reversing the judgment.

Much of the argument in the brief is made upon the instructions of the court. We are of opinion that the instructions fairly presented to the jury the issues set up in the pleadings, and brought before the jury by evidence. The court instructed upon these issues consistently with the view that we have above expressed as to what was the real gist of the action.

We have discussed this appeal from the point of view of the plaintiff only. It is sufficient to say that, as appellants themselves remark, the case of the intervenor must go with that of the plaintiff. It is therefore ordered that both as to intervenor and plaintiff the judgment and order denying a new trial are affirmed. Affirmed.

PEMBERTON, C. J., concurs. HUNT, J., being disqualified, takes no part in the foregoing opinion or decision.

**MCCORMICK HARVESTING-MACH. CO.
v. REINER et al.**

(Court of Appeals of Kansas, Southern Department, E. D. Oct. 7, 1896.)

ACTION ON NOTE—DENIAL OF EXECUTION—BURDEN OF PROOF—GUARANTY—CONSTRUCTION—FINDINGS—DAMAGES.

1. Where a verified answer denies the execution of the instrument sued on, the burden of proving its execution rests upon the plaintiff, and such instrument is incompetent as evidence against the party filing such verified answer, in the absence of evidence tending to establish its execution by said party.

2. Where a contract of guaranty has attached to it a notation that it is subject to a contract, the guaranty and contract must be construed together as one transaction.

3. Where a defendant claims that the notation, "Subject to contract with McCormick Harvesting-Machine Company," which is attached to a contract of guaranty, refers to an oral contract, and the plaintiff claims that such notation refers to a written contract, which by its terms does not provide for such guaranty, *held*, that a general finding of the jury for the defendants is a finding that the notation refers to the oral contract.

4. Where a loss occurs by reason of one party's failure to fulfill its part of a contract, it cannot recover the amount of such loss from the other party to the contract.

(Syllabus by the Court.)

Error from district court, Crawford county; J. S. West, Judge.

Action by the McCormick Harvesting-Machine Company against George E. Reiner and J. C. Prentice, partners as Reiner & Prentice. Judgment for defendants, and plaintiff brings error. Affirmed.

This action was brought in the district court of Crawford county, Kan., by the plaintiff, to recover from the defendants the amount due upon three promissory notes executed by George Salsbery, which contained the following indorsement:

"For value received, I or we hereby guaranty the payment of the within note at maturity or at any time thereafter, and waive demand, protest, and notice of nonpayment thereof. Reiner & Prentice.

"Subject to contract with McCormick Harvesting-Machine Co."

After setting out the notes and the indorsement thereon, the petition contains the following averment: "Plaintiff further says that said notes, and each of them, were indorsed, guarantied, and agreed to be paid by the said G. E. Reiner and J. C. Prentice, upon the conditions, and those only, set out in the contract made with this plaintiff and said defendants in writing, a copy of which is hereto attached, marked 'Exhibit D,' and made a part of this petition, and as well a part of each of the several causes of action set out herein." An examination of the contract develops the following statements in regard to taking, indorsing, and delivering notes: " * * * To thoroughly and vigorously canvass the above-named territory for the sale of said machines and to sell to responsible men only. * * * To draw all notes taken for sales of said machines, wire, twine, binder trucks, bundle carriers, payable to the order of the McCormick Harvesting-Machine Company upon blanks furnished for that purpose, and bearing not less than 7% per annum interest from July 1 next, and 10% interest after due. To sell all machines, wire, twine, binder trucks, bundle carriers, and repairs for such prices and on such terms only as shall be prescribed by the said company or its general agent in the territory above mentioned, and in case machines, wire, twine, binder trucks, bundle carriers, or repairs are sold at a less price or on different terms than so prescribed (except under written instructions from said company or said general agent), the loss in price to be assumed by said agents, and deducted from their commission, and the notes taken on other than that prescribed shall also be taken by said agent in payment of their commission. * * * To settle for machines sold either by cash or note at the time of delivery, and in no case to warrant machines other than as specified in the regular warranty furnished by said company, and if said agent shall deliver any machine for use in the field, or permit the use of a machine, before it is fully settled for by cash or note, said agent will account and pay to said company on demand full price of such machine, together with interest from July 1 next, and waive all claims under the warranty, and further agree to pay said first party for costs or expenses incurred on said machine. To furnish said McCormick Harvesting-Machine Company or

their general agent, as soon as called upon after harvest, a full and detailed account of sales on such blank forms as shall be furnished for that purpose, and to be prepared for a full and complete settlement at any time thereafter; * * * and in case sales are made to parties who are discovered and adjudged by said company or their authorized general agent to have been doubtful or worthless at the time of sale, the notes taken for such sale shall be received by said agent to apply on their commission due on sales; and it is further agreed, in case the said McCormick Harvesting-Machine Company or their general agent finds that any note taken and passed upon at settlement was doubtful or worthless at the time of sale, then the said agent shall take the said note, and replace it with cash or notes secured by good and responsible parties that shall be acceptable to said company or their general agent. * * * It is distinctly understood and agreed that the said party of the second part is to receive, in the capacity of agent of the party of the first part, and not otherwise, all moneys, notes, property, or other security given or taken in payment for machines, or for wire, twine, binder trucks, bundle carriers, repairs, or other property sold by them for said company; and said agents further agree not to retain, on account of commission or other claims against the said McCormick Harvesting-Machine Company, any money, notes, or other property received from sales of machines, wire, twine, binder trucks, bundle carriers, repairs, or any other property, or collection of notes or accounts, but to promptly remit all moneys, notes, or other property to said company or their authorized general agent, leaving the commissions and other claims to be determined and paid at settlement. * * * It is further mutually agreed that said McCormick Harvesting-Machine Company shall at all times have exclusive and entire control over all orders, contracts, accounts, notes, moneys, and assets, or other property accruing and growing out of sales of said machines, wire, twine, binder trucks, bundle carriers, repairs, or other property, whether for this or previous years, and may at any time annul and determine this and prior contracts, and take possession of all notes, accounts, moneys, machines, wire, twine, binder trucks, bundle carriers, repairs, and other property in the hands of said Reiner & Prentice by virtue hereof."

The defendant J. C. Prentice denies under oath the execution of the written indorsement and warranty by Reiner & Prentice. The answer of George E. Reiner admits the execution of the contract of agency but alleges "that, at the time the guaranty on the back of said promissory notes set out and described in plaintiff's petition were executed, a verbal agreement was entered into between himself and said plaintiff, by and through its general agent, by the terms of which said plaintiff agreed, in consideration

of the guaranty placed upon said notes, to return said notes to these defendants for the purpose of getting further security thereon, and thus making said notes good and collectible; that said agreement was referred to in said guaranty in the following words, to wit: "Subject to contract with McCormick H. & M. Company." The defendant Reiner also alleges that the plaintiff failed, neglected, and refused to return the notes according to said verbal agreement, and did not attempt to collect them, or send them to this defendant, or either of these defendants, for the purpose of obtaining more security, or for the purpose of collection, as it had agreed to do; that at the time the maker of said notes was ready and willing to obtain good security upon said promissory notes, and this defendant could have soon made said notes collectible; that by reason of said negligence of said plaintiff the said promissory notes became worthless and the maker thereof insolvent. The answer also alleges that the plaintiff failed to offer said notes to the said defendants as commission for the sale of goods of the said plaintiff, upon which the said defendants were entitled to commissions, as by the contract of agency it was their duty to do, and that they were unable to protect themselves at a time when they could have done so by obtaining further security, or by collection of the same from the maker thereof at a time when he was solvent and able to pay. The answer also alleges that the guaranty on the notes was made long after the notes were executed, and without consideration.

Judgment was rendered for defendants, and against the plaintiff, for costs, who brings the case here for review.

Wells & Wolly, for plaintiff in error.
Brown & Russell and Fuller & Randolph, for defendants in error.

DENNISON, J. (after stating the facts). So far as the defendant Prentice is concerned, there is no contention that he in person signed the guaranty. The firm name, Reiner & Prentice, was signed by George E. Reiner. The evidence discloses the fact that Reiner & Prentice were in partnership in the hardware and machine business, and there is no evidence that either one had any authority to bind the partnership by indorsing or guarantying notes, or to go security for third persons. "It is no part of the business of a partnership to give a guaranty of or become surety for the payment of the debts of others, or to bind its credit to third persons. The holder of a note made or indorsed by one partner without the consent of the firm therefor, who knows that the signature of the firm was given for the purpose of accommodation, or as surety, cannot recover as against the partnership, though the partner who thus uses the firm name is himself bound as though he had given his

individual signature." 17 Am. & Eng. Enc. Law, 1021.

It is contended by the plaintiff that Reiner signed the guaranty upon the notes in fulfillment of the written contract between the plaintiff and defendants. A careful examination of the contract fails to support the contention. It is provided that if sales are made to parties adjudged by the company to have been doubtful or worthless at time of sale, the notes taken for such sale shall be taken by Reiner & Prentice to apply on their commission. It is also provided that, if the company finds that any note passed upon at settlement was doubtful or worthless at the time of sale, then Reiner & Prentice shall take the note, and replace it with cash or notes secured by good and responsible parties acceptable to the company. All that the contract stipulates is that Reiner & Prentice shall take the doubtful or worthless notes for their commission, or, after settlement, take the notes, and replace them with cash or acceptable notes. There is no contract to guaranty the notes. If Reiner & Prentice, or either of them, guarantied the notes, they certainly must have done so in pursuance of some contract other than the written contract of agency. It therefore follows that the signature of the firm, executed by Reiner upon the notes, did not bind Prentice. Prentice denied the execution of the guaranty under oath, and no error was committed by the court in excluding the introduction of the note as evidence against Prentice until its execution by him had been proven. The demurrer of Prentice to the evidence of the plaintiff as to him, was properly sustained.

As to the transaction between Reiner and Rood, the agent of the company, it appears from the testimony that Rood was present for the purpose of making a settlement with Reiner & Prentice on behalf of the company, and the company ratified his actions in making the settlement. Rood testifies that the contract mentioned in connection with the guaranty, and to which the guaranty was subject, was the written contract of agency. Reiner testifies that it was the oral contract mentioned in the answer of Reiner. The finding of the court settles this in Reiner's favor. The plaintiff contends that this contradicts the terms of the written contract of agency, and is contrary to it, and that Rood, being a traveling salesman, and not a general agent, had no authority to make such deviation from the terms of the written contract. As already stated, the written contract did not provide for the guaranty of notes by Reiner & Prentice. It appears that Rood objected to the notes upon the settlement. It was therefore the duty of Reiner & Prentice to take the notes upon their commission. There was no commission coming to them, but Reiner told Rood that he could get the father of Sallsbery to sign the notes, as that was the agreement when the notes were taken, and Rood said

that would be satisfactory. Sallsbery's father lived in the country, and Reiner testified that he (Reiner) signed the guaranty to the notes so that Rood could send in the complete settlement, upon the terms stated in the verbal contract, that the company should return the notes to Reiner at once, so that he could obtain the surety, at which time Reiner & Prentice should be released from the guaranty.

The contract of guaranty must be construed with the contract with the company to which the notation referred. They were executed at the same time, as parts of one and the same transaction. The notation was sufficient to put the company upon inquiry as to what contract was meant. It has no right to presume it meant the written contract of agency, for the contract of agency did not provide for a personal guaranty. The finding of the jury, approved by the court, settles the fact that the notation refers to the oral contract. The company failed to carry out its part of said contract, and because of its failure the loss accrued. Having failed to perform its part of the contract, it cannot recover. The judgment of the district court is affirmed. All the judges concurring.

STATE v. MITCHELL.

(Court of Appeals of Kansas, Southern Department, E. D. Oct. 6, 1896.)

INTOXICATING LIQUORS—ILLEGAL SALE—INSTRUCTIONS.

1. There is abundant evidence in this case which tends to prove that the defendant sold intoxicating liquors to "Edward Herald," instead of "Edwin Herald," and to establish the fact that "Edward" is intended when the word "Edwin" is used.

2. The evidence in this case has been carefully examined, and the instructions given by the court correctly state the law applicable to the issues and the facts which the evidence tends to establish.

(Syllabus by the Court.)

Appeal from district court, Osage county; William Thomson, Judge.

Robert Mitchell was convicted of selling intoxicating liquors, and appeals. Affirmed.

Ellis Lewis, for appellant. T. B. Dawes, Atty. Gen., and Geo. W. Wolf, Co. Atty., for the State.

DENNISON, J. This action was brought before a justice of the peace in Osage county, Kan., by the state of Kansas, as plaintiff, against Robert Mitchell, as defendant, charging him upon two counts with illegally selling intoxicating liquors. The case was tried by the justice with a jury, and a verdict and judgment of guilty rendered. The case was appealed by the defendant to the district court, and at its June, A. D. 1895, term, was tried by said court with a jury, and a verdict of guilty returned, and judgment rendered thereon. A motion for a new trial was overruled,

and the defendant appeals to this court for a review of the errors alleged to have been committed in the district court.

At the close of the plaintiff's evidence, the county attorney was required to elect upon which sales he would rely for a conviction, and he made the following election: (1) On the first sale of beer to Edward Herald, on or about the middle of January, 1895; (2) and the first sale of beer to Edward Herald after one Charles Herald had come into the defendant's place of business, on the 13th day of February, 1895. The defendant contends that all the testimony proves the sales to have been made to "Edwin Herald," instead of to "Edward Herald." The complaint was subscribed and sworn to by Edward Herald. The first witness called by the state was Edward Herald. He testified that he bought intoxicating liquors of Mitchell about the middle of January, 1895, and on the 13th of February, 1895. He also, on cross-examination, testified as follows: "Question. You have a brother named Edwin? Ans. No, sir; I am the man myself. Question. Well, your name is Edward? Ans. Yes, sir. Question. You have no brother named Edwin? Ans. No, sir." The only time Edward Herald is referred to as "Edwin" is in the examination of Charles Herald, who refers to him once as "brother Edwin." Whether or not this is an error of the stenographer does not appear. James Cann testifies that he knows Edward Herald, and was in Mitchell's place of business with him but once, and that was in January or February, 1895, and his description of the transactions was similar to those described by Edward Herald. There is abundant evidence tending to prove that Mitchell sold to "Edward Herald" on or about January 15, 1895, and February 13, 1895.

The other error complained of is that the court erred in giving the thirteenth instruction, which reads as follows: "There has been some testimony introduced tending to show that the defendant was not in business at the time at which it is claimed he committed the offenses charged. This, however, even if proved, would not warrant you in finding the defendant not guilty if the evidence otherwise should convince you beyond a reasonable doubt. But, if it is a fact that he was not in business at that time, then such fact is a circumstance which you should consider with all the other evidence, to enable you to determine his guilt or innocence of the offenses charged, and each of them." We see nothing wrong in this instruction. The defendant is charged with unlawfully selling. He is not charged with running a place as a nuisance. If he sold unlawfully, he is guilty, whether he ran a place of business or not. The defendant contends that as the county attorney relied for a conviction upon the second count, upon a sale "after one Charles Herald had come into the defendant's place of business," it must be shown that he was in business at that time, or a conviction could not be sustained, and therefore the thirteenth in-

struction was wrong. The eleventh instruction, given by the court, reads as follows: "You are further instructed that the state has elected to rely for a conviction of the defendant of the charge contained in the second count of the complaint upon an alleged sale of beer to Edward Herald after one Charles Herald had come into the defendant's place of business, on the 13th day of February, 1895; and if you believe from the evidence, beyond a reasonable doubt, that the defendant did sell to the said Edward Herald beer on said occasion, being the first sale at said time, and that said beer was intoxicating liquor, and that the defendant at the time had no permit to sell intoxicating liquors, as provided by law, and this sale took place at Osage county, and state of Kansas, you will find the defendant guilty as charged in the second count of said complaint; otherwise, you shall acquit the defendant of said charge." The term "defendant's place of business," in the election of the county attorney, had relation to the first sale to Edward Herald after Charles Herald had joined the party. It was used to fix the time of the sale of February 13, 1895. Edward Herald had testified that he had bought and paid for beer of Mitchell in a building which he had charge of, and was running, on the north side of Main street, in Carbondale, Osage county, Kan., and, among others, his brother Charles was present at the time he made the purchase. Charles Herald testified that he wanted to find Jack Urey, and that he went into Mitchell's place, and that Urey and Steffe and Ed. were there, and that Mitchell was there, making five in all, including the witness, and that Mitchell sold them beer four times, and that once or twice he saw his brother pay for the beer. During the introduction of the testimony, the place where the liquor is alleged to have been sold was referred to repeatedly by the attorneys upon both sides, and by the witnesses, by such names as "Mitchell's," "Mitchell's place of business," and "The Iron Clad." The defense attempted to show that Mitchell had ceased doing business there about the 5th or 6th of January, 1895. There is no contention that the place was not Mitchell's place of business prior to that time. The term "defendant's place of business," as used in the county attorney's election, was a descriptive term, used only to establish the time of the sale. The time was "after one Charles Herald had come." Where? Into the place the attorneys and witnesses had all described as "Mitchell's place of business." Into the building where the liquors were alleged to have been sold and drunk. The instruction complained of made no mention of defendant's place of business as a descriptive term, but only as to the fact of whether the defendant was engaged in business at the time he is alleged to have made the unlawful sales. We think the instruction was not erroneous. The judgment of the district court is affirmed. All the judges concurring.

**WESTERN NAT. BANK OF YORK, PA.,
v. LONG et al.**

(Court of Appeals of Kansas, Southern Department, E. D. Oct. 6, 1896.)

**ASSIGNMENT FOR BENEFIT OF CREDITORS—ACTION
AGAINST ASSIGNOR.**

Shullsburg Bank v. Eastern Banking Co. (Kan. App.) 42 Pac. 835, cited and followed. (Syllabus by the Court.)

Appeal from district court, Linn county; S. H. Allen, Judge.

Action by the Western National Bank of York, Pa., against O. L. Long and the Eastern Kansas Banking Company. From a judgment overruling a demurrer to defendants' answer, plaintiff appeals. Reversed.

James D. McFarland, for plaintiff in error. James D. Snoddy, for defendants in error.

DENNISON, J. The facts in this case and the questions of law involved are precisely the same as in the case of *Shullsburg Bank v. Eastern Kansas Banking Co.*, 42 Pac. 835, decided in this court December 4, 1895; and upon the authority of that case the judgment of the district court is reversed, and the case remanded, with instructions to sustain the demurrer of the plaintiff below to the answer of the defendants below. All the judges concurring.

**WESTERN NAT. BANK OF YORK, PA.,
v. SIMMONS et al.**

(Court of Appeals of Kansas, Southern Department, E. D. Oct. 6, 1896.)

**ACTION AGAINST ASSIGNOR FOR BENEFIT OF
CREDITORS.**

Shullsburg Bank v. Eastern Kansas Banking Co. (Kan. App.) 42 Pac. 835, cited and followed.

(Syllabus by the Court.)

Appeal from district court, Linn county; S. H. Allen, Judge.

Action by the Western National Bank of York, Pa., against A. F. Simmons and the Eastern Kansas Banking Company. From an order overruling a demurrer to the answer, plaintiff brings error. Reversed.

James D. McFarland, for plaintiff in error. James D. Snoddy, for defendants in error.

DENNISON, J. The facts in this case and the questions of law involved are precisely the same as in the case of *Shullsburg Bank v. Eastern Kansas Banking Co.*, 42 Pac. 835, decided in this court December 4, 1895; and upon the authority of that case the judgment of the district court is reversed, and the case remanded, with instructions to sustain the demurrer of the plaintiff below to the answer of the defendants below. All the judges concurring.

GREENLEE v. SMITH.

(Court of Appeals of Kansas, Southern Department, E. D. Oct. 7, 1896.)

BONA FIDE PURCHASER—EJECTMENT—LIMITATIONS.

1. Where A. sells real estate, and executes and delivers a warranty deed thereto to the purchaser, B., which said deed is acknowledged before C., as notary public, and is delivered to B. through C., *held*, that C. had notice of the title of B. to said real estate.

2. Where A. sells real estate, and executes and delivers a warranty deed thereto to the purchaser, C., which said deed is acknowledged before C., as notary public, and where C. had notice that A. had formerly sold said real estate, and executed and delivered a deed thereto to the former purchaser, B., *held*, that the deed to C. was invalid as against B. or his grantees or assigns.

3. A person who, under a tax deed, claims title to real estate which is in the possession of another, must bring an action for the recovery thereof within two years from the time such action might first have been brought, or his right to recover such real estate under such deed will be barred by the statute of limitations.

4. In an action of ejectment it is error for the court to admit in evidence, to establish title in the plaintiff, an invalid deed or a tax deed barred by the statute of limitations.

5. In an action of ejectment, where the claim of title in the plaintiff is founded upon three separate transactions and attempted conveyances, two of which are improperly admitted, by reason of which a new trial must be granted, and where no separate findings are made by the court upon the issues raised upon the other transaction or attempted conveyance, and no attempt is made in the briefs to discuss separately the questions raised by said issue, we must decline to define the rights of the parties under such issue.

(Syllabus by the Court.)

Appeal from district court, Miami county; John T. Burris, Judge.

This is an action in ejectment, brought in the district court of Miami county, Kan., by H. B. Smith, as plaintiff, against Paul Greenlee and wife, as defendants, to recover the possession of lot 20 in block 10 in the city of Osawatomie, in said county and state. The petition alleges that the plaintiff is the owner in fee simple and entitled to the immediate possession thereof, and that for a long time he has unlawfully been kept out of such possession by the defendant Greenlee. Mrs. Greenlee filed a disclaimer. Greenlee denied all the allegations of the petition, except what were expressly admitted, and admitted that he was at the commencement of the action in the actual, open, and notorious possession of the lot, and had been in possession thereof for more than three years last past, and pleaded the statute of limitations. At the trial of the action in the district court, it was admitted that the title was originally perfect in the Osawatomie Town Company. Smith introduced in evidence a warranty deed dated and acknowledged August 17, 1880, from the Osawatomie Town Company to George Gilmore. Said deed was signed by H. H. Williams as president, and was acknowledged by H. B. Smith, as notary public. This deed had never been recorded, and had upon the margin the following indorsement:

"This deed is surrendered and quitclaimed and annulled to the Osawatomie Town Company, this 26th day of March, 1887.

his
"George X Gilmore.
mark.

"Witness: W. H. Campbell."

Smith also introduced in evidence the following receipt, with the indorsements thereon, which he claimed was executed and delivered to him by Gilmore, who signed for himself, and claimed to sign as the agent of his wife:

"\$50.00. Received of H. B. Smith the sum of fifty dollars, in payment of the quitclaim interest that I have, and Mary Gilmore, to lot 20, block 10, city of Osawatomie; and I certify I have sold said H. B. Smith our quitclaim interest to said lot 20, block 10, for \$100.00, and, when we make him a deed for same, he is to pay me the balance, \$50.

his
"George X Gilmore.
mark.

her
"Mary X Gilmore.
mark.

"Witness: W. H. Campbell."

Indorsed: "March 26, 1887. The balance, \$50.00, paid, by surrender of town company deed in full payment."

Smith also introduced in evidence a warranty deed, dated and acknowledged on the 26th day of March, 1883, from the Osawatomie Town Company to H. B. Smith. This deed was signed by H. H. Williams, president of the town company, executed in the presence of H. B. Smith, acting secretary of the town company, and was acknowledged before H. B. Smith, notary public, and was filed for record February 8, 1887. Smith also introduced in evidence a tax deed dated and acknowledged on December 18, 1883, and filed for record on January 13, 1886. Greenlee claimed that he fenced the lot, and took possession of it, on March 25, 1887, under a contract of purchase made with George Gilmore, and upon which he had paid, prior to that time, the sum of one dollar, and that he was to pay the balance when Mr. Gilmore had paid the taxes and executed a deed of conveyance. Mr. Greenlee claims that he wrote Mr. Gilmore a letter asking him for his lowest price upon the lot, and, in reply, received the following letter:

"La Cygne, Kansas, March 21, 1887.

"Mr. Paul Greenlee—Dear Sir: Yours of the 19th received, and duly read. I cannot come up just now, but if I can get \$30.00 subject to the taxes, or \$35.00 and me pay the taxes, I will send or bring the deed on them terms. There is a man wanting to buy it. He was wanting to trade me a horse, but, if I can get the cash, I would rather have it. We are all well at the present time. Hoping to hear from you soon, I will close for the present.

"Yours, truly, George Gilmore."

Greenlee claims that, in an answer to that letter, he wrote Mr. Gilmore, and accepted the offer, Gilmore to pay the taxes, and that he

sent him one dollar with his acceptance of this offer, and that Mr. Gilmore at once came to Osawatomie to close up the business and complete the sale.

The case was tried before the court without a jury, and judgment was rendered against Greenlee, and in favor of Smith, decreeing that Smith was the owner of the lot, and entitled to the immediate possession thereof; and Greenlee brings the case here for review. Reversed.

Sheldon & Sheldon, for plaintiff in error.
John C. Sheridan, for defendant in error.

DENNISON, J. (after stating the facts). The court made no separate findings of fact, and the question for us to consider is whether Smith established his title to the lot and his right to recover the same. He introduced evidence endeavoring to prove his title by three different conveyances and transactions, and it must be conceded that, if he has established a legal title in himself through any one of these three transactions, he is entitled to recover.

The conveyance by which Smith first attempted to obtain a title to the lot was the deed from the Osawatomie Town Company to him, dated and acknowledged March 26, 1883, and filed for record February 28, 1887. At the time this deed was executed, the Osawatomie Town Company had conveyed the lot to Gilmore, and H. B. Smith, as notary public, took the acknowledgment of H. H. Williams, president, to the deed; and Gilmore testified that he only got a bond for a deed from Mr. Williams, but that H. B. Smith made out the deed, and gave it to him; so that it cannot be said that Smith has no notice of the deed from the town company to Gilmore. Further than this, Smith, as notary public, took the acknowledgment of H. H. Williams to the deed executed March 26, 1883, in which said Smith was the grantee. An acknowledgment of a deed, being a quasi judicial proceeding, must be taken before some officer not interested in the land. *Wills v. Wood*, 28 Kan. 400. *Brewer, J.*, in delivering the opinion of the court in the above case, says that a person, if interested in the land, is incompetent to take the acknowledgment of a deed in relation thereto, "on the principle that an acknowledgment is a quasi judicial proceeding, and that no man can sit as a judge in a case in which he is interested." We must therefore hold that Smith did not establish his title and right of possession to the lot by reason of the deed from the town company to him, executed in 1883.

The next attempt of Smith to procure the title to said lot was by virtue of the tax deed dated December 18, 1885, and recorded January 13, 1886. It must be conceded that, under our statute of limitations, Smith must have brought his action to recover under said tax deed within two years from the time the action might first have been brought. Smith could have brought his action to recover from

Greenlee upon the day that Greenlee first took possession of the lot. There is no question that Greenlee had possession of the lot. The petition recites that he had such possession, and the allegation of the petition is admitted in the answer. The only evidence introduced upon the trial which fixes the date when such possession commenced was that Greenlee took possession of the lot, and fenced it, on the 25th day of March, 1887. There is some evidence tending to show that the possession might have been a few days later than this, but all the evidence established the fact that it was either on said day or very shortly thereafter. Smith testified that, a number of months after he purchased the lot from Gilmore, he was down in that end of town, and saw a wire fence stretched around the lot, and, after making some inquiry, found that Greenlee claimed the lot. This action was commenced on December 9, 1890, which was three years and about eight months and a half after the 25th day of March, 1887, and was certainly more than two years after Smith might have first commenced an action to recover under the tax deed. Therefore Smith is not entitled to recover under the tax deed, for the reason that his right of action is barred.

Smith's next and last attempt to obtain the title to said lot was the transaction between him and Gilmore on March 26, 1887, when Smith contracted with Gilmore for his interest in said lot, and paid him \$50, for which Gilmore gave him the receipt mentioned above. During the conversation, and after the receipt had been given, Smith ascertained that Gilmore had the original deed which he had received from the town company, and that it was unrecorded, when Smith paid him the other \$50, upon his making the indorsement mentioned above, upon the receipt, and also the quitclaim indorsement upon the deed. Upon this last transaction, Smith takes nothing by reason of the registry laws, as none of the papers were filed for record. He takes only what interest Gilmore had in the lot on March 26, 1887, at which time Gilmore quitclaimed to the town company, and also in his receipt certified: "I have sold said H. B. Smith our quitclaim interest to said lot 20, block 10, for \$100." At that time, or at least very soon thereafter, Greenlee was in possession of said lot, under a claim of title by virtue of the offer of Gilmore contained in the letter, and his claim of acceptance thereof. It may be said that the general finding of the court is a finding in Smith's favor upon this transaction. Each side set up a claim to the lot, and the court decided in favor of Smith. We are unable to say whether the finding was predicated upon the tax deed or the deed of 1883 or the last transaction. The tax deed was barred, and the deed of 1883 was invalid, and the court erred in admitting either one of them in evidence. For this error a new trial must be granted.

We will not attempt to define the rights of the parties under the last transaction, for the reason that no finding was made by the court upon this transaction, except the general finding, and the case is not properly briefed upon this question. Upon a retrial of this case, with the above incompetent evidence eliminated, the questions involved will be very much simplified. The judgment of the district court is reversed, and the cause remanded for a new trial. All the judges concurring.

ATCHISON, T. & S. F. R. CO. v. TODD.

(Court of Appeals of Kansas, Southern Department, E. D. Oct. 6, 1896.)

ASSIGNMENTS OF ERROR — APPEALABLE ORDER — SPECIFICATIONS OF ERROR—GRANT OF NEW TRIAL.

1. The case of *Beck v. Baden* (Kan. App.) 42 Pac. 845, cited and followed.

2. Where a verdict has been set aside, and a new trial granted, the refusal of the court to render judgment on the special findings of the jury is not such a judgment or order as we are authorized to reverse or vacate or modify under the authority granted by paragraph 4641 of the General Statutes of 1889.

3. Where one of the specifications of error contained in the petition in error and the brief of the plaintiff in error is the order of the court sustaining a motion for a new trial, which contains 17 grounds upon which such new trial is asked, the plaintiff in error is required to affirmatively show that none of the grounds of the motion are sufficient before reversal can be had.

4. Where no argument is made or authorities cited in the brief of plaintiff in error upon the specification of error in granting a new trial, and we can discover no such error as would justify us in reversing the order of the court in granting such new trial, we cannot say that the court erred in making such order.

(Syllabus by the Court.)

Error from district court, Franklin county; A. W. Benson, Judge.

Action by L. M. Todd against the Atchison, Topeka & Santa Fé Railroad Company. Verdict for plaintiff. From an order granting a new trial, defendant brings error. Affirmed.

A. A. Hurd and A. Littlefield, for plaintiff in error. John W. Deford and T. A. Waddle, for defendant in error.

DENNISON, J. This is an action brought in the district court of Franklin county, Kan., by Todd, as plaintiff, against the railroad company, as defendant, to recover damages alleged to have been sustained by him by fires caused by the negligence of said railroad company. The jury returned a verdict in favor of Todd for \$100, and answered the special questions submitted to them. The defendant below requested the court to instruct the jury to return a verdict in its favor, which request the court refused. The defendant below filed a motion for judgment upon the special findings, which motion was overruled. The plaintiff below filed a motion for a new trial, which motion was by the court granted. The defendant be-

low excepted to the rulings and orders of the court, and brings the case here for review.

The specifications of error enumerated in the brief of plaintiff in error are as follows: "(1) The court erred in refusing to instruct the jury to return a verdict for the defendant below, as requested; (2) the court erred in overruling the motion of defendant below for judgment on the special findings, the general verdict to the contrary notwithstanding; (3) the court erred in sustaining the motion of the plaintiff below for a new trial." The petition in error contains but two errors that are complained of, which are as follows: "(1) That the said court erred in overruling the motion of said railroad company for judgment in its behalf and against the said defendant in error, L. M. Todd, upon the special findings of the jury made, returned, and filed in said cause; (2) the said court erred in sustaining the motion of the said defendant in error, L. M. Todd, for a new trial of said cause, and for granting a new trial therein."

The first specification of error in the brief is not set forth in the petition in error, and is, therefore, not complained of. Following the rule laid down in the case of *Beck v. Baden*, which was decided by this court and the opinion filed on December 4, 1895, which has not yet been reported in the *Kansas Appeals Reports*, but which may be found in 42 Pac., at page 845, we cannot consider this assignment of error. The second specification of error relates to the refusal of the court to render judgment upon the special findings of the jury, notwithstanding the general verdict. The verdict has been set aside, and a new trial granted. Our authority to reverse, vacate, or modify judgments or orders of the district court is granted by paragraph 4641 of the General Statutes of 1889. Our supreme court has held that when the verdict has been set aside, and a new trial granted, that a refusal to render judgment on the special findings of the jury is not such a judgment or order as are enumerated in said paragraph 4641. See *Burton v. Boyd*, 7 Kan. 17; *Railroad Co. v. Brown*, 26 Kan. 413. The third and last specification of error relates to the order of the court granting a new trial. The new trial was granted upon the motion of the plaintiff below, and contains 17 grounds upon which a new trial is asked. It devolves upon the plaintiff in error to affirmatively show that none of the grounds of the motion are sufficient, before a reversal can be had. No argument is made or authorities cited in the brief of plaintiff in error upon this specification of error, and no mention is made of it except to assign it as error. Our attention is nowhere called to the particular in which the court erred. No error is apparent to us. We discover no such error as would justify us in reversing the order of the district court in granting a new trial. We cannot, therefore, say that the court erred in granting a new trial. The order of the district court granting a new trial is affirmed, and the case remanded for trial. All the judges concurring.

RICHARDSON v. MACKAY.

(Supreme Court of Oklahoma. Sept. 4, 1896.)

APPEAL—NEW TRIAL—ASSIGNMENTS OF ERROR—LIMITATIONS—NONRESIDENTS—FOREIGN LAW—PRESUMPTIONS.

1. That "the court erred in overruling the motion of plaintiff in error for a new trial" is a sufficient assignment of error to review all the questions raised upon motion for new trial.

2. A motion for new trial on the ground of error in the assessment of the amount recovered, it being too large, and that the findings are not sustained by sufficient evidence, is sufficient to challenge the correctness of the judgment rendered as to the amount of the same, and as to whether or not there was any evidence to support the findings of fact on a particular question.

3. The statute of limitation of this territory does not begin to run against a cause of action until the cause is brought under the operation of the statute, and, where a cause of action arose in another state, the statute of limitation does not begin to run against it until the debtor becomes a resident of this territory.

4. In order that a debtor may avail himself of the benefits of the statute of 1889, which provides that "when a cause of action has been fully barred by the laws of any state or country where the defendant has previously resided, such bar shall be the same defense in this state [meaning "territory"] as though it had arisen under the provisions of this title," it was necessary for him to allege the statute of the other state, and prove that the cause of action was barred by it; and the court cannot, in such a case, presume that the statute of another state, where it is alleged the debtor had resided, was the same as the statute in this territory.

(Syllabus by the Court.)

Error from district court, Kingfisher county; before Justice John L. McAtee.

Action by Andrew Mackay, Jr., against S. P. Richardson, administrator of Daniel Richardson, deceased, and another. From a judgment for plaintiff, defendant Richardson brings error. Reversed.

Andrew Mackay, Jr., brought his action in the district court of Kingfisher county on the 6th day of April, 1894, to recover the sum of \$639.46, alleged to be the balance due from the estate of Daniel Richardson, on his indorsement of a certain promissory note of John P. Jones, which note, with the indorsement thereon, is as follows: "Keytesville, Mo., May 13, 1876. \$268.00. 'One day after date I promise to pay to the order of Daniel Richardson two hundred and sixty-eight dollars, for value received, negotiable and payable without defalcation or discount, and with interest from date at the rate of 10 per cent. per annum, and, if the interest be not paid annually, to become as principal, and bear the same rate of interest. John P. Jones.' Indorsed as follows, to wit: 'September 21, 1885, by seven dollars and fifty cents on the within note of J. P. Jones. April 12, 1890, credited by ten dollars, on the within note of J. P. Jones. February 10, 1891, credit by eleven dollars and ninety-five cents, to apply on this note (collection on account of Daniel Richardson). December 5, 1893, credit by seven hundred and forty-four and 22/100 dol-

lars, to apply on this note, on account of estate of Daniel Richardson, balance due on storeroom and lot at Keytesville, Mo." "Waiving protest and notice of dishonor, for value received, I assign this note to A. Mackay, Jr., this 24th day of February, 1882." The petition alleged presentment to the administrator of the estate of Daniel Richardson, and the refusal to allow the same.

The defendant S. P. Richardson, administrator, filed his answer, setting up three defenses: First. A general denial of the plaintiff's petition, with an admission of the execution of the note, and the transfer thereof, as alleged. Second. A denial that the payments indorsed on the note were made by the deceased, or with his consent, and alleging that no payment was ever made by any person authorized by the deceased, and that by reason of the premises the note was barred by the statute of limitations. Third. That in November, 1885, the plaintiff and Daniel Richardson entered into a contract, whereby it was agreed that the plaintiff should purchase from one W. E. Hill a certain trust deed, to secure the payment by the deceased of the sum of \$1,000, which deed was before that time executed on a certain lot in Keytesville, Mo., by Daniel Richardson; and that by the terms of the agreement the plaintiff was to advance the necessary funds to purchase said trust deed for Daniel Richardson, and charge the same to his account, and to take and hold the property for him, and to reconvey the same to Daniel Richardson, his heirs or assigns, upon the payment of the amount of the purchase price advanced on such incumbrance, and all other sums of money due the plaintiff from Daniel Richardson; and that Daniel Richardson, in his lifetime, had paid all of the purchase price of said premises, and all other sums of money which he owed the plaintiff, and that Daniel Richardson, at the time of his decease, was not indebted to the plaintiff in any sum whatever; and that on the 10th day of April, 1886, the trustee under the trust deed sold the property to the plaintiff for the use and benefit of Daniel Richardson; and that he had collected large sums of money as rents and profits thereof, and had never accounted therefor. And the defendant asked that the plaintiff be required to render a full, true, and correct account of his doings in reference to the property, and that the defendant have judgment against him for the sum found to be due.

To this answer the plaintiff replied: First. In general denial. Second. Alleging that the note was not barred by the statute of limitations, because of payments made thereon, and written acknowledgments of said debt, and promises to pay the same. Third. Admitting the trust set out in the defendant's answer, and alleging the application of all rents and profits, less expenses, commissions, insurance, and taxes, to the payment of two notes of \$195 and \$114, respectively, of the deceased, Daniel Richardson, and that the balance was

applied on the note sued on. Also that the trust property remained in the name of the plaintiff, and was, on the 5th day of December, 1893, worth the sum of \$1,200, for which amount he had given the estate of Daniel Richardson credit, and that the sum sued for remained due. Fourth. Joining in a counter prayer that the plaintiff be permitted to present a correct statement of his account with the estate of the deceased. Afterwards, upon an order of the court, the plaintiff filed copies of letters referred to in his reply, and also an account with Daniel Richardson, giving the various notes which he alleged he held against Daniel Richardson, and the collections of money, and the charges made by him for taxes, insurance, fees, commissions, etc., and the credits which he had made upon the several notes from the proceeds of the collections and the trust property; and also setting out copies of the notes for \$195 and \$114, which were made to the plaintiff at Keytesville, Mo., on January 8, 1876, and April 17, 1877, respectively. This account was unverified.

Upon agreement of parties, M. J. Kane was appointed referee to try the cause, and return to the court his findings of fact and conclusions of law thereon. On the 10th day of November, 1894, after hearing all the evidence adduced by both parties and the arguments of counsel, the referee made the following findings of fact, and conclusions of law:

"Findings of Fact: The note sued on in this action was made at Keytesville, Mo., on the 13th day of May, 1876, by John P. Jones, one of the defendants, payable to Daniel Richardson, one day after date. On the 24th day of February, 1882, Daniel Richardson assigned the note to this plaintiff, Andrew Mackay, Jr., in words and figures as follows: 'Waiving protest and notice of dishonor, for value received, I assign this note to A. Mackay, Jr., this 24th day of February, 1882.' At the time this note was executed, Daniel Richardson was a resident of the state of Missouri, and continued to reside there until the — day of April, 1883, at which time he moved to the state of Kansas. That said Daniel Richardson resided in the state of Kansas for about six years, and thereafter a short time in the state of Oregon, and on the — day of May, 1890, he came to the territory of Oklahoma, and resided here until the 8th day of June, 1893. That on the 8th day of June, 1893, Daniel Richardson died, and in due time S. P. Richardson, one of the defendants in this cause, was regularly appointed administrator of the estate of said Daniel Richardson. That within the time prescribed by law the plaintiff herein presented a statement, duly verified by affidavit, of the amount he claimed was due him on this note, to said defendant S. P. Richardson, as the administrator of the estate of said Daniel Richardson, which claim was rejected. The evidence and admissions in the pleadings further show that

on or about the 20th day of November, 1885, the said plaintiff and Daniel Richardson, deceased, made and entered into a contract whereby it was agreed that the said plaintiff should purchase from one W. E. Hill a certain deed of trust securing the payment of the sum of \$1,000 before that time executed by one — upon and covering the 15 feet front (middle part) of lot one (1), block one (1), Bridge street, in the town of Keytesville, Chariton county, Missouri, wherein one J. C. Crawley was named and designated as trustee. That by the terms of said agreement said plaintiff was to advance the necessary funds for the purchase of said trust deed for the said Daniel Richardson, deceased, and charge the same to the account of said Daniel Richardson, deceased, and take and hold the said trust deed and all rights accrued or to accrue thereunder for the sole use, benefit, and behoof of the said Daniel Richardson, and was to reconvey to said Daniel Richardson, his heirs or assigns, all rights, title, and interest which might have accrued to the said plaintiff under said trust deed, upon payment to him of the amount of the purchase price advanced, and all other sums of money due the said plaintiff from the said Daniel Richardson, deceased. That about the 30th day of December, 1885, Daniel Richardson authorized this plaintiff to sell the property at Keytesville, Mo., or to manage it to suit himself. That about the 5th day of December, 1893, said plaintiff placed a value of \$1,200 on said property, and gave said Richardson credit for part of said sum in extinguishment of other debts due said plaintiff from Daniel Richardson; and the balance, amounting to \$744.22, was credited on the note sued on in this cause. The referee gathers from the pleadings of both parties and the evidence adduced that there is no serious contention between them as to the above disposition of this property, and that the only dispute is as to the value of the property, and the amount that said Richardson should be given credit for. Taking the evidence as a whole, the referee is of the opinion that \$1,400 was a reasonable value of said property at the time said property was applied as above, and that said Richardson ought to have been given credit with said sum. To which said findings of facts said plaintiff and said defendant, S. P. Richardson, administrator, excepts.

"From the foregoing finding of facts, the referee finds the following conclusions of law:

"Conclusions of Law: The burden of proof is on the defendant to show that said note is barred by the statute of limitations. The evidence shows that Daniel Richardson was not in the territory long enough for the statute of this territory to bar the collection of the note sued on in this cause. In order for the defendant to take advantage of the statute of limitation of the state of Missouri,—the state where the note was made,—the defendant must set up and prove the

statute. The referee cannot take judicial notice of the statutes of other states. The referee further finds that the assignment of said note is sufficient to charge said estate on said note, and that said plaintiff is entitled to judgment against said defendant, S. P. Richardson, administrator, on said note, for the amount claimed in said petition, less the sum of \$200, which the referee finds said defendant should be given credit for. Therefore said referee holds that the said plaintiff should have judgment against the defendant, S. P. Richardson, administrator of the estate of Daniel Richardson, deceased, in the sum of \$471.63, together with the costs of suit, assessed at \$——. To which conclusions of law, and all of them, said plaintiff and defendant except.

"The referee herewith returns into court all the papers, evidence, proceedings had in said cause before him, together with briefs of attorneys, and very respectfully submits his report. M. J. Kane, Referee."

Whereupon the defendant moved to set aside the report and findings of the referee, and grant the defendant a new trial, for the following reasons, to wit: "(1) Error in the assessment of the amount of recovery, the same being too large; (2) that the report and findings of the referee are not sustained by sufficient evidence; (3) that said findings and report are contrary to law; (4) errors of law occurring at the trial, and excepted to by the defendant, Richardson, at the time." This motion was overruled, and judgment rendered for plaintiff in the sum of \$471.63, and costs. From this judgment the defendant brings the cause here for review. The case made contains all the pleadings, papers, evidence, findings of fact and conclusions of law, motion for new trial, and rulings and judgment of the court.

Antrobus & Stevens, for plaintiff in error.
M. W. Noffsinger, for defendant in error.

BIERER, J. (after stating the facts). There are two preliminary objections to the consideration of the errors assigned for the reversal of the judgment appealed from. The first is that the assignments of error made by the appellant in his petition are insufficient to entitle the cause to review. Five assignments of error are made. Four of them are, indeed, very informal, and unskillfully drawn, but we think the other is sufficient. The one we hold sufficient is: "The court erred in overruling the motion of plaintiff in error for a new trial." This assignment is sufficient upon which to review the action of the court in overruling the motion made by the defendant below to set aside the report of the referee, and grant him a new trial; and sufficient to entitle appellant to a consideration of the questions presented upon his claim that the amount assessed against him was too large, and that the findings of the referee were not sus-

tained by sufficient evidence. *Da Lee v. Blackburn*, 11 Kan. 190; *Shepard v. Haas*, 14 Kan. 443. The case of *Reaping Co. v. Farnham*, 1 Okl. 375, 33 Pac. 897, is not in conflict with the holding we now make on this question; and if it were we would not consider it in point here, for that case was determined under the Indiana practice, then in force, while this case arose, and must be determined, under the Kansas practice. In the case last cited from Kansas, the supreme court there refused to follow the Indiana decisions; and we do not think that they should be followed under our present practice.

The second objection is that the sufficiency of the evidence to sustain the report of the referee, and the amount recovered, as found by him, cannot be considered, because the evidence was not preserved by proper bill of exceptions signed by the referee. This objection cannot be sustained. The record shows that the defendant below did except, before the referee, to his findings of fact and conclusions of law, and that the referee returned with his report all the evidence in the case, and the case made shows that it contains all of the evidence taken in the case. It was sufficient to present the questions (now urged upon this court) to the trial court, and they were presented and were passed upon, and we consider the record sufficient to present them here. We pass, then, to the merits of the case.

It is claimed by the appellant that the findings of fact made by the referee show that the plaintiff's action was barred by the statute of limitations, and that judgment should have been in his favor upon this question. The finding is that the note was made by John P. Jones to Daniel Richardson, at Keytesville, Mo., on the 13th day of May, 1876, and due one day after date, and indorsed to the plaintiff on February 24, 1882. There is no finding that any of the credits alleged to have been made by the deceased, Richardson, in his lifetime, or the written acknowledgments and promises to pay the same were ever made; but the referee found for the plaintiff on the theory that the defendant had not been in this territory five years, so that the five-years statute of limitations in this territory, barring actions on promises in writing, would have run at the time this action was brought, and that the burden of proof was upon the defendant to show that the action was barred by the statute of limitations of the state of Missouri, the state where the note was made; and, as the defendant had not pleaded and proved the latter statute, the action was not barred. Had the proposition been stated a little more broadly by the referee, he would have been correct. Had he stated that the burden was upon the defendant to allege and prove that the statute of some other state or territory, where the deceased had resided before coming to this territory, had barred this action, he would have stated

the law correctly. The findings show that the deceased, Daniel Richardson, became a resident of this territory in May, 1890. And we have already held, in the case of *Schnell v. Jay*, 46 Pac. 598, following the case of *Sohn v. Waterson*, 17 Wall. 596, that the statute of limitations does not begin to run against a cause of action until the cause comes under the operation of the statute, and under this rule the five-years statute here would not have barred this action; and, if the action was barred at all, it was by virtue of that provision of the statute of Nebraska, placed in force here by the organic act, which was the statute of limitations existing here at the time the defendant became a resident of the territory in May, 1890, and which provided: "When a cause of action has been fully barred by the laws of any state or country where the defendant has previously resided, such bar shall be the same defense in this state as though it had arisen under the provisions of this title." St. Neb. 1889, p. 855. Under this statute, and it is the most favorable one of the different statutes we have had, so far as the claims of the defendant are concerned, the cause of action against the deceased, Daniel Richardson, was not barred, unless it had been fully barred by the statutes of one of the states where he had formerly resided, and it was provided that it might be shown as a defense that this bar of the statute existed. We refer to the Nebraska statute alone, for we have seen that the limitation did not fully run after the deceased, Richardson, came to this territory; and, if the action was barred at all, it was because of this provision in the Nebraska statute quoted. And if it was not barred by this statute, it has not become so by any of the subsequent ones, for the Indiana statute, following the Nebraska statute, was no broader, and the Kansas statute, following the latter, is narrower in its provisions in this respect than the former; and also, if the cause of action was barred by the Nebraska statute, it could not have been revived by any of the subsequent ones. It is not necessary, for a person to maintain an action in this territory upon an obligation made elsewhere, that the person suing shall either allege or prove that the statute of limitations of some other state or territory did not bar the action before the defendant came here. It is only necessary that he shall show that the limitation of this territory has not fully run.

The defendant claims that the presumption of law is that the statutes of other states upon a particular question are the same as ours, and that this presumption exists until it is alleged and proved to the contrary; and that, as our statute of limitations is five years, there being no allegation or proof to the contrary, the court will presume that the statutes of Missouri, of Kansas, and of Oregon on this question were the same as ours. This proposition of law, asserted as

an abstract proposition, is correct; but it is not applicable to the present case. The question here is, not whether the cause of action was barred by the limitation of this territory, but whether it was barred by the statute of limitation of another state, which, being shown, would put the statute here into operation upon the particular case. That was the Nebraska statute, and the Nebraska statute made this a ground of defense to be shown by the party who claimed the bar in the former state to have existed. It is a substantive defense, the burden of which must be carried by the party resorting to it. This question was raised in the case of *Gillett v. Hill*, 32 Iowa, 220, under the Iowa statute, which was identical in substance with the Nebraska statute in force here in 1890. The cause of action there sued on had originally arisen in New York, and, concerning the matter, the court said: "And it is by the laws of the state of New York that the sufficiency of the answer, as averring facts constituting a bar by the statute of limitation, is to be determined. In the absence of such averment in respect to the laws of New York, the answers are insufficient, for we cannot presume, for the purpose of creating a substantive defense, that such is the law of New York." The conclusion reached, therefore, that the statute of limitation had not been shown by the defendant to have run against this cause of action before the deceased became a resident of Oklahoma, and that the Oklahoma statute had not barred the action, was correct.

It is strongly urged by the plaintiff in error that the proof shows that the cause of action was not kept alive by either payment or written acknowledgment of its existence, and while he lived elsewhere than in Oklahoma; but these contentions must all fall under the defect in his pleadings; the pleading, as we have seen, not being good to support the first claim, and it is no better for the several others.

The next contention for a reversal of the judgment is that the referee allowed a large number of credits to the plaintiff upon his account as trustee without proof of the same, and which, being allowed, diminished the credit which should have been given upon the note sued on. These credits, as has been before stated, were for insurance, taxes, commissions, and trustee fees, growing out of the administration of the trust arising from the Missouri property. The account was filed in court after the filing of the reply, and was not verified. There was no denial of its correctness by the defendant; but, even if it should be considered as filed as a part of the reply, the account being unverified by affidavit, its correctness was taken as disputed and denied; for our statute provides, with certain exceptions, which include the correctness of an account which is supported by affidavit, that all allegations of fact made in the reply shall be

taken as denied. It was, therefore, incumbent upon the plaintiff, before he could be allowed these items, that he should prove their correctness. The evidence is all in the record, and as to most of these items there was not a scintilla of evidence offered. The referee should, therefore, have disallowed those not supported by any evidence; and as he took as a basis of his computation the amount of the balance which Mackay claimed by his statement to be due, and deducted from this amount only the sum of \$200, which he found should have been allowed for the Missouri property, more than the plaintiff allowed, he necessarily charged the defendant with these various items which the plaintiff charged and failed to prove. The motion for a new trial on the ground that the assessment of the amount of recovery was too large, and that the findings were not supported by sufficient evidence, in this respect should have been sustained. The judgment is reversed, with directions to grant a new trial at the costs of defendant in error. All the justices concurring, except McATEE, J., not sitting.

TOOTLE et al. v. BROWN.

(Supreme Court of Oklahoma. Sept. 4, 1894.)

APPEAL—SUFFICIENCY OF EVIDENCE.

Where a motion to dissolve an attachment is heard by the district court, and a general finding of facts made upon oral testimony, as well as affidavits and depositions, such finding is a finding of every special thing necessary to be found to sustain the general finding, and is conclusive in the supreme court upon all doubtful and disputed questions of fact; and the supreme court will not weigh the conflicting testimony to determine whether the finding and action of the court below was justified by the weight of evidence.

(Syllabus by the Court.)

Error to district court, Kay county; before Justice A. G. C. Bierer.

Action by Kate Tootle and others against P. I. Brown. From an order dissolving the attachment, plaintiffs bring error. Affirmed.

Blevins & King and Asp, Shartel & Cottingham, for plaintiffs in error. Charles J. Peckham and Pollock & Love, for defendant in error.

TARSNEY, J. The only question presented by the record in this cause requiring our consideration is that arising from the action of the district court in sustaining the motion of the defendant in error to dissolve the attachment issued in the cause, and under which the property was seized as the property of the defendant in error. This action was commenced on the 14th day of May, 1893, by plaintiffs in error filing their petition in the district court of Kay county, upon which they demanded judgment for the sum of \$1,600 against defendant in error. At the time of filing the petition, there was also filed an affidavit for attachment, the grounds of said attachment stat-

ed in said affidavit being "that defendant has or is about to convert his property, or a part thereof, into money, for the purpose of placing it beyond the reach of his creditors; has assigned, removed, and disposed of, or is about to dispose of, his property, or a part thereof, with intent to defraud, hinder, or delay his creditors." On the 10th day of August, 1895, defendant in error filed his answer to the petition of plaintiffs in said cause, and also at the same time filed his motion for dissolution of the attachment upon the following grounds, among others, viz.: "Fourth. That it is not true, as averred in said affidavit for attachment, that this defendant, on the 14th day of May, 1895, at the time of making the said affidavit, was about to convert his property or a part thereof into money for the purpose of placing it beyond the reach of his creditors, with intent to defraud his creditors; and that it is not true that this defendant at the said time of making said affidavit of attachment had assigned, removed, and disposed of, or was about to dispose of, his property, or a part thereof, with intent to defraud, hinder, or delay his creditors, or with the intention to defraud his creditors." The issue presented by this motion came regularly for hearing and determination in said district court on the 7th day of October, 1895. At this hearing affidavits and depositions were produced and read in evidence, and also many witnesses were orally examined by both parties, and, upon the conclusion of said hearing, the court sustained the motion of defendant in error to dissolve said attachment, and said attachment was by said court dissolved, and the levy thereof discharged. Plaintiffs in error bring the case to this court by petition in error to review the action of the district court in sustaining said motion and in discharging said attachment.

The record is very voluminous, and the testimony of the witnesses and the facts which the evidence tended to establish were very conflicting upon every material point tending to show the motive and intent of defendant in error in disposing of and selling and assigning certain property, which sale and assignment of said property were made the grounds of said attachment in the affidavit therefor, and as showing that defendant in error had assigned, removed, and disposed of, or was about to sell, assign, or dispose of, his property, with intent to defraud, hinder, and delay his creditors. The motive and intent of the defendant in error in disposing of his property was the gravamen of the issue to be determined. It was the fact in issue, and upon this issue the court found for the defendant in error, and we are now asked to review this finding of the court upon the conflicting testimony in the record. Notwithstanding that the remarks of the court below in sustaining the motion are preserved in the record, the finding of the court was a general finding of facts, and the oral reasonings for such finding, delivered by the judge, have no proper place in the record, and cannot be considered as special findings of facts. *Insurance Co. v. Hamilton*, 11 O. C. A. 42, 63 Fed. 93, 95. In

this case, Lurton, Circuit Judge, says: "The entry recites that the court delivered a written opinion, and made a finding of all the issues in favor of the plaintiff. This is nothing more than a general finding in favor of the plaintiff. The contention of the appellant is that the effect of the recital is to make the opinion a part of the record, and a special finding of facts within the statute. We do not think the opinion thereby becomes a part of the record. It is a mere recital of the fact that an opinion has been read. The opinion did not become thereby a part of the judgment entry, and did not operate as a special finding of facts. The opinion is included in the transcript sent to us, but there is no minute entry making it a part of the record." In *Insurance Co. v. Tweed*, 7 Wall. 51, Mr. Justice Miller, delivering the opinion of the court, says: "We are asked in the present case to accept the opinion of the court below as a sufficient finding of facts, within the statute and within the general rule on this subject. But with no aid outside of the record we cannot do this. The opinion only recites some parts of the testimony by way of comment in support of the judgment, and is liable to the objection, often referred to in this court, that it states the evidence, and not the facts as found from that evidence. Besides, it does not profess to be a statement of facts, but is very correctly called in the transcript 'reasons for judgment.'" In the case at bar, it is clearly shown that the language of the court, giving his reasons for sustaining the motion, which language is copied into the record, was not intended or understood to be a special finding of facts. This is shown—First, by the fact, as appears in the record, that, after the motion had been sustained, plaintiffs' counsel requested the court to make a special finding of facts; and, second, that the court, in refusing such request, used this language: "You have got all the court's findings,—a general finding. That is all the court is required to make. You have got my understanding of it, and we have got the evidence. Request by the court denied." We must therefore consider the language of the court, giving his reasons for sustaining the motion, as no part of the findings of the court, and that the same is not properly in the record; that the only finding properly made and preserved in the record is a general finding in favor of the defendant in error upon the issues presented.

Where the case is tried by the court without a jury, and a general finding of facts is made upon oral testimony, such finding is a finding of every special thing necessary to be found to sustain the general finding, and is conclusive upon the supreme court upon all doubtful and disputed questions of fact. *Winstead v. Standeford*, 21 Kan. 270; *Arn v. Hoersemann*, 26 Kan. 415; *Stout v. Townsend*, 32 Kan. 424, 4 Pac. 805; *Crane v. Chouteau*, 20 Kan. 288; *Gibbs v. Gibbs*, 18 Kan. 419; *Knaggs v. Mastin*, 9 Kan. 532; *Bixby v. Bailey*, 11 Kan. 359; *Ulrich v. Ulrich*, 8 Kan. 402; *Railway Co. v. Piper*, 13 Kan. 505; *Hobson v. Ogden's Ex'rs*, 16 Kan. 388. We have carefully examined the

entire record in this case, and all the proofs, whether oral or otherwise, presented by the parties on the trial of the issues in the court below, and, although the proofs are conflicting on the material points, we cannot well see how the court below could have come to a different conclusion, or made a different finding from that made. But, be that as it may, such testimony being conflicting on the material points, under the authorities above cited such finding is conclusive upon this court. The principle of the above case has been approved by this court in an analogous case, this court holding, in *Dunham v. Holloway*, 3 Okl. 244, 41 Pac. 140, that, "where a party sues out a writ of attachment, and in his affidavit therefor sets forth two grounds for said writ, and evidence is offered in support of both grounds, and the jury finds against the defendant upon each of the issues so joined, and such verdict is approved by the trial judge, this court will not disturb the verdict for the reason that the same is not supported by the evidence."

We are cited by counsel for plaintiffs in error to *Conner v. Commissioners*, 20 Kan. 575, and *Reese v. Rice* (Kan. App.) 41 Pac. 218, to support a contention that this court is as capable of determining whether or not the facts show that the defendant in error was selling or disposing of his property, or had assigned, removed, and disposed of his property, with intent to hinder, delay, or defraud his creditors, as was the court below. We find nothing in *Reese v. Rice* in any manner bearing upon the proposition; and in *Conner v. Commissioners*, supra, the court say: "Error is alleged in sustaining the order of attachment. The question is one of fact, and the testimony wholly by affidavit." The doctrine involved in that case is approved in *Hegwer v. Kiff & Co.*, 31 Kan. 440, 2 Pac. 553. In this last case the court say: "This is not a case where the ruling of the district court is to be sustained if there is any evidence supporting it, but the question whether the attachment should be sustained or dissolved is to be determined from the facts established by the testimony; and where the testimony is all contained in affidavits, this court is as competent as the district judge to form a just estimate of the credence to be given thereto." These cases do not change the rule stated in the cases heretofore cited, and have no application to the question involved in the case at bar. It can readily be seen that a different rule should apply when a case is presented to the supreme court, as it was to the district court, wholly upon affidavits and depositions; or one where, as in the case at bar, the greater part of the testimony was oral, where the witnesses were personally present in court, and examined and cross-examined in the cause. In such case, the trial court has an opportunity not afforded to the supreme court to weigh and estimate the testimony of the witnesses, and the credence that should be given thereto from their conduct and their apparent intelligence and knowledge concerning the matters in controversy.

We find no error in the action of the court in

sustaining the motion to dissolve the attachment on the grounds stated in said fourth paragraph of said motion; and, as such action of the court below disposes of the entire attachment proceedings, it is unnecessary for us to review the other questions raised in this record. The judgment of the district court will therefore be affirmed. All the judges concur, except BIERER, J., who tried the case below, and did not sit.

CITY OF OKLAHOMA CITY v. MEYERS.

(Supreme Court of Oklahoma. Sept. 4, 1896.)

JURORS—QUALIFICATIONS—MUNICIPAL CORPORATIONS—NEGLIGENCE—CARE OF STREETS—ACTION FOR INJURIES—INSTRUCTIONS.

1. Where a case is being tried against a city, the trial court may, upon challenge, excuse from the jury all persons who are residents or taxpayers of the defendant city.

2. Where a city negligently permits an excavation to be made, in such close proximity to a street as to endanger the traveling public, and a person, without fault, is injured by falling into such excavation, a recovery may be had for such injury.

3. Where instructions are given by a trial court in an action against a city for personal injuries, caused by negligence of the city in not protecting its sidewalk from a dangerous excavation in close proximity thereto, it is not error to instruct generally as to the duty of the city in the care and management of its streets, bridges, and sidewalks; and, further, *held*, that the verdict of a jury should not be reversed for the reason that they were misdirected in the law, unless it appears that the jury might have been misled by the instructions.

(Syllabus by the Court.)

Appeal from district court, Oklahoma county; before Justice Henry W. Scott.

Action by Emily S. Meyers against the city of Oklahoma City. From a judgment for plaintiff, defendant appeals. Affirmed.

R. G. Hays, J. S. Jenkins, and W. R. Taylor, for plaintiff in error. A. T. Stone and Charles H. Eagin, for defendant in error.

DALE, C. J. October 2, 1893, Emily S. Meyers brought an action in the district court of Oklahoma county against the city of Oklahoma City to recover a judgment in the sum of \$2,000 for personal injuries received from a fall into an excavation near the sidewalk of one of the streets of said city. To the petition filed the defendant below answered by a general denial and an allegation of contributory negligence, and upon the issue so joined the cause was tried to a jury, and verdict returned in favor of plaintiff below in the sum of \$500 and costs. From the record of the evidence it appears that, at about 8 o'clock on the night of May 14, 1893, the plaintiff below was traveling west on foot upon the north side of a street named "Grand Avenue," in Oklahoma City; that there was no sidewalk built for foot travelers along the place where she was walking, but the ground was smoothly worn by pedestrians passing along where she was then traveling; and

that the side of the street was used generally by people traveling on foot. The place where plaintiff below received the injury was near the intersection of Hudson street and Grand avenue. Hudson street, on the north side of Grand avenue, intersects with such street 50 feet west of where Hudson street joins Grand avenue on the south, there being a jog in the survey of Hudson street where it intersects with such street. There was a cross walk on Grand avenue from the east side of Hudson street to the north side of Grand avenue, which cross walk strikes the north side of Grand avenue about 50 feet east of the east line of Hudson street, leading north from Grand avenue. It appears that the owner of the lot abutting on Grand avenue lying due north of where Hudson street intersects the south line of said Grand avenue had made an excavation in his lot, the south side of which excavation was within from three to six feet of the walk used by foot passengers in passing along the north side of Grand avenue. The surface of the ground between the walk and the excavation was level. This excavation had been made about one year previous to the time of the alleged injury. There were no barriers erected between the excavation and street, and no lights or other warnings of danger. On the night when the accident happened it was dark, and had been raining. It does not appear that plaintiff below knew of the excavation before she received the injury complained of. As she was walking west on the north side of Grand avenue she came to the cross walk leading to the south from the north side of Grand avenue, and, thinking she had reached Hudson street leading north from the north side of Grand avenue, turned to go north on the east side of Hudson street, stepped into the excavation, and received a serious injury. On proof of this state of facts the jury returned its verdict, upon which the court entered its judgment, and to reverse such judgment the case was brought here. Numerous assignments of error are made by counsel for appellant in their briefs, which they ask this court to pass upon, and they may be summarized as follows: (1) Error in excluding residents of Oklahoma City from the jury. (2) Refusal of the court to give an instruction asked, and in giving instructions which it is insisted were not applicable to the facts developed by the evidence.

1. Over objection of counsel for the city, the court below, upon challenge of the plaintiff, excused from the jury all persons who were residents of or taxpayers in Oklahoma City. It is earnestly insisted that the court should not have excluded residents of a city, especially those who were not taxpayers. No authorities are cited in support of this contention, but we are aware of the fact that the courts have decided both ways upon this question, and a decision either way would have the support of authority. This ques-

tion has never been directly passed upon by this court, but in *Bradford v. Woods*, 2 Okl. 228, 37 Pac. 1062, in speaking of the discretionary power of the trial court to excuse jurors, this court, by Burford, J., said: "It is the duty of a trial court, in the selection of a jury for the trial of a case, civil or criminal, to see that jurors are obtained who are fair and impartial between the litigants, —who will not be influenced or biased by previously formed opinions, or actuated by motives other than a desire to render exact justice to both parties. A very large discretion is vested in the court in determining the competency and qualifications of jurors, and its action should never be disturbed by an appellate court, unless an abuse of such discretion is clearly apparent." Under this decision it would seem that the appellate court should not reverse the ruling of the trial judge in excusing persons as jurors, unless it is shown that the discretionary power of the court was abused to such an extent as to work an injustice to one of the parties, or that the action of the trial court might have worked such injustice. We do not regard it as a right belonging to a litigant that he have jurors from any particular locality within the county in which the cause is being tried. If a party to such cause is provided with jurors from any part of the county who are qualified under the law to sit in a case, he has had a proper jury. And before an appellate court should reverse a verdict upon the charge that challenges allowed prevented a party from having a fair trial, it should affirmatively appear that the ruling of the trial court might have been prejudicial. No claim is made to this effect. The peremptory challenges allowed to appellant in the court below were waived, and nowhere does it appear in the record that the jury acted from improper motives in arriving at their verdict. A question similar in principle to the one under consideration arose in *City of Abilene v. Hendricks*, 36 Kan. 196, 13 Pac. 121. In that case the trial court directed the clerk, in calling the names from the jury list for the purpose of impaneling the jury, to omit the names of such persons as were known to be residents of the city. The supreme court held that no error was thereby committed. Upon this question we conclude that, in a case where a city is a defendant, the trial court commits no error in excusing from the jury all persons who reside in or are taxpayers in a defendant city.

2. It is insisted by counsel for appellant that the court below erred in refusing to give an instruction offered on behalf of appellant as follows: "If the jury find in this case that the excavation complained of was back on the lot on the private property of Ted Hill, and from four to eight feet from the line of the street, and that a person passing over the street would not, by reason of the surface of the ground, fall into such ex-

cavation, unless he first left the street, then you are instructed that, if the plaintiff left the street, and fell into such excavation, the city would not be liable, although they may not have placed barriers along such excavation." This instruction would preclude a recovery in the case, unless the excavation lies so close to the street that a person passing along the sidewalk would fall from the street into the excavation without passing over any intermediate ground. No authority is cited in support of such proposition. We have examined into this question somewhat in order to determine whether or not the principle contended for by counsel in the instruction asked is correct. The extent of the liability of the city for personal injuries may be said to depend somewhat upon the control granted by the legislative authority to a city over its streets. Such liability is increased or diminished, relatively speaking, as the authority of the city over its streets is extended or narrowed. In this territory, in cities of the first class, like Oklahoma City, the legislature has given a broad control over the streets to the city authorities. Section 27, c. 14, of the act relating to cities (page 171, St. Okl.) reads as follows: "Sec. 27. The council may prohibit and prevent encroachment into and upon the sidewalks, streets, avenues, alleys and other property of the city, and may provide for the removal of all obstructions from sidewalks, curb-stones, gutters, and crosswalks at the expense of the owners or occupiers of the grounds fronting thereon or at the expense of the person placing the same there; the council may also regulate the planting and protection of shade trees in the streets, the building of bulk heads, cellar and basement ways, stair-ways, railways, windows and doorways, awnings, hitching posts and rails, lamp posts, awning posts and all structures projecting upon or over and adjoining, and all other excavations, through and under sidewalks, or along any streets of the city." By this section and others of a similar nature, the legislature gave to cities of the first class in this territory ample power to control the streets, and to make them safe for the traveling public. If a dangerous excavation is in such close proximity to the street as to make traveling on such streets dangerous, it matters not to the person injured that it may not have been within the limits of a street. The safety of the traveler is what the law seeks to protect, and, if he has the right to the use of the street, he may presume that the authorities in control have provided a safe place for travel. It cannot be said that a safe place for travel has been provided if, abutting the sidewalk, or in close proximity thereto, there is permitted a deep excavation, which even the most careful of passengers would be in danger of falling into. *Langan v. City of Atchison*, 35 Kan. 318, 11 Pac. 38, is a case where a person walking along

a street was injured by the falling of a large bill or show board blown down by a strong wind. It was erected on private property, and, as shown by the evidence, in a negligent manner. The court in which the cause was tried sustained a demurrer interposed on behalf of the city, holding thereby that the city was not liable in damages for the injury sustained. The supreme court reversed the ruling of the lower court, and in the opinion state the law as follows: "The decisions in this state are numerous that cities having the powers ordinarily conferred upon them respecting streets and sidewalks within their limits owe to the public the duty of keeping them in safe condition for use in the usual mode by travelers, and are liable in a civil action for injuries resulting from the neglect to perform this duty,"—citing in support of this principle *Jansen v. City of Atchison*, 16 Kan. 358, and *City of Salina v. Trospen*, 27 Kan. 544. Following this decision, in a case entitled *Commissioners of Shawnee Co. v. City of Topeka*, 30 Kan. 197, 18 Pac. 161, the supreme court of Kansas said: "The law, in the absence of any express provision of the statutes, imposes upon a city of the first class the duty to keep its streets, avenues, alleys, and bridges in a safe condition for the traveling public. This is implied under the ordinary powers conferred upon it by statute, without any express provision. This duty appears to be imposed upon the city as a municipal corporation, and the duties devolving upon its officers having the care of the streets rest upon them as officers of the city. The power to repair and maintain the streets in a safe condition conferred upon the corporation is implied by authority to levy taxes and impose local assessments for that purpose. In conformity with these general rules, the duty to repair streets is considered to exist without special statutory provision. We think we can safely say this is the law." An examination of the statutes of the state of Kansas does not show any greater responsibility in the care and maintenance of the streets of a city than is placed upon the authorities of a city in this territory, and in that state, from an examination of the decisions, it would seem that the safety of the traveler is the principal consideration which the authorities of the city should have in view, in the care and management of its streets and sidewalks. In *Bassett v. City of St. Joseph*, 53 Mo. 290, is reported a case wherein it was held that a city is liable for an injury caused by reason of a person falling into an excavation which abutted on a side of a street. In the opinion the court said: "If the excavation, being outside of the street, did not render it dangerous to travel, and the highway remained reasonably safe to travelers, it would not become the duty of the city to place there guards or other protection to prevent persons from falling into the excavation. Of course, no negli-

gence could be imputed; but, whenever it becomes the duty of the city to afford protection, then a negligence to perform the duty will create a responsibility upon the part of the city to those who may receive injury in consequence of such negligence, whether the injury is received by falling into an excavation that is in the street or so near to it as to render it dangerous to those who travel upon the highway." In *City of Lincoln v. Beckman*, 23 Neb. 677, 37 N. W. 595, is a case where an injury occurred by a party falling off a sidewalk into an excavation. It was contended that the city did its duty if it kept its sidewalks in a good condition. Upon this question the court said: "It seems to be the contention of counsel for plaintiff in error that, if defendant received her injuries by falling off the crossing into the excavation or depression, she could not recover, provided the sidewalk and crossing were in themselves perfect; that is, she could not recover anything unless she was able to show that the sidewalk and crossing were in a broken condition, out of repair, or imperfect in their construction. This we do not think is the law, and the instruction referred to was properly refused. We think it tolerably well settled that, in questions of this kind, the question of care was one of fact. It is one which should be left to the jury under all the circumstances of the case, and if they find that the defendant in error, in the exercise of ordinary care, fell from the sidewalk into the excavation or depression, and received the injury, and that it was negligence on the part of the city to allow such a depression or excavation to remain so near the sidewalk as to render it dangerous, then she could recover. The whole question of negligence, both upon the part of the plaintiff and defendant, was for the jury to determine."

The members of this court are unfortunately very much limited in time, and our library is insufficient to enable us to make an extended review of all the decisions bearing upon the subject under discussion, and we will not, therefore, attempt to do so. It appears, however, from what we are able to gather in our research, that most of the New England states have adopted statutes which in direct terms make a town or city liable for its negligence in the management of its streets, and in Massachusetts it is held that, in the absence of such statute, no liability attaches to a town or city. *Oliver v. Worcester*, 102 Mass. 489. And while there are a number of decisions in those states holding towns and cities liable for injuries received for permitting dangerous obstructions and excavations to exist outside of its streets and sidewalks, but in close proximity thereto, yet they must be considered in the light of statutory enactments. Cases we find frequently cited in support of the view that a city is liable by reason of its negligence in permitting an excavation or

other dangerous place to exist off from the street or sidewalk, but in close proximity thereto, by states which have adopted no statute upon the subject, are *Alger v. City of Lowell*, 8 Allen, 402, and *Drew v. Town of Sutton*, 55 Vt. 586. The latter case is an instructive one upon this subject. And in such case the facts are almost identical with those in the case we are here deciding. An excavation was allowed to be made which came within six inches of the highway, and in the darkness of the night a person drove off the road and into it, and the supreme court of the state held that he could recover for the injury received. A very able dissenting opinion was filed in the case by one of the judges of the court. In *Hudson v. Inhabitants of Marlborough*, 154 Mass. 218, 28 N. E. 147, the supreme court held that no recovery could be had for an injury received at a point 25 feet from the road, as a place at such a distance from the road would not, as a matter of law, be in such close proximity thereto as to make traveling thereon dangerous. In most of the states where there is no express statute, the cities are held to a liability for negligence in permitting their streets to remain in a dangerous condition for travel. Such decisions are based upon statutes similar to ours, and hold that by reason of the control and management vested in cities by legislative enactment, there is an implied liability for negligence in case the cities fail to keep their streets in a reasonably safe condition for use by the traveling public; and this liability is not restricted to defects which exist within the limits of or upon the walks of the streets, or the roadbeds, but if a city negligently permits a fence, or awning which overhangs a street, or a wall at the side of the street to remain in an unsafe condition, after notice of its danger, any person injured thereby may, in the absence of contributory negligence, recover. *Grove v. City of Ft. Wayne*, 45 Ind. 429; *Langan v. City of Atchison*, *supra*. And we think it is equally well settled that, where a city permits an excavation to exist within such close proximity to a street as to make it unsafe for a prudent person to use the same, and an injury results from no fault upon the part of such person, a recovery may be had. As to how close to the street the excavation must be in order to allow recovery would, in most cases, be a question for the jury. It might frequently happen that it would be the duty of the court to say, as a matter of law, that no recovery could be had; but this would be only in that class of cases where it was plainly apparent that the person injured was guilty of contributory negligence in straying off the street, or where the excavation was so far removed therefrom as to enable a court to say that the authorities had no reasonable ground to believe that an injury would probably occur if the excavation was left in an unguarded

condition. We conclude, therefore, that where, as in this territory, the legislature has given to cities plenary powers over the streets, the cities, in their management and control thereof, are bound to so exercise their powers with the view, primarily, of preserving the safety of the traveling public, and that a recovery may be had for injuries received on account of negligence of the city in permitting an excavation to be made in close proximity to a street in use generally by the traveling public.

3. It is urged that the instructions given by the court below were not applicable to the case on trial, and that the jury was probably misled thereby. It is unquestionably true that a court should instruct only upon such a state of facts as there is some evidence to prove. Abstract questions of law which have no relation to the facts testified to by the witnesses should never be given to the jury as instructions in the trial of a case. But, unless an appellate court can say that a trial judge has given instructions which are not applicable to the case, and which may have misled the jury, the cause should not be reversed. Before the party appealing can demand a reversal he must show his injury. It will not do to send a case back for new trial merely because the trial court may be technically wrong.

The instructions complained of number from 10 to 23, inclusive, some of which are set out in full and argued in the brief. Those to which our attention has been directly called are as follows: "(12) The jury are instructed that it is the duty of a city to keep and maintain its streets and sidewalks in good repair for safe and convenient use, and maintain its sidewalks in a reasonably safe condition for the use of pedestrians." "(14) The fact that the defect in the unsafe condition of the sidewalk had been of long standing, and open to any observation, if so proven, is constructive notice to the defendant; and if the defendant had such notice a sufficient length of time, with reasonable diligence, to have repaired it before the accident occurred, defendant is liable. (15) The fact, if so shown, that the excavation was on a lot owned by a private party, does not exonerate the defendant, nor excuse the city from its liability, as it was the defendant's duty to maintain the sidewalk in a safe condition." "(18) You are further instructed that, as a matter of law, any person traveling upon the sidewalk of a city which is in constant use by the public has the right, when using the same with due diligence and care, to presume, and to act upon the presumption, that it is reasonably safe for ordinary travel through its entire width, and free from all dangerous holes, obstructions, and other defects. (19) You are further instructed that a traveler on a public street is held to the exercise of only ordinary care. Some negligence which is a want of extraordinary care will not defeat a recovery for an injury received in consequence of a defect in the street, provided that the evidence shows that the city

authorities were guilty of negligence in permitting the defect to exist in the street, and that the traveler was injured thereby and was using ordinary care to avoid the injury." The twentieth instruction, in substance and effect, is the same as the nineteenth. The twenty-third instruction refers to the measure of damages.

It is contended that these instructions should not have been given, because they refer to an injury sustained by reason of some defect in the sidewalk of a street, or within the street lines, whereas the injury complained of occurred off a street, and not upon a sidewalk, and that the use of the term "sidewalk" was misleading, because no sidewalk existed at or near the place where the injury occurred. Perhaps the court may have failed to point the instructions with as much exactitude as the nature of the case permitted, but still they each state a principle of law applicable to the questions at issue. This was a case for damages on account of the negligence of the city in the management of its streets. Instruction 10 states the law correctly relative to the duty of a city in the control of its streets, sidewalks, and bridges, and its liability in case of its failure so to do. It is true there was no particular reason for using the word "bridges" in the instruction, but we fail to see how that matter prejudiced the appellants. The eleventh instruction states the law relative to repairs of streets and sidewalks, and the condition in which they must be kept. This instruction would perhaps more properly refer to a case of injury on account of a street or walk getting out of repair, but it would also refer to that condition of a street which had originally been safe for travel and by reason of the excavation, either in or upon the side of the street, had become unsafe. Instructions 14 and 15 state the law correctly as to notice, and liability of a city for an injury sustained by reason of the city permitting a private person to so use his property as to injure the traveling public. Instruction 18 was held by this court in *City of Guthrie v. Swan*, 3 Okl. 116, 41 Pac. 84, to be erroneous, when applied to the facts of that particular case. But the court was then considering a case where the party injured had left a defective and impassable sidewalk, and gone out into that portion of the street used for vehicles, and, under the evidence, the court found that the city had attempted to provide a safe passageway for persons using the street. It was held that the question of contributory negligence upon the part of the city under such circumstances was a question of fact to go to the jury, and that the instruction was erroneous because it took such fact from the jury. The case we are now considering does not involve a question of injury sustained inside the limits of a street, and, although we agree that instruction 18 is bad as an abstract proposition of law, yet we do not think the jury could have been misled thereby. Instruction 19 is also erroneous. It leans towards the law of comparative negligence, which doctrine has been re

published in most of the states of the Union, and has never obtained a foothold in this territory, and it has been well said that the law "has no scales to determine in such cases whose wrongdoing weighed the most in the compound that occasioned the mischief." But here again we fail to find, and counsel do not in their brief attempt to show, wherein the city was injured. An examination of the record shows no act upon the part of the person injured which would justify the jury in finding her guilty of any negligence, and especially of contributory negligence, and in view of the evidence we do not think the city could have been prejudiced by the instruction. The brief of appellant does not attempt to show wherein the law is incorrectly stated in all of these instructions. The only objection seriously urged is that they refer to the injury as having occurred by reason of the defective condition of the street and sidewalk, and stress is also laid upon the fact that no sidewalk was laid on the street by the city, and that the accident did not happen in the street. A sidewalk does not necessarily consist of a walk made of boards, or a place paved or otherwise improved, for the use of foot passengers; but it may be a place set apart at the side of the street for the use of that portion of the public that travel on foot. It may be that, for an accident happening upon such a walk, the improvement of which the city has never undertaken, no recovery could be had; but upon this question we do not pass. But where the city, through its negligence, permits a person to make dangerous excavations so near to this natural walk as to make traveling thereon dangerous, then the city by its own wrongful act has so contributed to the injury as to make it liable.

Under the facts as disclosed by the evidence in this case, the plaintiff below received the injury without fault upon her part, and in a most natural manner. She was walking west on the north side of Grand avenue, and came to a cross walk leading from the east side of Hudson street on the south to the north side of Grand avenue. She, being a stranger to that portion of the town, would naturally suppose she had reached the east side of Hudson street, leading north from Grand avenue, and, wishing to go to the north, she turned at the place where she supposed Hudson street was, and stepped into the excavation, several feet deep, which had been dug a year previously, and was allowed to remain in such exposed condition for such length of time. It was a trap which was liable to catch the most wary traveler, and which ought never to have been permitted by the city. Under the evidence the plaintiff below was clearly entitled to recover, and we do not find that the appellant's rights were prejudiced by the instructions given or refused. The judgment of the lower court is affirmed.

SCOTT, J., having presided at the trial of the cause below, not sitting. The other justices concurring.

SEAWELL v. HENDRICKS.

(Supreme Court of Oklahoma. Sept. 4, 1896.)

STATUTES—EFFECT OF REPEAL—RIGHT TO RECOVER USURIOUS INTEREST.

1. Where a statute provides that a person who takes, receives, retains, or contracts for any higher rate of interest than 12 per cent. per annum shall forfeit all the interest so taken, received, retained, or contracted for, and it is subsequently provided by the legislature that this section "is hereby repealed," and another section of the Statutes of 1893 provides generally that "the repeal of any statute by the legislative assembly shall not have the effect to release or extinguish any penalty, forfeiture or liability incurred under such statute unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action for the enforcement of such forfeiture or liability," the right of the plaintiff to recover usurious interest, provided under the former section, is still complete, and it is not necessary that his right of recovering such usurious interest should be expressly reserved in the repealing act. The plaintiff's right to recover the forfeiture of usurious interest from the defendant is fully provided for in the general law of the territory, section 2697 remaining unrepealed.

2. Where an absolute deed to land is given, accompanied simultaneously by bond or agreement of defeasance, the latter may, upon agreement and consideration between the parties thereto, be surrendered and canceled, so as to vest the estate unconditionally in the grantee by force of the first deed, providing the transaction is conducted with fairness, both as between the parties and as against the creditors of the mortgagor.

(Syllabus by the Court.)

Error to district court, Cleveland county; before Justice Henry W. Scott.

Action by W. H. Seawell against T. W. Hendricks. From a judgment for defendant, plaintiff brings error. Reversed.

This action, for the recovery of usurious interest, was begun on the 31st day of January, 1895, by the plaintiff in error, in the district court of Cleveland county, against the defendant in error, T. W. Hendricks, to recover the sum of \$4,000, alleged to have been paid by the plaintiff to the defendant above the rate of 12 per cent. per annum upon promissory notes made by the plaintiff to the defendant. An amended petition having been filed by leave on May 4, 1895, the case came on to be heard on the 29th day of June, 1895, upon a demurrer thereto, upon the ground that the petition did not contain facts sufficient to constitute a cause of action, which demurrer was by the court sustained, and to which ruling of the court the plaintiff at the time excepted; and, the plaintiff not electing to further plead in the case, final judgment was thereupon rendered by the court against the plaintiff, dismissing the case, at the costs of plaintiff, to which decision and judgment of the court the plaintiff at the time excepted. The amended petition alleges, in substance, that plaintiff borrowed \$3,000 from the defendant on the 7th day of November, 1890; and, as evidence of this transaction, the plaintiff executed and delivered to the defendant

three promissory notes of said date,—namely, one for the sum of \$180, due January 7, 1892; one for \$1,180, due January 7, 1893; and one for \$2,780, due January 7, 1893,—and, upon the delivery of said promissory notes, the sum of \$3,000 was paid by the defendant to plaintiff, and no other or greater sum. These promissory notes included the sum of \$3,000, and the sum of \$1,140, which was interest on the said \$3,000, computed at the rate of 18 per cent. per annum; and the further sum of \$3,000 was thereafter, upon May 27, 1891, borrowed by plaintiff from defendant, making in all the sum of \$6,000, for which the plaintiff executed and delivered his promissory notes to the defendant; and afterwards, on November 13, 1895, the plaintiff borrowed from the defendant the further sum of \$60, and on September 5, 1895, the still further amount of \$80. Upon all these said several sums the plaintiff promised to pay to the defendant interest at the rate of 18 per cent. per annum. The petition further alleged that on November 7, 1890, the plaintiff and his wife executed to defendant an absolute warranty deed of conveyance to lots 6 and 7 in block 5, and lots 26 and 27 in block 6, in the town of Norman, this territory, as a security for the said loan. At the same time, and as a part of the same transaction, it was agreed between the plaintiff and defendant, by a separate agreement in writing, that, "upon payment of above-described notes, he will execute or cause to be executed a warranty deed transferring the above-described property back to W. H. Seawell, his heirs, or to any person whom he may designate." And afterwards, at the time of making the subsequent loans, it was agreed between the plaintiff and the defendant that the warranty deed should also stand as a security for each and all of the various sums of money loaned by the defendant to the plaintiff. The amended petition further sets forth that, in pursuance of plaintiff's agreement to pay interest on all of the said sums of money at the rate of 18 per cent. per annum, the plaintiff did pay, as interest, to the defendant, various sums of money, amounting in all to the sum of \$5,873.80 in cash, and his note for \$49 more, amounting in the aggregate to the sum of \$5,922.80. It was further alleged in the petition that "on or about the 6th day of December, A. D. 1894, this plaintiff made a verbal agreement with said defendant and three other persons, by which all of said parties agreed to form a joint-stock company in the ownership, operation, and management of the said opera-house property, by which agreement said property was valued, and was to be put in by said plaintiff at the sum of \$8,500; and this plaintiff was to have and retain a share in said property of one-eighth; said defendant was to have a like share of one-tenth interest therein; and each of said other persons was to have a share of one-fourth interest therein. That in pursuance to said agreement, and before the same was re-

duced to writing, but with the supposition that it would be fully consummated, said defendant deeded and conveyed to this plaintiff one undivided one-eighth interest in said real estate and opera-house property, and all of said lots twenty-six and twenty-seven in block six aforesaid. And it was further agreed that seven-eighths of said \$8,500, to wit, \$7,437.50, was to be a cash payment upon said notes executed by plaintiff to defendant, with interest thereon at eighteen per cent. per annum. And said notes were then delivered up as paid, and said agreement of defeasance was, on the same day, canceled, and satisfaction acknowledged on the margin of the record thereof, in the said office of the register of deeds. That thereafter said agreement, so far as the third parties were concerned, fell through, and that thereupon, and on or about the first day of January, A. D. 1895, the said defendant claimed the right to the ownership and title in said seven-eighths undivided interest in said opera-house property, at said valuation of \$7,437.50. The agreed price at which defendant and said third parties were to take the said seven-eighths undivided interest therein. The defendant since that time has claimed absolute ownership in fee simple to said opera-house property, being lots six and seven in block five, aforesaid, and still claims such ownership and title. The plaintiff here concedes that said defendant shall be taken and held to be the owner of said seven-eighths undivided interest in said opera-house; that same shall be taken and held to be a cash payment upon said borrowed money and interest thereon." Plaintiff prayed judgment for \$4,000, the amount of money paid by the plaintiff to defendant over and above the said sum of \$6,140, and legal interest thereon at 12 per cent. per annum, with interest upon said \$4,000 from the 6th day of December, 1894.

C. L. Botsford and Williams & Newell, for plaintiff in error. T. E. Berry, Selwyn Douglas, and McGregor Douglas, for defendant in error.

McATEE, J. (after stating the facts). The remedy sought for by the plaintiff in this action is based upon section 9, art. 6, c. 16, p. 223, St. Okl. 1893, which provides that "a person taking, receiving, retaining or contracting for any higher rate of interest than the rate of twelve per cent. per annum, shall forfeit all the interest so taken, received, retained, or contracted for. * * * When a greater rate of interest has been paid than twelve per cent. per annum, the person paying it, or his personal representative, may recover the excess from the person taking it, or his personal representative, in an action in the proper court." This section was repealed by the legislature of the territory by an act approved February 21, 1895, providing that "sections 6, 7, 8, and 9 of article 6,

chapter 16, of the Compiled Laws of 1893, entitled 'Contracts,' are hereby repealed." It was provided by section 2697 of the Statutes of 1893 (page 545) that "the repeal of any statute by the legislative assembly shall not have the effect to release or extinguish any penalty, forfeiture or liability incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purposes of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability." It is the contention of the plaintiff in error that this general provision of the statute preserved to him the remedy for the recovery of the usurious interest paid to the defendant in excess of 12 per cent. We think this contention is well founded. The language of the statute is plain that, if any higher rate of interest than 12 per cent. per annum be taken, the person so taking it "shall forfeit all the interest so taken, received, retained or contracted for." The defendant is therefore subject to a "forfeiture," and he is subject to a liability, "unless the repealing act shall so expressly provide" otherwise. The section of the statute providing the forfeiture and liability was repealed by the legislature without expressly providing that any person who was subject to a forfeiture or liability under it should be released therefrom, or that the forfeiture or liability should be extinguished. The section 2697 was not in any way affected by the repealing act, nor does the repealing act in any way touch, refer to, or relieve persons who were subject before its enactment to the "forfeiture" or recovery provided for the benefit of the person making such usurious payment by the section of the statutes above set out; and hence we consider the language of the statute peremptory, effective, and not clouded in any way by doubt. *Jenness v. Cutler*, 12 Kan. 500; *People's Bank v. Dalton* (Okla.) 37 Pac. 807; *U. S. v. Reisinger*, 128 U. S. 898, 9 Sup. Ct. 99; *State v. Showers*, 84 Kan. 269, 8 Pac. 474; *State v. Boyle*, 10 Kan. 93. Upon a precisely similar statute, it was said by the supreme court of North Dakota, in the case of *Bank v. Lemke*, 54 N. W. 919: "That the repeal of a statute, penal in its nature, without a saving clause, operates to absolutely extinguish all penalties under such law, is, we think, quite well settled. But this rule of law has been abrogated by a general provision of this state. [And refers to section 4767, Comp. Laws, which is the same as ours.] Other states have substantially the same provision. For a construction of the Indiana statute, see *Telegraph Co. v. Brown*, 108 Ind. 533, 8 N. E. 171. For Missouri statute, see *State v. Railroad Co.*, 32 Fed. 722. For Kentucky statute, see *Com. v. Sherman*, 85 Ky. 686, 4 S. W. 790. In each of these cases the court enforces a penalty incurred under a statute that had been repealed prior to the time of the trial. The repealing stat-

ute of this state passed in 1890 is silent as to the penalties incurred under the former law. Hence, under this plain provision of section 4767, Comp. Laws, appellant is not relieved from that penalty." And it is said in *Ex parte Larkins* (Okla.) 25 Pac. 745, as follows: "It is also objected to this act that it is an independent act, and that a saving clause can only be made in the repealing statute itself. That the saving clause is usually found in the repealing act may be admitted, but that it must be found there cannot be conceded. In most of the states of the Union, a saving of rights and prosecutions under a repealed statute is effected by general law, and no provision is made in the repealing act at all, but the repealing act and general law are construed together." We shall therefore hold that the right of the plaintiff to recover under section 9, art. 6, c. 16, St. 1893, as claimed in the amended petition, is complete; that it was not necessary that his right of recovery therein provided should be expressly reserved in the repealing act, but that it was sufficient, according to the uniform rule adopted in other states, that the plaintiff's right to recover the forfeiture from the defendant was provided for in the general law of the territory (section 2697, which remains unrepealed).

But it has been strongly urged by the defendant that no sufficient allegation of payment has been made by the amended petition, by which it appears on the face of the petition that a case of usury has been made out. It is contended that the warranty deed, originally executed as a mortgage, remains still a mortgage, and that it is necessary that the mortgagee should have executed a reconveyance of the property, or that foreclosure, judgment, and sale were necessary in order to vest the real estate in the mortgagee. We cannot agree with this contention. The amended petition alleges that the agreement of defeasance which accompanied the warranty deed was canceled, and satisfaction acknowledged on the margin of the record thereof, in the office of the register of deeds. This was sufficient to vest the title absolutely in the defendant. Where an absolute deed to land is given, accompanied simultaneously with a bond or agreement of defeasance, the latter may, upon agreement and consideration, be surrendered and canceled, so as to vest the estate unconditionally in the grantee, by force of the first deed, providing the transaction is conducted with fairness, both as between the parties and as against the creditors of the mortgagor. 15 Am. & Eng. Enc. Law, 793; *Trull v. Skinner*, 17 Pick. 213; *Rice v. Rice*, 4 Pick. 349; *Harrison v. Trustees*, 12 Mass. 456. The amended petition avers that upon the loan of \$6,000 the plaintiff paid to the defendant in cash the sum of \$4,576.30, and in the opera-house property \$7,437.50, which was agreed between the plaintiff and defendant to be cash payment upon said notes. The

notes were thereupon surrendered and delivered up. These payments are all alleged to have been made between the 7th day of November, 1891, and the 6th day of December, 1894. We think the allegations of the petition are plain full, and sufficient; that the plaintiff made out, under his amended petition, a case for recovery; and that the demurrer should have been overruled. The judgment of the court is therefore reversed, and it is ordered that the case be reinstated, and cause be proceeded with below in consonance with these principles. All the justices concur, except SCOTT, J., who sat below.

CASSIDY v. TAYLOR.

(Supreme Court of Oklahoma. Sept. 4, 1896.)

CONTRACT FOR SERVICES — CONSTRUCTION — PAYMENT.

T. entered into a contract with a fair association to do certain grading upon its race track for a stipulated price per cubic yard. It was agreed between T. and C. to divide the profits on this work. On a settlement T. gave C. a duebill for the balance of his share of the profit for the work, when the fair association should settle with him. Subsequently a small payment was made by T. on this order, and at the time C. brought his suit for wages against T. there was a larger amount still due T. from the fair association than was coming to C. on the order. *Held*, that there was no error in the judgment of the trial court against C.

(Syllabus by the Court.)

Error from district court, Logan county; before Justice Frank Dale.

Action by Michael Cassidy against George W. Taylor. From a judgment for defendant, plaintiff brings error. Affirmed.

S. D. Decker, for plaintiff in error. Baker & De Bois, for defendant in error.

BIERER, J. The plaintiff brought his action against the defendant to recover the sum of \$134.51, which he alleged was due him for work and labor performed by plaintiff for defendant in the summer of 1893 in grading the race track of the fair association in Logan county. The defendant answered by general denial, and also by interposing a special defense, in which he claimed that the defendant had contracted for grading the race track of the fair association at the rate of 10 cents per cubic yard of material removed; that the plaintiff knew of the terms of the contract, and entered into a co-partnership with the defendant, under the terms of which the defendant was to furnish a large portion of the stock, scrapers, and tools necessary for doing the work, and the plaintiff was personally to superintend the work, and act as foreman thereon, and that the plaintiff and defendant were to divide the net profits equally; that the profits of the transaction were about the sum of \$425, and on partial settlement with the plaintiff, in November, 1893, it was agreed

that there was \$154 coming to the plaintiff when the defendant should receive pay from the fair association; that the plaintiff had accepted the defendant's written order for this amount of money to be paid when the association paid the defendant in full; and that the association had never paid the defendant for the work done. The plaintiff filed his reply in general denial, and also by separate paragraph admitting that the defendant had received the contract mentioned with the fair association, and that the defendant was to give his personal attention to doing the work; denying that there was a partnership; alleging that the sum of \$212.50, which was one-half of the profits for this grading, was to be paid the plaintiff by defendant at the time of the completion of the work; and alleging that, in November, 1893, there was a full and complete settlement between plaintiff and defendant, and that it was ascertained that there was a balance due the plaintiff of the sum of \$159.50. Upon these issues trial was had before the court, jury being waived, and judgment rendered for the defendant, which the plaintiff now asks to have reversed. The evidence offered on the trial is all contained in the record, and consists entirely of the testimony of the plaintiff and of the defendant, and the following writing which it is admitted on both sides was delivered to the plaintiff by defendant in November, 1893, some time after the work was completed: "Due Mr. Cassidy \$159.51 for work on race track when fair association settles with me. G. W. Taylor." There is, in fact, very little dispute in the evidence in the case. The terms of the contract between Taylor and the fair association, under which the work was done, are not disputed. The amount of the work is not disputed, and there is only a difference between \$157.50 and \$159.51, less a payment by Taylor on Cassidy's order of \$25 since this settlement, in the amount that would, on complete settlement, be due to Cassidy. The dispute is as to whether Cassidy was to receive his payment from Taylor on completion of the work, irrespective of any settlement between Taylor and the association, or whether Cassidy was to receive his money when Taylor had received settlement or payment in full from the fair association. Cassidy's testimony clearly supports his theory of the case. Taylor's testimony clearly supports his theory of the case. And the only written evidence, which consists in the duebill signed by Taylor, in November, and which Cassidy admits he received, clearly supports Taylor's theory of the case, and of course the finding of the court in Taylor's favor settles that question.

But it is claimed by counsel for plaintiff in error that the legal effect of this duebill was to require payment within a reasonable time, and he cites the cases of *Jones v. Eisler*, 3 Kan. 134, and *Lewis v. Tipton*, 10 Ohio St. 88, in support of this contention. Neither of these cases supports this contention. The

Jones-Elisler Case was a suit upon a promissory note, which was given upon a settlement for work and labor of one Andres, who indorsed the note to plaintiff, and contained a promise by the maker to pay "when he receives it from the government for losses sustained in August, 1856, or as soon as otherwise convenient." The receipt by the maker of the note from the government of compensation for his losses appears to have had no connection with the compensation due the payee of the note for his labor. They were entirely separate transactions, and the court said: "After having performed work to the full amount of the note, it could not have been intended that Andres should never get his money unless Jones got his from the government, or should find it otherwise convenient to pay. The intention of the parties doubtless was that it should in any event be payable in a reasonable time, and such is the legal effect of the instrument." The waiting for payment by the laborer was a mere convenience extended to his employer. In the case at bar, however, the parties were jointly and equally interested in the compensation which was due for the work they did jointly for the fair association; and, under the state of the case which is presented here, this money would be due Cassidy only when received by Taylor from the fair association. It was not a mere convenience extended to Taylor for a reasonable time, but was a substantial part of the agreement to pay upon a fixed condition, which was when Taylor received this money, and in which both parties, as between themselves, had a joint interest. Whether the transaction between Taylor and Cassidy is called a partnership or not makes little difference. It was a contract in which they were both interested in doing a piece of work, and there is nothing to show to us that Taylor was bound to pay Cassidy his (Cassidy's) share of the money before he (Taylor) got it. And the settlement made by the parties is an agreement that Taylor should pay Cassidy when Taylor received settlement from the party for which the work was done. The case of *Lewis v. Tipton* is not at all in point. There the condition was that payment should be made by the maker of the note "when I can make it convenient, with ten per cent. interest till paid," and the court properly held that this was an agreement to pay "within a reasonable time after its date."

The case presents itself here as a plain action at law. No recourse was had to any equitable powers of the court, and no equitable remedies sought. It was simply a question whether Taylor owed Cassidy \$134.51 under the facts of the transaction, and the trial court held, as we must take the record, that Taylor did not owe Cassidy this money so long as the association for which they did the work still remained indebted to Taylor in the sum of \$157. We see no error of law in this conclusion. The judgment is affirmed. All the justices concurring, except DALE, C. J., not sitting.

HORNER v. CHRISTY.

(Supreme Court of Oklahoma. Sept. 4, 1896.)

APPEAL — CASE-MADE — EXTENSION OF TIME BY STIPULATION.

The parties to a record cannot, by stipulation, extend the time for making and serving a case-made; and where a case-made is served after the time allowed by law had expired, but within the time stipulated for by the parties, but which stipulation is not approved by any order of the court or judge, the case-made is void, and if no questions are saved, excepting by such case-made, the judgment will be affirmed.

(Syllabus by the Court.)

Appeal from district court, Kingfisher county; before Justice John H. Burford.

Action by S. H. Horner against T. P. Christy. Judgment for defendant. Plaintiff brings error. Affirmed.

Hobbs & Kane, for plaintiff in error. Hoff-singer & Nagle, for defendant in error.

BIERER, J. None of the errors assigned for a reversal of the judgment of the court below are properly saved in the record. To the petition in error there is attached what the plaintiff calls his "case-made." It shows that the case was tried in the district court on October 27, 1893, and the case taken under advisement; that on that day the plaintiff and defendant, through their attorneys, agreed that, after the court should have rendered a decision in the case, either party should have 60 days to prepare a case-made, and to take necessary steps to appeal the same; that the court decided the case and rendered judgment for the defendant below (defendant in error here) on the 3d day of November, 1893; that the case-made was served on the 16th day of December, 1893. There is nothing in this record to show that the stipulation extending the time to make a case was ever approved by the district court, or the judge thereof, and no order was made by the district court extending the time to make a case. The statute provides that a case-made must be served within three days after the judgment is entered, unless further time be given by the court or judge. Sections 4444, 4445. A case-made served after the time for making the same has elapsed is void. *Abel v. Blair*, 3 Okl. 390, 41 Pac. 342. The parties in a case cannot, by stipulation which is not approved by the court or judge, extend the time for making a case. *Insurance Co. v. Koons*, 28 Kan. 215; *Railway Co. v. Corser* (Kan.) 3 Pac. 560. There being no question presented by a proper record, the judgment is affirmed.

BOARD OF COM'RS OF WASHITA COUNTY v. HAINES.

(Supreme Court of Oklahoma. Sept. 4, 1896.)

APPEALS FROM COUNTY BOARD—HERD LAW—ELECTION—RESUBMISSION.

1. An appeal lies from all decisions of the board of county commissioners under our stat-

ute, and as under the provisions of article 2, c. 2, St. Okl., it is made the duty of the board of county commissioners to call an election to determine whether or not a regulation permitting stock to run at large shall be adopted, and where such board erroneously decides that such an election is a resubmission of the question to the voters, *held*, that an appeal will lie to the district court from such decision.

2. Section 4, art. 2, c. 2, construed. A second election under section 4, art. 2, c. 2, is not a resubmission as contemplated in such section, unless a majority of the resident electors of the district shall have, at a prior election, voted in favor of putting into effect a regulation permitting stock to run at large.

(Syllabus by the Court.)

Appeal from district court, Washita county; before Justice John H. Burford.

On appeal by Wilson Haines from a decision of the board of county commissioners of Washita county, the district court reversed the decision, and the board appeals. Affirmed.

R. B. Forrest, for appellant. John F. Stone, for appellee.

DALE, C. J. February 17, 1896, Wilson Haines filed in the district court of Washita county an appeal from the decision of the board of county commissioners of such county, and asked a reversal of their decision, wherein said board held that stock should not be restrained in stock district No. 8 in said county. It appears from the record that, upon a proper petition of voters in stock district No. 8 in Washita county, the board of county commissioners of such county called an election for December 21, 1895, to determine whether or not stock should be restrained from running at large. At the date of such election there were 140 qualified electors in said district. Of this number, 64 voted against restraining stock from running at large, 56 voted in favor thereof, 4 ballots were mutilated and not counted, and 16 did not vote upon the proposition. Upon this vote the board of county commissioners declared the proposition carried. To understand fully the question here for decision, it is necessary to state that the election of December 21, 1895, was a second election held for the purpose of submitting the same question, the first being called for December 28, 1894, at which time the vote of the district was in favor of restraining stock from running at large. And from this it appears that prior to the second election the law generally in force in the territory, which prevents stock from running at large, had always been in operation in stock district No. 8. The appeal is brought here upon three assignments of error, which present the following questions: First, will an appeal lie from the action of the board of county commissioners in receiving and recording the result of the election? Second, was the second election held a resubmission of the question, within the meaning of section 4, art. 2, Laws 1893? And, third, can the district court determine upon appeal the result of an election?

Under section 1, art. 2, c. 2, entitled "Herd Law Provisions," "Every owner of swine, sheep, goats, stallions, and jacks shall restrain them from running at large at all seasons of the year; all other stock shall be restrained unless permitted to run at large as hereinafter provided in this act." Section 2, *supra*, provides that the county commissioners shall, on petition, divide their county into districts for the purpose of determining whether or not stock other than swine, sheep, goats, stallions, and jacks shall be permitted to run at large. Section 3 of the same act provides for the calling of an election upon petition from any district in a county, and the submission to the legal voters of the question. Section 4 reads as follows: "If at such election a majority of the electors resident of the district so formed shall vote in favor of either one of such regulations, then the same shall take effect and be in force within the district at the end of thirty days after the election so held, and continue in force until an election is held for a resubmission of the same question, and if a majority of the electors of the same district voting therein shall vote against the regulation at the resubmission, then the regulation shall cease to be effective at the end of ninety days thereafter." Washita county was, under the provisions of this law, divided into several stock districts, and the question of restraining stock duly submitted to the electors of district No. 8 the first time on December 28, 1894, and by a majority of the votes cast at the election no change was made. Again, on December 21, 1895, upon petition, the same question was submitted; and at such election the board of county commissioners determined that the proposition to permit the running at large of stock was carried, and so found.

The first question for our consideration is whether or not, under the law, an appeal will lie from the decision of the board of county commissioners. Our statute provides that "from all decisions of the board of commissioners upon matters properly before them there shall be allowed an appeal to the district court by any person aggrieved." Laws 1893, c. 22, art. 9, § 37. It is contended, however, that this is not applicable to questions of dispute which arise in canvassing and declaring the result of an election. This contention is perhaps well taken, in so far as it relates to matters purely ministerial, but not as to disputed questions of fact which may arise, and which call for a decision upon the part of the board. Whether or not the decision of the board which declared the law requiring persons to restrain stock in district No. 8 abrogated was correct, depended upon a number of facts; and it was necessary for the board to pass upon such facts before they were authorized, under the law, to determine that stock should not be restrained. First, they must determine the number of resident electors in a district. This is a fact which must be found before

an election can be called, as the jurisdiction to call the election is based upon a petition of one-fourth of the legal voters of the district. Second, the board must determine at the first election that a majority of the electors residing in the district have voted in favor of allowing stock to run at large, as this finding is necessary, under the statute, before they may declare the law abrogated as to such district. And, third, if an election has been previously held in the district, as was the case under consideration, the board must determine whether or not the second election was a resubmission of the question as contemplated in the statutes. In all these matters the board of county commissioners act judicially, and from their decision an appeal to the district court will lie. This appeal does not bring to the district court for review any matter wherein the board acted simply in a ministerial capacity, as a canvassing board, but only those questions upon which they acted judicially in their findings upon which they predicated the result. To this extent an appeal will lie under section 37, art. 9, *supra*.

Whether or not the election called for December 21, 1895, was a resubmission of the question under section 4, art. 2, *supra*, depends entirely upon the construction given to the language of such section. This section clearly provides that a majority of all resident electors must vote in favor of free range at the first election, in order to change existing conditions. But it is contended that if one election be held, and free range be defeated, a second election is such a resubmission as will enable a majority of the votes cast to put free range into operation. We do not assent to this view. The section of the statute, construed as a whole, evinces the mind of the legislature with certainty. That part which provides when the regulation may be put into effect is followed by, and is a part of, the law which also provides how the regulation may be discontinued. The language used, "and shall continue in force until an election is called for a resubmission," refers to a condition precedent (that is, to the regulation providing for free range theretofore in force), and it is to determine whether or not such regulation shall be continued in force that the election upon the question of resubmission is called; and if the regulation is once put into effect (that is, if the law requiring owners to restrain stock has been abrogated) a majority of all those voting may restore the law. This view is in harmony with the spirit of the law, and is, we think, in accord with its letter. There must be a majority of all the resident voters in a district in favor of abrogating the law, before stock is permitted to run at large. If this be true, an election which does not favor this has no effect upon a subsequent election. To hold that the first election has the effect contended for by counsel for appellant would defeat the provision

which requires a majority of the resident electors to open up the district for free range, and would permit the law to be set aside without ever having had such a majority in favor thereof. We hold, therefore, that the second election, held on December 21, 1895, was not a resubmission of the question, within the meaning of the statute.

The third question presented is answered by a discussion of the first assignment of error. Counsel for appellant fails to distinguish between what he terms "the result of an election," and the questions which are involved in reaching such result. The result of the election, which is the number of votes cast for or against the question voted upon, cannot be disturbed or in any way involved in the appeal. The finding of the board of county commissioners to the effect that the district had, under the law, adopted a regulation which permitted stock to run at large, was a decision based upon facts not involved in canvassing the votes, and from such decision an appeal lies to the district court, under our statutes. Judgment affirmed. All concurring.

TECUMSEH STATE BANK v. MADDOX. (Supreme Court of Oklahoma. Sept. 4, 1896.)

PLEADING—AMENDMENT—DEMURRER—CONTRACTS
—CONSIDERATION.

1. Where a court has granted leave to file an amended pleading, the question whether the amendment made could properly be made under the statute of amendments is a question that cannot be reached by demurrer. The demurrer does not go to the right to make the amendment, but to its sufficiency when made.

2. The relinquishment of the preferment right to entry on the public lands, and an agreement to sell personal property, such as a house, fences, and other improvements thereon, are a good and valuable consideration for an assignment of moneys. Where B. was contestant for entry on lands, and had obtained a decision in the local land office, canceling the entry of the contestee, and recommending to the general land office that B. be allowed the preferment right under the law, and B. agreed with W. that, when such decision should be affirmed by the general land office, he would surrender such preferment right, and not assert the same, but would assist W. to make entry on said lands, and that W. should own and be possessed of the personal property and improvements on said land then owned by B., held, that such agreement was a good and valid consideration for an assignment of moneys from W. to B.

(Syllabus by the Court.)

Error to district court, Pottawatomie county; before Justice Henry W. Scott.

Action by James Maddox against the Tecumseh State Bank, in probate court. There was a judgment for defendant, and plaintiff appealed to the district court, where he obtained a judgment, and defendant brings error. Reversed.

This action was originally commenced in the probate court of Pottawatomie county, by James Maddox, the defendant in error, to recover a judgment of \$1,000, the pro-

ceeds of certain drafts deposited with the Tecumseh State Bank, plaintiff in error, by one Michael Wogoman, and alleged to have been assigned by him to Maddox, after the deposit was made. Judgment was rendered upon the verdict of the jury in said probate court in favor of said bank, and Maddox appealed to the district court, where a demurrer to defendant's answer was sustained, and plaintiff in error, by leave of said court, filed an amended and supplemental answer, which was demurred to by defendant in error; and said district court sustained said demurrer, and rendered judgment on the pleadings in favor of the defendant in error, and against the plaintiff in error, for \$1,070 and costs. Plaintiff in error excepted. A motion for a new trial was overruled and excepted to, and cause duly brought to this court for review. The petition of the defendant in error in said cause states: That on the 29th day of March, 1894, one Michael Wogoman deposited in the bank of the defendant three certain drafts for collection. That the amount of said drafts then collected was to be placed to the credit of said Wogoman on the books of said bank, subject to his direction. Said drafts amounted to the sum of \$1,000. That, at the time of depositing the said drafts, said Wogoman took and received from said defendant bank a certificate of deposit in due and proper form, signed by the president of said bank, as the evidence of this deposit. That afterwards, in due course of business, the defendant bank collected said drafts, and received into its possession the full amount and proceeds of said drafts, amounting to the sum of \$1,000. That no part of the same was ever drawn out of said bank by the said Wogoman, or by any person for him, or by his authority. That afterwards, on the 25th day of September, 1894, said Wogoman, for a valuable consideration to him paid, sold and transferred to the plaintiff, Maddox, the said certificate of deposit, and thereby transferred to said Maddox the said sum of \$1,000 so on deposit in said defendant's bank. That, by reason of said sale and transfer, said Maddox became the owner of said certificate of deposit, and of the \$1,000 so collected and held by said bank, and was and is entitled to have said sum paid to him by said bank. That on the 27th day of September, 1894, Maddox, within proper banking hours, presented said certificate of deposit to said bank, on the back of which was indorsed as follows: "For value received, I hereby sell and assign unto James Maddox the within certificate of deposit, and all my claim to the sum of \$1,000.00 by me deposited in the State Bank of Tecumseh on the 29th day of March, 1894, and no part of said sum has been withdrawn by me or on my order, and all of which is due from said bank and unpaid, without recourse on me. [Signed] Michael Wogoman." And said Maddox, at the time of presenting the said certificate to said bank as

aforesaid, demanded of said bank payment thereof. That said bank refused to recognize said certificate of deposit, and refused to pay or in any manner accept the check of said Maddox drawn on said bank for said sum, or to accept said certificate of deposit, and refused to honor either of the same, or to pay any portion of said sum of money to said Maddox. On the 4th day of October, under leave of the district court, and within the time fixed by the court, said bank filed in said district court an amended and supplemental answer to said petition, in which said bank denied each and all the allegations in said petition, except such as were in and by said amended answer specifically admitted. Said answer admitted that on the 29th day of March, 1894, Michael Wogoman deposited with defendant three certain drafts for collection; that the same were duly collected by the defendant; that the amount of proceeds thereof was \$1,000. The answer then alleges: That the bank received said draft and the proceeds thereof, and agreed to hold the same, and pay the same out, pursuant to and in accordance with a contract and agreement made between said Wogoman and one Charles J. Benson, a memorandum of which contract and agreement, made at the time, was in words and figures as follows, to wit: "March 29, 1894. Received from Michael Wogoman one thousand dollars, subject to the following conditions: That when Michael Wogoman shall receive either homestead or filing papers on the southwest quarter section thirty-three, township ten N., R. 5 east, then said sum of money shall be paid to C. J. Benson, of Tecumseh, O. T., said Benson having contested said land, and contest having been decided in his favor; and, when cancellation of said land shall be made on the books of the land office at Oklahoma City, said Michael Wogoman shall make his application for said land. [Signed] W. S. Search, President." That said money, the proceeds of said drafts, should, by the mutual agreement of said Wogoman, said Benson, and said bank, be held by said bank until said Wogoman should be permitted to make homestead entry of or file upon the said described land. That, when said Wogoman should make such entry and file upon the said land, then said sum of \$1,000, held as aforesaid, should be paid the said Benson. That, in pursuance of said agreement, said Wogoman did immediately make settlement on said tract of land under the homestead law, and, at the time of filing said answer, had availed himself of the said agreement, had made homestead entry thereof, and filed thereon, under said agreement. That said Benson had prior to said March 29, 1894, contested the homestead entry of one Aquilla O. Owens on said land, alleging that said homestead entry was fraudulent and void, because said Owens was disqualified to make such entry, by reason of having violated the law under which said land had been opened to settlement. That said Benson,

prior to said date, had presented his evidence in said contest case in the United States land office at Oklahoma City; had paid the fees, costs, and charges thereof; had proved said allegations; and had purchased, and was then the owner of, valuable improvements then on the said land, consisting of a house, fences, plowed ground, and other improvements, all of which were then the personal property of the said Benson. That prior to said date, and on February 3, 1894, the register and receiver of said land office rendered a decision in said contest case in favor of said Benson, and had recommended to the commissioner of the general land office that the homestead entry of said Owens be canceled, and that the preference right to make homestead entry of said lands be awarded to said Charles J. Benson. That it was on said 29th day of March, 1894, contracted and agreed between said Wogoman and Benson that the said \$1,000 deposited as aforesaid should be paid by said bank to said Benson, for and in consideration of the aforesaid agreement and the aforesaid improvements on said land, the personal property of said Benson, and in consideration of said Benson's waiving his preference right to make homestead entry of said tract of land, and his refraining from exercising the same, and from making homestead entry thereof at such time and under such circumstances as the said Wogoman might make homestead entry thereof, and of permitting the settlement rights acquired by said Wogoman by virtue of the purchase of the aforesaid improvements on said land to attach thereto under the homestead laws. That notice of the decision of the commissioner of the general land office of the cancellation of the homestead entry of said Owens, and that the preference right to make homestead entry of said tract of land had been awarded to said Benson, was served on said Benson on about March 25, 1895. The said Benson immediately notified the said Wogoman of that fact. That on the 28th day of March, 1895, Benson went, with Wogoman, to the United States land office at Oklahoma City, and filed with the said office a waiver, withdrawal, and dismissal of his preference right to make homestead entry on said land, acquired as aforesaid; and immediately, and before any intervening rights of any other person attached to said land, Wogoman made homestead entry thereof, and filed thereon, and received filing papers on said land. That the aforesaid waiver of said preference right, and the aforesaid improvements sold to Wogoman by said Benson, were and are reasonably worth \$1,000, and were of the value of \$1,000. That the defendant bank, on or about the 5th day of April, 1895, paid the aforesaid \$1,000 to said Benson, in accordance with the terms and conditions of said contract and agreement; and that all the parties to the aforesaid contract and agreement have complied with the conditions and terms thereof. That on the

4th day of October, 1895, Maddox filed in said district court a demurrer and reply to said amended and supplemental answer. That the reply filed therein specifically denied that said Benson had any improvements on said land, or that improvements were embraced in or were a part of said consideration in said contract, or were mentioned in connection with said agreement. That on the 5th day of October, 1895, the district court sustained said demurrer. The plaintiff in error, at the time, duly excepted. Afterwards, on said day, said plaintiff in error electing to stand on said pleading, and refusing further to answer therein, the said court, upon the pleadings in said cause, rendered judgment in favor of the defendant in error, and against the plaintiff in error, for the sum of \$1,070 and costs of the action. That on the same day the plaintiff in error filed its motion in said court in said cause for a new trial, which said motion was on said day by the court overruled. And the cause is duly brought to this court by petition in error for review. The errors assigned are: First. Said court erred in sustaining the demurrer of the defendant in error to the answer of the plaintiff in error. Second. Said court erred in sustaining the demurrer of the defendant in error to the amended and supplemental answer of plaintiff in error. Third. Said court erred in rendering judgment on the pleadings in favor of the defendant in error against plaintiff in error. Fourth. Said court erred in overruling motion for new trial, filed by plaintiff in error.

J. H. Woods, for plaintiff in error. Charles H. Eagin and W. S. Pendleton, for defendant in error.

PER CURIAM. We deem it unnecessary to consider the question raised by the first assignment of error, as to whether the court below erred in sustaining the demurrer to the original answer, as the error therein, if any, was waived and cured by the failure of the plaintiff in error to stand thereon, and by the filing of its amended and supplemental answer; and as the amended and supplemental answer contains, in addition to the new matter therein stated, all the material allegations of the original answer, the entire question is presented by the ruling of the court in sustaining a demurrer to such amended supplemental answer.

A peculiar condition is presented by the pleadings in this cause, the defendant in error having filed on the same day, and presumably at the same time, a demurrer to the amended answer, and also a reply thereto, the reply specifically denying certain of the material allegations in said answer. These pleadings are inconsistent. A demurrer, for the purposes thereof, admits the truth of all the material allegations in the pleading, and a party cannot at one and the same time admit and deny the truth of the allegations set forth in a pleading. But as the court below

appears to have ignored this reply, and given it no consideration, and no objection or exception appears in the record to its filing, we will treat the case as though no such reply was in the record.

Counsel for defendant in error contend that the new matter set up in the amended answer was not proper subject-matter of amendment; that it was not an amendment, but was new, distinct, and entirely different matter, which shifted and changed the defense upon foreign grounds, not occupied or contemplated in the original answer; that it presented a different issue from the one tried in the probate court, and therefore was not permissible under the statutes relating to amendment. The statute relating to amendment (section 4017, c. 63, Code Civ. Proc.) is very liberal, but whether sufficiently liberal to permit such an amendment is not necessary for us here to determine. The subject of amendment to pleadings is largely in the discretion of the court, and the question whether a court exceeds its discretion in the matter of allowing an amendment is not one that is raised by demurrer. A demurrer does not go to the right of incorporating matter in a pleading, but to the sufficiency of such matter. The defendant in error, not having, by motion to strike such answer from the files, or other proper proceeding, under the rules of practice, raised the question, but having chosen to challenge its sufficiency by demurrer, has not preserved the question of the right of the court to permit such amendment. The only question, therefore, in the case is, did the said amended supplemental answer present a good and sufficient defense to the cause of action stated in plaintiff's petition? This is to be determined by a consideration as to whether the facts stated in such answer, and the agreements therein alleged, between the said Wogoman and the said Benson, constituted a good and sufficient consideration for the assignment of the moneys deposited by said Wogoman with the plaintiff in error to said Benson. The amended answer alleged that Benson, prior to the deposit of said money in the bank, had contested the homestead entry of one Owens, on the grounds that said Owens was disqualified to make entry of such land; that he had presented his evidence in said contest case, paid all charges and fees, and had proven Owens' disqualification; that the register and receiver of the land office had decided in favor of said Benson, and had recommended to the general land office that Owens' entry be canceled, and that the preference right to make homestead entry of said land be awarded to said Benson; that Benson, as a contestant for said land, had valuable improvements thereon,—a house, fences, and plowed ground, and other improvements; that, when his preference right was approved by the general land office, he was to surrender the same, and permit Wogoman to file thereon, without any contests by him (Benson), and without any assertion by

him (Benson) of such preference rights; that, when Wogoman should make entry on such land, the personal property and improvements thereon should be his. Did this constitute a good and sufficient consideration for the assignment by Wogoman to Benson of the \$1,000 deposited in the bank? The authorities seem to leave no question or doubt that such agreement constitutes a good consideration for such an assignment.

We can discover no difference in principle or material distinction in facts between this case and the case of *Pelham v. Service* (Kan. Sup., March, 1891) 26 Pac. 29. In that case, Service had made a homestead entry upon certain lands in Wichita county, Kan., and had pending a protest against the final proof of one William H. Montgomery on and to said land, in the Wakeeney land office, to settle the question of conflict of right to the same. It was agreed between Pelham et al. and said Service that in consideration of said Service furnishing to the other parties to the agreement a relinquishment to his homestead entry, and a written withdrawal and dismissal of said protest and hearing, the other parties to the agreement should pay to said Service the sum of \$5,000. Service brought suit on this agreement for the \$5,000, alleged performance on his part, and demanded judgment. There was a demurrer to his petition, for the reason that "it did not constitute a cause of action, the pith of the demurrer being that there was no consideration for the agreement; the contract itself, and the petition, on its face, showing the facts that Service had no possessory right in the land, had nothing to sell, and could transfer nothing to the plaintiffs in error. The demurrer was overruled, and the overruling of such demurrer was the only question presented to or considered by the court. In that case the court said: "Contracts about the possession, improvements, and relinquishments of rights on public lands, when free from fraud, can be enforced, and constitute a good consideration;" the doctrine of the case being that the relinquishment of a right to a homestead entry on public lands, and the withdrawal of a written protest against the final proof of another, are a good and valid consideration in a written instrument for the payment of money. In *McCabe v. Caner*, 68 Mich. 182, 35 N. W. 902, it was held that where a defendant executed to plaintiff certain promissory notes, in consideration of plaintiff's agreement to relinquish and surrender to the government his certificate of homestead entry, to enable defendant to locate the land, and the surrender was made as agreed, it was a valid consideration for the notes. The record in that case discloses the fact that the plaintiff had entered, under the homestead law of the United States, a parcel of land in Clare county, subject to such entry, and received a certificate of entry from the land office; that the notes in question were given by the defendant to the plaintiff upon the agreement of the

plaintiff that he would surrender his certificate of entry to the government, and would relinquish all his interest thereunder to the government, at the request of the defendant, to enable the defendant to locate said land, and acquire the interest of the plaintiff therein; that such was the sole consideration given for said notes. The court, in the opinion in the case, says: "We have no doubt about the correctness of this decision upon the defendant's own showing. The testimony of the misrepresentation and fraud was not admissible under the pleadings, and has no rightful place in the case, and should have been excluded when objected to. The plaintiff performed his agreement, as the testimony shows; and it was a legal one. The government had not found fault with the plaintiff's conduct in the premises at the time the notes were given; and the testimony tended to show that it stood ready to recognize the homestead rights he surrendered for the note, and they were a legal consideration therefor. Really, the government's right to forfeit the plaintiff's entry, if such were the case, had nothing to do with the case. If such right existed, as claimed, the government could enforce it or not, as it chose. The plaintiff's relinquishment of his rights in the premises was a good consideration for the notes." The court cited, in support of its decision therein, *Olson v. Orton* (Minn.) 8 N. W. 878; *Thompson v. Hanson* (Minn.) 11 N. W. 86; *Lamb v. Davenport*, 18 Wall. 307; *Myers v. Croft*, 13 Wall. 291; *Kennedy v. Shaw*, 43 Mich. 359, 5 N. W. 396; *Sanford v. Huxford*, 32 Mich. 318; *Rood v. Jones*, 1 Doug. (Mich.) 188. In *Lamb v. Davenport*, 18 Wall. 307, the supreme court of the United States say: "The right of the United States to dispose of her own property is undisputed, and to make rules by which the lands of the government that are sold or given away is acknowledged; but, subject to these well-known principles, parties in possession of the soil might make valid contracts even concerning the title, predicated upon the hypothesis that they might thereafter lawfully acquire the title, except in cases where congress has imposed restrictions on such contracts." And in that case the court held that, unless forbidden by some positive law, contracts made by actual settlers upon the public lands concerning their possessory rights, and concerning the title to be acquired in the future from the United States, are valid as between the parties to the contract, though there be at the time no act of congress by which the title may be acquired, and though the government is under no obligation to either of the parties in regard to the title. In *Thompson v. Hanson* (Minn.) 11 N. W. 86, the facts stated were that defendants Hanson and Johnson entered into an agreement with the plaintiff by the terms of which he was to procure the cancellation of the entry of one Holmes, and then enter the land under the timber culture act for Hanson's benefit. In consideration of

this agreement, defendants executed a note for \$200, upon which the suit was brought. Holmes' entry was canceled July 1, 1878. On July 2, 1878, plaintiff filed with the register of the Worthington (Minn.) land office an affidavit, and paid a fee of \$10, as prescribed by statute. This was done in the name of, and for the use and benefit of, Hanson; the effect being to entitle him to enter the land specified. It was there held that the note was founded upon a sufficient, and not illegal, consideration. Fully supporting the doctrine of these cases, as above stated, and directly in point, are the following: *Lapham v. Head*, 21 Kan. 332; *Bell v. Parks*, 18 Kan. 152; *Fessler v. Haas*, 19 Kan. 216. And, applying the doctrine of these cases to the case at bar, they would seem to be conclusive of the validity of the contract set up in the answer of the plaintiff in error, as showing the agreement therein stated to constitute a good and valid consideration for the assignment of the money deposited by Wogoman to Benson. As the facts were stated in the amended answer, Benson was contesting the entry of Owens. A successful contest entitled him to a preference right of entry of said land, which right he was to surrender when the same should be confirmed, and, by such surrender, permit Wogoman to make entry, and acquire the rights which he (Benson) had surrendered. This, we think, he might lawfully do, and that such surrender, upon the authority of the cases cited supra, would constitute a good and valid consideration for the assignment made. But the case at bar is much stronger to establish the right of plaintiff in error to pay over the money in question to Benson, and to be exempt from liability therefor, either to Wogoman or to any subsequent assignee, than the cases heretofore cited; for, if the allegations in this amended answer be true,—and they must, under the demurrer filed, be taken as true,—then there was an independent consideration for the assignment from Wogoman to Benson. Benson had made improvements or was the owner of improvements on the land in question, consisting of a house, fences, and valuable improvements made upon the land by plowing and breaking the sod on a portion thereof. These, the answer alleges, were sold and conveyed to Wogoman as a part of the consideration for said \$1,000. And it matters not whether Benson was in the actual and undisputed possession of said property, or could deliver the possession thereof to said Wogoman; the right to such possession was a valid consideration. The parties knew precisely what they were doing. There could have been no mistake or misunderstanding as to the extent of Benson's interest either in the land or the personal property thereon situated. If there was any consideration of value, there can be no inquiry now into its sufficiency. Parties place their own value on their purchases, and, unless their bargain is rescinded, they must pay what they agree to pay. *Kennedy v.*

Shaw (Mich.) 5 N. W. 396; Bell v. Parks, 18 Kan. 162; Lapham v. Head, 21 Kan. 332. There is no law that we know of which prohibits the sale of improvements on public lands of the United States, and there is no reason why they may not be proper subjects for sale, and serve as actual value and valuable consideration for contracts. Caldwell v. Ruddy (Idaho) 1 Pac. 339; O'Hanlon v. Denver (Cal.) 22 Pac. 407; Paxton Cattle Co. v. First Nat. Bank of Arapahoe (Neb.) 33 N. W. 271. "A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other." Add. Cont. p. 31.

The only authorities to which we have been referred in support of the contention of the defendant in error are Dameron v. Dingee (Colo. App.) 29 Pac. 305, and Bennett v. Collins, 1 Copp. Pub. Land Laws, 462x; but neither of these cases is applicable to the question involved here. Those cases only hold, and hold correctly, that the preference right of a successful contestant is personal, and cannot be transferred to another; that such preference right, or any right of entry or other inchoate right to acquire title to public land, cannot be sold or transferred from one party to another. No such question is involved in this case. It is not pretended that Benson undertook to transfer his preference right to Wogoman. He contracted to surrender such right to the government, so that Wogoman might acquire the same right for himself. This answer alleges that he not only surrendered that right, but that, in pursuance of the agreement, Wogoman made entry upon the land, went into possession of said land, the personal property, and improvements transferred to him by Benson, and, at the time this cause was tried, was in the peaceable and uncontroverted possession of everything he contracted to attain, and was enjoying every right which Benson contracted that he might acquire. But counsel for defendant in error contends that before the preference right of said Benson had been confirmed by the general land office, and before he surrendered such right, and before Wogoman entered into the undisputed enjoyment and possession of the lands and personal property, Wogoman, by the assignment of said moneys so deposited in plaintiff in error's bank to Maddox, the defendant in error, had rescinded the contract between himself and Benson. This he could not do if it was a valid contract when made. It did not need to be an executed contract. An executory contract, if valid when made, is a good consideration for a promise.

The agreement between Wogoman and Benson was not void as being against public policy. It contravened no law or policy of the government. It is not claimed that fraud entered into it, or that it violated any rule of morals. What is meant by rescission of a

contract? Bishop defines it as "the avoiding of a voidable contract." Bish. Cont. § 679. But even where a contract is voidable, and is sought to be rescinded by one of the parties thereto, equity and good conscience require that he shall place the other in statu quo. He will not be permitted to repudiate a contract, and retain the benefits derived thereunder. The statutes of this territory, particularly, specify the cases and conditions under which parties to a contract may rescind the same; and this case falls under none of the classes therein specified. St. Okl. 1893, §§ 866, 868.

From the foregoing, it is our conclusion that the court below erred in sustaining the demurrer to the amended and supplemental answer of plaintiff in error to the petition of defendant in error in this cause; that said amended and supplemental answer presented a good and sufficient defense to the action of defendant in error, and said demurrer should have been overruled. For the reasons stated, the action of the court below in sustaining said demurrer, and in entering judgment upon the pleadings in favor of the defendant in error, against the plaintiff in error, is reversed, and this cause is remanded to the court below, with instructions to overrule said demurrer, and grant a new trial.

CITY OF OKLAHOMA CITY v. HILL et al. (Supreme Court of Oklahoma. Sept. 4, 1896.)

FORCIBLE ENTRY AND DETAINER — WHEN LIES — DEFENSES — PLEADING — HARMLESS ERROR — NOTICE — SUFFICIENCY — SUBMISSION OF SPECIAL QUESTIONS.

1. In a forcible entry and detainer case all defenses may be interposed under a general denial, and it is not reversible error to strike from the answer a special defense, even though the special paragraph might plead a good defense.

2. A notice as a basis of a forcible entry and detainer proceeding, which is addressed to M., as the mayor of the city, and which notifies the city to leave and vacate the premises described therein within three days, or an action will be commenced against the city, and which is signed by the parties claiming the property, is sufficient. A substantial notice to quit and leave the premises, and not technical accuracy, is what the statute requires.

3. It is not necessary that the names of the parties who claim the property should appear in the body of the notice; it is sufficient if the names are signed to the notice given.

4. An action of forcible entry and detainer may, under the statute of this territory, as construed by the supreme court of Kansas before its adoption, be maintained by one who was, without right, in the actual and peaceable possession of the premises, even against the true owner, who ousts him of such possession by force; and in a case where it is shown that the plaintiffs were in the actual and peaceable possession of certain town lots, with the buildings thereon, in one of which the plaintiffs were running a saloon, and the sheriff arrested the plaintiffs under a charge of violation of the liquor laws, and removed them and their goods and furniture from the building, and while they were under arrest for a short time the sheriff permitted the officers of the city who were standing by to enter into possession of the

building, and keep the plaintiffs therefrom, it is held, that the plaintiffs may maintain their action of forcible entry and detainer, and that in such case it is not error to sustain an objection to the introduction of evidence tending to show that the sheriff had a right to arrest plaintiffs, and take their goods and furniture from the building, and the defendant had a deed to said premises, and that the plaintiffs had no right to the possession thereof. If the sheriff, in such a case, had the right to arrest the plaintiffs, and take their goods and property from the building, he had no right to deprive the plaintiffs, by force, of the possession of the building; and it is no defense for the city to say that it was not a party to such dispossession, when its officers stood by, and saw and took advantage of these acts of the sheriff.

5. A party has a right to submit to the jury special questions of fact which are within the issues in the case, and a refusal to submit such questions to the jury is material error.

(Syllabus by the Court.)

Error from district court, Canadian county; before Justice Frank Dale.

Forcible entry and detainer by P. J. Hill and J. T. Hill, partners as Hill Bros., against the city of Oklahoma City. From a judgment for plaintiffs, defendant brings error. Reversed.

W. R. Taylor, R. G. Hays, J. S. Jenkins, and John I. Dille, for plaintiff in error. Amos, Green & Son, for defendants in error.

BIERER, J. This was an action brought in the probate court of Oklahoma county by P. J. and J. T. Hill, partners as Hill Bros., against the city of Oklahoma City, to recover possession of lots 40 and 41, in block 23, in Oklahoma City. The plaintiffs alleged in their bill of particulars that on the 31st day of October, 1893, they were in peaceable and rightful possession of the property described, and that the defendant and its officers wrongfully, illegally, and forcibly entered upon the premises, and forcibly took possession thereof, and that the defendant still forcibly and wrongfully holds and detains said premises from the plaintiffs. The bill of particulars also alleges notice to quit and leave the premises, duly served more than three days before the action was brought, and the bill of particulars was filed on the 15th day of November, 1893. On trial in the probate court judgment was had for defendant, from which plaintiffs appealed to the district court, and on application of plaintiffs the venue of the cause was changed to Canadian county. The defendants, on leave of court had, filed an amended answer in two paragraphs: First, a general denial; and, second, a special defense, alleging that on April 22, 1889, the lots and real estate claimed by the plaintiffs were public lands of the United States, and were, on that day, settled upon and occupied as a government town site; that afterwards town-site trustees were duly appointed, as provided by law, who made entry of said lands, and surveyed and platted the same; and that afterwards, on the application of the plaintiffs for title to said

lots, before said town-site board, it was found that the plaintiffs had entered the territory of Oklahoma in violation of the act of congress of March 2, 1889, prohibiting the entry upon said lands or into the Oklahoma country prior to the time the same should be opened to settlement, and that for this reason the lands were awarded to the city; and that the city is the lawful owner of the lots, and holds the legal title thereto. On motion of the plaintiffs this second paragraph of the answer was stricken out. On trial before a jury the plaintiffs proved that they settled on these lots in controversy on the 22d day of April, 1889, and soon thereafter placed buildings upon the lots, covering all of the lots excepting about 10 by 50 feet on the back portion of the lots, and off the street; that the lots were on and adjoined the southwest corner of the block, and extended north and south, facing Broadway on the south, and lying adjacent to Grand avenue on the west. The plaintiffs, by themselves and their tenants, remained in peaceable possession of these lots and buildings from the time the buildings were erected, soon after April 22, 1889, up to the morning of October 31, 1893, the eastern building being rented to tenants, and the western building, occupying about 18 feet, being used by the plaintiffs in running a saloon and billiard hall, the upper room of this building being also occupied by the plaintiffs. It was proved by the plaintiffs: That shortly prior to October 31, 1893, the city had employed special counsel to procure possession of these lots for the city, and the mayor had directed the chief of police of Oklahoma City to be present when the sheriff and his deputies should arrest the plaintiffs and their employees under a charge of maintaining screens upon their saloon windows, and for running or permitting gambling devices to be run on the premises where liquors were sold, in violation of a statute which makes these things unlawful, and requires the officers making the arrest to take the furniture and utensils used in the place where such violations of law are committed, and transport them, with the defendants, before a justice of the peace; and that when the plaintiffs, with their furniture, should be thus taken out of the building, while under arrest, the city officers should move into and occupy the premises in which the plaintiffs were carrying on the saloon business. That on the morning of the day stated, at about 5 o'clock, the sheriff, with a number of deputies, and the chief of police, with some special policemen, and a member of the council, went to the premises, the sheriff and his deputies arrested the plaintiffs, and proceeded to remove all the furniture and fixtures of the plaintiffs from the west building, and the policemen and city officers immediately moved into and took possession of this building, and on the return of the plaintiffs in about an hour and

a half, they, having been released from custody, were refused admittance into the premises. The plaintiffs also proved notice to quit the premises, which will be hereafter referred to more specifically.

The first error that is assigned is in the action of the trial court in sustaining the motion of the plaintiffs to strike the second paragraph from the answer. It is contended that this answer set up a defense which they were entitled to interpose in a forcible entry and detainer proceeding. Whether this is true, it is not necessary to determine, for, even if the matter alleged was a good defense to the action, the striking it out does not constitute reversible error. No pleading is mentioned under the special provisions of the Justice Code relating to forcible entry and detainer excepting the complaint. No answer whatever is, by these provisions, required of the defendant; and under the general provisions of the Justice Code, in any other proceeding than forcible entry and detainer, no answer is required of the defendant, unless it is demanded by the plaintiff. In the case of *German v. Ritchie*, 9 Kan. 106, it was held that: "Where there is no bill of particulars filed by the defendant before a justice of the peace, and no demand therefor, and on appeal no new pleadings are made, and no demand is made for any pleadings, the defendant may introduce in evidence any defense that he may have." Now, if it is true, as the supreme court of Kansas has held, that in ordinary proceedings before a justice of the peace, where no answer is demanded of the defendant by the plaintiff, the defendant may introduce in evidence any defense that is pertinent to the case, it is certainly equally true in forcible entry and detainer proceedings, where the statute does not require the defendant to make any answer whatever. And if the defendant in this case could have made the very defense which it alleges it was error to strike from its answer without being pleaded, it was certainly not reversible error to strike it out, for he was in as good a position with the matter stricken out as he would have been with it left in his pleadings. In the case of *Poffenberger v. Blackstone*, 57 Ind. 288, under a justice of the peace procedure act similar to ours, it is held that in a forcible entry and detainer case all defenses may be given in evidence without plea, and therefore the sustaining of a demurrer to an answer is harmless. Therefore, whether this was a good or bad defense, there was no reversible error in striking it out, for the defendant was not put in a worse position without it than he was with it.

The next contention is that the notice to quit the premises was insufficient. This notice, which was duly served on the mayor of Oklahoma City, was as follows: "Hon. O. A. Mitscher, Mayor of Oklahoma City: You are hereby notified that the said city has wrong-

fully and illegally taken forcible possession of lots No. 40 and 41, in block 23, in Oklahoma City, together with all buildings thereon, and are now forcibly detaining the same; and you, as mayor of said city, are hereby requested and notified to leave and vacate said premises within three days, or an action will be commenced against said city to recover possession thereof. P. J. and J. T. Hill, by Amos Green & Son, Attorneys. November 9, 1893." The first objection to this notice is that it was not addressed to "The City of Oklahoma City," as the statute makes its title, but to "O. A. Mitscher, Mayor of Oklahoma City." The statute requires that a party desiring to commence an action under the forcible entry and detainer act shall "notify the adverse party to leave the premises for the possession of which the action is about to be brought," which notice shall be in writing. The statute pertaining to cities of the first class, of which Oklahoma City is one, provides that the name of the city shall be "The City of _____," and, as applied to this case, the proper name would be "The City of Oklahoma City"; and it also provides that all notices and processes shall be served upon the mayor. Now while, had technical accuracy been followed, the appropriate notice would probably have been addressed to "The City of Oklahoma City," and served upon the mayor, yet we do not perceive that there has been such a departure from the statute as to make the notice insufficient. The notice was served upon the mayor, and it does substantially say that the city of Oklahoma City has wrongfully and illegally taken forcible possession of the lots in controversy, and the city, through its mayor, is requested and notified to leave and vacate the premises, and is also notified that action will be commenced against the city if possession is not given. This, we think, substantially complied with the statute. In the case of *Seeley v. Adamson*, 1 Okl. 73, 26 Pac. 1070, this court held: "That, while accuracy in the description of the property in the notice is required, yet, as in all cases of the kind requiring notice, what is required is substantial, and not technical, accuracy. The law will not regard mistakes which do not mislead the party notified." The second objection to this notice is that the name of the party who claims the possession of the property must appear in the body of the notice, and the case of *Nason v. Best*, 17 Kan. 408, is cited as authority for this contention. It is true, the case cited does contain this language, and would seem to support the position, but the later Kansas cases do not follow it. In the case of *Conaway v. Gore*, 22 Kan. 216, the notice given was as follows: "To John M. L. Gore and James W. Reed: You are hereby notified and required to forthwith leave the premises hereinafter described, to wit [description], for the possession of which premises action is about to be brought. Lloyd G. Conaway. April 17, 1873." And of this notice the court said: "True, he does not say in the body of the instrument that he is the one who claims the possession,

and that he intends to bring the action; but he leaves no doubt, for he alone is named in or signs the notice, and he alone brings the action. A certainty may be implied as well as expressed. Such a notice would not be sufficient to sustain an action in the name of a third party; nor would a notice in any case be sufficient when, upon the face of it, there appeared a doubt as to which of two or more parties was claiming the possession. The statute requires simply a 'notice to leave,' and not a notice to surrender the possession to any particular party." And the notice was there held sufficient. We consider the one here a broader and better notice than that. Nor do we think there is anything in the contention that the Hills should have signed their names as partners.

The next error relied upon is the sustaining of objections to the introduction of certain evidence offered by defendant. The defendant offered in evidence the original papers, warrants, and processes of the court issued by the justices of the peace, charging the Hills with a violation of the liquor and gambling laws, and the order of the justice of the peace for the sheriff to seize the utensils and property used by the Hills in their saloon business, in the corner building, and convey them before the justice of the peace; and also offered in evidence the order binding the Hills over to answer said charges in the district court, and the appearance bond in said cases, and the indictment found by the grand jury in the district court, and the plea of guilty to the charges, and the judgment and fine imposed by the court for such violation. These were offered, as it is stated, for the purpose of showing that there was no conspiracy between the city officers and the sheriff and his deputies to oust the plaintiffs from their possession of the building. The defendant also offered in evidence the deed from the town-site board to the city for these lots in controversy, which deed was issued on the 18th day of October, 1893, and filed of record in the office of the register of deeds of Oklahoma county on October 20, 1893. They also offered in evidence testimony of witnesses who swore that they saw the plaintiffs in the Oklahoma country prior to 12 o'clock noon, April 22, 1889. All this evidence was excluded, and error is based thereon. Now, if this evidence tended to show that the entry of the defendants upon the plaintiffs' possession was not forcible and unlawful, then it was admissible. But did it have any such tendency? The plaintiffs were in peaceable possession of the property when the sheriff and his deputies and the defendant's officers went there on the morning of October 31, 1893. Suppose the sheriff had a right to arrest the plaintiffs, and to take the furniture and utensils used in the unlawful business, before a justice of the peace, and suppose this right was based upon a proceeding instituted and warrants issued, and that subsequent proceedings showed that these prosecutions were fully

justified, this gave the sheriff no warrant or authority to deprive the plaintiffs of the possession of the building, and turn it over to the defendant, and it gave the defendant, through its officers, no authority whatever to stand by and see that done,—and certainly that is the mildest light that the proceeding can be placed in,—and then ratify and take advantage of this conduct of the sheriff, and enter into the possession of the building while the plaintiffs were under arrest and held out of the building. The sheriff's right to arrest the plaintiffs and seize their furniture gave him no right, under the statute, to seize the building, and turn it over to the possession of the city; and the city's ratification of that conduct, following so immediately, as the evidence shows, on the heels of the sheriff's forcible ouster, must make, in contemplation of law, this force of the sheriff the force of the city, for it ratified and approved it. In forcible entry and detainer cases, with reference to the right of the defendant to offer a deed in evidence, we may say that ordinarily it is true that evidence of title may be offered as proof of the party's right of possession, and for the purpose of showing the purpose for which the entry was made, and to uphold the possession when once peaceably obtained. *Conaway v. Gore*, 22 Kan. 210. But the admissibility of evidence must always, in a measure, be determined by the application of the principles to the case in question, and not to a different kind of a case. If the possession had been peaceably obtained, and without force, this evidence would probably all have been pertinent; but, as it was not, the evidence, as applied to this case, was properly rejected. Upon this question it is strongly contended by plaintiff in error that the plaintiff in a forcible entry and detainer case must always have the right of possession; that is, he must be entitled to the possession of the particular premises; and that, even though the defendant has made the entry by force, the plaintiff cannot recover such possession, unless he has a right thereto. In this connection it may be said that the trial court instructed the jury upon the theory that the plaintiffs were not entitled to the possession of these premises, but that, being in the peaceable possession thereof, the defendants could not eject them by force, and gain forcible entry to the premises, to the possession of which they were really entitled; and, if they recovered the possession in this manner, the plaintiffs were entitled to maintain their action of forcible entry and detainer. There are unquestionably very high authorities, under other forcible entry and detainer acts than ours, holding this position of the trial court incorrect, and holding that a party must be entitled to the possession of the premises before he can recover in a forcible entry and detainer case. But that is not the law of this territory. We get the law on this question from the adoption of the Kansas statute, and that has been many

times construed in that state to mean that a party, although he has no right to the possession, yet may not be ousted from such possession by force, and, if he is ousted by force, he can recover the possession which he actually had by forcible entry and detainer proceedings. The doctrine of our statute is thus stated by Mr. Chief Justice Horton, of the supreme court of Kansas, in the case of *Peyton v. Peyton* (Kan. Sup.) 9 Pac. 479: "It was unnecessary for the plaintiff to state that she was the legal and equitable owner of the premises. It is only necessary for her to allege that she had the actual and peaceable possession thereof. An action may be maintained against any person who commits a forcible entry and ouster, even though the latter is the owner of the property, and entitled to immediate possession, if the plaintiff had, at the time of the forcible ouster, the actual and peaceable possession thereof. *Campbell v. Coonradt*, 22 Kan. 704; *Conaway v. Gore*, 27 Kan. 127; *Burdette v. Corgan*, Id. 275; *Buettinger v. Hurley*, 9 Pac. 197; *Emsley v. Bennett*, 37 Iowa, 15." This doctrine obtains in the state of Nebraska, under a statute similar to ours. There, in the case of *Brown v. Feagins* (Neb.) 55 N. W. 1048, it is held: "An action for the forcible detention of real property may be maintained by one whose complete possession thereof has been ended by the wrongful entry of another, even though such entry was made under claim of a paramount title." This doctrine is also maintained by the supreme court of the United States in the case of *Railroad Co. v. Johnson*, 119 U. S. 608, 7 Sup. Ct. 340. This was an action of forcible entry and detainer, brought in the United States district court in Arkansas, and taken on appeal to the supreme court of the United States. In this case Mr. Justice Miller, speaking for the court, said: "The general purpose of these statutes is that, not regarding the actual condition of the title to the property, where any person is in the peaceable and quiet possession of it, he shall not be turned out by the strong hand, by force, by violence, or by terror. The party so using force and acquiring possession may have the superior title, or may have the better right, to the present possession; but the policy of the law in this class of cases is to prevent disturbances of the public peace, to forbid any person righting himself in a case of that kind by his own hand and by violence, and to require that the party who has in this manner obtained possession shall restore it to the party from whom it has been so obtained; and then, when the parties are in statu quo, or in the same position as they were before the use of violence, the party out of possession must resort to legal means to obtain his possession, as he should have done in the first instance. This is the philosophy which lies at the foundation of all these actions of forcible entry and detainer, which are declared not to

have relation to the condition of the title, or to the absolute right of possession, but to compelling the party out of possession, who desires to recover it of a person in the peaceable possession, to respect and resort to the law alone to obtain what he claims." With reference to the propriety of such a statute, it is said in the case of *Peyton v. Peyton*, supra: "If, however, the law is defective, the remedy is with the legislature, not with the courts." We, too, feel that the law in this case is perhaps not the best under which to give effect to the real rights of parties, but is not for us to change it.

Exception is taken to numerous instructions given and refused by the trial court, but, as they were given on the same theory on which the evidence offered by the defendant was excluded, it is unnecessary to review the question again in this connection.

The last error relied upon is the refusal of the court to submit certain special questions to the jury. One, at least, of these questions, we think should have been given. This question asked whether the city took possession of all the buildings on said lots, or only the corner rooms and the upstairs over the same. The defendant's denial placed in issue the question as to whether or not it took possession of both lots, with the buildings thereon, as well as whether it took possession of so much of the west or corner lot, as it is termed in the evidence, as was covered by the building and rooms in which the plaintiffs were carrying on the saloon business; and it had a right to present to the jury special and pertinent questions on each or all of these issues, under section 4176 of the statute, which reads: "In all cases the jury shall render a general verdict, and the court shall in any case at the request of the parties thereto, or either of them, in addition to the general verdict, direct the jury to find upon particular questions of fact, to be stated in writing by the party or parties requesting the same." If, in answer to this question, the jury had stated that the defendants only took possession of the corner rooms and the upstairs over the same, the plaintiffs could have recovered from the defendant only so much of the two lots as was embraced within the part taken possession of by it; while, under the judgment the plaintiffs recovered from the city all of the two lots, with the buildings thereon. The materiality of the question refused is thus very apparent. A party has a right to submit to the jury special questions of fact which are within the issues of the case, and a refusal to submit such questions to the jury is material error. *Railroad Co. v. Feckheimer* (Kan. Sup.) 12 Pac. 362; *Elliot v. Reynolds* (Kan. Sup.) 16 Pac. 688. For the error in refusing to submit this special question to the jury, the judgment is reversed, and the case remanded for a new trial. All the justices concurring. DALE, C. J., not sitting.

TERRITORY v. BRADY.

(Supreme Court of Oklahoma. Sept. 4, 1896.)

CRIMINAL LAW—APPEAL—BRIEFS—PARTIES AGREEING NOT TO FILE—CAUSE DISMISSED.

The rules of the court require that, in criminal as well as civil cases, counsel for each party shall file 10 printed briefs in each case; and where the cause is submitted upon agreement of parties not to file briefs, and no briefs are filed, and where the appeal is from a judgment as to costs, of unstated amount, and the evident purpose of the appeal is to get the construction of this court upon a section of the criminal statute, in a case where the party charged with the crime is not before the court in a way to be bound by its determination, the cause will be dismissed.

(Syllabus by the Court.)

Appeal from district court, Oklahoma county; before Justice Henry W. Scott.

P. H. Brady was charged with forgery, and discharged, and costs assessed against the complaining witness, from which judgment he appeals to the district court. Judgment reversed, and costs assessed against Oklahoma county, and it appeals. Dismissed.

—J. L. Brown, for appellant. E. W. Stone, for appellee John Richards.

BIERER, J. The record, which is in the form of an agreed statement of facts, with the finding of the judge of the district court of Oklahoma county thereon, shows that on the 14th day of May, 1896, one John Richards filed, with the approval of the county attorney of Oklahoma county, an information, duly sworn to before a justice of the peace, charging one P. H. Brady with the commission of the crime of forgery; that on the preliminary examination, evidence, the substance of which is set out in the agreed statement of facts, was offered, and the justice of the peace discharged the defendant, and assessed the costs against the complaining witness, John Richards, from which judgment he appealed to the district court of Oklahoma county, and, on the facts as presented, the district court reversed the determination of the justice of the peace, and set aside the judgment assessing the costs against Richards, and taxed the same against Oklahoma county. From this judgment the appeal is taken, and the cause is submitted here upon the agreement of attorneys for the parties that all informalities are expressly waived, and the cause submitted on its merits, and that either party may have the right to an oral argument, but that no briefs or written arguments need be filed.

There is nothing in the record to show what the amount of the costs assessed against Richards was; and the appeal appears to us to be, more than anything else, an attempt to get beforehand, and in a case in which P. H. Brady is not interested as a party (for he was discharged by the justice of the peace), a construction upon the statute denouncing as a forgery the procuring of the signature of another to a written instrument by false pretenses. And this is done without any attempt

to comply with the rules of the court, which require that, in criminal as well as civil cases, the counsel shall brief the cause presented. We cannot permit counsel to set aside these rules by agreement, and particularly will we not do this to gratify the desire of parties to get a construction upon a section of the criminal statutes, in a case where the party charged with the crime is not directly interested. The appeal is dismissed. All the justices concurring, excepting SCOTT, J., not sitting.

ARMOUR PACKING CO. et al. v. ORRICK.

(Supreme Court of Oklahoma. Sept. 4, 1896.)

ATTACHMENT—ACTION ON INDEMNITY BOND—PLEADING—AMENDMENT—SUMMONS AND COST BOND—DEFENSES.

1. Where a suit was brought by O. for the benefit of certain parties, who were the heirs of F.,—the suit being upon an indemnity bond made to O., the constable, to indemnify him against "judgments," etc., that might be rendered against him upon account of a certain attachment procured by the principal obligor on the bond,—and where F. had procured judgment against O. on account of the liability for which the indemnity bond was given, *held*, that it was not error to permit O. to amend the petition to allege a cause of action upon the indemnity bond in his own name.

2. And, where such amendment to the petition as above stated is permitted, it is not necessary for the plaintiff to file a new cost bond and procure a new summons; cost bond having been filed, and summons issued and served, and appearance made in the original case.

3. Where a bond was given to indemnify the constable against all damages, costs, and judgments which might accrue against him, or be rendered against him, on account of the levy and sale of the property attached, and where a judgment was rendered against the constable for the attached property, for the amount of which judgment the constable sues the obligor and his sureties upon the indemnity bond, it is not necessary that the constable should have paid the judgment rendered against himself, as a condition precedent to maintaining the action.

4. It is a good defense to an action on such indemnity bond that the constable or obligee therein had, by gross laches and neglect, failed to notify the attaching creditor, who gave the indemnity bond, of a suit by a third party against the constable to recover the goods attached, and that the constable had permitted such third party to take judgment against him by default, and that such default was in pursuance of a previous understanding between the constable and the third party that the constable should make default in the cause, and that the amount of the judgment should be recovered against the attaching creditor; and it was error for the trial court to sustain a demurrer to a paragraph of the answer setting up such defense.

(Syllabus by the Court.)

Appeal from probate court, Oklahoma county.

Action by B. L. Orrick against the Armour Packing Company and the Dowden-McGlinchey Mercantile Company. From a judgment for plaintiff, defendants appeal. Reversed.

Burwell & Scott, for plaintiffs in error. A. B. Hammer, John Burton, and S. Armstrong, for defendant in error.

BIERER, J. B. L. Orrick, defendant in error here, brought his action in the probate court of Oklahoma county to recover upon an indemnity bond given him to indemnify him against loss, damages, judgments, etc., by reason of the levy of an attachment which was in his hands in the case of Armour Packing Co. v. W. C. Farrington, brought in a justice court. The original petition was entitled: "B. L. Orrick, for the Benefit of Albert Farrington, Mrs. Charity Wallace, née Farrington, and Mrs. R. M. Guinn, née Farrington, the Heirs of the Deceased, P. C. Farrington, Plaintiff, vs. The Armour Packing Co. and Dowden-McGlinchey Mer. Co., Composed of E. W. Dowden & F. J. McGlinchey, Defendants." The petition set out the indemnity bond, and a judgment rendered in the case of Mrs. P. C. Farrington v. B. L. Orrick for the recovery of the goods attached, the judgment being in a mandamus proceeding, for the return of the goods, as exempt property, or the sum of \$185 in lieu thereof, with interest and costs, and concluded with the allegation: "That no part of the judgment described above has been paid by the said B. L. Orrick, as constable, to Mrs. P. C. Farrington, now deceased, or her heirs, the plaintiff in this suit, and that the defendant has wholly failed and refused to pay to said B. L. Orrick, as constable as aforesaid, any part of said judgment aforesaid, as bound by said indemnifying bond set forth above, although often requested to do so by the plaintiff. * * *

B. L. Orrick, for the Benefit of Albert Farrington, Mrs. Charity Wallace, née Farrington, and Mrs. R. M. Guinn, née Farrington, the Heirs of the Deceased, Mrs. P. C. Farrington, Plaintiff,"—and is signed by the attorneys. The suit is upon the indemnity bond. And, while the petition shows a cause of action in favor of B. L. Orrick, it also appears that Orrick sought in the original petition to have the judgment rendered for the benefit of the heirs of Mrs. P. C. Farrington, the judgment plaintiff in the suit brought against Orrick as constable, and to indemnify him against which the bond in this suit was given. The defendants below demurred to this petition on the grounds that the plaintiff had no capacity to maintain the suit, and that there was a defect of parties plaintiff and defendant, and for the reason that the petition did not state facts sufficient to constitute a cause of action. The demurrers were sustained, and the plaintiff given leave to amend his petition, which he did by leaving out of the petition all reference to its being brought for the benefit of the heirs of Mrs. P. C. Farrington. The amended petition framed the action upon the correct theory, which was that the suit should be brought by Orrick for his own benefit. Of course, he had no power or authority to sue upon this bond for the benefit of any other persons.

The plaintiffs in error objected to the

court giving the plaintiff below leave to amend the suit as it finally appeared,—in the name of Orrick for his own use and benefit,—and claimed that there was a substitution of action in the name of different parties than those who originally brought the suit. It is true that the amended petition was framed for the benefit of a different party than those whom Orrick, in his original petition, stated the action was brought for; but Orrick was a party to the original petition, and he was a proper party, and he was in fact the only proper party, and the ruling of the court upon the demurrer was correct. Orrick had no capacity to maintain the suit for the use and benefit of other persons, but the court, on sustaining the demurrer, did have the right to give him leave to amend so that the action should proceed in the name of, and for the use and benefit of, the only real party in interest in the case, who was the plaintiff, B. L. Orrick. Such amendment is clearly sanctioned by the liberal provision of our statutes, and is supported by authority. In the case of *Hanlin v. Baxter*, 20 Kan. 134, which we have already had occasion to cite in the case of *Mulhall v. Mulhall*, 3 Okl. 252, 41 Pac. 577, Justice Brewer, delivering the opinion of the court, held that it was proper to amend a bill of particulars by substituting the name of William O. Baxter, as plaintiff, for that of John B. Baxter, who had brought the action; the action being shown to be with reference to the same subject-matter and cause of action, and there being a mistake in the name of the party plaintiff. In that case ample authority is cited from numerous states to support the decision, and the amendment here made was fully within that case, as well as being within the letter and spirit of our statute on amendments, and clearly in the furtherance of justice.

The plaintiffs in error contend that, upon this amendment being allowed, it was the duty of the court to have required a new cost bond and new summons. There is nothing whatever in this contention. The amendment was made in the suit already brought, and in which bond for costs had been filed, and summons issued and served, and appearance made; and it would have been a useless formality, as well as a thing not required by the Code, to have required these preliminary steps to have been gone over again.

The next contention of the plaintiffs in error is that, as the action was brought to recover the amount of a judgment which had been obtained by Mrs. P. C. Farrington because of the levy of attachment against the property of W. C. Farrington, it was necessary for the plaintiff to allege in his petition and prove on the trial that he had paid this judgment, before he could recover against the defendants below. The indemnity bond secured the plaintiff against "all damages, judgments, and costs that may be

awarded against him by any court or tribunal for or on account of making" the levy upon and sale of the goods attached by Orrick as constable. No authority whatever is cited by plaintiffs in error in support of this contention, and as the bond indemnified Orrick against all judgments which might be rendered against him on account of making the attachment, levy, and sale, manifestly the condition of the bond was broken when such judgment was recovered, if Orrick's actions were proper and in good faith towards those who indemnified him. *Jones v. Childs*, 8 Nev. 121.

The next assignment of error is in the action of the court in sustaining the demurrer of the plaintiff below to the second and fourth paragraphs of the defendants' answer. These paragraphs were as follows: "Second. Defendants further deny that the property, goods, and chattels seized by the said B. L. Orrick, as constable, under the order of sale issued from J. T. Hickey's justice of the peace court in and for Oklahoma county, territory of Oklahoma, in the case therein pending, wherein the Armour Packing Company was plaintiff and W. C. Farrington was defendant, were the property, goods, and chattels of the said P. C. Farrington." "Fourth. Defendants, for a further defense to this action, allege, aver, and state that the said plaintiff herein failed to notify these defendants, or either of them, that he had been sued by one P. C. Farrington, as the owner of said goods, for the recovery of the same, and that these defendants nor either of them had any opportunity to defend any such action in said court on behalf of the said B. L. Orrick. And defendants further state that, after said action of mandamus of P. C. Farrington v. B. L. Orrick was brought in the said district court, the said B. L. Orrick was guilty of gross laches and negligence, in this: that he failed to file his answer in said case in conformity with the order of the court, and that said Orrick did not defend said action at the trial of the same, but permitted the said P. C. Farrington to take judgment against him by default; that these defendants have reason to and do believe, from information obtained, and therefore, upon said information and circumstances, allege, aver, and state, that said judgment was taken against the said B. L. Orrick by said P. C. Farrington in conformity with a previous understanding between the said P. C. Farrington and B. L. Orrick that the said B. L. Orrick should make default in said case, and that the said Orrick should not be compelled to pay any judgment so obtained unless said Orrick could first recover the amount thereof from the Armour Packing Company. And defendants further state that this action is not being prosecuted in the name of the real party in interest, but is being prosecuted for the benefit of P. C. Farrington, or her heirs at law,

and further state that said B. L. Orrick has not paid said judgment recovered against him by reason of his default in the said district court, or any part thereof, and has therefore sustained no loss by reason thereof." The court did not err in sustaining the demurrer to the second paragraph of the answer, for that, standing alone, and as a separate defense, as it was pleaded, was not complete in itself; for if the attachment creditor, the Armour Packing Company, had been notified of the suit brought by Mrs. Farrington against Orrick, and had had opportunity to defend this suit, it could not have escaped liability for the amount of the judgment rendered against Orrick therein upon the ground that the goods were not in fact the property of Mrs. Farrington. That was an appropriate question for all parties to settle in the first suit, and if opportunity was once given the Armour Packing Company to litigate that question, and it was determined against the party secured by the indemnity bond, it could not have escaped liability on the bond because the goods might justly and rightfully have been subject to the attachment levy. The first suit, under those circumstances, would settle that question.

There was error, however, in sustaining the demurrer to the fourth defense set out in the answer. The plaintiffs in error were entitled to expect that the conduct of Orrick would be in good faith. Their bond was to indemnify him against loss, damages, and judgments which might accrue to or be rendered against him on account of the liability for which the indemnity was given; and a part of the implied condition of this bond, as well as of all bonds, is good faith on the part of the party for whose benefit the obligation is made. The obligors were entitled to notice of any suit or proceeding brought against Orrick, and they were entitled to reasonable diligence in the giving of such notice, and opportunity to them to defend Orrick against the claims of Mrs. P. C. Farrington. They certainly could not be made liable for any judgment which might be rendered against Orrick by reason of an understanding or agreement between him and Mrs. Farrington by which he would let the case go by default, and permit judgment to be rendered against him without a defense. Such conduct would be in extremely bad faith. It would be no less than a fraud upon the rights of those who gave the indemnity bond, and, if it is true that Orrick did as is alleged in the fourth paragraph of the answer, it is a complete defense to this action upon the indemnity bond. We do not observe that this error was cured by any other conduct of the case. The judgment will be reversed at the costs of defendant in error, with directions to overrule the demurrer to the fourth paragraph of the answer and grant a new trial. All the justices concurring.

SAUER et al. v. McMURTRY.

(Supreme Court of Oklahoma. Sept. 4, 1896.)
MUNICIPAL CORPORATIONS—INDEBTEDNESS—FEDERAL LIMITATION—WARRANTS VALID.

Indebtedness contracted or incurred for necessary and lawful purposes by any political or municipal corporation, or any subdivision of the territory of Oklahoma, created and existing under and by virtue of the organic act and the laws of the territory of Oklahoma prior to the taking of the first assessment for the purpose of territorial and county taxation, is valid if issued within four per centum of the value of said taxable property, as ascertained when said first assessment has been made, and warrants may be issued in evidence thereof. *Hoffman v. County Com'rs*, 41 Pac. 568, 3 Okl. 325, followed.

(Syllabus by the Court.)

Error to district court, Roger Mills county; before Justice John H. Burford.

Bill by J. W. McMurtry against W. P. Francis and others. Nicholas Sauer and William Sauer were allowed to appear as defendants. Judgment for plaintiff, and defendants Sauer bring error. Reversed.

Plaintiff's petition filed in the district court of Roger Mills county, September 5, 1893. Petition verified by J. W. McMurtry, under the seal of the district court, and avers that he is the duly elected, qualified, and acting county attorney of said county, and a resident and taxpayer of said county, and that this action is brought in behalf of himself and all the taxpayers of said county; that the said W. P. Francis and J. B. Freeman and C. B. Howerton are the legally elected and acting county commissioners, and that A. G. Gray is the legally elected and acting county clerk, and that W. W. Owens is the legally elected and acting county treasurer, of Roger Mills county; that on or about the 22d day of April, 1892, C. M. Dunbar, J. F. Sterling, and J. N. Sarber were duly appointed and entered upon the discharge of their duties as county commissioners of said county, and that W. H. Hallett was duly appointed and entered upon the discharge of his duties as county clerk of said county on the day and year aforesaid; that said commissioners above mentioned ordered the said W. H. Hallett to draw warrants on the county treasurer of said county, to the sum of \$——, said warrants numbering from 1 to 203, inclusive, series of 1892. Plaintiff further avers that at the time said warrants from 1 to 203, series 1892, were drawn, they were, and are now, illegal and void, in this particular, to wit: that at the time said warrants were drawn and issued, and all during the year 1892, there was not made any assessment of taxable property, nor any roll of any assessment of taxable property returned, in said county of F, now Roger Mills. Plaintiff further alleges that at the time said warrants were drawn and issued, as aforesaid, there was no property in said county subject to taxation. Plaintiff further alleges that the first assessment of the taxable property of

said county was had in the year 1893, and for said year, and after the warrants heretofore described were issued and drawn, and that all of said warrants were issued and drawn as aforesaid in violation of section 4 of the act of congress entitled "An act to prohibit the passage of local or special laws in the territories of the United States to limit territorial indebtedness, and for other purposes," passed and approved July 30, 1886. Plaintiff then alleges that W. P. Francis, C. B. Howerton, and J. B. Freeman, as successors to C. M. Dunbar, J. F. Sterling, and J. N. Sarber, and the said A. G. Gray, as county clerk, are threatening and about to issue bonds of said county of Roger Mills to take up and pay said so-called "void warrants," to the injury of said county and the taxpayers thereof. Plaintiff further alleges that the said W. W. Owens, as treasurer of said county, is threatening and is about to pay for and take up said void warrants so illegally and wrongfully issued. Plaintiff further alleges that said warrants, or any of them, were not issued to pay any judgment against said county, nor to pay the necessary running expenses of any court of justice in and for said county. Plaintiff then prays judgment that commissioners, defendants, and A. G. Gray, clerk of said county, and their successors in office, be perpetually restrained and enjoined from issuing bonds of said county for the payment of said warrants, or any part of them, or in any way recognizing said warrants as of any validity or indebtedness against said county; and that the said W. W. Owens, as county treasurer, and his successor in office, be perpetually restrained and enjoined from paying said warrants, or any part of them, and for such other and further relief as seemed proper. Notice was accepted by defendants on the 5th day of September, 1893, and, together with the complaint, filed September 6, 1893. On September 7, 1893, a restraining order was issued. On the 3d day of May, 1894, at the April term of said district court of Roger Mills county, Nicholas Sauer and William Sauer, being parties in interest, and affected by this action, moved the court to be allowed to plead as defendants, which motion was allowed, and N. and W. Sauer permitted, through their attorneys, to file an answer in the cause, which answer was verified. Plaintiffs in error, in their answer in the court below say that they are affected by this action; that they are citizens of the United States of America; that one of the defendants, W. W. Owens, is the duly elected and qualified and acting treasurer of said county; that the Cheyenne and Arapahoe country was opened to settlement in the month of April, in the year 1892, by proclamation of the president of the United States; that A. J. Seay, the governor of Oklahoma Territory, by virtue of his office, appointed C. M. Dunbar, J. F. Sterling, and J. N. Sarber commissioners, W. H. Hallett county clerk, Sat Rouden county treasurer, and A.

G. Cunningham county attorney, of the then F, now Roger Mills, county; that the said commissioners, clerk, treasurer, and attorney aforesaid entered upon the discharge of their duties in and for said county; that said commissioners and clerk, in the discharge of their official duties, issued warrants Nos. 4, 5, 41, and 49, which were issued in payment of the legitimate running expenses of the said county aforesaid; that on the 12th day of August, 1892, Nicholas and William Sauer purchased, for a valuable consideration and in good faith, and without notice of fraud, the said warrants Nos. 4, 5, 41, and 49; that F county was in the fall election of 1892 changed to Roger Mills county. The answer then recites that W. P. Francis, C. B. Howerton, and J. B. Freeman are the present county commissioners, A. G. Gray clerk, and W. W. Owens treasurer, of said county, and are in the discharge of their respective duties. The answer then sets forth the complaint filed by J. W. McMurtry et al., and that they pray to have payment of any warrants numbered from 1 to 203 permanently enjoined; that the warrants owned by the plaintiffs in error are included in the warrants mentioned in defendants in error's petition in the court below; that the Hon. John H. Burford, judge of the district court for said county, did grant a temporary restraining order, restraining the said commissioners hereinbefore mentioned, Francis, Howerton, and Freeman, as commissioners, and A. G. Gray, as clerk, of said county, from issuing bonds to pay any part of the warrants mentioned, of the issue of 1892, and the said treasurer was also restrained from taking up or paying any of said warrants. The plaintiffs in error further allege that there were funds in the hands of said treasurer to pay warrants Nos. 4 and 5 of series of 1892, as provided by St. Okl. p. 420, c. 24. Plaintiffs in error further allege that the warrants held by them were for indebtedness of said county coming under St. Okl. 1890, c. 24, and are payable out of the treasury of the county. Plaintiffs in error say that they had no notice of this action, and could not defend, until such time as they filed their application to be made parties; that the injunction proceedings, so far as they relate to warrants Nos. 4, 5, 41, and 49 of the issue of 1892 of said county, and all restraining orders issued in pursuance thereto, be dissolved; and for such other and further relief as the court may deem just and equitable. The plaintiff below filed no reply to the answer of defendants below, thereby admitting every allegation not directly controverted by the petition. This cause was heard by the court on the 4th day of May, 1892, and the court, being fully advised thereon, ordered that the temporary injunction be made perpetual as to said warrants Nos. 4, 5, 41, and 49, described in plaintiff's petition. Exceptions to the order and decision of the court were taken by Nicholas and William Sauer, defendants. Defendants made motion for a

new trial, which was overruled by the court, and defendants excepted. The court allowed 60 days to make a case for the supreme court. With the material facts in the case admitted, the real issue is the conclusions of law reached by the court.

E. M. Bamford, for plaintiffs in error. Dungan & Ray, for defendants in error.

SCOTT, J. (after stating the facts). This cause was consolidated on September 17, 1895, in this court, with the case of Hoffman v. County Com'rs, on motion, upon the hearing of which it appeared that the questions involved in each of the cases were identical. That case, having been decided then (see 3 Okl. 325, 41 Pac. 566), is very full and elaborate, covering the whole history of the legislation and laws applicable to the question involved, from the act of congress of July 30, 1886, down to the statutory provisions of the territory of Oklahoma and the congressional acts up to the present time. It is therefore unnecessary to repeat here what was therein held, or to enter into a discussion of the conclusions therein reached, or their application to a point involved in this case.

From the foregoing statement of the facts in this proceeding, there appears but one question for determination, which is substantially this: Are county warrants issued by counties in Oklahoma for lawful purposes, prior to the making of the first assessment for the purposes of taxation, invalid? It is maintained here, as in that case, that the counties and municipalities of the territory of Oklahoma are incapable of legally contracting indebtedness of any kind or for any purpose until an assessment for the purpose of taxation has been made, equalized, and approved as required by law, and that all warrants issued prior to the taking of said assessment are void for any and all purposes, and neither the subject of funding into bonds or payment in money. The injunction granted by the court below in this case, restraining the county treasurer from the payment of, or the commissioners from funding into bonds, the warrants involved in controversy, can be sustained only on the ground that the question is governed by section 4 of the act of congress of July 30, 1886, without any conditions or limitations upon its application to the counties and municipalities in the territory of Oklahoma. Section 4 of that statute reads as follows: "That no political or municipal corporation or any other subdivision in any of the territories of the United States shall ever become indebted in any manner or for any purpose to any amount in the aggregate, including existing indebtedness, exceeding four per centum on the value of the taxable property, within such county or subdivision, to be ascertained by the last assessment for territorial and county purposes previous to the incurring indebtedness, and all bonds or obligations in excess of such amount given by such corporation shall be void." The

court, in passing upon that case, held that all counties, municipal corporations, and other subdivisions in the territory of Oklahoma created and existing under and by virtue of the organic act and the territorial statutes have the power, prior to the taking of the first assessment of the taxable property for territorial and county taxation, to contract indebtedness, for all necessary and legitimate purposes, to an amount equal to 4 per centum of the value of the taxable property within said corporation, county, or subdivision, to be determined by the last assessment taken for the purpose of territorial and county taxation, and to issue warrants in evidence thereof. Roger Mills county was created and became an organized and existing corporation, in strict conformity to the laws of congress and the organic act and the statutes of the territory of Oklahoma, on April 19, 1892. It is conceded by counsel in this case that no assessment had been taken, nor was there one in existence during the period within which the warrants in dispute were issued. It is also conceded that the warrants were issued for necessary and legitimate purposes, and, unless they are void by reason of having been issued prior to the taking of the first assessment for taxation, are binding upon said county. It is therefore concluded that it was and is the duty of the county treasurer to pay the warrants in controversy with any money held by him for the purpose of paying the warrant indebtedness of the county, and that they are legal, and capable of being funded into bonds, should the proper authorities see fit so to do. The judgment of the lower court is accordingly reversed. All the justices concurring, except McATEE, J., who presided below.

POLSON v. PURCELL et al.

(Supreme Court of Oklahoma. Feb. 13, 1896.)

CASE-MADE—SERVICE—EXTENSION OF TIME.

The district court, or the judge thereof, has no power to extend the time for serving a case-made after the extension of time originally granted has expired. *Abel v. Blair* (Ok.) 41 Pac. 342.

(Syllabus by the Court.)

Appeal from district court, Payne county; before Justice Frank Dale.

Action by C. C. Purcell and W. M. Jackson against T. M. Polson. Judgment for plaintiffs and defendant appeals. Dismissed.

C. R. Buckner, for plaintiff in error. Gardner & Risley, for defendants in error.

BIERER, J. The defendants in error have presented their motion to dismiss the appeal brought in this case to this court, the ground of their motion being that the case-made was not served in time. The record shows that the judgment of the district court was rendered on the 24th day of November, 1893, and the plaintiff in error given 60 days to make and serve

case-made. It further shows that on February 1, 1894, the plaintiff in error, by his attorney, made a motion to be granted a further extension of time of 30 days to make and serve his case-made, and to this motion is attached the affidavit of his attorney that he has been unable to prepare his appeal, and serve case-made in the cause. The record shows an acceptance of service of case-made by the attorneys for the defendants in error, but does not show when it was served. The record should always affirmatively show that the case-made was served in time. This record not only does not do this, but it does show, by the affidavit of appellant's own attorney, that it was not served in time, and that was his reason for getting a further extension of time. The extension of time was granted by the trial judge as asked for, but he had no power to then extend the time to make a case-made, and the extension was absolutely void. *Abel v. Blair* (Ok.) 41 Pac. 342. The appeal is dismissed. All the justices concurring.

DALE, C. J., who tried the case below, not sitting.

GAY et al. v. THOMAS et al.

(Supreme Court of Oklahoma. Sept. 4, 1896.)

CONSTITUTIONAL LAW—TAXATION OF PROPERTY ON INDIAN RESERVATIONS—DISCRIMINATION—UNIFORMITY—TAXING DISTRICTS—GENERAL LAWS.

1. The power of taxation is not an arbitrary power, nor can it be exercised capriciously. It is hedged about and restricted by wise constitutional limitations and fixed general rules. These constitutional limitations and general rules are designed to secure a just apportionment of the burdens of government by requiring uniformity of contributions, levied by fixed and general rules, and apportioned by the law according to some uniform measure of equality. Within these rules and limitations, the authority and power of the legislative department is absolute and conclusive.

2. The discretion of the legislature in matters of taxation is very broad, and its exercise may work injustice and oppression. The judicial cannot prescribe to the legislative department of the government limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively, but if it does not clearly violate some established rule or limitation, the responsibility of the legislature is not to the courts, but to the people, by whom its members are elected. The courts can only interfere when the conclusion is unavoidable that the legislature has transcended its powers or clearly violated some constitutional or other fixed general rule defining or limiting such powers.

3. In the absence of any provisions or stipulations in the treaties by which the Indians were settled on the reservations in this territory, that the lands in such reservations should not, without the consent of the Indians occupying them, be included within the limits or jurisdiction of any state or territory that might thereafter be created, and which should include such reservation within its exterior boundaries, the authority of the territory may extend over such reservation in all matters of rightful legislation, not interfering with the persons or property of the Indians under the protection of the United States. As to all matters and subjects of rightful legislation, not interfering with that protection, and not otherwise repugnant to the consti-

tution and laws of the United States, the legislative power of the territory is as absolute, in and upon these reservations, as in any other part of this territory.

4. Taxation is a rightful subject of legislation. It is the duty of the territorial legislature to apportion the burdens of government upon all property within the territory not withdrawn from its jurisdiction by the organic act or otherwise exempted. The property of United States citizens, not connected with the Indians kept upon these reservations, is a part of the mass of property within the territory, receiving the protection of its laws and subject to taxation. It was, therefore, the right and duty of the legislature to subject such property to taxation.

5. Taxation of cattle of white men kept and grazed upon Indian reservations under leases from the Indians, is not a taxation of any right or property of the Indians. The taxation in controversy in this case was not assessed or levied upon the real estate, or upon the rents of real estate, belonging to the Indians, and was therefore not invalid as interfering with the property rights of the Indians under the protection of the United States and withdrawn from the jurisdiction of the territory, nor obnoxious to the principle of *Pollock v. Trust Co.*, 15 Sup. Ct. 673, 157 U. S. 429, even if the constitutional provision governing that case was operative upon any other legislative body than the congress of the United States or in the raising of revenue for any other government than the federal government, which it was not.

6. The establishing of taxing districts is a legislative, not a judicial, function. The taxing district comprising the county of Kay and the attached Indian reservations and unorganized country was not created by the order of the supreme court attaching such Indian reservation and unorganized country to Kay county for judicial purposes, but by the act of March 5, 1895. The supreme court attached such territory to Kay county for judicial purposes, and the legislature adopted and made the district thus created a taxing district.

7. An act providing for the taxation of personal property alone in a district where there is no real estate subject to taxation is not invalid, as discriminating in taxing different kinds of property. Courts will take judicial knowledge of the treaties of the United States with Indian tribes, and from those treaties that the title to the lands in the Indian reservations in this territory is in the Indian tribes, or in the United States for the benefit of the Indians, and that there is no real estate therein, subject to taxation.

8. Taxation must be for purposes in which the people taxed have a legal interest. Property which is located upon an Indian reservation, and which is attached to a county of the territory for judicial purposes, but is not within the geographical boundaries of the county, and is not a part of the county for municipal purposes, and in which the people thereof have no voice in the selection of the county and other officers, and no part of the fund derived from the taxes levied can be expended for the purposes for which they were levied within such Indian reservation, and which taxes, when collected, are to be appropriated entirely to the expenses of the county, roads, and schools within the organized county, cannot be taxed for the various county, school, and road purposes of such county. The property on such reservation can only be taxed for territorial and judicial purposes.

9. See *Daily Leader v. Cameron*, 41 Pac. 635, 3 Okl. 677.

10. An act providing for listing and assessing personal property in Indian reservations and unorganized territory at a different time from that fixed for listing and assessing such property in organized counties is not invalid for want of uniformity. Taxes must be assessed according to some uniform rule; but this does not mean

that the time and method of assessment shall be identical, but only that, after the legislature has declared what classes of property shall be subject to taxation, the tax itself shall be levied upon such property or the owner thereof according to a uniform rate of valuation.

(Syllabus by the Court.)

Error from district court, Kay county; before Justice A. G. C. Blerer.

Separate actions by D. P. Gay and others against A. M. Thomas and others for an injunction against tax sales. The actions were subsequently consolidated, and from the judgment rendered plaintiffs and defendants bring error and cross error, respectively. Affirmed.

The plaintiffs in error are nonresidents of the territory of Oklahoma, and owners of large herds of cattle that were kept and grazed, during a portion of the year 1895, in parts of the Osage Indian reservation in this territory. The defendants in error are the board of county commissioners, treasurer, and sheriff of Kay county, Oklahoma Territory. On the third Monday in February, 1894, the supreme court of the territory of Oklahoma, by an order entered on the journals of said court, attached to said county of Kay, for judicial purposes, all the Kaw or Kansas Indian reservation, and all of the Osage Indian reservation north of the township line dividing townships 25 and 26 North. All of said reservations, so attached to said Kay county for judicial purposes by such order, are without the boundaries of said Kay county, as established by the secretary of the interior, and are not within the boundaries of any organized county of this territory. Said territory, so attached to said county of Kay for judicial purposes, is comprised wholly of lands owned and occupied by Indian tribes, and consists, principally, of wild, unimproved, and unallotted lands, used for grazing purposes. Plaintiffs in error, during the year 1895, and during the month of April of said year, drove, transported, and shipped to the ranges and pastures in that part of said Osage Indian reservation attached to said Kay county for judicial purposes, as aforesaid, large herds and numbers of cattle, which were taken onto said reservation in pursuance and by virtue and authority of certain leases to plaintiffs in error, for grazing purposes, made by the Osage tribal government, under the supervision of the agent in charge of said tribe, and upon the ratification and approval of the commissioner of Indian affairs and of the secretary of the interior. And said cattle of said plaintiffs in error were on the 1st day of May kept and grazed on that part of said Indian reservation attached to said Kay county for judicial purposes as aforesaid. By an act approved March 5, 1895, the legislative assembly of the territory of Oklahoma amended section 13, art. 2, c. 7, of the Oklahoma Statutes, relating to revenue, so that the same reads as follows:

"That when any cattle are kept or grazed or any other personal property is situated in any unorganized country, district or reservation of this territory, such property shall be subject to taxation in the organized county to which said country, district or reservation is attached for judicial purposes;" and authorized the board of county commissioners of the organized county or counties to which such unorganized country, district, or reservation is attached to appoint a special assessor each year, whose duty it should be to assess such property, and conferred upon such special assessor all the powers and required him to perform all the duties of a township assessor. The assessor so provided for was required to begin and perform his duties between the 1st day of April and the 25th day of May of each year, and to complete his duties and return his tax lists on or before June 1st, and the property therein authorized to be assessed, it was provided, should be valued as of May 1st each year. In pursuance of the provisions of said act, the county commissioners of said Kay county did duly appoint a special assessor for the year 1895 to assess such cattle as were kept and grazed and any other personal property situated in the unorganized country and parts of Indian reservations attached to said Kay county for judicial purposes, and said special assessor did, by virtue of said appointment, assess all the personal property in the territory so attached to the county of Kay for judicial purposes, including all of the cattle of the said plaintiffs in error kept and grazed in said reservation on the 1st day of May, 1895. The said special assessor assessed the property of these plaintiffs in error so located on said territory attached to said county of Kay for judicial purposes as aforesaid, and returned the same upon an assessment roll at the total valuation of \$760,469. Thereafter the said sum by the clerk of said county was carried into the aggregate assessment for said county, and by him certified to the auditor of the territory. The territorial board of equalization, in acting upon the various assessments of the various counties as certified to said board, raised the aggregate valuation of the property returned for taxation upon the tax rolls of said county of Kay 35 per cent., and the county clerk for said county carried out the raised valuation so certified to him by said territorial board of equalization against the property of these plaintiffs in error, and made the aggregate valuation of such property \$1,026,634. Thereafter the territorial board of equalization levied and duly certified to the county clerk of the county of Kay tax levies, for territorial purposes for the year 1895, as follows: General revenue, three mills on the dollar; university fund, one-half mill on the dollar; normal school fund, one-half mill on the dollar; bond interest fund, one-half mill on the dollar; board of education fund, one-half mill on the dol-

lar. The board of county commissioners for the county of Kay made the following levies for the year 1895: For salaries, five mills on the dollar; for contingent expenses, three mills on the dollar; for sinking fund, one and one-half mills on the dollar; for court expenses, two and one-half mills on the dollar; for county supplies, three mills on the dollar; for road and bridge fund, two mills on the dollar; for poor fund of said county, one mill on the dollar; for county school fund of said county, one mill on the dollar. The county clerk of said county of Kay carried the valuation of the property of these plaintiffs in error upon the tax rolls of said county, and against the same extended the levies as aforesaid, and charged against the property of these plaintiffs in error in the aggregate the sum of \$28,174.16. Before these taxes became delinquent plaintiffs in error began to remove, or attempted to remove, their respective property from the territory attached to Kay county for judicial purposes, and beyond the limits of Oklahoma Territory. The treasurer of said Kay county issued tax warrants for the several amounts of taxes levied against the property of each of said plaintiffs in error and delivered the same to the sheriff of said county for execution. Said sheriff seized certain property of each of plaintiffs in error by virtue of such tax warrants. The plaintiffs in error filed their several petitions in the district court of Kay county, and on application obtained injunctions restraining the defendants in error from making any further attempt to collect such taxes. Afterwards, on motion, the several actions were consolidated into one. To the petition filed in such consolidated action the defendants in error filed a general demurrer. At the hearing the district court sustained the demurrer in part and overruled it in part, holding that all of the levies made for territorial purposes and the county levy for court expenses were valid, and as to those levies the injunction was dissolved, and as to all of the other county levies such injunctions were made perpetual. From that part of the order and judgment of the court dissolving the injunction as to the territorial taxes, and the one county fund levy, plaintiffs appealed. From that part perpetuating the injunction as to all of the county levies, except that for court expenses, the defendants appealed, and filed their cross petitions in error, and the case is thus here for review.

Asp, Sbartel & Cottingham, for plaintiffs in error. C. A. Galbraith, Atty. Gen., and D. L. Weir, for defendants in error.

TARSNEY, J. (after stating the facts). The questions involved are of great public and private interest, and have received from us that very careful consideration and attention which their importance demands. By section 6 of the organic act of the territory it is provided: "That the legislative power of the

territory shall extend to all rightful subjects of legislation, not inconsistent with the constitution and laws of the United States, but no law shall be passed interfering with the primary disposal of the soil; no tax shall be imposed on the property of the United States nor shall the lands or other property of non-residents be taxed higher than the lands or other property of residents, nor shall any law be passed impairing the right to private property, nor shall any unequal discrimination be made in taxing different kinds of property, but all property subject to taxation shall be taxed in proportion to its value. * * * A broader grant of legislative power than that contained in this section could hardly be conceived of. This organic act of the territory defined its boundaries, created a government, which comprised a legislative department, vested with power of legislating upon all rightful subjects of legislation, and co-extensive with the exterior boundaries of the territory. The taxing power is a part of the legislative power of government, and taxation is a rightful subject of legislation. Taxes are the enforced contributions upon persons or property levied by the government by virtue of its sovereignty for the support of government and for public needs. The citizen pays from his property the portion demanded, in order that by means thereof he may be secured in the enjoyment of the benefits of organized society. The power is unlimited in its reach as to subjects. In its very nature it acknowledges no limit. It is sometimes said that in its exercise it may become a power to confiscate and to destroy, but this must be thus qualified: that under our system of constitutional government it differs from the forced contributions, loans, and benevolences of arbitrary and tyrannical governments. It is not an arbitrary power, nor can it be exercised capriciously. It is hedged about and restricted by wise constitutional limitations and fixed general rules. These constitutional limitations and general rules are designed to secure a just apportionment of the burdens of government by requiring uniformity of contributions, levied by fixed general rules, and apportioned by the law according to some uniform measure of equality. Within these rules and limitations, the authority and power of the legislative department is absolute and conclusive. The ends sought to be reached by these general and fundamental rules and constitutional restrictions upon the powers of taxation are equality, uniformity, and justice in apportioning the burdens of government; but, as the idea of exact equality, uniformity, or justice under any system of human laws being attainable is Utopian, it is not expected that such exactness can be attained in the exercise of the powers of taxation. Notwithstanding such fixed general rules and limitations, the discretion of the legislature is very broad, and its exercise may work injustice and oppression. If such discretionary power be threatened with abuse, security must

be found in the responsibility of the legislature that imposes the tax to the constituency that elected them. The judicial cannot prescribe to the legislative department of the government limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons or with regard to property, but, if it do not clearly violate some established rule of limitation, the responsibility of the legislature is not to the courts, but to the people, by whom its members are elected. The courts can only interfere when the conclusion is unavoidable that the legislature has transcended its powers, or clearly violated some constitutional or other fixed general rule defining or limiting such power. *Bank v. Fenno*, 8 Wall. 548; *Weston v. City Council*, 2 Pet. 449-466; *Lane Co. v. Oregon*, 7 Wall. 71; *Tallman v. Treasurer of Butler Co.*, 12 Iowa, 531.

Our inquiry, then, is, did the legislature, by the act of 1895, under authority of which the taxes in controversy were assessed and levied, transcend its powers, and is such act a violation of any constitutional or other fixed general rule controlling the discretion of the legislature? The only limitation or restriction upon the taxing power of the legislature which I find in the organic act for the territory is that contained in section 6 of said act, which is as follows: "No tax shall be imposed on the property of the United States nor shall the lands or other property of non-residents be taxed higher than the lands or other property of residents, nor shall any law be passed impairing the right to private property, nor shall any unequal discrimination be made in taxing different kinds of property, but all property subject to taxation shall be taxed in proportion to its value." And the following provision in section 1 of said act: "Provided, that nothing in this act shall be construed to impair any right now pertaining to any Indians or Indian tribe in said territory under the laws, agreements and treaties of the United States or to impair the rights of persons or property pertaining to said Indians, or to affect the authority of the government of the United States to make any regulation or to make any law respecting said Indians, their lands, property or other rights which it would have been competent to make or enact if this act had not been passed." If, therefore, there be any restriction or limitation upon the power of the legislature to tax the property of plaintiffs, or which makes such taxation invalid, it must be found in these provisions of the organic act or in the constitution, treaties, or legislation of the United States, or some general rule inherent in our system of government. It is not contended that the act under which these taxes are sought to be imposed is obnoxious to any provision of the federal constitution, but it is contended by plaintiffs that the legislature has no jurisdiction to enact laws, especially tax laws, and put the same in force in these Indian reservations; the argument being that, although these res-

ervations are within the exterior boundaries of Oklahoma territory, yet they comprise no part of the territory for territorial governmental purposes, but are exclusively under the jurisdiction of the United States, and that the legislative power of the territory does not extend over them. It is conceded by counsel for plaintiffs that the treaty under which the Osage Indians were settled on these lands contained no provision or stipulation by which said Indian tribe, or the lands occupied by them, were not, without their consent, to be included within the limits or jurisdiction of any state or territory that might thereafter be created, and which should include such reservation within its exterior boundaries; that there was at the time the organic act creating the territory of Oklahoma was passed, and at the time the act of 1895, authorizing the taxation in controversy, was enacted, and at the time these taxes were assessed and levied, no treaty with the Osage Indian tribe that the lands, or any part thereof, within this reservation, should be thus excluded from the limits and jurisdiction of any state or territory. I think there is no proposition better settled by authorities than that, in the absence of such treaty stipulation, the authority of the territory may rightfully extend over such reservation in all matters of rightful legislation, not interfering with the persons and property of the Indians within such reservation under the protection of the laws and authority of the United States; and that as to all matters and subjects of rightful legislation, not interfering with that protection, and not otherwise repugnant to the constitution and laws of the United States, the legislative power of the territory is absolute. *Railway Co. v. Fisher*, 116 U. S. 28, 6 Sup. Ct. 246; *Langford v. Montelth*, 102 U. S. 145; *Phoenix & M. R. Co. v. Territory (Ariz.)* 26 Pac. 310; *Maricopa & P. R. Co. v. Arizona*, 156 U. S. 347, 15 Sup. Ct. 391; *Torrey v. Baldwin (Wyo.)* 26 Pac. 908; *Petition of Gon-shay-ee*, 130 U. S. 343, 9 Sup. Ct. 542; *Ex parte Crow Dog*, 109 U. S. 556, 560, 3 Sup. Ct. 396; *U. S. v. Kagama*, 118 U. S. 375, 6 Sup. Ct. 1109; *U. S. v. Pidgeon*, 153 U. S. 48, 14 Sup. Ct. 748. This doctrine was distinctly held by this court in *Keokuk v. Ullam*, 4 Okl. —, 38 Pac. 1083. The contention of plaintiffs upon this proposition would seem to be based upon reasonings and authorities which are not applicable. Their contention seems to be that these reservations are to be considered as exclusively under the jurisdiction of the United States, the same as lands purchased by the United States within the boundaries of states, and with the consent of said states, for the purposes of forts, arsenals, magazines, navy yards, dock yards, etc. If this contention were correct, then it would be supported by all the authorities, and would prevail; for I concede it to be uncontroverted that property situated wholly within boundaries exclusively within the jurisdiction of the United States cannot be taxed by the state or territory within which it may be situated. But these reservations are not within boundaries

exclusively within the jurisdiction of the United States, for the reason that congress, in section 6 of the organic act of this territory, delegated to the government of the territory legislative power extending to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States within the exterior boundaries of the territory created by that act, which includes the reservation which is the locus of this controversy; that the jurisdiction conferred upon the territory is not exclusive. That congress has reserved to itself jurisdiction over the persons and lands of the Indians occupying the reservation does not diminish or restrict the authority of the territory to legislate concerning the persons and property of citizens of the United States therein. It was the duty of the territorial legislature to apportion the burdens of government upon all property within the territory not withdrawn from its jurisdiction by the organic act or other laws of the United States, or not otherwise exempted from such burden by law. The property of the plaintiff comprised a part of the mass of property within the territory which was receiving the protection of its laws, and which might lawfully be, and should justly be, subjected to taxation. And the right to subject such property to taxation, under the conditions and the situation in which plaintiff's property was, has not been denied by any court, but has been upheld in numerous instances. *Railway Co. v. Fisher*, 116 U. S. 28, 6 Sup. Ct. 246; *Torrey v. Baldwin (Wyo.)* 26 Pac. 908; *In re Phoenix & M. R. Co. (Ariz.)* 26 Pac. 310; *Farris v. Vannier*, 6 Dak. 186, 42 N. W. 34; *Maricopa & P. R. Co. v. Arizona*, 156 U. S. 347, 15 Sup. Ct. 391. In *Torrey v. Baldwin*, 26 Pac. 908, the supreme court of Wyoming held that the treaty of July 8, 1868, with the Shoshones, pursuant to which their reservation was established, contained no reservation or exception whereby it should be excluded and excepted out of the territory within which it was situated, and that the reservation was included within the territory, and that cattle thereon belonging to a white person in no wise connected with the Indians were subject to taxation in the county within which the reservation lay. In *Re Phoenix & M. R. Co.*, supra, the supreme court of Arizona held that, in the absence of treaty or other express exclusions, the different Indian reservations became a part of the territory where situated, and subject to territorial legislative jurisdiction, subject, however, to the powers of the general government to make regulations respecting the Indians, their property, etc.; and that a railroad built across an Indian reservation in the territory is subject to taxation by the territory, where there are no treaty stipulations or express exclusions against the jurisdiction of the territory; and this decision was, on appeal, affirmed by the supreme court of the United States in 156 U. S. 347, 15 Sup. Ct. 391, supra. In *Railway Co. v. Fisher*, 116 U. S. 31, 6 Sup. Ct. 246, Mr. Justice Field says: "The authority of the territory may rightfully extend to all matters not

interfering with that protection [protection of Indians and their property]. It has, therefore, been held that process of its courts may run into an Indian reservation of this kind where the subject-matter in controversy is otherwise within their cognizance. If the plaintiff lawfully constructed and now operates a railroad through the reservation, it is not perceived that any just rights of the Indians under the treaty can be impaired by taxing the road and property used in operating it."

A further contention of the plaintiffs is: That this reservation, under the statutes of the United States, has been leased by the Osage Nation or Tribe for grazing purposes, and that the taxation of cattle kept and grazed upon said reservation is a direct tax upon the right of the Indians to lease the same, and decreases to the extent of the tax the value of the Indian lands; that the act authorizing such taxation is in direct derogation of the property rights of the Indians upon such reservation, and is, therefore, void. This proposition is without merit, and certainly is unsupported by authority. The authority upon which plaintiffs rely to support this contention is the case of *Pollock v. Trust Co.*, 157 U. S. 429, 15 Sup. Ct. 673, known as the "Income Tax Case." Counsel, in their brief, quote from Mr. Chief Justice Fuller, on page 555, 157 U. S., and page 679, 15 Sup. Ct., in the report of that case, as follows: "The contention of the plaintiff is, first, that the law in question in imposing a tax upon the income or rents of real estate imposes a tax upon the real estate itself, and in imposing a tax upon the interest or income of bonds or other personal property held for the purpose of income, or ordinarily yielding income, imposes a tax upon the personal estate itself; that such tax is a direct tax, and void, because imposed without regard to the rule of apportionment; and that by reason thereof the whole law is invalidated." It is true that the contention was sustained by a majority of a divided court in that case, but I am unable to perceive its application to the principles of the case at bar. The contention was sustained in that case because it was held that a tax upon the income or rents of real estate imposed a tax upon the real estate itself; that it was, therefore, a direct tax; and that, being such, it was obnoxious to the provision of the constitution prohibiting the levy of direct taxes except by apportionment among the several states. It would not be seriously contended that that provision of the federal constitution prescribed a rule operative upon any other legislative authority than the congress of the United States, or in the raising of revenue for the support of any government other than the federal government; but, even if such contention should be made, the principle of the case cited is not broad enough to cover the proposition submitted by counsel for plaintiffs. The taxation we are considering was not assessed or levied upon the real estate or other property of the Indians occupying this reservation, nor upon the income or rents of such Indians derived from such real estate or other

property. This tax is not levied upon the rents which are paid to these Indians under their leases to the plaintiffs, but it is levied upon the property of the plaintiffs in which the Indians have no interest. The argument that taxation upon property brought into this reservation for the purpose of grazing upon Indian lands is an additional servitude that decreases the salable value of the land, and that it operates in fixing the rental value of these lands to the same extent it would if made a tax upon the land itself, is scarcely less remote than to say that the tariffs which these cattle owners have to pay to railroad corporations for transporting their cattle out of these reservations to market is an additional servitude that decreases the rental value of the lands of the Indians, or that the taxation of the personal property of a tenant is an added servitude on the freehold of the landlord. I do not think the act of the legislature providing for this taxation in any manner impairs the property rights of the Indians occupying this reservation.

Another contention of the plaintiffs is that this taxation is unconstitutional and void, because it rests upon the attempt of the supreme court of the territory to fix taxing districts, which is a legislative function. The answer to this proposition is that the supreme court of the territory has not attempted to fix any taxing districts; that that court, under the powers expressly vested in it by the organic act of the territory in 1894, attached this reservation and unorganized country to Kay county for judicial purposes, and not for the purposes of taxation; that the taxing districts in which these taxes were imposed and levied were created and fixed, not by the supreme court, but by the legislature, in the act of 1895; the language of the act being: "That when any cattle are kept or grazed or any other personal property is situated in any unorganized country, district or reservation of this territory, that such property shall be subject to taxation in the organized county to which said country, district or reservation is attached for judicial purposes." It was by this act that a taxing district was created, and not by the order of the court.

Another objection which plaintiffs make against the legality of this tax is that the act attempting to authorize it only applies to personal property; that no provision is made for the taxing of real estate in such reservation; that it is a discrimination in taxing different kinds of property, and therefore in conflict with the organic act. This court will take judicial knowledge of the public treaties of the United States, and from such treaties the court has judicial knowledge that the title to all the lands within this Indian reservation is in the Indian tribe or in the United States for the use of said Indian tribe. The power of taxation possessed by the territorial government not extending to the taxing of the property of the United States or of the Indian wards of the United States, there is no taxable real estate in said reservation, and consequently the act does not discriminate as between different kinds of prop-

erty subject to taxation, there not being different kinds of property subject to taxation in such reservation.

The most serious contention of the plaintiffs that confronts us in this matter is that the act under which these taxes were assessed and levied is void, for the reason that it attempts to tax property situated in these Indian reservations for the benefit of the counties to which they are attached for judicial purposes. The owners and holders of property on these Indian reservations, it is claimed, have no interest in the taxes gathered by said counties, no voice in their expenditure, nor benefit therefrom, said Indian reservations not being within the geographical boundaries of said counties; that the taxing of the owners of said property by such counties is taking the property of the persons holding said property on said reservation for the benefit of the residents of said county, and is, therefore, taking private property for private uses. It is argued that plaintiffs have no interest in the purposes for which these taxes are to be expended, and will derive no benefit from their expenditure; that the moneys derived from this taxation under the county levy will all be expended within the organized county of Kay; that plaintiffs are nonresidents of the territory; and that neither they nor their property are within said county of Kay, and therefore cannot be benefited by the expenditure of moneys apportioned and used for the salary fund, contingent expense fund, sinking fund, court expense fund, county supplies fund, road and bridge fund, poor fund, or county school fund of said county. We have been cited to or been able to find but one authority directly in point upon the proposition as presented in this case. In the case of *Farris v. Vannier*, 42 N. W. 34, the supreme court of Dakota territory, in a case similar to this in all particulars, save that the attached territory was not an Indian reservation, but was unorganized territory, held the levy for territorial purposes to be valid, and those for county purposes to be invalid. There are a number of authorities upon analogous cases, but such authorities are conflicting. The greater number of authorities presented by counsel for plaintiffs in their brief upon this proposition relate to cases of special assessments for local improvement, such as the construction of highways, streets, pavements, sewers, etc., where the benefits are peculiar to a limited district or locality; and this class of cases have always been held distinct in principle from that which we are considering, and the right to impose such taxes has always been held to be founded upon and to be governed by different principles from those embraced in public taxation for ordinary public or governmental purposes. Bearing upon the case at bar is the case of *Wells v. City of Weston*, 22 Mo. 384, in which the court held that "the legislature cannot authorize a municipal cor-

poration to tax for its own local purposes land lying beyond the corporate limits." In *Cheaney v. Hooser*, 9 B. Mon. 341, the court held that the extension of the limits of one town so as to include the adjacent lands of another town against or without the consent of the owners, and subject the property and people within the added territory to the jurisdiction and taxing powers of the extended municipal government, without the consent of the added population, is, in effect, taking private property for public use. In *Sharpless v. Mayor, etc.*, 21 Pa. St. 172, the court said: "By taxation is meant a certain mode of raising revenue for a public purpose in which the community that pays it has an interest; but, to make a tax law unconstitutional on this ground, it must be apparent at the first blush that the community taxed can have no possible interest in the purpose to which their money is to be applied. And this is more especially true if it be a local tax, and if the local authorities have themselves laid the tax in pursuance of an act of the assembly." In a case in Tennessee (*Taylor v. Chandler*, 9 Helsk. 349) the court said: "A state burden cannot be placed upon any territory less than the entire state, nor a county burden upon territory greater or smaller than the county." In *Case of Washington Ave.*, 69 Pa. St. 361, the learned judge delivering the opinion says: "I admit that the power to tax is unbounded by any express limit in the constitution; that it may be exercised to the full extent of the public exigency. I concede that it differs from the power of eminent domain, and has no thought of compensation by way of a return for that which is taken and applied to the public good, further than all derive benefit from the purpose to which it is applied." In *Morford v. Unger*, 8 Iowa, 82, the court said: "The extension of the limits of a city or town so as to include its actual enlargement as manifested by houses and population is to be deemed a legitimate exercise of legislative power. An indefinite or unreasonable extension, so as to embrace lands and farms that are distant from the local government, does not rest upon the same authority. And although it may be a delicate, as well as a difficult, duty for the judiciary to interpose, we have no doubt but that there are limits beyond which the legislative discretion cannot go." *Kelly v. City of Pittsburgh*, 104 U. S. 658, was a case wherein the city of Pittsburgh, under an act of the legislature, extended the city limits so as to include the plaintiff's farm, and assessed the same as other property in the city was assessed for street tax, school tax, etc. The court, in sustaining the validity of the extension, said: "We cannot say judicially that Mr. Kelly received no benefit from the city organization. These streets, if they do not penetrate his farm, lead to it. The waterworks will probably reach him some day, and may be near enough him now to serve

on some occasions. The schools may receive his children, and in this regard he can be in no worse condition than those living in the city having no children, and who pay for the support of the schools. Every man in a county, a town, a city, a state, is deeply interested in the education of the children of the community, because his peace and quiet, his happiness and prosperity, are largely dependent upon the intelligence and moral training which it is the object of the public schools to supply to the children of his neighbors and associates, if he has none himself. The police government, the officers whose duty it is to punish and prevent crime, are paid out of the taxes. Has he no interest in their protection, because he lives farther from the courthouse and the police station than the others? Clearly, these are matters of detail within the legislative discretion, and, therefore, of power in the law-making body within whose jurisdiction the parties live. This court cannot say, in such cases, however great the hardships or unequal the burden, that the tax collected for such purposes is taking the property of the taxpayers without due process of law." I might multiply citations from conflicting authorities like these, without finding any rule to guide or definitely determine where the line can be drawn which determines, in cases like this, the limit of legislative discretion. Nearly, if not all, these cases arose to test the extent and limit of authority in subordinate agencies of the state, like municipal corporations, and not the discretion vested in the legislature of the state. No court has yet attempted to define specifically the benefits that a taxpayer must receive from government, in order to make valid the public taxes taken from him. True, in theory, taxation should be equal, not only in its burdens, but in its benefits; but this equality is never attained. No one questions the right of a commonwealth to tax the property of nonresidents within its borders, yet such nonresidents do not stand upon a basis of equality in the benefits of the government that imposes the tax. They may or may not receive particular benefits from its courts, its schools, the improvement of its public highways, or from any of the other purposes to which its revenues are appropriated. But such benefits are never a test of the liability of their property to taxation. The plaintiffs in this case might have their herds of cattle within the limits of Kay county, and receive no greater benefit in the protection of the laws than they do now; yet they would not be heard to assert that such property should not be taxed for the various county purposes to which taxation is appropriated. The counties, cities, and towns of this territory are not independent or distinct governments from that of the territory. They are a part of that government. They are the instrumentalities and agencies through which the territorial government promotes

the welfare of its inhabitants, and through which the territory is better enabled to protect the lives and liberties of its inhabitants and the property that is within its borders, whether that of its own citizens or that of nonresidents. The nearer these purposes are attained, the greater are the benefits to these plaintiffs, as well as to all others having property subject to the protection of its laws. Laws similar to this, attaching unorganized territory to municipal townships in the state of Michigan, were for years maintained and enforced; and, though the taxes gathered from the attached territory were appropriated and expended for the purposes of the township to which it was attached, I do not find that their validity was ever directly called into question. *Midland Tp. v. Roscommon Tp.*, 39 Mich. 424; *Comins Tp. v. Harrisville Tp.*, 45 Mich. 442, 8 N. W. 44. In this last case the facts found by the court were that from the year 1869 until March, 1877, the county of Oscoda was attached to the county of Alcona for judicial and municipal purposes, and up to the last-named date the township of Harrisville, in said Alcona county, exercised municipal jurisdiction over the territory comprising the unorganized county of Oscoda. That in 1877 the legislature organized the county of Oscoda into a township called by the act creating it the "Township of Comins." In that year, and after the passage of said act, but before said township of Comins had been fully organized by the election of township officers, the township of Harrisville made an assessment roll embracing, with other territory, all the territory in the county of Oscoda, and the taxes thus assessed were collected by the officers of the township of Harrisville. In 1879 the township of Comins made a demand on the township board of the township of Harrisville for the payment to the township of Comins for the taxes thus collected in 1877, and suit was brought therefor. On that case, Marston, C. J., says: "The laws of this state relating to the assessment, levy, and collection of taxes, does not regard certain designated territory as a township until the proper officers necessary to conduct its affairs have been elected. The officers of the new township not having been elected until July, there was no such perfected organization as would enable that township to assess the township and school taxes for that year. Under such circumstances, in my opinion, the township of Harrisville had a right to levy and collect the taxes in question; but, whether they did or not, the present action will not lie to recover the money so collected." I can perceive no distinction in principle between that case and the case at bar; and, although the legality of the assessment and collection of the taxes imposed was not directly involved in the case, both the circuit judge trying the case and the chief justice express no doubt as to their legality.

Not being able to point out the provision in the constitution, the organic act, in any statute, or general rule limiting the powers and discretion of the legislature in imposing these taxes, from which I can say that they are unquestionably void, I am not disposed to arbitrarily invade the province of the legislative department to sit in review without other evidence than that they possessed, and say that in this case they have abused the discretion vested in them to such a degree as to call for our interference. Under the general rules stated herein, we have no right to do this. This taxation may not be levied upon the basis of absolute equality. It may in a measure be unjust. It may impose upon the plaintiffs in this case a burden without equal compensation in benefits with others; but this, alone, will not warrant our interference. Unquestionably, the plaintiffs are benefited in some degree by the expenditure of these taxes in Kay county. The proximity to their property of a well-ordered community with courts and schools open to the plaintiffs if they wish to avail themselves of them, with good roads and bridges, with provision made for the care and maintenance of the poor and indigent, with these and other elements of civilization, order, and observance of law, for which money obtained by taxation is expended, it is beyond dispute that plaintiffs have a greater security in their property rights than they would have without them. These are the benefits upon which the right of taxation is based and gives to the legislature the acknowledged authority to impose taxation. The authority being acknowledged, the reasonableness of or necessity for its exercise cannot be inquired into by the courts. Of such reasonableness or necessity the legislature, and not the courts, are to judge.

The validity of these taxes is further assailed on the ground that the act of the legislature authorizing them is obnoxious to the act of congress of July 30, 1886 (24 Stat. 170), which provides as follows: "That the legislature of the territories of the United States now or hereafter to be organized, shall not pass local or special laws in any of the following enumerated cases, that is to say: * * * for the assessment and collection of taxes for territorial, county, township or road purposes." It is insisted that the act in question is local and special. I cannot perceive how this contention can be sustained. The act has none of the elements of a local or special law. It does not operate upon an individual, or a number of designated individuals, or upon particularly designated property. It operates upon any individual and upon any property that may come within its general provisions. Mr. Cooley, in his work on Constitutional Limitations (page 480), says: "The authority that legislates for the state at large, must determine whether particular rules shall extend to the whole state and all its citizens, or, on the other hand, to a sub-

division of the state, or a single class of its citizens only." Again, he says (page 481): "If the laws be otherwise unobjectionable, all that can be required in these cases is that they be general in their application to the class or locality to which they apply, and they are then public in character; and of their propriety and policy the legislature must judge." The constitutional requirement of equal protection of the laws does not make necessary the same local regulations, municipal powers, or judicial organization or jurisdiction. *Missouri v. Lewis*, 101 U. S. 82; *Virginia v. Rives*, 100 U. S. 313; *Ex parte Virginia*, Id. 339. The prohibition of special legislation for the benefit of individuals does not preclude laws for the benefit of particular classes; as, for example, mechanics and other laborers. *Davis v. State*, 3 Lea, 876. We think the case of *Daily Leader v. Cameron*, 3 Okl. 677, 41 Pac. 635, is decisive on this point. In that case this court says: "A statute relating to persons or things as a class is a general law. One relating to particular persons or things of a class is special. The number of persons upon whom the law shall have any direct effect may be very few, by reason of the subject to which it relates; but it must operate equally and uniformly upon all brought within the relations and circumstances for which it provides. A statute, in order to avoid a conflict with the prohibition against such special legislation, must be general in its application to the class, and all of the class, within like circumstances, must come within its operation." The statute in question in this case does not operate upon persons or things within a general class, but upon persons and things as a class. It operates upon all the unorganized counties, districts, and reservations within the territory, and upon property generally within such unorganized county, district, or reservation, and operates uniformly upon such several counties, districts, and reservations, and upon the persons and things that may be brought therein, and is, therefore, in no sense local or special in its character.

It is further claimed that the act of 1886 violates the principle of uniformity in providing for an assessment of cattle kept and grazed on these Indian reservations and unorganized territory at a different time from that provided for the assessment of personal property in the organized counties; that for this reason it unjustly discriminates against the owner of such cattle, and is therefore void. I have already shown it to be a fundamental principle that the rules of taxation shall be uniform. It is of the very nature of a tax that it should be assessed according to some uniform rules; otherwise it would be confiscation, and not taxation. But this does not mean that the time and method of assessment shall be identical, but only that, after the legislature has declared what classes of property shall be subject to taxation, the tax itself shall be levied upon such, or the

owner thereof, according to a uniform rate of valuation. *C. N. Nelson Lumber Co. v. Town of Loraine*, 22 Fed. 54. Statutory provisions authorizing the assessment of different classes of property at different dates, or of the same classes of property, in different localities, at different dates, are so common that their validity for this reason is scarcely ever called in question. The revenue law of this territory provides that real estate shall be valued for taxation on the 1st day of January, and that personal property in the counties shall be assessed on the 1st day of February, of each year. Counsel for plaintiffs, in their brief, ask: "What valid reason can be suggested why the property situated on these Indian reservations should be assessed and valued on one day, and the property situated in the organized counties should be assessed and valued on another day?" I think the answer to this question is found in the language of the supreme court of Wisconsin in *C. N. Nelson Lumber Co. v. Town of Loraine*, supra, wherein it says: "The purpose of the law would seem to be to bring about that substantial equality in taxation which the common law, as well as the constitution, requires. The legislature was aware that the logs of nonresidents, as well as resident owners, were liable to be floated out of the state in the month of April, or, if not run out of the state, might become mixed with the logs of other persons in the different streams in such a manner as to render it quite impracticable to take any separate account of them in the month of May, when the logs of resident owners were assessed. Very often they would be beyond the jurisdiction of the taxing officer of the town, and, as the owner could not be reached, and had no local agent in the state, they escape entirely. The law, by providing that the situation, amount, and value of the logs be taken in April at the place where piled or banked, seeks to put nonresident and resident owners on the same footing." The legislature of this territory, when they enacted the law of 1895, undoubtedly took into consideration the peculiar conditions and situation of the property to be taxed in these reservations; that nearly all of the cattle that were kept on these reservations were brought into the territory after the 1st of February, and would be removed before another listing of property for taxation; and, unless a different date from that existing in the general law should be fixed for its assessment, such property would entirely escape taxation. The very principle of uniformity required that this distinction in dates of assessment should be made. It was not an injustice against the owners of the property, but it was to prevent injustice to the territory, and to all its taxpaying citizens, by prohibiting this property from escaping its just share of the burdens of taxation. I think this was a very proper exercise of the discretion of the legislature, and that no discrimination exists such as is inhibited by the organic act of

the territory and the act of congress of July 30, 1888.

The final proposition contained in plaintiffs' brief—that relating to the action of the territorial board of equalization in raising the aggregate valuations of property returned from the county of Kay for the year 1895—having been fully considered and determined by the court, at this term, in the case of *Wallace v. Bullen*, 52 Pac. 954, and held adversely to the contention of the plaintiffs herein, fully disposes of this point.

For the reasons stated, upon the various points submitted herein, I am of the opinion that the legislature was vested with full authority to extend the revenue laws of the territory over the Indian reservations and other unorganized territory within this territory; that the act of 1895 was a proper exercise of such authority; that said act does not contravene any constitutional or other established rule of taxation; that I can find nothing in this record showing such abuse of the discretionary power of the legislature as warrants our interference; that the assessment and taxation of plaintiffs' property under said act and in the manner shown was valid. I think that it follows, therefore, that the action of the court below in overruling defendants' demurrer to plaintiffs' petition, in so far as it related to the assessment and levy of said taxes for county purposes and perpetuating the injunction against the collection of such taxes, was erroneous; and the judgment of said court enjoining the collection of said taxes should be reversed, and this cause be dismissed. The judgment of the district court is affirmed.

SCOTT and McATEE, JJ., concur to the extent of holding that the taxes levied for territorial and court expense funds are valid, but also hold that the balance of the levies are unauthorized, for the reason that the people on these reservations are not interested in such levies, and receive no benefit from the expenditure of the moneys derived from such levies. DALE, C. J., dissents. BIERER, J., who tried the case below, not sitting.

JACKSON v. KINCAID et al.

(Supreme Court of Oklahoma. Sept. 4, 1896.)

PLEDGE — WHAT CONSTITUTES — VALIDITY AS AGAINST CREDITORS.

1. A pledge is a bailment of personal property as a security for some debt or engagement.
2. The term "lien" includes every case in which personal property is charged with the payment of a debt, and a pledge of personal property is a lien upon it.
3. In order to constitute a valid pledge, there must be an immediate, actual, and continued change of possession of the property pledged, as against creditors or subsequent purchasers or incumbrancers in good faith.
4. And such a change of possession requires the pledgee to hold the property exclusively as a security for the payment of the debt for which the property is pledged.

5. And where pledgees took possession of the property pledged, which consisted of a stock of goods, and opened them up for sale in a building rented prior thereto by the debtors, and in the same name in which a mercantile business had been run and was being carried on by the debtors at another place, and allowed the debtors to buy a large amount of new goods and place them in the stock, and all were being sold in the usual course of trade, and the money used in payment of freight on goods, rent of building leased by debtors, and for shelving and counters, and other expenses of the store, and the remaining proceeds of the sales deposited in bank in the name of the debtors, and the debtors drew on the same by sight draft, and the remaining balance was never drawn out of the bank or asked for by the pledgees, the transaction is conclusively held to be fraudulent and void as to attaching creditors who merged their attachments into a chattel mortgage given by the debtors.

(Syllabus by the Court.)

Error to district court, Logan county; before Justice Frank Dale.

Action by James B. Kincaid and William Chitwood against Thomas Jackson. From a judgment for plaintiffs, defendant brings error. Reversed.

This was an action brought by defendants in error in the district court of Logan county on the 7th day of August, 1894, in conversion, against the plaintiff in error, to recover the value of a stock of goods on which the plaintiffs claimed a pledgee's lien, with interest from the date of the alleged conversion, July 19, 1893. On the trial before the jury on the 6th day of April, 1895, verdict was rendered for James B. Kincaid in the sum of \$1,514.81, and for William Chitwood in the sum of \$1,692.86. After motion for a new trial was overruled, judgment was rendered for the plaintiffs on the verdict. From this judgment the appeal is taken. The general verdict was in favor of the plaintiffs, and there were no special findings of fact. The facts of the case, in order to present the principal question urged, resolving all disputes in favor of the plaintiffs, are as follows: For some years prior to June 10, 1893, Robert Kincaid and Zalmon Kincaid had been engaged, as partners, in the mercantile business; having at that time a store at Perry, Iowa, one at Pleasanton, Kan., one in Brown County, Kan., and another at Mound City, Kan., and were interested extensively in numerous banks. At Mound City, Kan., they had a large stock of goods, and the business was run under the name of the "Regulator." James B. Kincaid, their cousin, had been working for them most of the time since 1881, and was then clerking in the Mound City store, and had never had a settlement with them. On that day, on settlement had, it was agreed that there was \$1,370 then due him for his wages. Shortly prior to this, Robert Kincaid had gone to Yukon, Okl., and had rented a building in which to open a store, had returned to Kansas, and had had \$7,850 worth, by invoice, of the stock of goods at Mound City boxed and shipped to Yukon. On the same date, June 10, 1893, Kincaid &

Bro. borrowed \$1,500 of William Chitwood, and gave him their note, payable one day after date. Kincaid & Bro. not having the money to meet these debts, it was agreed that James B. Kincaid and William Chitwood should hold the stock of goods shipped to Yukon as security therefor, and that the money should be paid within 90 days, or when the Strip opened, or when the parties demanded it, and that they should go to Yukon, take possession of the stock, open it up in the building rented by Kincaid & Bro., and run the business for Kincaid & Bro., and under the style of the "Regulator," and if Kincaid & Bro. could not pay these debts when the Strip opened, or when they demanded their money, these goods were to be theirs. On June 12th or 13th, Kincaid & Bro. ordered a large bill of goods, amounting to \$1,053, from the Richardson-Roberts-Byrne Dry-Goods Company of St. Joseph, Mo., and these goods were shipped to Yukon, Okl., to Kincaid & Bro., received by Kincaid & Chitwood, and put in with the old stock; and during the latter part of the month the store was opened, and the old and new goods sold together, in the usual course of trade. The business was continued in this manner until the 19th day of July, 1893, when the Sims Grocery Company and the Richardson-Roberts-Byrne Dry-Goods Company brought attachment suits, the first to recover the sum of \$1,020, and the latter the sum of \$2,773, and attachment orders were issued and levied on the stock. During the time the store was run in this manner, about \$400 or \$500 worth of goods was sold, and the money was used in paying freight on goods, for shelving and counters, for rent of store and other expenses of the business, and the balance was deposited in bank in the name of Kincaid & Bro., and they drew out from the same, by draft, \$200; and the balance of the deposit, about \$40, remained in the bank, and was never asked for by Kincaid & Chitwood. Robert Kincaid had directed Kincaid & Chitwood to deposit the proceeds of the sales in the bank at Yukon, and let it accumulate there to pay the bill of the Richardson-Roberts-Byrne Dry-Goods Company. On July 17, 1893, the Hood & Kincaid Bank at Pleasanton, Kan., and of which Robert Kincaid was a member, failed, and this almost immediately led to the insolvency of Kincaid & Bro. On July 17th Chitwood left Yukon for Mound City, Kan., and never returned to Oklahoma. On leaving he told James B. Kincaid: "Hold the fort! You sell the stock of goods until I get back, or until I hear from you,"—and never gave him any other directions on the subject. Shortly afterwards James B. Kincaid returned to Kansas, and never went back to Yukon. On July 29, 1893, Kincaid & Bro., through Robert Kincaid, who was manager of the business, gave the Richardson-Roberts-Byrne Dry-Goods Company and the Sims Grocery Company a chattel mort-

gage on the stock of goods at Yukon to secure the sum of \$2,673.62,—\$1,020.48 to the Sims Grocery Company, and \$1,653.14 to the Richardson-Roberts-Byrne Dry-Goods Company. They immediately filed the chattel mortgage, received the stock of goods from the sheriff, who held it under the attachments, advertised it for sale as provided by law, and sold the stock. William Chitwood, after he returned to Kansas, on July 18, 1893, and after he had learned of the failure of Kincaid & Bro., asked for his money. James B. Kincaid never made any demand for his. Later on, a tract of land in Kansas, which was heavily mortgaged, was deeded to James B. Kincaid, the consideration stated in the deed being \$1,370, but is testified by him to have been taken as security for his debt. Considering the land worth no more than the mortgage, and desiring to qualify himself to enter land in the Cherokee Strip, he deeded this land to his wife, the consideration stated in this deed being \$2,000. The verdict being for plaintiffs, the facts with reference to badges of fraud and intentional fraud upon creditors need not be considered. This suit was brought to recover the amount of the claims of James B. Kincaid and William Chitwood against this stock at Yukon, Okl.

Keaton & Cotteral, for plaintiff in error.
George Gardner and E. N. Smith, for defendants in error.

BIERER, J. (after stating the facts). The first error assigned for a reversal of the judgment in this case is the refusal of the court to give the instruction presented by defendants below to the jury, to return a verdict in favor of the defendants. The defendants presented their case to the trial court on two theories: First. That the transaction between Kincaid & Chitwood and Kincaid & Bro., under the undisputed facts of the case, must be held fraudulent in law, on account of the failure of the pledgees to take actual and immediate possession of the property, and maintain actual and continued possession thereof, under section 2663, St.; that as the plaintiffs held the goods for sale in the usual course of trade for Kincaid & Bro., and received new goods for them, to be, and which were being, disposed of in the same manner, and let the money be used by Kincaid & Bro. for other purposes than to pay the debt for which the property was a security, the pledge was defeated. Second. If this theory was not sustained, that there was a fraudulent intent, which, under section 2662 of the Statutes, defeated the pledge. The plaintiffs claim that the facts presented only a question of the good faith of the transaction, and was a question to be submitted to the jury, whose determination would settle the question, as a disputed question of fact. The court adopted the plaintiffs' view of the case.

Section 2662, referred to, provides as follows: "Every transfer of property or charge thereon made, every obligation incurred, and every judicial proceeding taken, with intent to delay or defraud any creditor or other person of his demands, is void against all creditors of the debtor, and their successors in interest, and against any persons upon whom the estate of the debtor devolves in trust for the benefit of others than the debtor." Section 2663 is as follows: "Every transfer of personal property other than a thing in action, or a ship or cargo at sea, or in a foreign port, and every lien thereon, other than a mortgage, when allowed by law, and a contract of bottomry or respondentia is conclusively presumed, if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent and therefore void, against those who are his creditors while he remains in possession, and the successors in interest of such creditors, and against any person on whom his estate devolves in trust for the benefit of others than himself, and against purchasers or incumbancers in good faith subsequent to the transfer." It will be observed that these two sections of the statute denounce two separate characters of fraudulent transfer, and make two clear and well-defined divisions of such cases. The first class is where the transfer is made with the fraudulent intent to delay creditors. The intent there is the gist of the fraud. It is the primal thing. And that, under section 2665, is a question of fact, and not of law. The second class of such transfers is the one provided by section 2663, and that makes the transfer conclusively fraudulent where it is not followed by an actual and continued change of possession, and the matter of intent here is not an ingredient of the fraud. It makes no difference what the intent may be, under this section,—whether it is good or bad. The law has prescribed the rule, regardless of any intent, and that rule is that the transfer is fraudulent unless accompanied by an actual and continued change of possession of the things transferred. Many statutes of frauds make the intent one of the ingredients of the fraud in the latter class of cases, and make the failure to change the possession only a badge of fraud, or a presumption of fraud, which may be overcome by proof. The Nebraska statute, for example, provides that the transfer, unless accompanied by an immediate delivery, and followed by an actual change of possession, "shall be presumed to be fraudulent and void." Under such a statute there is no conclusive presumption of fraud, as there is under ours, and, of course, authorities under such a statute would not be in point in a case which arises under our statute.

It is claimed, however, by defendants in error that the case at bar does not come with-

in section 2663, because this is a case of pledge, and our statute only provides with reference to transfers of personal property and liens thereon, and that a pledge is neither. This is the very foundation of the plaintiffs' case. Can the position be sustained? Is a pledge a lien upon property, within the section of the statute (section 2663) which we are now considering? A "pledge" is defined to be a bailment of personal property as a security for some debt or engagement. Jones, Pledges, § 1; And. Law Dict. The term "lien" includes every case in which personal or real property is charged with the payment of a debt. *Sullivan v. Railroad Co.*, Fed. Cas. No. 13,596; And. Law Dict. These authorities we think sufficient to fully establish the proposition that a pledge is a lien. In fact, it would be a strained and unwarranted construction to place upon this section to say that it was not. It would require an unusually strong presentment of the matter to make us believe that, while the legislature were so plain and direct in denouncing fraudulent transfers and liens upon property, when in fact they adopted the very strongest statute on this question, they left the door to that very class of frauds so widely open by simply allowing the parties to the fraud to call the transaction by the name of "pledge," and thereby defeat the purposes of the statute. The legislature had no such intention, and the statute has no such meaning. It includes a pledge, as well as every other character of transfer and lien. Now, was there an actual and continued change of possession of the property? There is, as we are considering the case, no question, no dispute, as to the facts. The general verdict, without special findings, has resolved all questions of fact in favor of the plaintiffs below. Both of them testify that the agreement was that this property should be taken to secure the indebtedness due them. It had already been shipped to Yukon as the property of Kincaid & Bro. Kincaid & Bro. had rented the store building to open the business in. They went there and opened up the stock. They opened the store in the name of the "Regulator," which was the name of the store of Kincaid & Bro. They received a large invoice of goods purchased by Kincaid & Bro. They put the old and the new goods together in this store of Kincaid & Bro., and sold them for Kincaid & Bro. in the usual course of trade, in the same manner that the business had been carried on before the alleged pledge was entered into. Finally, and to eternally clinch the transaction, they deposited these moneys in the bank in the name of Kincaid & Bro., and permitted them to draw upon this fund, and to divert the proceeds of the sale of these goods to other purposes than those for which they were alleged to be pledged, and this continued up to the time they were seized by attachment. Whose possession was this, when held under such circumstances? That the possession of the agent is the possession of

his principal is too elementary to require the citation of authorities. We will, however, cite the following: *Ewell, Evans*, Ag. p. 330; *Bump, Fraud. Conv.* 134; *Stoddard v. Butler*, 20 Wend. 507. The foundation and policy of the rule that there must be an actual and continued change of possession of the property, in order to affect the rights of creditors and subsequent transfers, is to prevent the beneficial use of the property by the debtor. *Bump, Fraud. Conv.* 134. This forcible language is used on this subject by Mr. Justice Bronson in the case of *Stoddard v. Butler*, supra: "But it is said that the vendees made the vendor their agent, and that the possession of the agent is the possession of the principal. This is not a new device to get round the statute, but if it succeed this will be a new and most fortunate era for fraudulent debtors. They can place their goods beyond the reach of creditors, and still retain the beneficial enjoyment, provided the friend who takes the transfer will declare the vendor his agent. Such an attempt to cheat the law cannot succeed." It will be observed that in this case the learned justice points to an exception to the rule where the possession of the agent cannot strictly be held to be the possession of the principal, but this exception is made to prevent fraudulent transfers, and not to assist them, as is sought to be done in the case at bar. Further on in this case the learned justice, partly quoting from Chief Justice Kent, and partly in his own language, said: "The attempt to screen these constant, essential, and conclusive acts of ownership under the authority of an agent is a shallow artifice, destitute even of the merit of plausibility." There must be an actual and substantial change of possession. A divided enjoyment, which leaves the vendor to appear to the world as owner, will not answer. In *Paget v. Perchard*, 1 Esp. 205, the plaintiffs, on taking a bill of sale of a Mrs. Spencer, who kept a public house, put a third person in possession. But, it appearing in evidence that the vendor had been permitted to sell liquor in the usual way of her trade, Lord Kenyon held the sale void as against creditors, and nonsuited the plaintiffs." The most that could be said of the possession of Kincaid & Chitwood is that they had the goods in their custody, but they were retaining such custody for the beneficial use of Kincaid & Bro. They were not holding possession, actually, fully, absolutely, and continuously, for themselves. It was certainly nothing more than a joint possession, and that is not sufficient, under the statute. *Bump, Fraud. Conv.* p. 137. In the case of *Stiles v. Shumway*, 16 Vt. 435, which presents many marks of similarity of possession and beneficial use to the case at bar, the learned court said: "They all continued to live upon the farm as before. The vendor worked upon it, and both the vendor and vendee used the mare and oxen, and the young stock was pastured on the farm. The verbal

agreement between Wait and the plaintiff, or between the plaintiff and his father, can have no effect in changing the possession." In the case of *Regli v. McClure*, 47 Cal. 612, the debtor made a transfer to the purchaser for a valuable consideration, and he started, in company with the debtor and others, to move the property, which consisted of cattle, to another county. The vendor and his family accompanied them, but did not assist in driving the cattle. The cattle were attached by creditors, and on trial a verdict was had for the purchasers. The court said: "The verdict of the jury should have been set aside by the court below. The circumstances disclosed by the evidence do not amount to that change of possession required by the statute. The conflict in the evidence as to the alleged fraud in the sale of the cattle, if, indeed, there be any conflict at all, is not substantial in its character. The sale was plainly fraudulent. The jury must have misunderstood the testimony in the case. Their verdict can be accounted for in no other way." Concurrent possession is not sufficient, under such a statute. On this subject, Wait, *Fraud. Conv.* § 259, says: "The authorities seem to be almost unanimous in holding that concurrent possession by the vendor and the vendee will not satisfy the rule or the statute requiring a change of possession. 'There cannot, in such case,' said Duncan, J., 'be a concurrent possession. It must be exclusive, or it would, by the policy of the law, be deemed colorable.' Again, it is said to be 'mere mockery to put another person to keep possession jointly with the former owner.' In *Wordall v. Smith*, 1 Camp. 332, Lord Ellenborough observed: 'To defeat the execution by a bill of sale, there must appear to have been a bona fide, substantial change of possession. * * * A concurrent possession with the assignor is colorable. There must be an exclusive possession under the assignment, or it is fraudulent and void as against creditors.' So it is no change of possession to have the property in charge of the vendor's agent." This statute demands not formal, but substantial, change of possession. It is not the form of the transaction, but the merit of the transaction, that the statute looks to. Remedial statutes, statutes which are aimed at the protection of the rights of parties, are not to be defeated in their operation by mere forms. It requires a performance in substance, rather than in form, to satisfy it. On this subject, in the case of *Waller v. Cralle*, 8 B. Mon. 11, it is said: "An actual change of possession, so far as the thing sold is susceptible of it, is absolutely necessary to the validity of the sale, as to creditors and subsequent purchasers, whenever the vendor at the time of the sale is in possession of the property. And this transmutation of possession, to be effectual, must not be merely nominal or momentary, but must be real, actual, and open, and such as may be publicly known." In the case of *Stevens v. Irwin*, 15 Cal. 503, the

court, while holding that the statute was complied with in that case, stated in forcible language what was meant by "change of possession." It there said: "The 'continued change of possession,' then, does not mean a continuance for all time of this possession, or a perpetual exclusion of all use or control of the property by the original vendor. A reasonable construction must be given to this language, in analogy to the doctrines of the courts holding the general principles transcribed into the statute. The delivery must be made of the property. The vendee must take the actual possession. That possession must be open and unequivocal, carrying with it the usual marks and indications of ownership by the vendee. It must be such as to give evidence to the world of the claims of the new owner. He must, in other words, be in the usual relation to the property which owners of goods occupy to their property. This possession must be continuous, not taken to be surrendered back again; not formal, but substantial." In the case of *Mead v. Noyes*, 44 Conn. 487, the supreme court, in that case, in the able and learned opinion of Mr. Chief Justice Park, in reversing the judgment of the trial court in sustaining the transfer, said: "Now, whether there has been a change of possession of personal property following a sale in any case, so that the sale will be valid as against the creditors of the vendor, is a mixed question of law and fact. After the facts are all ascertained, the law determines whether or not there has been such a change of possession. It is not enough that the sale was bona fide. It is not enough that there was a formal change of the possession of the property accompanying the sale. The law requires an open, visible, permanent change of the possession, to make the sale good as against the vendor's creditors, except in certain cases for which the law has provided. We think the court erred in applying the law to the facts of this case. The facts do not warrant the conclusion to which the court came. A vendee may be in possession of property, as between himself and the vendor, and still his possession may not be sufficient to protect the property from the vendor's creditors." Upon the question as to whether or not the case is determined by a matter of good faith, or whether, the facts being undisputed, it is a question of law, for the court to determine, it is stated in this opinion, partly quoting from prior opinions of the same court: "The enjoyment of the thing purchased is generally, if not always, the object the purchaser has in view; and his neglect to take possession is therefore so unusual and contrary to general experience as to be very strong evidence that the purchase was only colorable, and not real. And the reason of extending it from a mere rule of evidence, calling it a 'badge of fraud' only, and arbitrarily declaring, as matter of law, that it rendered the sale void as to creditors, notwithstanding the highest evidence of the hon-

esty of the sale, is because it has been thought better to take away the temptation to practice fraud than to incur the danger arising from the facility with which testimony may be manufactured to show that a sale was honest. * * * And as, in applying the rule, we must look beyond the good faith or the secret, technical features of the transaction, so purchasers must learn and understand that if they purchase property, and, without legal excuse, permit the possession to remain in fact, or apparently and visibly, the same, or, if changed for a brief period, to be in fact, or apparently and visibly, restored, and thereafter in fact, or apparently and visibly, continued as before the sale, they hazard its loss by attachment for the debts of the vendor, as still, to the view of the world, and in the eye of the law, as it looks to the rights of creditors and the prevention of fraud, his property. * * * But the court has found that the sale was made in good faith, and such we are bound to consider it. Still these circumstances require that it should clearly appear that there was an actual, visible, and permanent change in the possession of the property. Was there such a change in the possession? As said Judge Hinman in the similar case of *Potter v. Payne*, 21 Conn. 377, we are to consider the possession as a stranger to the sale would regard it. Whom would a stranger have considered in possession in this case? He would have seen the horse, harness, and wagon continuing to remain in the same place where they had previously been kept. He would have seen the vendor using them about his business, and for the benefit of his family, apparently in the same way as before. He would have seen him feeding the horse and caring for the property, using it in the transportation of lumber, coal, and other materials, precisely as if he was the owner of the property. He would have seen these acts repeated and continued down to the time of the attachment. We are unable to discover anything which would lead a stranger to the sale to suppose that there had been a change in the possession and ownership of the property. We must therefore regard the sale, under the rule we have stated, as void against the attaching creditor. The excuse of the vendee for permitting the vendor to use the property apparently as his own after the sale is clearly insufficient. Such excuses in similar cases have been repeatedly declared insufficient to satisfy the law."

Now, it will be observed that these cases from New York, Kentucky, California, and Connecticut are cases which involve the question of the sufficiency of the possession to sustain a sale, while the case at bar was simply one where the property was sought to be pledged as security. We do not regard this distinction as making any difference in the principle to be applied. The change of possession, under the statute, must be the same where the transaction is a lien

other than a mortgage as where it is a sale. And the transferee must, during the time of the existence of the lien, be deprived of his beneficial use of the property as fully as in the case of a sale. We can see—and in fact there can be—no difference, upon this feature, in the cases cited and the case at bar, because of the fact that in those cases the partial possession which the vendor had was actually exercised by him personally, for the possession of the debtors in this case by their agents remained substantially their own possession. In fact, we consider the case at bar a stronger case than those cases, for in those cases the transfer was of articles of property not consisting of merchandise to be sold, changed, and substituted in the usual course of trade, as in the present case. If a distinction is to be made, it certainly should be in favor of this latter class of cases; for the opportunity for the practice of deception and fraud being greater, by the owner being allowed to sell the goods and substitute others in their place, the rule, if to be different, should be made so by being more rigidly enforced. The same rule which we gather from these cases, where the transaction was a sale, obtains in chattel-mortgage cases where the transaction is a security for a debt, under a statute which requires an actual and continued change of possession to make the security valid. This is the character of the Nebraska statute, and there, in the case of *Brunswick v. McClay*, 7 Neb. 137, the action was to recover, by the mortgagees, certain billiard tables and accompanying furniture. The mortgagees, through their agent, had gone to the saloon of the debtor, and, with his assent, taken nominal possession of the property, and had put them in charge of a third party, who was then, and for a long time afterwards was, in the debtor's employ. The court said of the transaction: "The tables were not removed from the saloon, but remained there in their usual place, and were used by Graham in his business, and to his profit, precisely the same as he did before Hull [the agent of the mortgagees] went there, and until after the levy was made. This shows beyond a doubt that the 'actual and continued change of possession' which the statute requires to prevent the presumption of fraud was entirely wanting." It will be remembered that the Nebraska statute made the continuance of possession by the debtor only a presumption of fraud. Otherwise this decision is entirely applicable to cases of liens other than mortgages under our statute.

The cases we have thus far cited have all—except the Nebraska case, which we have cited in this connection because of the direct bearing on the question as to what satisfied the requirement of actual and continued change of possession—been cases of sale; and we would consider these authorities amply sufficient to sustain the view we take of this case, without any where the question

was considered upon a case of pledge. The Reports, however, are not without cases where the principle was considered in its application to a pledge. The question as to the validity of a pledge, where the change of possession was not actual and continuous, and where the right of disposal and substitution was allowed, was most ably and exhaustively considered by the supreme court of the United States in the case of *Casey v. Cavaroc*, 96 U. S. 467. In that case Charles Cavaroc, Sr., was the president of the National New Orleans Banking Association, which was largely indebted to the Credit Mobilier of Paris, which was represented in New Orleans by Cavaroc & Son, their agents. Cavaroc directed the discount clerk of the bank, who had charge of its notes, to select securities to be pledged to the Credit Mobilier. The clerk selected the securities, and placed them in an envelope by themselves, and handed them to Mr. Cavaroc, for Cavaroc & Son, who handed them to the cashier of the bank for safe-keeping. As some of the securities soon matured, they were taken out of the envelope for collection, and Cavaroc had them collected and renewed in the usual manner by the discount clerk. To facilitate the handling of the notes, and to avoid going to the cashier when a note became due, after a few days the securities were handed back to the discount clerk, in the envelope, in order that he might more conveniently attend to their collection and renewal. When any note was paid the money was taken and used by the bank, and other notes were taken and substituted in their place. When renewed the new notes took the place of the old. At one time quite a large amount of the notes were exchanged for others, because more available in the bank's transactions. The entire lot, however, except the exchange of individual securities, appeared to have been kept in the envelope, by itself, by the discount clerk, who was under the direction of the cashier, and in whose hands the notes had been placed for Cavaroc & Son. The claim of Cavaroc was that these notes were pledged for the security of the debt of the bank to the Credit Mobilier. As to the sufficiency of the possession to constitute a valid pledge, Mr. Justice Bradley, speaking for the court, said: "Was there such a delivery and retention of possession of the collateral securities as to constitute a valid pledge by the law of Louisiana? Clearly, they were never out of the possession of the officers of the bank, and were never out of the bank for a single moment, but were always subject to its disposal in any manner whatever, whether by collection, renewal, substitution, or exchange; and collections, when made, were made for the benefit of the bank, and not that of the Credit Mobilier. * * * Whether constructive possession in the creditor can be affirmed, where an article to which his only title is that of pledge is actually red-

livered to the debtor, with general authority to dispose of it and substitute another article of equal value in its place, is the question which we have to meet in this case. Such a redelivery for a mere temporary purpose, as for shoeing a horse which has been pledged and is owned by the farrier, or for repairing a carriage which has been pledged and is owned by the carriage maker, does not amount to an interruption of the pledgee's possession." The opinion then proceeds to review the three cases which are relied upon by defendant in error to sustain the validity of the pledge in question, which are: First. The case of the sea captain who pledged his chronometer for a debt, and who was afterwards employed by the pledgee as master of one of his ships, and the chronometer placed in his charge to be used on the voyage. It was held that the possession of the pledgee was not lost, and that he could recover the chronometer against a person to whom the master had pledged it a second time. Second. The case where a party pledged a convertible railroad bond, and the pledgee delivered it to the pledgor in order to get it exchanged for stock in the same company, and which was to be returned and substituted for the bond in pledge. Neither the bond nor the stock was returned, and the pledgee brought an action in trover for the bond, and recovered its value. Third. Where the proprietors of a brickyard contracted it out on shares to the brickmaker, agreeing to advance the money to carry on the manufacture of bricks. After the proprietors were paid their advance, the profits were to be divided between them and the brickmaker. The bricks were to remain upon the premises, and pledged to the owner of the yard as a security for the advances, and to be sold by the brickmaker at retail, and as fast as \$100 was procured it was to be deposited in bank to the credit of the owner. The bricks were attached, as to the share of the owner, and it was held that the pledge was valid. Concerning these cases the opinion says: "All the cases cited, however, show that a bailment to the pledgor for a mere temporary purpose for the use of the pledgee, or for the repair and conservation of the pledge, will not destroy the latter's possession. At the same time, they imply that a redelivery to the pledgor, except for the special and temporary purposes indicated, divests the possession of the pledgee, and destroys the pledge." After reviewing the civil law, the modern French law, the Code Napoleon, certain statutes of Louisiana, and some French decisions on the question, the opinion further says: "A different result was had in another case, where certain champagne wines were the object of the pledge, and the debtor had reserved the care of them; and, though the vaults in which they were stored were leased to the creditors, they communicated by open doors with the other vaults of the debtors, where

their workmen were employed on the wines, and there was nothing to indicate which were pledged and which were not, and nothing to prevent a substitution thereof, so that the debtors appeared in possession, and kept up their credit thereby, which they could not otherwise have done. * * * From these authorities it seems to be evident that, in the French law at least, the text of which, in this regard, is the same as that of Louisiana, a delivery by the owner of securities by way of pledge, followed by a return thereof to him for the purpose of enabling him to collect them and apply the money to his own use, on substituting others in their stead, and with general liberty of substitution, and to appear as the owner and possessor thereof in his dealings with others (the title of the securities not being transferred to the creditor), is not such a delivery of possession as is necessary to establish the privilege due to a pledge as to third persons. It would be contrary to the very letter of the law to allow such a transaction to have that effect. It would not be mere evidence of fraud, which might be rebutted by counter evidence, but it would be contrary to the rule of law adopted to prevent fraud. In other words, as to third persons, it would not be a pledge at all, within the meaning and requirements of the law." It is not claimed that there is any substantial difference between the common-law pledge, which is the law on this subject in this territory, as we have no statute on the subject, and the civil law, or the law of Louisiana, as they appear in this case in the United States supreme court. In this case, too, the argument that it is a question of good faith or bad faith, for the jury to determine, is effectually disposed of in this language: "Bad faith, it is true, would defeat the pledge, though the creditor had possession. But want of possession is equally fatal, though the parties may have acted in good faith. Both are necessary to constitute a good pledge, so as to raise a privilege against third persons. The requirement of possession is an inexorable rule of law, adopted to prevent fraud and deception; for, if the debtor remains in possession, the law presumes that those who deal with him do so on the faith of his being the unqualified owner of the goods." It will be observed in that case the term "possession," as applied to pledge, was not considered in any narrow or contracted sense; but a broad and liberal view of it was taken, to promote the purpose of the law. It is true, the pledge was defeated because the pledgee did not retain the possession of the securities; but the conclusion of want of possession was arrived at more by the manner in which the securities were treated, than from any question of their actual custody. They were in the actual possession of the persons who were designated as the agents of the pledgee, but they were allowed to be handled and used and

substituted and disposed of at will, for the convenience, and even for the benefit, of the pledgor. And it was this character of use, principally, which led the court, we think, to the conclusion that the pledge was defeated on account of the character of the possession. In none of the cases which we have cited were the conclusions based upon any statute which prohibited the handling of the property transferred, mortgaged, or pledged by the seller, mortgagor, or pledgor, but upon the general policy of the law that the transferee or debtor cannot be allowed to handle or traffic in the property sold, or on which the security is given, and if he does so the transfer or lien is void as to creditors, purchasers, and incumbrancers. In this character of cases the term "possession" cannot be weighed in any technical scales, but must be given a broad and liberal meaning, to prevent the very frauds for which such a statute as we are considering was enacted.

But it is contended by counsel for defendants in error that the creditors who attached these goods, and afterwards merged their attachments into a chattel mortgage given by Kincaid & Bro., had notice of the claims which Kincaid & Chitwood had upon these goods as pledgees. This notice would have been a potent factor, indeed, in the case, if their claims were valid, but, being void, their notice amounts to nothing. The notice of a valid claim often prevents the vesting of a right in a third person, but the notice of a void claim cannot prevent the attachment of a valid right in a third party. This question is effectually disposed of in the case of *Smith v. Epley*, 39 Pac. 1016, 1018, where the supreme court of Kansas said: "It is suggested that the plaintiffs are not attaching creditors, and that, as they took their mortgage with notice of the prior mortgage, the Beck mortgage is not void as to them. It is true that they had notice of the prior mortgage when they accepted their mortgage to secure their claim. Instead of taking a lien by attachment, they preferred a mortgage lien; but, when they accepted their mortgage, they had notice that J. W. Epley had possession of the mortgaged property as the owner thereof, had the absolute control over the same, the absolute right to sell it as he chose, and the absolute control over the proceeds. They knew, therefore, that the Beck mortgage was void, and no lien upon the stock of goods." It appeared in the case of *Mead v. Noyes*, supra, that when the levy was made "the officer was at the time informed that the property belonged to the plaintiff, and was shown his bill of sale of the same, but stated that he had been directed to attach them." In *Waller v. Cralle*, supra, it is said: "Waller was apprised of the sale to the plaintiff Mrs. Cralle at the time he made his purchase. It is therefore contended that, having notice, he is not such a purchaser as has a right to impeach the previous sale on the ground of fraud. Where, however, a sale is fraudulent, and made to defeat or delay creditors in the collection of

their debts, a subsequent purchaser from the fraudulent vendor is not affected by notice of the fraudulent sale and conveyance." The holding of possession by Kincaid & Chitwood for the debtors, Kincaid & Bro., in their name, and allowing them to buy and put into the stock new goods, to sell the same in the usual course of trade the same as before the pledge, to divert the proceeds to another purpose than the payment of the debt, defeated their claim to the property. They cannot be heard to say that they opened the stock of goods for sale in the name of Kincaid & Bro., and ran the store in the same name in which it was run in Mound City, Kan., permitted Kincaid & Bro. to buy new goods from creditors, which were placed in the stock and sold in the usual manner, and the proceeds, which were not diverted to other uses, deposited in bank in the name of the debtors, and drawn out by them, and the business run in all respects the same as it had been run by Kincaid & Bro. for years, up to the very moment of the attachment levy, and then to say to those who attached, and whose liens were by Kincaid & Bro. merged into a valid chattel mortgage, that they held the possession of those goods for the purposes of a pledge, when these subsequent liens attached, as pledgees. The conclusion naturally follows that the plaintiffs having failed to take actual possession of the property pledged, in their own interest, and having failed to maintain a change of possession for the purpose of a pledge, but having allowed the debtors, through them, to sell and dispose of parts of the property, of which they (the debtors) had the control, if not the possession, at the time the property was sought to be pledged, and the substitution of other goods in the usual course of the business, for the debtors, the pledge was void, under section 2863 of the statute.

But aside from this plain, direct, positive, and unequivocal statute, the application of which to the facts of this case, in no more vigorous manner than its letter and purpose demands, by the courts, in the prevention of such frauds upon the commerce of our young territory, we think the transaction before us was fraudulent by analogy to the rule which is applied to chattel-mortgage cases, where the debtor, until default, is allowed to retain the possession of the property, as he is under our statute, but where such a handling and use of the property—a stock of merchandise—by the mortgagor is inconsistent with the idea of a security, and renders the mortgage void as to creditors and incumbrancers. The Reports are full of such cases, a few of which we will refer to in support of this view of the case. In the case of *Alken v. Pascall*, 24 Pac. 1039, 1040, the supreme court of Oregon held that "when it appears either on the face of a chattel mortgage, or by parol evidence, that the mortgagee of personal property has given to the mortgagor the power to dispose of the mortgaged property, and to apply the proceeds to his own use, the mortgage is void as to attaching creditors."

Another strong case is that of *Gallagher v. Rosenfield*, 50 N. W. 606, where the supreme court of Minnesota, as late as December, 1891, used this language: "It will be observed that the mortgage, on its face, expressly authorized Berwin to sell at retail the stock of goods mortgaged, as his own property, in the ordinary course of business. It is the doctrine of this court that such provision made the mortgage fraudulent in law as to the creditors of the mortgagor. *Chopard v. Bayard*, 4 Minn. 533 (Gil. 418); *Horton v. Williams*, 21 Minn. 187; *Stein v. Munch*, 24 Minn. 390; *Bank v. Anderson*, Id. 435; *Mann v. Flower*, 25 Minn. 507. In this we have adopted the doctrine of the New York courts. In *Southard v. Benner*, 72 N. Y. 432, the court uses this language, 'Such an arrangement, included in and making a part of the written instrument of mortgage, would clearly invalidate it as fraudulent in law, as that term is understood; that is, it would be conclusive evidence of fraud in fact, and would be so held by the court as a matter of law.' It may be regarded as the settled rule in this state. In the cases above cited no reference is made to the distinction suggested here between existing and subsequent creditors of the mortgagor. Berwin's debts were all subsequent to the mortgage, and the plaintiff receiver represents subsequent creditors only. But the rule clearly applies to debts incurred subsequently to the execution of the mortgage, and while the mortgagor is in possession of the goods under it, as in this case, for the reason that the direct and natural tendency of such possession of the property, and dominion over it, is to enable the mortgagor to hold himself out to the world as owner, with all the outward indicia of ownership, and to obtain a credit by reason thereof to which he is not entitled, while the mortgage would operate as a shield or cover to ward off his creditors, and protect the property in his possession from being applied to satisfy his debts. *Bump, Fraud. Conv.* 123-126; *Bannon v. Bowler*, 34 Minn. 418, 26 N. W. 237." The recent case of *Smith v. Epley*, supra, is in line with this late Minnesota case. The same conclusion is reached in *Hangen v. Hachemelster*, 114 N. Y. 506, 21 N. E. 1046, where the court said: "In the case of *Southard v. Benner*, 72 N. Y. 424, it was held that if, at the time of the execution of the chattel mortgage upon the stock of merchandise, it is understood and agreed between the parties that the mortgagor may sell the stock and use the proceeds in his business, and the agreement is carried out, the mortgagor making the sale with the knowledge of the mortgagee, the transaction is fraudulent in law as against the creditors of the mortgagor. It was further held in that case that such an agreement might be proved by parol, or inferred from the fact that the mortgagee had permitted the sales to be made." The question of the validity of a chattel mortgage, where the mortgagor was allowed by the

mortgagee to remain in possession of the property,—a stock of merchandise,—and sell and dispose of the same in the usual course of trade, and convert the proceeds to his own use, was before this court in the case of *Bank v. Cooke*, 3 Okl. 534, 41 Pac. 628; and there the rule for this territory was announced, in terms too positive for uncertainty and too direct for evasion, that: "Where, at the time of the execution of a chattel mortgage, it is understood and agreed between the parties that the mortgagor shall be allowed to remain in possession of the mortgaged property, and sell and dispose of the same in the ordinary course of trade, and apply the proceeds to his own use, the mortgage is absolutely void as to creditors of the mortgagor. It does not matter whether such agreement is oral or in writing, contained in the mortgage or without; if such an agreement was had, the mortgage is fraudulent and void as to creditors." This, in our judgment, is the doctrine that is supported by the learning of the courts, the demands for the enforcement of fixed and unevasive rules in the transaction of the vast volume of commercial business, and which had for its sure guide the light of reason. The opposite rule reduces law from a rule of action for all cases which come within its provisions, to the ascertainment of the intent of the parties,—a thing of doubtful stability, and depending much upon the elasticity of conscience on the one side, and absolutely unknown to the other, whose rights must be determined, not by the application of a sure rule, but by the often uncertain speculation as to the favorable or unfavorable impression with which the transaction has impressed the jury in their bewildering effort to perform a divine, rather than a human, function,—the ascertainment of a purpose in the mind of man. The application of this rule to cases of this character can do harm to none. It will undoubtedly prevent injury to many. It only requires that when property is taken as security it be held and treated as a security, and not left to the disposal of a debtor whose hidden and unfathomable purpose may be to prepare against the day when his creditor is sure to call. We cannot believe that the contention of counsel for defendants in error, that there is a distinction to be made between chattel-mortgage cases and cases of pledge, in respect to this rule governing commercial securities, is tenable. The principle of the two cases is the same. The only difference between a chattel mortgage and a pledge, in this territory, is that in the former case the debtor retains possession of the property until the money is due, or some other condition of the mortgage deprives him of his right of possession, while in the latter case the creditor must take and hold the possession. In both the debtor retains title to the property, and in both the transaction is a mere security for a debt. Chattel-mortgage cases, then, where the

transaction was declared fraudulent because the debtor was allowed the beneficial use and the disposal of the property, and the right of substitution, in his own name or for his own benefit, or where the proceeds are not applied to the payment of the debt for which the security was sought to be given, we consider as squarely in point in principle as if they had in fact been cases upon a pledge, and not upon a chattel mortgage. Why should the rights of creditors require that if the security is handled in a commercial way, for the benefit of the mortgagor, the lien is void, and a security as a pledge not be governed by the same principle in establishing the rule? No reason can be assigned. And where this is true there cannot be a different rule, unless the statute or the time-honored law on the question has made one, and from neither source has this been done. In either one of these classes of security the least that can be said is that so long as the property is allowed to be sold and disposed of by the debtor, or in his name and for his use, for all practical purposes, the same as before the security was given, the lien is void and the rights of others may intervene. The waiting for more than a year after the alleged conversion before this action was brought is a strong indication, also, that this claim that *Kincaid & Chitwood* were pledgees was a proposition not intended to be relied upon at the time *Kinkaid & Bro.* gave the chattel mortgage on these goods and they were sold thereunder.

The instruction asked by the defendants, directing the jury to return a verdict for them on the undisputed facts of the case, should have been sustained. This should be done where there are no disputed facts for the jury to pass upon. *Sullivan v. Insurance Co.* (Kan. Sup.) 8 Pac. 112. And the court erred in refusing it. The judgment of the court below is reversed, with directions to enter judgment for defendants below. All the justices concurring, except DALE, C. J., and SCOTT, J., who was formerly attorney in the attachment suits referred to, not sitting.

CARSON v. BUTT.

(Supreme Court of Oklahoma. Feb. 13, 1896.)

MOTION FOR NEW TRIAL—RECOVERY OF REAL PROPERTY—COMPLAINT—AMENDMENT.

1. This court will not consider assignments of error which involve questions of the weight and sufficiency of evidence, and matters occurring on the trial of the cause, in the absence of a motion for a new trial filed in the court below.

2. Where a complaint filed under the Code of 1890 sets out the interest of the plaintiff in real property, describes the premises, and alleges that defendant unlawfully obtains and holds possession, and in addition thereto sets forth fully all the facts necessary to entitle him to possession, held sufficient upon which to base a judgment in favor of plaintiff for possession.

3. A prayer in a petition being a matter of form, the demand for relief may be amended.

4. Averments which might have been amended below, on motion, will in the supreme court be deemed to have been made.

(Syllabus by the Court.)

Error from district court, Pottawatomie county; before Justice Henry W. Scott.

Action brought April 15, 1892, by J. U. Carson to have May Butt declared a trustee for his benefit in certain real estate situated in Tecumseh, Pottawatomie county. Judgment below in favor of Carson. Butt brings error. Affirmed.

J. H. Woods, for plaintiff in error. J. L. Brown, for defendant in error.

DALE, C. J. April 15, 1892, J. U. Carson filed in the district court of Pottawatomie county his complaint against May Butt, alleging in substance that he settled and made valuable improvements upon a certain town lot situated in Tecumseh, Pottawatomie county; that the deed to said lot had been improperly awarded to said Butt by the board of townsite commissioners acting for the town site of Tecumseh, and asked that Butt be adjudged to hold the legal title to the lot in trust for the use and benefit of Carson. To this complaint Butt answered fully, and after reply by Carson an issue of fact was duly joined between the parties, growing out of their respective claims of settlement, occupancy, and improvements upon said lot. By stipulation it was agreed between the parties that the testimony of the witnesses should be taken before a notary public, and thereafter submitted to the court upon argument of counsel and the testimony so adduced, all of which was done; and on May 14, 1894, the court rendered judgment for the plaintiff below, finding him to be the equitable owner of the lot in controversy, awarding him the possession thereof, and directed the defendant below to convey the legal title within five days, in accordance with the judgment, and, in case of a failure upon her part to so convey, appointed the clerk of the court a commissioner to make such conveyance. No motion for a new trial was filed in the court. The defendant below brings the case here upon an assignment of numerous errors, which, with one exception, involve questions of the weight and sufficiency of evidence and matters occurring on the trial of the cause in the court below. None of these alleged errors can be considered, in the absence of a motion for a new trial. *City of Atchison v. Byrnes*, 22 Kan. 59; *Decker v. House*, 30 Kan. 614, 1 Pac. 584, and cases therein cited.

The only question which this court may consider is that contained in the sixth assignment of error, which is as follows: "The district court erred in ordering the removal of the defendant Butt from said lot, in this: the matter of removal was not in issue, and for the further reason that, it being made to appear that the defendant had valuable improvements on said lot, the order for her removal could not go until her right as an occupying claimant was adjusted, and said decree allowed no opportunity so to do, and did not provide for adjusting

said right." This assignment of error attacks the sufficiency of the pleading to sustain the judgment rendered in the case, and should be considered with that end in view. This case was instituted under the Code of 1890. The sufficiency of the complaint was not attacked in any manner in the court below, but to the complaint the defendant filed an answer wherein she specifically controverted all questions of fact set out in the complaint, and then fully set out her own claim to the lot by showing her settlement, occupancy, and improvements, and further alleged that plaintiff below was not qualified to enter such lot by reason of the fact that he was not a resident or occupant of the town site of Tecumseh. The reply of plaintiff below traversed in full the affirmative matter set forth in the answer, and the cause was by both parties submitted to the trial court, to be determined upon the equities of the parties as shown by the evidence. Under this state of pleadings and submission of the cause, the judgment should go to that extent necessary to give adequate relief. Article 32, c. 70, Code 1890, under which this action was brought, provides for bringing a suit for possession of real property. The complaint is sufficient if it states "that the plaintiff is entitled to the possession of the premises, particularly describing them, the interest he claims therein, and that the defendant unlawfully keeps him out of possession." Section 5; *Knight v. McDonald*, 37 Ind. 403. The complaint sets out the interest of plaintiff, describes the premises, and alleges that defendant unlawfully obtained possession thereof, and keeps the plaintiff out of possession, and, in addition to such direct allegations, sets forth fully all the facts which are necessary to entitle him to the possession of the premises. While it does not in specific terms allege that he is entitled to the possession of the premises, yet by a showing of facts the same fully appears, and such facts so pleaded should be given as much force as if the plaintiff had merely alleged a conclusion. We hold, therefore, that the petition upon its face was sufficient, under the Code then in use, to entitle the plaintiff to a judgment for possession. *Smith v. Kyler*, 74 Ind. 575. It is true that the prayer of the complaint does not ask for possession, but a prayer for judgment is only a matter of form. *Lowry v. Dutton*, 28 Ind. 473; *Bennett v. Preston*, 17 Ind. 291; *Baker v. Armstrong*, 57 Ind. 189. And the demand for relief may be amended at any time. *Billingsley v. Dean*, 11 Ind. 331. Averments which might have been amended below, on motion, to correspond with the proof will in the supreme court be deemed to have been made. *Lucas v. Smith*, 42 Ind. 103; *Hamilton v. Winterrowd*, 43 Ind. 393; *Krewson v. Cloud*, 45 Ind. 273; *Scheible v. Law*, 65 Ind. 332; *Krutz v. Howard*, 70 Ind. 174.

As we view this case, there is nothing in the contention of appellant growing out of her claim under the occupying claimants' act, for the reason that we have nothing before us showing that she has ever preferred such claim

in the court below. Section 622, c. 68, of our Code provides that "the court rendering judgment in any case * * * against the occupying claimant, shall at the request of either party, cause a journal entry thereof to be made; and the sheriff and clerk of the court, when thereafter required by either party, shall meet and draw from the box a jury of twelve men," etc. There is nothing in the record showing that this procedure has been complied with, and until the lower court has had an opportunity to pass upon this question it is not properly before us.

This appeal was first filed in this court December 31, 1894, and while the same was pending undetermined the appellant filed a motion to have the decision withheld until the court below passed upon a petition for a new trial therein filed. Such petition was denied, and, inasmuch as counsel for appellant has failed to point out any error in denying the petition for a new trial, we will not consider such matter.

SCOTT, J., having tried the case in the court below, not sitting. The other justices concurring.

SCHNELL v. JAY.

(Supreme Court of Oklahoma. Feb. 13, 1896.)

LIMITATIONS — ACCRUAL OF CAUSE OF ACTION — COMMENCEMENT OF ACTION.

1. The statute of limitations adopted from Nebraska by provisions of the organic act did not begin to run until May 2, 1890, at which time the cause of action is first subjected to its operation.

2. When the time in which an action may be brought has not expired, the legislature may extend the time.

3. Under the Nebraska statutes, a cause of action was deemed commenced, as to the defendant, at the date of the summons which was served on him.

4. Under the Oklahoma Statutes of 1890 (chapter 70, art. 7, § 1), adopted from Indiana, a civil action was deemed commenced from the time of issuing summons.

5. When the statute of limitation was two years, and the complaint was filed September 30, 1890, summons issued April 5, 1892, and served same day, the action should be deemed commenced under the statutes of May 2, 1890, and was not barred by the two-years' limitation at the time the action was commenced.

(Syllabus by the Court.)

Error to district court, Logan county; before Justice Frank Dale.

Action by Francis M. Jay against Andrew C. Schnell. Judgment for plaintiff. Defendant brings error. Affirmed.

J. A. Baker, for plaintiff in error. H. R. Thurston, for defendant in error.

BURFORD, J. The defendant in error, on June 24, 1890, filed his complaint against several defendants, claiming damages for assault and false imprisonment. One M. E. Schnell was made a party defendant, and the summons served upon Andrew C. Schnell, the plaintiff in error, whom it is alleged was gen-

erally known by both names. Several amended complaints were filed, and finally, on September 13, 1890, the name of Andrew C. Schnell was substituted for M. E. Schnell. On April 5, 1892, plaintiff obtained leave of court to issue summons for Schnell, which was duly issued on said day, and served and returned same day. On the following day Schnell appeared, and filed his demurrer to the complaint. One of the grounds of demurrer was that the action was not commenced within the time prescribed by the statute of limitations. The court overruled the demurrer, to which Schnell excepted. Answer was then filed, which consisted of a general denial and a plea of the statute of limitations. The allegation in the complaint is that the assault was committed on August 17, 1889. At the time the complaint was filed, the statutes adopted from Nebraska were in force in this territory. According to the provisions of that statute, actions of this character were required to be brought within one year from the time the cause of action accrued. At the time the assault was committed, there was no statute of limitations in force in Oklahoma, and the Nebraska statutes did not become operative until May 2, 1890, and by the terms of the act of congress, putting said statutes in force in Oklahoma, they only continued in force until the adjournment of the First legislative assembly of Oklahoma, which was December 25, 1890. The cause of action stated in the complaint in this cause did not accrue, as contemplated in the Nebraska statute of limitations, until such time as an action could be brought under its provisions. In the case of *Sohn v. Waterson*, decided by the supreme court of the United States (17 Wall. 596), it was held "that in construing a statute of limitations it must, so far as it affects rights of action in existence when the statute is passed, be held, in the absence of contrary provisions, to begin when the cause of action is first subjected to its operation." The cause of action in the case at bar did not accrue until May 2, 1890, and the statute gave one year from that time in which to bring the action. While the complaint was filed and Schnell made a party defendant during the time the Nebraska laws were in force, it does not clearly appear that he was served with summons within that period, and hence the action was not deemed commenced under that statute. The Nebraska statute, in force when the complaint was filed (section 19, Code Civ. Proc. 1889), provides: "An action shall be deemed commenced, within the meaning of this title, as to the defendant, at the date of the summons which is served on him." The summons issued in this case which was served on Schnell was dated April 5, 1892, so that the cause of action was not commenced under the Nebraska statutes. The one-year limitation prescribed by the Nebraska statutes had not expired at the time the Oklahoma statutes adopted by the First legislative assembly took effect. These statutes fixed the limitation on this class of actions at two years, and pre-

scribed that the statute should begin to run as to causes of action arising prior to the adoption of the organic act on May 2, 1890. The time in which Jay could have brought this action not having expired at the date the Nebraska laws were superseded by the Oklahoma statutes, the legislature had the power to extend such time. 1 Wood, Lim. §§ 11, 12. The Oklahoma Statutes of 1890, adopted from Indiana (section 1, art. 7, c. 70), provide: "A civil action shall be commenced, by filing in the office of the proper clerk a complaint, and causing a summons to issue thereon; and the action shall be deemed to be commenced from the time of issuing the summons." The summons which brought Schnell into court was issued April 5, 1892, and he appeared to the action April 6, 1892. At this time the two-years limitation which then operated on the cause of action, had not expired, and the action was commenced, as to him, within the period of limitation, and there was no error in overruling his demurrer.

There are no other questions presented in this cause by the record before us. The judgment of the district court is affirmed, with costs. All the judges concurring, except DALE, C. J., who tried the case below, not sitting.

ROGERS et al. v. BONNETT et al.
(Supreme Court of Oklahoma. Feb. 13, 1896.)
PRESUMPTIONS ON APPEAL—MOTION FOR NEW TRIAL.

1. The Statutes of Oklahoma of 1890 required that "the application for a new trial must be made by motion upon written grounds, filed at the time of making the motion."

2. When no copy of motion for a new trial accompanies the proceedings, or any other record to show that such motion in writing was presented, it will be presumed, for the purpose of upholding the judgment of the lower court, that all things have been done regularly there, and that no written motion, as provided in the statute, was filed. (Syllabus by the Court.)

On rehearing. Dismissed.

For former opinion, see 37 Pac. 1078.

McATEE, J. This cause came on for hearing in this court, and an opinion was filed September 7, 1894. It is here upon a petition for rehearing, and our attention is called for the first time to the fact—hitherto unobserved, and not before presented in the briefs—that after hearing the case the court took the case under advisement, and on the 30th day of June, 1893, rendered a general judgment for the plaintiffs in error, admitting the same to record by filing on the 30th day of June, 1893, and "refusing to entertain or allow filed a motion for a new trial." No copy of a motion for new trial accompanies the proceedings, nor is there any other record to show how such motion was presented. This cause was begun under the Code of Civil Procedure, when the Statutes of 1890 were still in force; but, the case having been conducted to final judgment, the provisions of the Code of Civil Procedure of the

Statutes of 1893 then became applicable. Section 321 of the Code of Civil Procedure (St. 1893, p. 815) provides that "the application for a new trial must be by motion, upon written grounds, filed at the time of making the motion." There is in the record no evidence that any motion upon written grounds was ever presented to the court, and the offer to file the same, and the refusal to allow filed, is not sufficient evidence to us that any such motion was ever made in the record. We regard the presumption that all things have been done regularly by the lower court, for the purpose of upholding the judgment of that court, to be stronger than any inference that might be drawn from the statement in the record that no written motion as provided in the statute was filed. In the absence of a copy of motion for a new trial, the record must at least show that the motion itself was reduced to writing, in order that the presumption in favor of the trial court might be overcome. *Douglass v. Insley*, 34 Kan. 605, 9 Pac. 475; *Clayton v. School Dist.*, 20 Kan. 202. The judgment heretofore rendered in this case by this court is therefore vacated, without re-examination. The judgment of the lower court will be affirmed.

NORTHROP v. KNOTT. (Sec. 106.)

(Supreme Court of California. Oct. 24, 1896.)

EVIDENCE—RECEIPT—BURDEN OF PROOF AS TO PAYMENT—DEMAND ON DEPOSITARY.

1. In an action by an administrator to recover money alleged to have been placed by his decedent in the hands of defendant as a loan or deposit, a receipt signed by defendant for a sum of money from the decedent is admissible in evidence, though it does not state the purpose for which the money was received, such purpose being provable by parol.

2. The possession by an administrator of a receipt from defendant to his decedent for money casts on defendant the burden of proving its repayment.

3. Under Civ. Code, § 1823, providing that a depositary shall not be bound for the delivery of a deposit until demand made, a demand by an administrator on a depositary for the effects of his decedent, coupled with a statement that he held a paper calling for a certain sum of money, is a sufficient demand for the money.

Commissioners' decision. Department 1. Appeal from superior court, Plumas county; G. G. Clough, Judge.

Action by E. Northrop, administrator of the estate of Mathias Thompson, deceased, against William Knott. Judgment for plaintiff, and defendant appeals. Affirmed.

C. E. McLaughlin, for appellant. Goodwin & Webb, for respondent.

HAYNES, C. This action was brought to recover from the defendant \$720.37. The complaint contained two counts,—the first for money loaned; and the second was for the same amount alleged to have been deposited with the defendant for safe-keeping, to be repaid upon demand. The answer to the first count denied

that he borrowed the said or any sum of money from plaintiff's intestate, or that he was indebted to said estate for any sum whatever; and in answer to the second count the defendant denied that plaintiff's intestate, or any one for him, deposited with or delivered to defendant for safe-keeping, or for any purpose whatever, or at all, said or any sum of money whatever, and also denied the alleged indebtedness. The cause was tried by the court without a jury, and the findings were to the effect that the money in question was deposited with the defendant for safe-keeping, to be returned upon demand; that plaintiff demanded it, and that defendant failed and refused to repay the same, or any part of it, and that the whole sum remained unpaid. Some exceptions were taken by the defendant to rulings upon the admission of evidence, and it is also contended that the findings are not justified by the evidence.

J. W. Denton, called for the plaintiff, testified, in substance, that about the last of October, or the first of November, 1891, he went to the defendant for a loan of \$500; "the defendant said Mr. Peterson had money with him that he could loan me, but that he would write Peterson about it;" that defendant went away in a few days, and he never saw him about the money afterwards.

The plaintiff testified, in substance, that on December 13, 1892, he met the defendant, and told him that he was administrator, and asked him to deliver the effects of Thompson, alias Peterson, to him. "I told him I had a statement calling for money. He said he had [had] money on deposit there of Thompson's, but he did not have any then; that he could explain in regard to the money, and what became of it; but he did not do so. He said he used some of Peterson's money to loan, and was to have one-half the interest. He did not pay me any money. I told him I had a statement (a document. I could not describe the document) calling for so much money." The two notes delivered to the plaintiff by defendant, above mentioned, were shown to the witness, and identified by him. The first was a note made by M. J. Noee, October 31, 1891, at one year, for the sum of \$168. The second note was made by W. P. Sutton, June 15, 1892, at 18 months, for \$250. The witness further testified that defendant told him these notes belonged to Peterson. The receipt spoken of, and which was received in evidence against defendant's objection, is as follows:

"Mohawk, May 29, 1892.

"Received from Mathias Thompson seven hundred and twenty dollars 37 cents. One note Mr. Michel Nayo 160 and note W. P. Sutton 250

1130.37

"Wm. Knott

1337."

Plaintiff also testified to other conversations with the defendant, and added "that at all these conversations I had with him he stated to me that he had no money belonging to the estate, and did not owe the estate anything." The re-

ceipt copied above was not shown to the defendant at any of these conversations.

At the conclusion of the evidence on behalf of the plaintiff the defendant moved for a nonsuit, upon the ground that it was not proven that said or any sum of money was ever deposited with or loaned to the defendant, or that, if so deposited or loaned, it had not been repaid. The nonsuit was denied, and the cause was submitted upon the evidence introduced by the plaintiff.

Defendant's objection to the admission of the receipt in evidence was not well taken. It was, at the least, *prima facie* evidence that the defendant had received from plaintiff's intestate the amount of money therein expressed, and, unexplained and unimpeached, was conclusive evidence of that fact, and the receipt of the money by the defendant was a necessary step in establishing plaintiff's cause of action. The execution of the receipt by the defendant was admitted, and, even if the purpose for which the money was delivered to defendant was essential to its admissibility, persuasive evidence that it was delivered as a deposit had been given. In considering the sufficiency of the evidence to justify the finding that the money was received by the defendant as a deposit, it is not necessary to decide what inference should be drawn from the unexplained acknowledgment of the receipt of the money. Such acknowledgment would appear to be equally consistent with a payment, a loan, or a deposit; and hence the purpose for which the money was delivered and received may be shown by parol or other competent evidence, and for this purpose the admissions of the defendant testified to by the plaintiff, in the absence of all contradiction or explanation, were quite sufficient to justify the finding that the money in question was received by the defendant on deposit, and not as a loan, or in payment of a debt. The defendant was a competent witness as to conversations or transactions between himself and the plaintiff, and therefore the plaintiff's testimony as to defendant's statements must be taken as true, the defendant having declined to testify. The acknowledgment that he had had money on deposit, that he had used some of Thompson's money to loan it, and to receive one-half the interest, would certainly tend to prove that the money was not delivered to him in payment of a debt, and was delivered to him as a loan or deposit.

But it is contended by appellant that there is no evidence to sustain the finding that the deposit had not been repaid. This contention cannot be sustained. The receipt, having been given for money deposited, was evidence of a liability on the part of the defendant to the depositor, and, upon repayment of the money, he was entitled to a surrender of the receipt, or, if the receipt embraced other things, as promissory notes, for safe-keeping, he was entitled to have the return of the money indorsed upon it; and the possession of this evidence of liability by Thompson and his administrator, like the possession of a promissory note by the payee after maturity, is evidence of its nonpayment. It is true, the defendant, in his conversation with

plaintiff, denied that he had the money then, or was indebted to the estate, but he did admit that he had had money belonging to Thompson, and said he could explain what became of it. In all this there was no hint of payment, and the most that can be claimed for it in defendant's favor is that the money had been lost under circumstances which relieved him from liability. No such defense was pleaded, nor was there any explanation as to what the circumstances were, nor any offer to prove such defense; but he stood upon the explicit denial in his answer that he had ever received the money for any purpose, or at all. We think the demand made by plaintiff on December 13, 1892, was sufficient. He was asked to deliver the effects of Thompson to the plaintiff as administrator. In part compliance with this demand, he delivered two promissory notes assumed by the plaintiff to be the ones mentioned in the receipt. He was then told by the plaintiff that he had "a statement or document calling for so much money," and to this statement of the plaintiff the defendant made the explanation hereinbefore stated and commented upon, that he had had money on deposit, but did not have any then, and that he could explain what became of it, but did not do so. This reference to the receipt or document, which it is conceded was written and signed by the defendant, with the general demand for all the effects in defendant's hands belonging to the estate, we think is a sufficient compliance with section 1823 of the Civil Code.

Appellant also specifies several alleged errors in rulings upon the admission of evidence. The more important of these relates to the introduction in evidence of two promissory notes claimed by the plaintiff to be those mentioned in defendant's receipt, and from which it is argued by respondent that, the notes mentioned in the same receipt with the money having been admittedly a deposit with the defendant, the inference is that the money was also a deposit. Without discussing the particular points of objection to the identity of these notes with those mentioned in the receipt, it is sufficient to say that we think they were properly admitted; but, if it be conceded that their admission in evidence was error, inasmuch as we have already held that, upon the evidence hereinbefore stated, without referring to these notes, the findings were sustained, the defendant was not prejudiced by their admission. The objection to the question by plaintiff to the witness J. C. Knickrem, as to whether the deceased had money deposited in his safe in the year 1891, should have been sustained; but, for the reason above stated, the judgment should not be reversed on that ground. It may also be conceded that a portion of the testimony of Charles Hegard, in which he testified to statements made by the deceased to him in 1892, the day before his death, to the effect that he (Thompson) had two notes and seven hundred and some odd dollars in money at Mr. Knott's, was incompetent evidence; the defendant not being present. So far as the testimony of this witness went to the identification of the receipt which had been left in his hands for

several months, it was competent; but no part of this testimony was objected to by the defendant, nor was any motion made to strike it out. And, under these circumstances, the appellant is not entitled to a reversal of the judgment upon that ground. The judgment appealed from should be affirmed.

We concur: BELCHER, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

PEOPLE v. BARKER. (Cr. 162.)

(Supreme Court of California. Oct. 28, 1896.)

CRIMINAL LAW — CORROBORATING TESTIMONY — SUFFICIENCY — PROVINCE OF JURY.

1. On trial for robbery, testimony of the prosecuting witness tended to identify defendant as one of his assailants. Several other witnesses testified that they had seen the defendant, in company with his accomplice, near the scene of the robbery but a few moments prior to its commission. *Held*, that the evidence was a sufficient corroboration of the testimony of the accomplice connecting defendant with the crime to warrant a conviction.

2. In a criminal case the question of the weight and sufficiency of corroborating testimony is for the jury.

Department 1. Appeal from superior court, San Bernardino county; John L. Campbell, Judge.

Thomas Barker was convicted of robbery, and appeals. Affirmed.

Paris & Allison, for appellant. Atty. Gen. Fitzgerald, for the People.

VAN FLEET, J. Defendant is convicted of robbery, and appeals from the judgment and an order denying him a new trial.

1. It was objected that there was no evidence tending to connect defendant with the commission of the crime, other than the uncorroborated statements of an accomplice. We regard the evidence as quite sufficient to satisfy the statute as to the degree of corroboration required. The testimony of Leary, the prosecuting witness, while not positive on the point, nevertheless tended directly to identify defendant as one of his assailants, while that of several other witnesses placed defendant, in the company of his accomplice, in the near vicinity of the scene of the robbery at a very few minutes prior to the commission of the offense. This was evidence tending, independently of that of the accomplice, to connect defendant with the commission of the offense, and that is all that is required. The strength or credibility of the corroborating evidence is for the jury. It "need not be strong. It is sufficient if it tends to connect the defendant with the commission of the offense, though if it stood alone it would be entitled to but little weight." *People v. McLean*, 84 Cal. 480, 24 Pac. 32. Nor need it extend to every fact and detail covered by the statements of the accom-

plíce. *People v. Kunz*, 73 Cal. 818, 14 Pac. 836; *People v. Cloonan*, 50 Cal. 449.

2. The instruction as to the degree of corroboration required, which is objected to, is in full accord with the principles above stated, and correctly states the law. There is no error in the record, and the judgment and order are affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

PEOPLE v. HARRIS. (Cr. 150.)

(Supreme Court of California. Oct. 22, 1896.)

BURGLARY — PROOF OF CORPUS DELICTI — STATEMENTS OF DEFENDANT — EVIDENCE.

1. On a trial for burglary the prosecuting witness testified that he lived in a certain house; that he had there certain articles of personal property; that a part of said articles were in the house at 6 o'clock p. m. December 18, 1895; that about 9 o'clock p. m. of the same day A. and H., who were police officers, came to witness' house, having defendant with them, and also the said articles of personal property belonging to witness. The officers testified that between 8 and 9 o'clock p. m. of the same day they saw defendant some distance away from the house of the prosecuting witness, having with him a tin box containing opium dope, and other articles identified by the prosecuting witness. Held, that the testimony was sufficient to prove the corpus delicti, and hence to justify the admission of statements made by defendant to the officers.

2. The fact that the witnesses mentioned the opium dust, a razor, and other specific articles which the prosecuting witness recognized as his property, was sufficient to show that defendant had possession of the property.

3. The question asked the prosecuting witness, whether, when the officers and defendant were at his house, either of them said anything to him about the things that were stolen, to which the witness answered: "He [defendant] didn't say anything, but the two men asked me if those things were mine. There was nothing else said about the things,"—was without prejudice.

Department 2. Appeal from superior court, Los Angeles county; B. N. Smith, Judge.

George Harris was convicted of burglary, and appeals. Affirmed.

R. A. Ling, for appellant. Atty. Gen. Fitzgerald, for the People.

McFARLAND, J. The defendant was convicted of burglary, the charge being that he feloniously, burglariously, etc., entered the house of one Lou Sam with intent to commit larceny. He appeals from the judgment, and also from an order denying a new trial. The only point made by appellant for a reversal is that the trial court erred in allowing the witnesses Auble and Hawley to testify as to certain statements made by the appellant, the contention being that there was no sufficient proof of the corpus delicti independently of said statements. But the witness Lou Sam had testified that he lived in a certain house; that he

said house; that a part at least of said articles were in said house at 6 o'clock p. m. of the 18th day of December, 1895; that afterwards, about 9 o'clock p. m. of the same day, the said witnesses Auble and Hawley, who were police officers, came to his (the witness Lou Sam's) house, having the appellant with them, and also the said articles of personal property belonging to said Lou Sam. The testimony of said witnesses Auble and Hawley, to which the objection was made, was substantially this: That between 8 and 9 o'clock p. m. of the same day they saw the appellant some distance away from the house of said Lou Sam; that said appellant had with him a tin box containing opium dope or "yen see"; that said witnesses asked said appellant where he got the said box, whereupon the appellant handed the said box, and also some other things, called by said witnesses "the rest of the stuff," to said witness Hawley; that appellant told said witnesses that he had got the things in a laundry, and would show them the place; that he took said witnesses to the house of said Lou Sam, and, in the language of one of said witnesses, "went right to the bunk and showed us where he got the stuff." He said he took it because he was hard up, and expected to get a good price for it in Chinatown. We think that the testimony of the witness Lou Sam, and also the facts testified to by the witnesses Auble and Hawley, independent of what appellant said, were sufficient, within the rule of the most extreme cases on the subject, to so show the corpus delicti as to justify the admission of the said statements of the appellant. Appellant's counsel contend that the evidence does not show, or even tend to show, that the appellant was ever in the possession of the articles alleged to have been stolen from the witness Lou Sam. This contention, however, cannot be maintained. The prosecution was no doubt somewhat careless in not asking the witnesses more particularly about the specific articles stolen, or in not seeing that the testimony was fully put into the bill of exceptions. It is clear enough, however, that the articles taken from the appellant by the said officers were recognized by the witness Lou Sam as his missing property; and a razor, the opium dust, and some other articles were specifically mentioned by the witnesses. There was also an objection made to the question asked the witness Lou Sam, whether when the said two police officers and the appellant were present at his house either of them said anything to him about the things that were stolen; but the answer of the witness was of no consequence, he merely saying: "He, the defendant, didn't say anything, but the two men asked me if those things were mine. There was nothing else said about the things." The judgment and order appealed from are affirmed.

We concur: HENSHAW, J.; TEMPLE, J.

STETSON v. BRIGGS et al. (L. A. 177.) 1
(Supreme Court of California. Oct. 10, 1896.)

LEASE—EXECUTION—PLEADING—AUTHORITY OF
AGENT.

1. An agent with authority only to collect rents cannot bind his principal by accepting as payment a credit on a personal indebtedness of the agent to the tenant.

2. An averment in a complaint of the execution of a lease by plaintiff to defendants is denied by the averment of the answer that plaintiff, having a lease, signed by him, and naming defendants as lessees, requested defendants, who did not want to lease the property, to sign the lease as lessees, and then assign it to another person, to avoid the making out of a new lease, and that they so signed it as an accommodation, but it was never delivered to them, and they never entered on the property.

Commissioners' decision. Department 1. Appeal from superior court, Kern county; A. R. Conklin, Judge.

Action by Edward Gray Stetson against T. L. Briggs and others. Judgment for defendants. Plaintiff appeals. Reversed in part.

G. C. Cowgill and Edw. Gray Stetson, for appellant. J. W. Ahern and H. L. Packard, for respondents.

BELCHER, C. The plaintiff brought this action to recover the sum of \$375, alleged, in two separate counts, to be due for the second installments of rent on two leases executed by plaintiff to defendants on land in Kern county, one tract described as a certain section 20, and the other as the north half of a certain section 7. Copies of the leases are attached to the complaint, from which it appears that they were both executed April 2, 1892, for the term of one year from February 1, 1892, to February 1, 1893, and that the rent to be paid on the one first named was \$400 and the other \$375, one-half of each sum being made payable on July 1, 1892, and the other half on October 1, 1892. It further appears that each lease contained the following provision: "And the said parties of the second part do hereby promise and agree to pay to the said party of the first part the said rent herein reserved in the manner herein specified, and not to let or underlet the whole or any part of said premises; * * * and not to assign this lease without the written consent of the said party of the first part." Indorsed on the last-named lease was an assignment dated April 2, 1892, and signed by defendants, in these words: "For value received, we hereby assign, transfer, and set over to Lizzie K. Mastellar all our right, title, and interest in and to the within lease." And following this was another indorsement, signed by Mrs. Mastellar, in these words: "I hereby agree to fulfill the terms of the within lease." The defendants, by their answer, denied that there was any rent due plaintiff from them on the first lease set out, and alleged that they had fully performed all the covenants and conditions therein to be performed by them, and had paid to plaintiff all sums of money mentioned and due from them thereunder. And as to the

second lease the answer denies that the defendants are bound thereby, or that they, or either of them, are indebted to plaintiff in any sum of money, or at all, by reason of said lease. It then, as an affirmative defense, alleges, in effect, that on April 2, 1892, one Houghton, who was plaintiff's agent in Kern county to lease his lands and collect the rents, had in his hands the draft of the said lease, signed by plaintiff, and in which defendants were named as lessees; but that, as defendants did not want the land, Houghton requested them to sign the lease, and then assign it to Mrs. Mastellar, and thereby avoid making out a new lease, and sending it to San Francisco, to be signed by plaintiff, where plaintiff then had his place of business; and that defendants, to accommodate the plaintiff and Houghton, signed the lease as requested, but never entered on the land, or received any benefit therefrom, and that the lease was never delivered to them; and that plaintiff, in the month of July, 1892, knew of said assignment, and accepted from Mrs. Mastellar the first installment of rent, and ratified the acts of Houghton in so leasing said land. The case was tried before a jury, and the verdict and judgment were in favor of defendants. From that judgment the plaintiff has appealed, and has brought the case here on the judgment roll and a bill of exceptions, the appeal being taken within 60 days.

1. At the trial the theory of the plaintiff was that he had never received the second installment of rent on the section 20 lease,—\$200,—and that, if it was paid by defendants at all, it was by a credit of the amount on the personal indebtedness of Houghton to them, and hence did not constitute a payment. The evidence tended to support this theory, and there was very little, if any, conflict. It is true that Houghton was plaintiff's agent, with authority "to collect the rents under the leases involved in this action," but under this authority he had no right to accept anything but money in payment. *Mudgett v. Day*, 12 Cal. 139; *Taylor v. Robinson*, 14 Cal. 399; *Story, Ag.* (9th Ed.) § 98. In accordance with his theory, the plaintiff requested the court to give to the jury the following instructions, which were refused, and exceptions reserved: "(3) An agent who is only authorized to collect rents has no power to receive in payment anything but money. (4) If you believe that W. E. Houghton was only authorized to find tenants for plaintiff's land, and collect the rents under leases executed by plaintiff, and that the second installment of rent for section 20 was never paid except by a credit on Houghton's account with the defendants, such payment does not bind the plaintiff, nor discharge the defendants." These instructions stated the law applicable to the case correctly, and the refusal to give them was clearly error.

2. The theory of plaintiff as to the liability of defendants to pay the rent on the section 7 lease is that, when defendants signed the lease, they became obligated to pay the rent

1 Rehearing denied.

stipulated for, and that this obligation was not discharged or affected by the subsequent assignment, whether it was made with or without the consent of plaintiff. But no obligation on the part of defendants to pay the rent was created or arose until the lease was fully executed, and it was not so executed until it was signed and delivered. Code, Civ. Proc. § 1933. It is objected, however, that the averment in the complaint that the lease was "executed" by the plaintiff and defendants is not met by the affirmative averments in the answer as to the manner and circumstances under which it was signed by defendants, and its due execution must therefore be deemed admitted. But it is not essential that a traverse should be expressed in negative words. An averment in the answer of the contrary of what is alleged in the complaint is equivalent to a denial (*Perkins v. Brock*, 80 Cal. 320), and the averments in the answer here are, in our opinion, equivalent to a denial of the execution of the lease. If, therefore, the facts alleged in the answer be true, and there was evidence tending to sustain them, then the lease was never fully executed by defendants, and they never became obligated by it. This being so, it is unnecessary to consider the very elaborate argument of counsel for plaintiff. It follows that the judgment should be reversed as to the first cause of action for \$200, and should be affirmed as to the second cause of action for \$175.

We concur: BRITT, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed as to the first cause of action for \$200, and is affirmed as to the second cause of action for \$175.

GRANGER v. ROBINSON. (L. A. 251.)
(Supreme Court of California. Oct. 29, 1896.)

APPEAL—UNDERTAKING—SUFFICIENCY.

When appeals are taken from both a judgment and an order denying a new trial, a single undertaking is sufficient, provided both appeals are referred to therein and made the consideration for its execution.

Department 1. Appeal from superior court, Riverside county; J. S. Noyes, Judge.

Motion to dismiss appeal. Denied.

Harry Conner, for appellant. Walter Bordwell, for respondent.

PER CURIAM. Motion to dismiss an appeal upon the ground that the undertaking is insufficient. The appeal is from the judgment, and also from an order denying a new trial. The undertaking recites both of the appeals, and that in consideration thereof the appellant will pay all damages and costs which may be awarded against him on the appeal, or on the dismissal thereof, not exceeding \$300. It was held in *Chester v. Association*, 64 Cal. 42, 27 Pac. 1104,

that, upon an appeal from both the judgment and an order denying a new trial, only one undertaking for \$300 need be filed in order to give this court jurisdiction of the appeal. This was recognized as an exception to the general rule requiring a separate undertaking for each appeal, but the practice had been continued so long, and had become so well settled, that as was said in *Sharon v. Sharon*, 68 Cal. 326, 9 Pac. 187, the court very properly declined to disturb it. The sufficiency of this practice, as well as the fact that it is an exception to the general rule, has since been frequently recognized, and upheld by this court. *Corcoran v. Desmond*, 71 Cal. 103, 11 Pac. 815; *Williams v. Dennison*, 86 Cal. 430, 25 Pac. 244; *Ditch Co. v. Bachtold*, 109 Cal. 111, 41 Pac. 813. It is, however, necessary that the undertaking shall refer to each of the appeals as distinctly as if they were from separate orders requiring an undertaking for each. If the undertaking recites merely the appeal from the judgment, the appeal from the order denying a new trial will be dismissed. *Bornheimer v. Baldwin*, 38 Cal. 671; *Bernhard v. Beecher*, 74 Cal. 618, 16 Pac. 510; *Crew v. Diller*, 86 Cal. 554, 25 Pac. 66; *Paving Co. v. Bolton*, 89 Cal. 154, 26 Pac. 650. If, on the other hand, both of the appeals are referred to in the undertaking and made the consideration for its execution, a single undertaking for \$300 will be sufficient. In the present case the undertaking recites that the defendant has appealed from the judgment and also from the order denying a new trial, and is executed "in consideration of the premises and of such appeal." Under the rule of practice held in the above-cited cases to be well settled, this undertaking is sufficient. The motion is denied.

BAKER et al. v. SOUTHERN CALIFORNIA RY. CO. (L. A. 61.)

(Supreme Court of California. Oct. 10, 1896.)

STOCK-KILLING CASE—COMPLAINT—AMENDMENT—HARMLESS ERROR.

1. Allowing an amended complaint to be filed without notice is not ground for reversal, where, for aught that appears, it should have been allowed had notice been given.

2. The superior court, on transfer to it from justice court of a case as involving the question of title to or possession of land, may allow an amendment of the complaint, under Code Civ. Proc. § 838, providing that after the filing of the papers therein with the clerk the superior court shall have over the action the same jurisdiction as if it had been commenced therein.

3. The allegation in an amended complaint for killing of cattle by a train that defendant's railway "is" not fenced is not an allegation that it was not fenced at the time of the accident.

4. A complaint for killing cattle, alleging that they, without fault of plaintiff, strayed on the track and ground occupied by defendant's railway at a certain station; that defendant so negligently managed its train that it ran on and killed the cattle; that at the point where they were killed the railway was not fenced; and that at or near the place where the cattle were killed there is a highway crossing the railroad, and no bell was rung,—leaves it uncertain as to whether plaintiff's cause of action is founded on failure of defendant to fence at a point where it was its

duty to (Civ. Code, § 485), or on failure to ring at a crossing, or on other negligent management of its train

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by Amelia B. Baker and another against the Southern California Railway Company. Judgment for plaintiffs. Defendant appeals. Reversed.

W. J. Hunsaker, for appellant. Withington & Carter, for respondents.

HAYNES, C. This action was brought by the plaintiffs in justice court to recover the sum of \$130, the value of a cow and a steer alleged to have been killed by a train on defendant's road. An answer was filed in which it was alleged, among other things, that the determination of the action necessarily involved the question of title to or possession of real property; and said cause was accordingly certified to the superior court, under the provisions of section 838 of the Code of Civil Procedure. Thereafter, on the 22d day of January, 1895, an order was made by said superior court on motion of the plaintiffs, and without notice to the defendant, granting plaintiffs leave to file an amended complaint, and the complaint upon which this action was tried in said court was thereupon filed. Afterwards, on February 1, 1895, the defendant, upon notice duly given, moved the court to strike out said amended complaint, and to vacate the order under which the same was filed, basing said motion upon various grounds stated therein. This motion was denied, the defendant demurred to said amended complaint, the demurrer was overruled, and an answer filed. The cause was tried by the court without a jury, and findings and judgment were for the plaintiffs; and this appeal is from the judgment, and from an order denying defendant's motion for a new trial.

Respondents contend that the amount in controversy being less than \$300, and no question as to the title or possession of real estate being raised on appeal, this court is without jurisdiction, and that the appeal should be dismissed. Respondents moved this court in December last to dismiss this appeal upon the ground that it had no jurisdiction to entertain or consider it. That motion was denied, and the opinion of the court then rendered thereon is a sufficient answer to the contention of respondents now made herein. See 42 Pac. 975. The plaintiffs should have given notice of their motion for leave to file an amended complaint, but as the motion, for aught that appears in the record, should have been granted had due notice of the motion been given, respondents are not prejudiced. It is quite true, the jurisdiction of the superior court must appear on the face of the pleadings certified to it by the justice of the peace, and any amendment of the pleadings which would show that the justice had jurisdiction to try the case would doubtless justify the court in remand-

ing it; but the amended complaint in this case shows upon its face that the title or possession of real property was necessarily involved in the action, and therefore the jurisdiction of the superior court was not affected. We see no reason to limit the power of the superior court to permit amendments in any other respect to the same extent as it might do if the action had been commenced therein. Said transfer was made under section 838 of the Code of Civil Procedure, which provides, among other things, that, "from the time of filing such pleadings or transcript with the clerk, the superior court shall have over the action the same jurisdiction as if it had been commenced therein." The case of *City of Santa Cruz v. Santa Cruz R. Co.*, 56 Cal. 143, cited by appellant, is broadly distinguishable from this case, and does not conflict with what we have said touching the power of the superior court to permit an amended complaint to be filed. In that case, after it had been certified to the district court the defendant was permitted to withdraw his verified answer, which alleged that the legality of the license was necessarily involved in the case, and to demur to the complaint. This court held the withdrawal of the answer to be an abandonment of the only issue which gave the district court jurisdiction, and in that connection remarked, "The action should have been tried or determined in the district court upon the pleadings in the justice's court." The amendment made in this case did not eliminate the facts upon which the right to a transfer of the case to the superior court depended, and hence could not affect its jurisdiction. In *Arroyo Ditch & Water Co. v. Superior Court of Los Angeles County*, 92 Cal. 47, 28 Pac. 54, it was held that the jurisdiction exercised by the superior court under the provision of section 838 of the Code of Civil Procedure is original, and not appellate, and quoting from *City of Santa Cruz v. Santa Cruz R. Co.*, supra, said, "The superior court had jurisdiction only because the pleadings had before the justice, and filed with its clerk, presented the issue of the legality or the validity of the tax or impost." In this case the issue as to the possession of the plaintiff was as effectual to show jurisdiction in the superior court as the allegation of ownership, and was not such an amendment as affected its jurisdiction.

The defendant demurred to the amended complaint: First, for want of facts sufficient to constitute a cause of action; and, second, for uncertainty; and said demurrers were overruled. We think the demurrer should have been sustained. It is alleged in the fourth paragraph of the complaint that the cattle, "without the fault of plaintiffs or of either of them, casually strayed upon the track and ground occupied by the defendant's railway at Sorrento station." The fifth paragraph alleges "that defendant then and there, by its agents and servants, and not regarding its duty in that behalf, so carelessly and negligently ran

and managed its cars and locomotive that the same ran on and against the said cattle, and killed and destroyed the same," and proceeds to allege that the defendant then and there killed and destroyed said cattle and took and carried away the same, and converted said cattle to its own use. The sixth paragraph alleged "that at the point where said cattle were killed, taken, and carried away as aforesaid, defendant's railway is not fenced on either side thereof." The seventh paragraph alleges "that at and near the point where said cattle were taken and carried away as aforesaid there is a public road or highway transecting said defendant's said railway, and that at the time aforesaid when said cattle were killed, taken, and converted as herein stated, the said defendant did not ring, or cause to be rung, the bell attached to the defendant's said locomotive, at or near said public road or highway, or at the time of crossing the same." It will be observed that the complaint nowhere alleges that it was the duty of the defendant to fence its road at the place where the cattle were killed. We do not hold that, in a complaint which does not indicate that the cattle were killed at a place where the company would not be required to fence their track, it would be necessary for the plaintiff to allege such duty. Section 485 of the Civil Code provides that railway companies must make and maintain a good and sufficient fence on either or both sides of their track and property. The same section further provides that, where the railroad corporation pays to the owner of the land through or along which its road is located an agreed price for making and maintaining such fence, a railway company is relieved and exonerated from all claims for damages arising out of the killing or maiming any animals of persons who fail to construct and maintain such fence. The latter provision, generally speaking, must be pleaded by the defendant in defense of the action, as it will be assumed that it was the duty of the railroad company to have kept and maintained the fence where the injury occurred, unless something in the complaint indicates that at said point it was not their duty, under said provision of the Code, to fence their road. It is true, the section above mentioned does not make any exceptions as to stations or highway crossings; but the necessity of the case, as well as other provisions of the Code, show that the railroad company are not only under no obligation to fence their road at particular points, but have no right to do so,—as, for example, they cannot fence on the sides of their road across a public highway transecting it. Nor will it be presumed that all roads or avenues to a station are to be kept closed, or that the station or station grounds are to be fenced off, so as to prevent access thereto.

Under the allegations of the complaint that the cattle "strayed upon the track and ground occupied by the defendant's railway at Sorrento station," and that "at or near the point

where said cattle" were killed there is a public highway crossing the railroad, and that no bell was rung at said crossing, the inference or presumption is that at the place where the cattle strayed upon the road, or were killed, not only no duty rested upon the defendant to fence its road, but that it had no right or authority to fence it. Besides, the allegation in paragraph 6 "that defendant's railway is not fenced" is an allegation of a condition existing at the time the amended complaint was filed, which was nearly a year after the cattle were killed; and, for aught that appears, the railway may have been fenced at that time, though destroyed by fire or removed subsequently. It is true that cattle may be negligently killed or injured at a place where there is no duty or obligation on the part of the railway company to fence its track, and the company be liable therefor. In the complaint before us there is a general allegation of carelessness on the part of the defendant in managing its cars and locomotive, but there are also in the complaint two specifications of particulars in which it is alleged the defendant was negligent, or of facts which it is contended constitute negligence; the one being that the railway is not fenced, and the other that defendant did not ring, or cause to be rung, a bell at or near said public road or highway, or at the time of crossing it. One of these points was included in defendant's special demurrer, which we think should have been sustained, inasmuch as the complaint is uncertain as to whether plaintiffs' cause of action is founded upon the alleged negligent acts of the defendant in the management of its train, or upon the failure of the defendant to fence its track or right of way. If the defendant so negligently managed its train that it would have been liable for killing the cattle at a place where they were not required to fence the road, and it were so alleged, a cause of action would be stated; but, when the failure to fence or the failure to ring the bell are added as allegations of fact tending to show the liability of defendant, the complaint at once becomes uncertain. Besides, if the complaint be construed as alleging that the cattle were killed through the negligence of the appellant in managing its train at a place or point where it was not required to fence its track, the finding of the court would not be consistent with such allegation, since it is stated in the sixth finding that the killing of the cattle was due to the negligence of the defendant in failing to fence its tracks and in failing to ring its bell, and there is no finding of any other negligence on the part of the appellant. It may also be noted, in passing, that there is nothing to indicate that the property described in the fourth finding as that occupied by the plaintiffs is the property described in the complaint. The judgment and order appealed from should be reversed, with leave to the plaintiffs to amend their complaint if so advised.

We concur: SEARLS, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are reversed, with leave to the plaintiffs to amend their complaint if so advised.

DUNN v. LONG BEACH LAND & WATER CO. et al. (L. A. 94.)

(Supreme Court of California. Oct. 24, 1896.)

ACTION IN BEHALF OF CITY — RIGHT OF CITIZEN TO MAINTAIN.

1. A citizen and taxpayer of a city cannot maintain an action in behalf of the city against third persons unless the bringing of such action is a duty devolving on the authorities of the city, as to which they have no discretion, and which they have refused to perform.

2. An action cannot be maintained by a citizen to set aside a judgment against a city, quieting the title of a claimant to land alleged to have been dedicated to the public for street purposes, which judgment was rendered in pursuance of an agreement with the city authorities by which the city acquired other property in consideration of its making default; there being no offer to restore such property, and no allegation that the use of the alleged street by the public has been interfered with.

Department 2. Appeal from superior court, Los Angeles county; Waldo M. York, Judge.

Action by James C. Dunn against the Long Beach Land & Water Company, the Long Beach Development Company, and the city of Long Beach. Judgment for defendants on a demurrer to the complaint, and plaintiff appeals. Affirmed.

W. Pollard, Wells & Lee, and S. P. Mulford, for appellant. A. B. Hotchkiss and Silent & Campbell, for respondents.

McFARLAND, J. A demurrer to the complaint was sustained in the court below, and judgment entered for defendants; and plaintiff appeals from the judgment. The subject-matter of this action is certain premises constituting a street or passageway called "Ocean Park Avenue." The purpose of the action is to enjoin the defendants from making any claim to said premises under a certain judgment of the superior court entered on the 10th of March, 1889, in an action entitled "Long Beach Land & Water Company, Plaintiff, v. City of Long Beach, Defendant," numbered 10,455, and to have said judgment canceled; to have said premises decreed to be the property of the public, held by the city of Long Beach in trust for the public, and to have the title of said city to said premises quieted; to have it adjudged that neither of said defendants other than the city has any right, title, or interest in or to any portion of said premises; and to enjoin said defendants other than said city from asserting any claim whatever to said premises, or any part thereof, adverse to the city of Long Beach or this plaintiff. The plaintiff brings this suit entirely in his capacity as a resident of, and a property owner and taxpayer in, said city of Long Beach. The material averments of the complaint are briefly these: That, in 1882, J. and L. Bixby and

Thomas Flint, being the owners of a tract of land in which said Ocean Park avenue is now situated, caused the same to be surveyed and staked off, and caused a map to be made and filed in the county recorder's office showing that said tract was subdivided into lots, blocks, streets, lanes, avenues, and parks, and named said tract "Town of Willmore"; that, among other streets, avenues, etc., the said Ocean Park avenue was thus surveyed and staked off; and that, by these acts, the said avenue was dedicated for the use of the public. It was further averred that said town of Willmore was afterwards included in the territory of the city of Long Beach, and that said avenue has ever since been a public avenue by virtue of the dedication as aforesaid. It was further averred that in 1888 the said Long Beach Land & Water Company, defendant herein, without any right or title, asserted a claim as against the city of Long Beach to said avenue; that the board of trustees of said city of Long Beach entered into a conspiracy with said water company for the purpose of enabling the said company to acquire that portion which had been so dedicated; that, in pursuance of said conspiracy, it was agreed in the month of January, 1889, that said matter should be compromised by the said company conveying to the city certain lands and certain other streets and passageways, and the board of trustees agreeing that no defense would be made by the city to an action brought by said water company to quiet its title to said premises; that, in accordance with said compromise, the said water company brought an action, to wit, the said action No. 10,455, above referred to, and, the board of trustees making no defense (as it was understood they should not), judgment was entered in favor of said company, decreeing that said company was owner of said premises, and that the city had no property right or easement therein. It was further averred that said judgment was ultra vires and void, and, to avoid the plea of the statute of limitations, it is averred that "the facts set out in this complaint, setting forth the fraud, conspiracy, and collusion entered into by and between the Long Beach Land & Water Company and the majority of the board of trustees of the city of Long Beach," whereby said judgment was obtained, "became first known to and were not discovered by plaintiff till the month of April, 1894." This present action was not brought until February 18, 1896, more than five years after the entry of said judgment. It is not averred in terms that the plaintiff requested the present board of trustees to bring this action, and that they refused to do so; but it is averred that the city attorney of Long Beach did bring an action similar to the present one, and that he was ordered by the board of trustees to dismiss it, and to bring no further action of that character. It is averred that the defendant the Long Beach Development Company claims to have some interest in the premises, and that for that reason it is made a party to this suit, and it is prayed that said defendant be required to set up what-

ever claim it may have, and that the same may be adjudged to be invalid.

The demurrer is general, and also includes nearly all the special grounds of demurrer mentioned in the statute. We think that the demurrer ought to be sustained. There are a great many grounds of demurrer, such as estoppel, statute of limitations, insufficiency of description of the premises involved, want of offer to rescind and restore, ambiguity, uncertainty, etc., which we do not deem it necessary to discuss. We do not think that the complaint states facts sufficient to constitute a cause of action, or to justify the plaintiff in bringing it. It is no doubt, under the authorities, frequently difficult to determine whether or not in a given case a person merely in his capacity of citizen or taxpayer can maintain an action by which he seeks to control the administration of municipal government, and put himself in the place of public officers selected for the purpose of such administration. The cases cited by appellant are mostly actions brought by taxpayers directly against public officers to restrain them from increasing the burden of taxation by levying or enforcing taxes which could not be legally imposed. The rule is that the municipality, through its governing body, has control of the property and general supervision over the ordinary business of the corporation; and there would be utter confusion in such matters if every citizen and taxpayer had the general right to control the judgment of such body or usurp the office. Where the thing in question is within the discretion of such body to do or not to do, the general rule is that then neither by mandamus, quo warranto, nor other judicial proceeding can either the state or a private citizen question the action or nonaction of such body; nor in such cases can a private citizen rightfully undertake to do that which he thinks such body ought to do. It is only where performance of the thing requested is enjoined as a duty upon said governing body that such performance can be compelled, or that a private citizen can step into the place of such body and himself perform it. If, therefore, in the case at bar, it was not a duty enjoined upon the board of trustees of the city of Long Beach to bring an action similar to this present action brought by appellant, then we need not discuss the general subject of the right of private citizens to maintain actions concerning municipal affairs, which right is founded to a great extent upon necessity, and the want of any other proper party plaintiff; and the proposition that it was a duty enjoined upon said trustees to bring such an action cannot be maintained. In the first place, the main purpose of this action could not, under any view, be judicially accomplished; for it seeks to have the fee-simple title of the city to said avenue quieted, and the respondents enjoined from asserting any right or claim whatever

thereto; while it is clear from the complaint that the city or the public has, at best, only an easement in the premises, consisting of a right of way over it as a public thoroughfare. Then, again, it is averred that the judgment sought to be vacated is ultra vires and void; and, if that be so, it could never be enforced, and there is no averment that any one ever tried to enforce it. But waiving these points for the present, and assuming that said avenue was dedicated as claimed in 1882, there is no averment that the use of said avenue as a public thoroughfare has ever been interrupted by respondents, or any other person; no averments that respondents have put buildings upon it, or fenced or inclosed any part of it, or placed on it any impediments to travel, or obstructed in any way the enjoyment by appellant and the public of the alleged easement. On the other hand, it is expressly averred in the complaint "that ever since said dedication aforesaid, and for upward of twelve years last past, this plaintiff and other residents, citizens, and taxpayers of the city of Long Beach aforesaid have continued to use the said lands as and for a public park and avenue." Under these circumstances, the proposition that it is the duty of the present board of trustees to put the city into litigation by commencing the suit indicated by appellant, and that they have no discretion to refuse to do so, cannot be successfully maintained. In this present action the appellant seeks to have the alleged compromise and judgment of March, 1889, set aside, solely upon the ground of the want of power of the then trustees to make such compromise, not upon the ground that it was a bad bargain for the city. There is no averment which we can find in the complaint that the lands and public ways conveyed by the water company to the city were not more valuable to the city and the public than said Ocean Park avenue. And, in the event of a suit being brought by the city, would not it be compelled to restore said lands and ways to said water company? And would not other doubtful questions involving rights which the city now peacefully enjoys be opened up? As the matter now stands, the city and the public have the lands and ways granted by the said water company at the time of said alleged compromise, and also have ever since enjoyed, and now enjoy, the uninterrupted use of Ocean Park avenue itself. As long as the present circumstances continue, any alleged rights which respondents in the future might undertake to enforce would not be strengthened, but would rather be weakened by the lapse of time. It cannot be rightfully said, therefore, that the trustees now in office are not exercising a wise discretion by refusing, at the present time, to commence unnecessary and hazardous litigation. The judgment is affirmed.

We concur: HENSHAW, J.; TEMPLE, J.

GASTON v. GASTON. (No. 16,001.)¹
(Supreme Court of California. Oct. 14, 1896.)
JUDGMENT FOR ALIMONY — ENFORCEMENT — LIEB.

1. The jurisdiction of a court to award alimony to a wife on granting her a decree of divorce is not dependent on allegations in the complaint of the husband's ability.

2. A court has the power to make its judgment for the payment of alimony to a wife a lien on property of the husband, the provision of Civ. Code, § 140, authorizing it to require a husband to give security for the payment of alimony, or to appoint a receiver, not being an abridgment of its general equity powers.

3. It is not essential to the validity of a decree for the payment by a husband of a monthly allowance to his divorced wife for her maintenance that the husband should be the owner of either separate or community property from which such payment could be enforced.

4. A judgment for alimony, to be paid to a divorced wife monthly, is not within the provisions of Code Civ. Proc. § 681, limiting the right to the issuance of execution on a judgment to five years from the date of its entry.

Commissioners' decision. In bank. Appeal from superior court, Santa Clara county; W. G. Lorigan, Judge.

Action of divorce by Anna E. Gaston against Andrew A. Gaston. Defendant moved the court to vacate an order for the sale of property under a decree for alimony theretofore entered, and from the order denying such motion appeals. Affirmed.

H. V. Morehouse and W. A. Bowden, for appellant. John E. Richards (C. D. Wright, of counsel), for respondent.

BRITT, C. On November 22, 1884, plaintiff obtained a decree in the court below dissolving the bonds of matrimony previously subsisting between herself and defendant, awarding to her the custody of their minor child, setting over to her a specified portion of the community property, and requiring defendant to pay the sum of \$45 per month "during her lifetime, or during the time that she shall remain unmarried, as permanent alimony for her maintenance and support." It also declared a certain tract of land situated in the county, part of the community property set over to the defendant, to be charged with a lien in favor of plaintiff for securing such payments, and directed the issuance of an order of sale of such land in case the defendant should fail to make the said payments as required. The ground of the action was extreme cruelty practiced by defendant upon plaintiff. The complaint contained no allegations of defendant's ability to pay alimony, etc., though it alleged the existence of several parcels of community property. Defendant did not answer the complaint, but he appeared by attorney at the trial. He regularly paid the monthly alimony awarded to plaintiff until October, 1894, when he refused to make further payment. Plaintiff then obtained from the court an order for the sale of the defendant's land as provided in the decree. This was on November 16, 1894. A few days later the defendant moved the court to vacate said order of November 16th. The court refused, and

this appeal is from the order denying his motion.

It is argued that the portion of the judgment requiring the payment of \$45 per month for the support of plaintiff is void, because no statement of the husband's ability was contained in the complaint. The provision for support in such cases is ordinarily an incident of the judgment of divorce. The jurisdiction of the court (which is the extent of our concern at present) to make such provision is not dependent upon averments in the complaint of the husband's resources, any more than its power to dispose of the children depends upon an allegation of the relative fitness of the parents for their custody. Civ. Code, §§ 138, 139; *Ex parte Gordan*, 95 Cal. 374, 30 Pac. 561; 2 Bish. Mar., Div. & Sep. 1067 et seq. The statute provides that "the court may require the husband to give reasonable security for providing maintenance, * * * and may enforce the same by the appointment of a receiver, or by any other remedy applicable to the case." Civ. Code, § 140. Appellant claims that the effect of this section is to render void the portion of the judgment imposing a lien on his land; that the power of the court was limited to exacting security of him. We think the law is otherwise. With us an action for divorce is treated as a case in equity (*Wadsworth v. Wadsworth*, 81 Cal. 187, 22 Pac. 648); and the statute ought not to be construed as abridging the power exercised by courts having cognizance of matrimonial causes—commonly, though not always, as a branch of their chancery jurisdiction—to declare a lien for securing the award of support to the wife in such cases. Said the supreme court of Ohio of a judgment like the present, except that it omitted the provision for a lien: "That it is within the legitimate power of the court to make such decree a charge upon real estate we have no doubt, and it has been the practice so to do in cases where it was deemed proper." *Olin v. Hungerford*, 10 Ohio, 268. And such is the current of authority with but little dissent. *Wightman v. Wightman*, 45 Ill. 167; *O'Callaghan v. O'Callaghan*, 69 Ill. 552; *Holmes v. Holmes*, 29 N. J. Eq. 9, 12. Many other cases are collected in the reporter's note to *Stoy v. Stoy*, 41 N. J. Eq. 370, 2 Atl. 638, and 7 Atl. 625. Moreover, the divorce being upon the ground of extreme cruelty, the court was authorized to assign the community property to the parties in such proportion as, under the circumstances, seemed just. Civ. Code, § 140. Under this section it had the power to assign to the wife the absolute property in the land in question, and this included power to charge a lien on the same. *Foster v. Foster*, 56 Vt. 540; *Blankenship v. Blankenship*, 19 Kan. 159. These considerations sufficiently dispose also of the further view advanced by appellant that the lien expired, under section 671, Code Civ. Proc., in two years after the entry of the judgment. The lien does not derive its force from that section.

It is also insisted (as we understand the argument) that permanent alimony could not be

¹ Rehearing denied.

allowed to the wife, because, it is said, the husband then had neither separate nor community property to which resort could be had to enforce payment thereof. Civ. Code, § 141. We are not convinced that there was no such property. It was not essential, however, to warrant the decree for future maintenance, that he should then have owned property of either class. *Ex parte Spencer*, 83 Cal. 400, 23 Pac. 395; *Eldenmuller v. Eldenmuller*, 87 Cal. 364.

Next, it is said that, in virtue of the statute limiting the right to have execution on a judgment to the period of five years from the date of entry (Code Civ. Proc. § 691); and, that period having expired in this instance, "the judgment ceased to be of binding force, and process could not issue under it." But the court had power to make suitable allowance for support of the wife during her life (Civ. Code, § 139); and the allowance might take the form of pecuniary payments at successive monthly intervals (*Ex parte Spencer*, 83 Cal. 400, 23 Pac. 395). The right to execution for these does not accrue until they respectively fall due. The case is within the principle of *De Uprey v. De Uprey*, 23 Cal. 352. The order should be affirmed.

We concur: VANCLIEF, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order is affirmed.

JURGENSON v. DILLER. (Sac. 113.)¹
(Supreme Court of California. Oct. 10, 1896.)
MINING CLAIM—LIENS—AGENCY—CONSTRUCTION OF STATUTE.

1. Code Civ. Proc. § 1183, giving any person doing work on a mining claim, at the instance of the owner or his agent, a lien thereon for his work, and further providing that any "person having charge of any mining * * * shall be held to be the agent of the owner," does not entitle a laborer to a lien for work done for a person whom he knew not to be the owner, and not to be working the mine as representative of the owner.

2. Code Civ. Proc. § 1192, providing that every building or other improvement constructed upon any lands with the knowledge of the owner shall be held to have been constructed at his instance, and the land shall be lienable accordingly, unless he gives written notice as therein provided, does not cover the case of work done in removing ore from a mine, where it is not done in improvement of the property.

Commissioners' decision. Department 1. Appeal from superior court, Butte county; John C. Gray, Judge.

Action by Peter A. Jurgenson against R. Diller. Judgment for defendant, and plaintiff appeals. Affirmed.

William J. Herrin and John Guidery, for appellant. Park Henshaw, for respondent.

BRITT, C. Action to enforce an alleged lien for labor on certain mining claims, together called the "John Dix Mine." Defendant became the owner by purchase at a sale

of the ground on foreclosure of mortgage, and the sheriff's subsequent deed therefor, executed March 4, 1888. One Dix had previously been the owner, and after said March 4th he asked and obtained leave of defendant to remain on the premises, promising to take care of the same, and make no expense for defendant. Without authority from the latter Dix proceeded to work the mine, and hired plaintiff for this purpose. Under such employment, plaintiff performed the labor in question between November 1, 1888, and September 15, 1890, for which a balance remains unpaid.

It is provided in section 1183, Code Civ. Proc., among various other things relating to the liens of mechanics and others on real property, that any person performing labor on a mining claim shall have a lien thereon for his work, whether done at the instance of the owner or his agent; "and every contractor, subcontractor, architect, builder or other person having charge of any mining, * * * shall be held to be the agent of the owner for the purposes of this chapter." It is argued that, under this section, Dix was a person in charge of the mining, and hence was the agent of defendant in employing the plaintiff. But the presumption raised by the statute may be repelled. *Donohoe v. Mining Co.* (Cal.) 45 Pac. 250, 260. The evidence here tended to show that, when plaintiff did the work in question, he knew that Dix did not own the property, and was not working the mine as defendant's representative; that Dix employed plaintiff on his own account, paid him such wages as were paid at all, and at no time assumed to act on defendant's behalf. Obviously, plaintiff had no just reason to expect payment from defendant, and cannot charge a lien upon his mine on any theory of Dix's agency.

Section 1192, Code Civ. Proc., provides that every building or other improvement mentioned in section 1183, constructed upon any lands with the knowledge of the owner, shall be held to have been constructed at his instance, and his interest in the land shall be lienable accordingly, unless he shall, within three days after obtaining knowledge of the construction, alteration, or repair, post a written notice that he will not be responsible for the same, etc. Plaintiff urges that his claim of lien should be upheld, because, he says, defendant, having the knowledge mentioned in this section, yet failed to post such notice. That the notice was not posted is undisputed; and plaintiff testified at the trial that on a single occasion, in the year 1888, defendant was at the mine, and then saw him, plaintiff, and another man working there, "drifting in a tunnel." It was said by the court in *Williams v. Association*, 66 Cal. 200, 5 Pac. 90, that the language of said section 1192, "which treats of buildings and improvements, and of knowledge of the construction, etc., would hardly cover a case like the one now before us." That action, like the present, was prosecuted for the enforcement of a lien for

¹ Rehearing denied.

work done on or in a mine; and, though the observation of the court we have quoted was unnecessary to the decision there, we think it correctly stated the law. "Drifting in a tunnel" (the only work in which, so far as appears, defendant knew plaintiff to be engaged) means, as we understand the mining phrase, taking earth, gravel, or ore from ground made accessible by means of the tunnel; is not synonymous with "running a tunnel"; and is not the construction, alteration, or repair of any building or improvement on or in a mine,—the knowledge of which must be brought home to the owner before any duty becomes incumbent upon him under said section 1192. This construction of the statute is not intrinsically unjust. It is equitable to require the owner who sees going forward an unauthorized building or other beneficial improvement upon his property to give notice that he will not be responsible therefor (*Avery v. Clark*, 87 Cal. 628, 25 Pac. 821); but this consideration fails when the work consists in a subtractive process,—the removal of the very corpus of the property; as well require one who sees a trespasser cutting his timber to post notice of his nonliability, under penalty of having his land subjected to a lien for the labor. The judgment and order denying plaintiff's motion for a new trial should be affirmed.

We concur: **BELOHER, C.; SEARLS, C.**

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order denying plaintiff's motion for a new trial are affirmed.

PEOPLE v. ARMSTRONG. (Cr. 132.)
(Supreme Court of California. Oct. 22, 1896.)
LARCENY—EVIDENCE OF ACCOMPLICE—CORROBORATION.

1. On a trial for larceny, where the thing stolen is described in the information as the property of "Sam Sisler," and the evidence shows that the owner's full given name is "Samuel," there is no material variance.

2. On a trial for larceny the jury were charged that under Pen. Code, § 1111, a conviction could not be had on the uncorroborated evidence of an accomplice, and later that, "if you are satisfied beyond a reasonable doubt that defendant is guilty, * * * it will be your duty to return a verdict to that effect." *Held*, that the instructions informed the jury that evidence corroborative of that of the accomplice was indispensable to conviction.

3. On a trial for larceny the evidence of an accomplice incriminated defendant in the theft of a horse, two bridles, and a saddle, which were taken by the accomplices to M. county. There was other evidence that defendant then went to Y. county, where he was arrested, having then in his possession one of the bridles stolen with the horse; that he expressed astonishment at being overtaken, and declared that if he had not been surprised he would have resisted arrest. *Held*, that the facts tended to corroborate the testimony of the accomplice that the horse was stolen as the result of a conspiracy between defendant and the witness.

4. On a trial for a larceny, where the flight of defendant, as a corroborating circumstance, might

have been caused by an apprehension of arrest for a breach of the peace, the circumstance is for the jury, who are not bound to attribute the consciousness of guilt indicated by flight to one disposing cause rather than the other.

Commissioners' decision. Department 2. Appeal from superior court, Tulare county; W. A. Gray, Judge.

Claude Armstrong was convicted of larceny, and appeals from the judgment of conviction and from an order denying him a new trial. Affirmed.

Lamberson & Middlecoff, for appellant. Atty. Gen. Fitzgerald, for the People.

BRITT, C. 1. On the night of July 23, 1895, a horse, two bridles, and a saddle were stolen from the premises of the brothers Sisler in Tulare county. Defendant was convicted of the theft of the horse under an information in which the animal was described as the "property of George P. Sisler and Sam Sisler." The evidence showed that "Samuel" was the full given name of the person called "Sam Sisler" in the information, though he was commonly known by the latter designation in the community where he lived. Appellant contends that here was a case of fatal variance between allegation and proof. The objection is untenable. *People v. Leong Quong*, 60 Cal. 107; *People v. Smith* (Cal.) 44 Pac. 668.

2. Testimony inculpatory of defendant was given at the trial by one Barlow, who confessedly was an accomplice in the offense charged. The court instructed the jury, in the language of section 1111, Pen. Code, that a conviction cannot be had on the testimony of an accomplice unless he is corroborated by other evidence which in itself tends to connect the defendant with the commission of the offense, etc. Among other instructions, it also gave the following: "If you are satisfied beyond a reasonable doubt that the defendant is guilty of the crime charged in the information, it will be your duty to return a verdict to that effect." Appellant argues that the jury might have inferred from this instruction that they could be satisfied of defendant's guilt by the testimony of Barlow alone. But the court had informed them that evidence corroborative of that of the accomplice was indispensable to conviction, and it must be assumed that this caution was held in mind when the jury came to consider whether defendant was guilty beyond a reasonable doubt. The charge was to be taken as a whole, and it was not necessary that each paragraph should contain all the conditions and limitations expressed in the others. *People v. Morine*, 61 Cal. 367, and cases cited; *People v. Leonard*, 106 Cal. 302, 314, 39 Pac. 617, 620.

3. It is further contended that there was no evidence corroborative of Barlow and tending to connect defendant with the commission of the offense. It appeared that defendant and Barlow were two of a trio of intimates, the third member being one Morgan. According to defendant's own statements and ad-

missions at the trial, Barlow and Morgan "got the horse" in the nighttime,—in what manner defendant claimed not to know,—while he waited for them at an appointed meeting place. He recognized the horse as belonging to Sisler. The three surreptitiously fled together from the vicinity of the larceny, and by a most circuitous route, covering seven or eight hundred miles, reached the county of Madara; the horse—ridden, it seems, by Morgan—being taken with the party. There was further evidence, independent of that of Barlow, that defendant next went north to Yolo county, where he was arrested on the present charge, having then in his possession one of the bridles which was stolen with the horse. He expressed astonishment at being overtaken after the efforts he had made to evade pursuit, and declared that if he had not been surprised he would have resisted capture, even to the killing of the arresting officer. We think the facts here stated tended strongly to corroborate the testimony of Barlow to the effect that the horse was stolen as the result of a conspiracy for that purpose between himself, Morgan and defendant; in which case it was not important whether defendant or Barlow—as the latter claimed—was the person who tarried at the common rendezvous while the other conspirators led the animal from its owners' corral. True, there was evidence to show that before the theft of the horse the defendant was, as he put it, "taking precautions to avoid running into an officer," being apprehensive of arrest for some breach of the peace, and his flight might have been ascribed to such apprehension. But this was a circumstance for the jury. They were not bound to attribute the consciousness of guilt indicated by flight to one disposing cause rather than the other. The evidence warranted the verdict. See *People v. Cleveland*, 49 Cal. 577; *People v. Rolfe*, 61 Cal. 540; *People v. Hong Tong*, 85 Cal. 171, 24 Pac. 728. The judgment and order denying a new trial should be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order denying a new trial are affirmed.

PEOPLE v. MAIN. (Cr. 192.)

(Supreme Court of California. Oct. 29, 1896.)

LARCENY—EVIDENCE OF ACCOMPLICE—CORROBORATION—INFORMATION—VARIANCE.

1. On trial for larceny, an accomplice testified that he drove with defendant to a slaughterhouse, and remained in the car while defendant entered the house, and took therefrom a butchered sheep and hog, which they carried back to the house in which they lived. There was no other evidence which tended to connect defendant with the offense, or to corroborate the testimony of the accomplice. *Held* that, under Pen. Code, § 1111, which requires a corroboration of an accomplice's testimony, the evidence was insufficient to convict defendant.

2. On trial for larceny, the information stated that the property was stolen from "the slaughterhouse of A. Zimmermann and L. Deffner, co-partners, situated about two miles east of the town of St. Helena." The evidence showed that the firm was composed of John Zimmermann and L. Deffner, but that there was no other butcher in that neighborhood by the name of Zimmermann, and no other slaughterhouse belonging to or used by the firm of Zimmermann & Deffner within seven miles of St. Helena. *Held*, that the variance was immaterial.

Department 1. Appeal from superior court, Napa county; E. D. Ham, Judge.

One Main was convicted of burglary, and appeals from the judgment of conviction and the order denying him a new trial. Reversed.

Geo. E. Colwell, for appellant. Atty. Gen. Fitzgerald, for the People.

HARRISON, J. The defendant was convicted of burglary in the first degree, in entering a slaughterhouse and stealing therefrom a sheep and a hog that had been killed, for which he was sentenced to imprisonment for seven years in the state prison.

The only evidence before the jury connecting the defendant with the overt act was that of one Hanson, against whom an information had been filed charging him with burglary committed at the same time and place. After he had been called as a witness he refused to testify upon the ground that his testimony would tend to convict him of a felony, and thereupon the district attorney dismissed the information against him. He then testified that on the 7th of April, 1896, he and certain other persons were living at Mrs. Moore's, near St. Helena, and that he and one of those persons, together with the defendant, drove along the county road in a cart to the slaughterhouse in question, and that the defendant remained in the cart while he and the other person entered the slaughterhouse, and took therefrom a sheep and a hog, which they then carried back to Mrs. Moore's. There was no other evidence which tended to connect the defendant with the commission of the offense, or to corroborate the testimony of this accomplice. Mrs. Moore testified that, after she went to bed, she heard some of the boys go out, but did not know who went out; nor was there any testimony, other than that of Hanson, tending to show that the defendant even knew that the hog and sheep had been taken from the slaughterhouse until after they had been brought to Mrs. Moore's house, when, awakened by the noise, he came out of his room, and saw them lying on the table. Several of the witnesses testified, and there was no evidence to the contrary, that he went to bed early in the evening, and remained there until awakened, as above stated. The testimony was insufficient to justify the jury in convicting the defendant. Pen. Code, § 1111; *People v. Thompson*, 50 Cal. 480; *People v. Koenig*, 80 Cal. 574, 34 Pac. 238; *People v. Smith*, 98 Cal. 218, 33 Pac. 58. Aside from the testimony of the accomplice, there was absolutely no evidence

on which to found even a suspicion of his guilt.

The variance between the ownership of the slaughterhouse, as charged in the information and as shown at the trial, was immaterial. The information stated that it was "the slaughterhouse of A. Zimmermann and L. Deffner, co-partners, situated about two miles east of the town of St. Helena, in the county and state aforesaid." At the trial it was shown to be the slaughterhouse of John Zimmermann and L. Deffner; but it was also shown that there was no other butcher in that neighborhood by the name of Zimmermann and no other slaughterhouse belonging to or used by a firm of Zimmermann & Deffner, within a radius of seven miles of St. Helena. The discrepancy in this averment of ownership could not mislead the defendant, or prejudice him in his defense. *People v. Edwards*, 59 Cal. 359.

The judgment and order denying a new trial are reversed, and a new trial granted.

We concur: VAN FLEET, J.; GAROUTTE, J.

PEOPLE v. LAURINTZ. (Cr. 188.)

(Supreme Court of California. Oct. 29, 1896.)
RAPE—ASSAULT WITH INTENT—CONSENT—GIRL UNDER AGE OF CONSENT.

A defendant may be convicted of an assault with intent to commit a rape on the person of a girl under the age of consent, though she in fact consented to the assault, her incapacity under the statute extending to the act and all its incidents.

Department 1. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

One Laurintz was convicted of an assault with intent to commit rape, and appeals. Affirmed.

El. S. Salomon, L. O. Pistolesi, and J. A. Stephens, for appellant. Atty. Gen. Fitzgerald, for the People.

VAN FLEET, J. The sole question in this case is whether a defendant can be legally convicted of an assault with intent to commit rape upon the person of a female under the age of consent, where the latter in fact consents to the defendant's act. This same question was before the court in the recent case of *People v. Verdegren*, 106 Cal. 211, 89 Pac. 607, where the reasoning and doctrine of the cases now relied upon by defendant was considered and rejected, and where it was held (following *People v. Gordon*, 70 Cal. 467, 11 Pac. 762) that, under our statute, which makes a female under a certain age incapable of consenting to an act of sexual intercourse, and making such act rape regardless of such consent, a girl under that age is equally incapable in law of consenting to an assault committed with the intent to have such intercourse; that whether the girl in fact consents to or resists such an assault is immaterial. In either event the defendant is

guilty. It is there said: "It is the declared policy of our law, as expressed in the statute, that any female under the age there fixed shall be incapable of consenting to the act of sexual intercourse, and that one committing the act with a girl within that age shall be guilty of rape, notwithstanding he obtain her actual consent. The obvious purpose of this is the protection of society by protecting from violation the virtue of young and unsophisticated girls. To hold that one of this class, although incapable of consenting to sexual commerce, could nevertheless give her assent to an assault upon her person made for the express purpose of accomplishing the sexual act, would be to largely emasculate the statute, and defeat in great part its beneficent object. It is the insidious approach and vile tampering with their persons that primarily undermines the virtue of young girls, and eventually destroys it; and the prevention of this, as much as the principal act, must undoubtedly have been the intent of the legislature. The incapacity extends to the act and all its incidents." The evidence in this record clearly makes a case against the defendant within the principles there announced, and the instructions of the court are in exact accord therewith. As we are not disposed to depart from the construction there given our statute, we must hold that the court below did not err in its rulings. Judgment and order affirmed.

We concur: GAROUTTE, J.; HARRISON, J.

EPPINGER et al. v. KENDRICK. (Sac. 46.)

(Supreme Court of California. Oct. 28, 1896.)

BILLS AND NOTES—PLEADING—SPECIAL DEFENSES—SUFFICIENCY OF ALLEGATIONS—INCONSISTENT DEFENSES—SUFFICIENCY OF EVIDENCE—PRINCIPAL AND SURETY—LIABILITY OF SURETY—RELEASE—EVIDENCE.

1. In an action on a note signed by defendant and one F. the defendant pleaded the general denial, and, as a special defense, that he had signed the note for the accommodation of plaintiffs only, and not as surety for F.; and, if found to be a surety, that F. had directed certain payments made by him to be applied on the note, which had not been done. *Held*, that a motion for judgment on the pleadings was properly refused.

2. An objection to evidence under such plea on the ground that it does not state facts constituting a defense was properly overruled.

3. An allegation in the answer that the note was executed at the request of one S., who was the manager and agent for plaintiffs, was sufficient as to the fact of agency under an objection to evidence.

4. Where two separate defenses, one of which is inconsistent, are pleaded together, such inconsistent defense cannot be construed as an admission to destroy the other.

5. In an action on a note signed by defendant and one F., which the defendant claimed was executed for the accommodation of the plaintiffs, and not as surety for F., the defendant testified that plaintiffs' agent had represented that they needed money; that F. was owing them, and that he wished defendant to go on F.'s note, so that they could use it as collateral; that F. did not make such request, and that defendant finally

consented as an accommodation to plaintiffs. Plaintiffs testified that their agent had requested F. to secure defendant as a surety; that F. had recently consummated a transaction with defendant in regard to a patent on which F. was to have a royalty, and that plaintiffs had suggested that F. turn over the royalty to defendant in order to secure him for becoming his surety, and that an agreement was in fact entered into under which defendant was to retain the royalty to the amount of the note, and pay the same to plaintiffs. Plaintiffs did not deny that they, and not F., had requested defendant to go on the note, nor did they deny that they represented to defendant that they wished his signature as collateral to enable them to raise money. *Held*, that the jury was justified in finding that defendant was an accommodation maker for the benefit of plaintiffs.

6. It appeared that the note had been renewed at different times, but there was nothing to show that any new consideration had passed between the parties. It also appeared that defendant had made payments on the note, which, however, he testified were made with money derived from the sale of grain belonging to F. It further appeared that in a letter agreeing to ship to plaintiffs a quantity of grain to be applied on the note defendant had asked that a new note be made, payable one year from date; that such request for extension was made in view of the stringency of the money market, and the fear that plaintiffs might fail, and the note pass into the hands of third parties, against whom he would have no defense. *Held*, that the transactions in connection with the renewal of the note and the payments made by defendant were not sufficient to render him liable as a surety.

7. In an action in a note signed by defendant and one F., which the defendant claimed was as to him an accommodation note, and that, moreover, if he was liable as surety, F. had deposited with plaintiffs grain, with directions that the proceeds should be applied to the note, which had not been done, it was not error to instruct the jury that, if defendant was in fact a surety upon the original note; that before the renewal of the note F. had placed in plaintiffs' hands grain sufficient to pay the original note, and requested plaintiffs to sell the same, and apply it on said note, but that they failed to do so, and without defendant's consent applied the proceeds to other uses,—they must find for the defendant.

8. A creditor obtained from his debtor a note representing part of an open account due, which note was signed by a third person as surety. The debtor deposited with the creditor a quantity of grain, directing that it be sold, and the proceeds applied on a note. The creditor, however, applied the proceeds to the open account. *Held*, that this was, in effect, a repayment to the principal, releasing the surety from liability to that extent.

9. In an action upon a note, where the defendant pleaded that he had signed the note for the accommodation of the plaintiffs, and not as surety for the real debtor, and testified to all the circumstances surrounding the transaction, he was then asked, "At the time of signing these renewal notes, what was your understanding as to the purpose of your signature thereto?" and was permitted to answer that, "It was to be used in place of the original note." *Held*, that the admission of the testimony was error without prejudice.

10. It was not reversible error to allow the defendant to testify as to whether there was any other or further consideration for the signing of the new notes than the original note previously given.

Commissioners' decision. In bank. Appeal from superior court, Glenn county; Frank Moody, Judge.

Action upon a promissory note, brought by Eppinger & Co. against J. K. Kendrick and M. P. Farnham. Farnham having failed to an-

swer, the action proceeded against Kendrick alone, and upon a judgment for the defendant plaintiffs appeal. Affirmed.

Benjamin F. Gels, K. E. Kelley, and Platt & Bayne, for appellants. Hurst & Hurst and C. L. Donohoe, for respondents.

HAYNES, C. This action was brought against M. P. Farnham and J. K. Kendrick upon two promissory notes, each dated August 19, 1891, payable one day after date, one for \$2,000, and the other for \$900, to the order of Eppinger & Co., upon which there was claimed to remain unpaid \$1,119.04 and interest. Farnham, having been adjudged an insolvent debtor, did not answer, and the action proceeded against Kendrick alone, whose answer consisted of a general denial, and a special defense, in which it was alleged that on September 12, 1887, Farnham was indebted to the plaintiffs in the sum of about \$4,000, and, at the request of Oscar C. Schultz, manager and agent for said plaintiffs in their mercantile business at Germantown, he (Kendrick) executed with Farnham a promissory note for \$2,000, payable to the order of the plaintiffs one day after date, with interest at the rate of 1 per cent. per month; that he executed the same upon the representation of said Schultz that plaintiffs needed money; that Farnham's note was not good as collateral security, and that his (Kendrick's) name would be used for no other purpose than to make the note good as collateral security at the bank, and that the notes in suit were given in renewal thereof; that he did not execute any of the notes at the request of Farnham, and that, as to him, they were without consideration. It was also alleged that in 1890 Farnham delivered to plaintiffs a quantity of wheat sufficient to have paid said note, with the request that it should be applied thereon, but that Schultz said that he wanted to use the note longer, and he would see Kendrick, and obtain his consent, but did not do so; that he received no consideration for the execution of any of the notes, and that Farnham did not request him to execute them. The jury returned a verdict for the defendant, and this appeal is from the judgment entered thereon, and from an order denying a new trial.

Plaintiffs' motion for judgment on the pleadings was properly denied. Whether the general denial was sufficient to prevent judgment in the absence of proof need not be considered.

Plaintiffs also objected to evidence under the special defense upon the ground that it does not state facts sufficient to constitute a defense. The "special defense," so called, really contains two special defenses: (1) That defendant was not Farnham's surety, but joined in the execution of the notes for the accommodation of the plaintiffs, to enable them to raise money upon them as collateral; and (2) that, if he were liable as surety, the principal maker had put in plaintiffs' hands sufficient wheat to pay them, and directed that the proceeds be applied upon the original note, and that they did not so apply

it. These defenses should have been separately pleaded, but no objection was taken by motion to require them to be separately stated, nor by special demurrer for ambiguity or uncertainty. Though defectively pleaded, the answer stated a defense, and the objection to evidence upon that ground was properly overruled. So, too, the objection that the agency of Schultz for the plaintiffs is not sufficiently alleged cannot be sustained. The answer in that regard is sufficient as against an objection to evidence, though defectively pleaded, whatever might have been held if it had been specially demurred to.

The question principally discussed by counsel goes to the sufficiency of the evidence to justify the verdict. The defendant testified that at the time the original note was executed (September 12, 1887) Mr. Schultz came to him, and said the plaintiffs needed money; that Farnham was owing them, and that he wanted him to go on Farnham's note so that they could use it as collateral; that Farnham did not request it; that defendant declined to execute it, but Schultz appealed to him, reminding him that he had accommodated him in many ways, that as a friend he wanted him to sign it, so he could use it as collateral, and he then agreed to do so, and that the notes in suit were renewals without any new agreement or consideration. Mr. Schultz testified, in relation to the making of the original note, as follows: "Mr. Eppinger had been up and saw that the account was very large, and said the account had to be reduced; told me to go out and see Farnham, which I did and told him what Mr. Eppinger said. Mr. Farnham said he could not pay at present, and stated he had consummated a transaction with Mr. Kendrick on a patent plow, and was willing that I have the royalty. I told him that wasn't satisfactory to my people at all. I then says, 'If Mr. Kendrick will sign your note with you for \$2,000, you can secure Kendrick by allowing him to retain the royalty on the plows he is to manufacture as security for the money.'" These statements of defendant and Schultz are materially conflicting; but appellants contend that the other evidence given by and on behalf of defendant renders defendant's statement as to the transaction so improbable that the court cannot consider it, and that, therefore, there is no material conflict. One of these items of evidence relates to the plow contract. Some time prior to the making of said note, a contract was made between Farnham and Kendrick, by which Kendrick was to manufacture a patented plow for Farnham, under which Farnham was to receive a royalty of \$10 for each plow sold; and, at the suggestion of Schultz, at the time the original note was made, an additional agreement was made, by which Kendrick was to retain the royalty to the extent of \$2,000, and pay the same to plaintiffs; and, if Farnham should otherwise pay the note, this latter agreement should be canceled. Schultz learned of the plow contract when he went to see Farnham, and that, we may reasonably sup-

pose, led Schultz to make the effort to have Kendrick go upon Farnham's note. It should not be overlooked that Schultz nowhere denies that he, and not Farnham, requested Kendrick to go on the note; nor did he deny that he represented to Kendrick that he wanted his signature to enable him to use it as collateral with which to raise money; nor was Schultz's suggestion that Farnham should secure defendant by allowing him to retain and apply the royalty upon the note inconsistent with that purpose. Kendrick did not solicit security from Farnham, but this contract was made at Schultz's suggestion, and was written and retained by him, and the plaintiffs thereby obtained from Farnham whatever security the royalty afforded. Appellants contend, however, that it is not reasonable that plaintiffs, if they desired to use the note as collateral, would have made it payable one day after date. But, on the other hand, it may be said that, if Kendrick's purpose was to secure the plaintiffs' claim against Farnham, it is equally improbable that he would have placed himself in a situation in which he was liable to be sued the second day thereafter, instead of stipulating for time to enable Farnham to pay. So far, therefore, as the evidence relates to the making of the original note, the evidence is sufficient to justify the jury in finding that defendant was an accommodation maker for the benefit of plaintiffs. The notes here in suit were given in renewal of the former note; the one for \$2,000 representing the principal, and the one for \$800 representing the interest. There does not appear to have been any new consideration, or any new agreement or understanding, at the time they were executed; and defendant testified that they were to be used in place of the other note. The circumstances relied upon by plaintiffs to show that the notes were not executed by Kendrick otherwise than as security for Farnham occurred afterwards. There is credited on one of these notes, September 7, 1892, \$714.32, and on the other, at the same date, \$285.68, making together \$1,000, and that payment was made by a check drawn by the Bank of Willows on the Bank of California to the order of Mr. Kendrick, and, therefore, appeared to have been made by him; but he testified that it was Farnham's money, and came from his wheat, and was represented by another check, which he took to the bank at Willows, and got its check on the Bank of California for it. According to the testimony of Mr. Kendrick, Schultz never demanded any payment from him until in July, 1892, and that was the first time Schultz said or did anything showing that he held him personally liable, and defendant then denied his liability. Schultz then said: "You live right here by Mr. Farnham, and you can take a crop mortgage on his crop, and get your money from Farnham. We live down at Dixon, and we do not have the opportunity. Hochhelmer & Co. will take what he has, and we cannot get it." Kendrick took a crop

mortgage from Farnham, but the date of the mortgage I do not find. On June 6, 1893, Kendrick sold to plaintiffs 50 tons of wheat at \$1.15 per 100, to be delivered in July, the proceeds to apply on these notes; and this makes the amount of the only other credit upon the notes, amounting together to \$1,156.73, credited on July 15, 1893. On July 4th, prior to this delivery, Kendrick wrote Schultz, in reply to some communication from him, as follows: "Dear Sir: I have just telegraphed you: 'I would with one proposition. See letter.' You said, when here, I could have all month. I mean I will ship immediately with this proposition. Those notes are to be taken up when I pay the \$1,000 this month, and a new one made payable first of August, 1894. The note will be just as good, and if there is any crisis I will not be compelled to pay it until the time we agreed I could have when you were here." Mr. Kendrick wrote another letter, two days later, of similar import. The first of these letters was evidently written in reply to some communication from Schultz urging an immediate shipment of the wheat, which, under the contract, was to be shipped in "July." Mr. Kendrick explains what he did by saying he was informed by Schultz that his company was in a bad fix, and he inferred "were liable to go under"; that he did not want these notes outstanding; that he "wanted a note that could not touch them for a year," so he could get the wheat out of Farnham's crop, and that was why the letters were written; that he was afraid the company might break up, leaving the notes in the hands of others. That there were grounds for this fear appears from Schultz's letter to him of July 18, 1893, in which he said: "During this awful stringency of money every available thing was sent to the city, so that it may be some few days before I can get your old note." I fail to find in any of the transactions subsequent to the making of these renewals any conclusive evidence affecting the uncontradicted testimony of the defendant as to the circumstances and representations attending the original transaction. Upon the face of some of these subsequent transactions they would appear to be inconsistent with defendant's claim; but, as explained by him, they do not so affect his testimony as to remove the conflict conceded to exist between the testimony of Schultz and Kendrick as to the original transaction. Besides, defendant was corroborated to a greater or less extent by Farnham and some other witnesses. Upon this branch of the case we cannot say that the jury were not justified in finding for defendant. This conclusion makes it unnecessary to consider whether the plaintiffs were bound to apply the proceeds of the wheat delivered to them by Farnham in 1889 upon the old note, nor whether the answer of defendant was such as to make that claim available as a defense. It is well settled that a defendant may plead as many defenses as he may have, though they are inconsistent, and neither of two inconsistent de-

fenses can be used as an admission to destroy the other.

Appellants also contend that the verdict is against law, because it is in disregard of 10 different instructions given them by the court. These instructions cannot be repeated here. We have examined each one, and each instructs the jury that if they find from the evidence that certain facts exist, their verdict must be for the plaintiffs. But whether those facts exist was a question for the jury; so that the question is not whether there was a palpable violation of the instructions, but whether the evidence justified them in finding upon these facts as the verdict shows they must have done in order to find for the defendant.

Appellants specify the fourth instruction given at defendant's request as erroneous. This instruction is to the effect that, if the jury believe from the evidence that Kendrick was in fact a surety for Farnham upon the original note, yet, if they further believe that before the renewal of the original note, Farnham placed in plaintiffs' hands a quantity of wheat sufficient to pay said original note, and requested plaintiff to sell the same for that purpose, and apply it on said note, but that they failed to do so, and without Kendrick's consent applied the proceeds to other uses, and that Kendrick did not consent to such application to other uses, and did not know of Farnham's said request at the time he signed the renewal notes, they must find for the defendant. We see no error in this instruction. Appellants' contention that the defendant cannot avail himself of the rights of a surety because he averred in his special defense that he was not a surety, has already been noticed. Two special defenses were pleaded, in one of which he denied that he was a surety, and the other alleged the delivery of the wheat by Farnham, with direction to apply the proceeds to the payment of the \$2,000 note. In the second special defense there is an implied admission that he executed the note as surety. That inconsistent defenses and hypothetical pleadings are permitted, see *Bell v. Brown*, 22 Cal. 679 et seq. Upon the face of each of the notes Kendrick, it is true, appeared to be a joint maker, and therefore a principal. "One who appears to be a principal, whether by the terms of a written instrument or otherwise, may show that he is in fact a surety, except as against persons who have acted on the faith of his apparent character of principal." Civ. Code, § 2832. It is not pretended that plaintiffs acted upon the faith of Kendrick being a principal. The testimony of Mr. Schultz shows the contrary. "If they had agreed to take him as surety, they could only have held him as such, although he appeared as principal upon the written instrument." *Harlan v. Ely*, 55 Cal. 340. There was evidence tending to prove that when Farnham deposited the wheat with plaintiffs he directed that they should sell it, and apply the proceeds to the payment of the \$2,000

note, and that Schultz replied, in substance, that they would like to use the note longer, and he would see Kendrick, and get his consent. This he failed to do. The question is, therefore, whether, as against Kendrick, assuming that he was bound to plaintiffs as surety, they could apply the wheat or its proceeds to Farnham's open account, and hold Kendrick for the payment of the note. As between the plaintiffs and Farnham there is no question that it must be applied as directed by the debtor (Civ. Code, § 1479, subd. 1), and "a surety is entitled to the benefit of every security for the performance of the principal obligation held by the creditor, or by a co-surety, at the time of entering into the contract of suretyship, or acquired by him afterwards, whether the surety was aware of the security or not." Civ. Code, § 2849. In *Law v. East India Co.*, 4 Ves. 829, it was said: "It cannot be contended, upon any principle that prevails with regard to principal and surety, that when the principal has left a sufficient fund in the hands of the obligee, and he thinks fit, instead of retaining it in his hands, to pay it back to the principal, the surety can be called upon." Here the effect of applying the wheat or its proceeds to the payment of the open account instead of the note was, so far as Kendrick is concerned, a repayment of the fund thus provided back into the hands of Farnham. The same principle is applied in *Bragg v. Shain*, 49 Cal. 181; *Klessig v. Allsbaugh*, 91 Cal. 231, 27 Pac. 655; *Montgomery v. Sayre*, 100 Cal. 182, 34 Pac. 646; and *Clarke v. Scott*, 45 Cal. 86. Appellants cite *Shriver v. Lovejoy*, 32 Cal. 575, where it was held that: "All the makers of a joint and several promissory note, whatever may be their true relations between themselves, stand, as to the payee, as principals. * * * As he [a defendant who was in fact a surety] was not entitled to show that he was not a principal, but that, as between himself and Lovejoy & Co., he was merely their surety, he had no better right than Lovejoy to complain of the release of the attachment." In that case property of Lovejoy, who was claimed to be the real debtor, was released by the plaintiff. Two of the justices (Shafter and Sawyer) concurred in the judgment on the ground that the court below found, upon sufficient evidence, that Grandvolnet was not a surety, but a principal party to the note. But whether the opinion of the majority was right or wrong is immaterial now. That case was decided before the Code, and, as we have seen, section 2832, Civ. Code, expressly authorizes one who appears on the face of the instrument to be a principal to show that he is in fact a surety; and, besides, a distinction may well be taken between the release of property seized by the creditor in an adversary proceeding, and property or money placed in the hands of the creditor by the debtor for the protection of his surety, inasmuch as the creditor has no right to apply it to any other purpose than that to which the debtor directs where such direc-

tion is given. *Damon v. Pardow*, 34 Cal. 278, was also decided before the Code, and, as to the inability of a joint maker to show that he was in fact a surety, followed *Shriver v. Lovejoy*, supra; and it was further held that appellant Waters, who claimed to be a surety, could not show that Pardow deposited with the payee collaterals to secure the payment of the note, which he did not sell, and apply in satisfaction of the note, but still held the same, and that it became of little value. But sections 2840, subd. 2, and 2849, of the Civil Code, have changed the rule laid down in the case last cited. Whether, under these sections, a release by the creditor of attached property belonging to the principal debtor would operate as a release of the surety pro tanto need not be decided. There is nothing inconsistent with the views we have expressed in *Harlan v. Ely*, 55 Cal. 340, or in *Leeke v. Hancock*, 76 Cal. 127, 17 Pac. 937. In the first of these cases the court quoted section 2832, Civ. Code, and said: "The section of the Civil Code relates to a class of cases in which the apparent differs from the real character of a contracting party. But one may be a surety merely, as between himself and his co-promisor, and yet, as to the creditor, both his apparent and actual relation be that of principal. * * * It would be strange if one could not waive his right to be treated as surety, and agree that he should be bound as upon his unconditional promise." *Leeke v. Hancock*, supra, follows and cites *Harlan v. Ely*. As there was at least some evidence to which the instruction was applicable, the instruction itself being right, this point must be ruled against appellants; for, if it be conceded that the evidence was insufficient to sustain this defense, the evidence under the other defense being sufficient to sustain the verdict, the judgment cannot be reversed.

The defendant was asked by his counsel the following question: "At the time of the signing of these renewal notes, what was your understanding as to the purpose of your signature thereto?" Plaintiffs were not prejudiced by the ruling permitting it to be answered. The witness had already testified to the circumstances surrounding the transaction; that he did not sign them for Farnham; that he was not asked to become security for Farnham; that he received no benefit, or anything of value; and that the request therefor came from the plaintiffs. The answer was that "it was to be used in place of the other note," and there was no evidence to the contrary.

The following question was also objected to: "Was there any other or further consideration for the signing of the new notes other than the \$2,000 note that had been previously given?" This question also followed a statement which appeared to be a full recital of all the circumstances connected with the transaction, and was doubtless intended to cover any other possible consideration; and, in the connection in which it was put, cannot properly be considered

a conclusion of law. But, if it were so, as there was no evidence tending to show any consideration other than the circumstances already disclosed, we cannot see that plaintiffs were prejudiced.

We are also referred, by folios, to numerous other exceptions taken by appellants, and which are not argued, nor even restated, in appellants' brief. We have, however, examined each of them, and find no error justifying a reversal. We advise that the judgment and order appealed from be affirmed.

We concur: VANOLIEF, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

HART et al. v. KIMBERLY et al. (11. A. 280.)

(Supreme Court of California. Oct. 29, 1896.)
APPEAL—FAILURE TO FILE TRANSCRIPT—INEXCUSABLE NEGLIGENCE.

Subsequently to the taking of the appeal, one of the appellants, being ill, requested her attorney to desist from further proceedings, but, after receiving notice of a motion to dismiss the appeal for failure to file the transcript within the required time, said appellant directed the attorney to proceed with the cause. No action was taken towards the preparation of a transcript prior to appellant's first direction to her attorney, nor after the order to proceed with the appeal. *Held*, that the appeal would be dismissed.

Department 1. Appeal from superior court, Santa Barbara county; W. B. Cope, Judge.

Action by Hart and others against Kimberly and others. An appeal was taken from the judgment, and appellees moved to dismiss the same for failure to file the transcript. Motion granted.

B. F. Thomas, for appellants. E. B. Hall and Richards & Carrier, for respondents.

PER CURIAM. The appeal herein was taken May 26, 1896, and, no transcript on appeal having been filed in this court, the respondents, on August 27th, gave notice to the appellants of a motion to dismiss the appeal. At the hearing of the motion the appellants presented affidavits to the effect that one of the appellants had been ill, and that, while in this condition, had, on June 15th, instructed her attorney to desist from any further proceedings in the cause, and that thereupon he had abandoned all proceedings for filing the transcript; that in the latter part of August the appellant requested her attorney to proceed with said appeal. Upon these statements appellants ask to be relieved from their default, and that they be allowed 20 days within which to file a transcript on appeal. The motion must be denied. No action towards the preparation of the transcript appears to have been taken prior to the direction to the attorney not to proceed with the appeal, or since the subsequent direction to proceed therewith; nor is it shown that this latter

direction was given until after receiving the notice to dismiss the appeal. While the illness of the appellant, as shown by the affidavits, might have been urged as ground for an order extending the time within which to file the transcript if such extension had been asked within the 40 days, it is not a sufficient reason for relieving her from default when the application therefor is made after the default. The motion to dismiss the appeal is granted.

BOARD OF COM'RS OF OTERO COUNTY
v. FIRST NAT. BANK OF LA JUNTA.

(Court of Appeals of Colorado. Oct. 12, 1896.)
APPEAL—BILL OF EXCEPTIONS—SIGNED OUT OF TIME—PRESUMPTION AS TO FACTS.

Where the bill of exceptions cannot be considered as a part of the record, because signed out of time by the trial court, it will be presumed that the facts warranted the judgment.

Error to district court, Otero county.

Action between the board of county commissioners of Otero county and the First National Bank of La Junta. From a judgment in favor of the bank, the commissioners bring error. Affirmed.

Thomas R. Hoffmire, for plaintiff in error.
Calvin E. Reed and Fred A. Sahlin, for defendant in error.

THOMSON, J. What purports to be a printed abstract filed in behalf of the plaintiff in error fails to comply with our rule, in that it does not refer to the folio numbers in the transcript and bill of exceptions. Figures are placed along the margin at intervals, but they do not correspond with the folio numbers upon the record, and are misleading; and, aside from this objection, the abstract is so compiled as to be of no practical assistance to us. However, by reference to the record proper, we find enough to enable us to make a satisfactory disposition of the case. Judgment was entered on the 9th day of May, 1894. On the same day an appeal was prayed to this court, and 60 days from that date were allowed within which to tender a bill of exceptions to the judge. The appeal was dismissed by this court, and the transcript refiled on writ of error. The bill of exceptions was signed, and sealed by the judge on the 24th day of August, 1894, and there is no memorandum of an earlier tender. It was signed a month and a half too late. There is attached to the transcript a paper dated March 26, 1885, with the name of John Voorhees, Judge, affixed, which recited that an order was made by the judge on the 31 day of July 1894, extending the time for filing the bill of exceptions until September 1, 1894, and that it had been lost. The paper purports to grant such extension *nunc pro tunc*. The transcript to which this paper is attached was certified to by the clerk of the district court on the 8th day of December, 1894,—more than three months before the paper purports to have been written. It is plain that the docu-

ment does not belong in the transcript, and its presence is evidence that some person has been unlawfully tampering with the record. The purported bill of exceptions having been, as the authenticated transcript shows, signed by the judge out of time, it is no part of the record, and cannot be considered by us. There is, therefore, no evidence before us, and we must presume that the facts warranted the judgment, which will therefore be affirmed. Affirmed.

LOWREY et al. v. SVARD.

(Court of Appeals of Colorado. Oct. 12, 1896.)

MECHANIC'S LIEN—PERSONAL JUDGMENT.

Act 1893, § 15, providing that when, on trial of a cause under the mechanic's lien act, the proceeding will not support a lien, plaintiff may proceed to judgment as in an action on a contract, does not authorize an employé of a subcontractor, failing in his lien, to have personal judgment against the owner, there being no privity of contract between them.

Error to district court, Boulder county.

Suit by John Svard against Mary T. Lowrey, executrix of Charles E. Lowrey, deceased, and others, to enforce a mechanic's lien. Plaintiff had personal judgment against said executrix, and she brings error. Reversed.

Young & Shoemaker, for plaintiffs in error.
S. A. Giffin, for defendant in error.

BISSELL, J. According to the record presented, John Svard brought suit against Mrs. Lowrey, as the executrix of Charles E. Lowrey, and against Brindlinger and Raikes & Critchfield, to enforce an alleged mechanic's lien on certain property in an addition to Boulder, and to collect \$504.77 as the amount due him and certain of his assignors for work and labor done in the erection of a house thereon. The complaint states that Lowrey, in his lifetime, made a contract with Brindlinger to construct the buildings. This principal contractor made an agreement with Raikes & Critchfield, whereby they were to do some stone and mason work in putting in the foundation of the buildings, and these subcontractors hired the men whose wages were the subject-matter of the suit. The terms of the lien were stated, the performance of the work, and the sums due, and notice of these claims was alleged to have been given the owner. All the parties defaulted except the executrix, who took issue. She controverted much of the complaint, and alleged a want of notice, and the case came on for a hearing on this issue. On the trial the lien was adjudged invalid, but a personal judgment was rendered against the executrix for \$93.10, and an execution was ordered. We are not concerned with the character of the lien or the right of the plaintiff to maintain it, because this was adjudged against him, and no error has been assigned on the ruling. The executrix, however, prosecutes error to reverse the judgment on the general ground that the court was

without authority to enter a personal judgment against her because of the plaintiff's failure to establish his lien. The defendant in error contends that section 15 of the act of 1893, which in general enacts that wherever, on the trial of a cause under the provisions of the mechanic's lien act, the proceedings will not support a lien, the plaintiff may proceed to judgment as in an action on a contract, which entitles him to preserve his judgment. We cannot so conclude. In one sense the right to the judgment is dependent on the establishment of the lien; in another, the plaintiff may wholly fail to prove his right to collect his claim out of the res, and yet proceed to judgment against the party or parties whom he has selected as defendants. It is not a rule, however, of universal application. The only legitimate construction to be given that section of the statute is one which will permit the enforcement of the evident legislative intent, which manifestly was to enable the plaintiff to recover whenever, irrespective of the lien act, he is entitled to maintain his action against the defendant. It is quite true, several cases are cited from the supreme court, which sustain judgments entered against the person who was liable on the contract. *Mining Co. v. Isaacs*, 18 Colo. 400, 32 Pac. 822; *Finch v. Turner* (Colo. Sup.) 40 Pac. 565. These cases, however, do not decide the precise question involved. In both of them the defendants were parties to the original contract, and were liable to the plaintiff because of the employment and the agreement which they had made; but when, as in this case, there is no privity whatever between the plaintiff and the defendant, and no contract established between them, the plaintiff cannot recover, even by virtue of that general provision of the lien act. This has been established in California under a statute almost identical with ours, and is recognized by the leading authorities on the subject of mechanics' liens. *Lumber Co. v. Schmitt*, 74 Cal. 625, 16 Pac. 516; *Lumber Co. v. Williams* (Cal.) 31 Pac. 1128; *Phil. Mech. Liens*, § 447. Under the lien statutes no judgment in personam can be entered against a defendant unless it be expressly authorized by statute. The Colorado statute only permits it when the plaintiff proves a contract on which he may recover regardless of the lien act. According to the record, these laborers were employed by the subcontractors, between whom and the owner of the premises there was no contract. Having failed to establish facts which would entitle him to recover in an action in assumpsit, a personal judgment could not be entered against the estate. The language of the act does not compel any such construction; it does not appear to have been the intent of the legislature. There is no principle of law by which the clause cited can be held to confer on the plaintiff the right to a personal judgment. The decision of the trial court was not in accord with these views, and it must therefore be reversed. Reversed.

**PEOPLE'S SAV. BANK v. COLORADO
MIN. EXCH. BLDG. CO. et al.**

(Court of Appeals of Colorado. Oct. 12, 1896.)

CORPORATIONS—SUIT BY STOCKHOLDERS.

Stockholders may maintain suit against the corporation to restrain it from misappropriating funds.

Error to district court, Arapahoe county.

Suit by the People's Savings Bank against the Colorado Mining Exchange Building Company and another for injunction. Injunction dissolved, and plaintiff brings error. Reversed.

Teller, Oranhood & Morgan and Robert W. Bonyage, for plaintiff in error. Williams & Whitford, for defendants in error.

BISSELL, J. This suit concerns the right of a stockholder of a corporation to bring an action for the enforcement of corporate rights where there is a distinct failure of the corporate authorities to act in the premises, and where they are directly proceeding to misappropriate and divert the funds of the company to the prejudice of its stockholders. The Colorado Mining Exchange Building Company acquired title on the 18th of August, 1892, to the property which had theretofore belonged to the Colorado Mining Stock Exchange. It consisted of certain lots in the city of Denver, on which the exchange had erected a building. The property was conveyed to the new company, subject to certain specified incumbrances, which need not be otherwise referred to. After the new company had acquired title and gone into possession, the property was let to various persons, and on the 10th of July, 1894, there was due the new company for rents, etc., upwards of \$10,000. On the day mentioned the directors of the defendants in error undertook to transfer to Martin Currihan, as assignee, title to the various personal property belonging to the company, and these accounts and claims for rent, with directions to apply the proceeds to the payment of sundry claims owed by the Colorado Mining Stock Exchange, which accrued during the time that company owned the building. There are many allegations respecting the situation of these debts which were to be paid by the assignee, principally regarding the circumstance that the old claims against the Colorado Mining Stock Exchange had ceased to be debts of that company, and had become the debts of individuals whose notes the creditors held. These transactions will be disregarded, as they are wholly unimportant. After setting up all these various facts, and alleging that the bank was the owner of 4,152 shares of the 5,000 shares of the stock of the company, and stating that no other shares were owned by anybody, except by five gentlemen, who owned one share each for the purposes of a directory, the bill states that the directors confederated to use the funds

of the company for the illegal purposes set up, divert them from their legitimate channels, and devote them to the payment of claims which were not legitimate obligations of the building company. No more need be said in this behalf, because the defendant company defaulted, and the allegations of the bill are to be taken as true in these particulars. The only issue in the case was raised by Currihan, the assignee, who did not controvert the plaintiff's allegations respecting the conduct and intended purposes of the company and its directory, but averred that these claims which he was about to pay with the funds of the company, while on their face debts of the stock exchange, were in reality debts of the new company, which it had accepted and agreed to pay. This was denied, and the case went to trial upon this as the sole issue. The injunction was dissolved, and the assignee left to act under the assignment and pay these outstanding obligations. The case therefore presents the single question whether the stockholders of the company may unite in a bill to restrain the corporation from misappropriating the company's funds. The fact that the suit is brought by one is immaterial, because that one represents the entire company and all the stock of the corporation. The right to bring a bill in a case like this has been pretty thoroughly settled in this state, and we only need refer to the authorities on the subject. The modern rule is recognized, and adjudged applicable in all cases where the corporate authorities refuse to act, and where otherwise there would be a manifest miscarriage of justice. *Miller v. Murray*, 17 Colo. 408, 30 Pac. 46; *Jones v. Mining Co.*, 20 Colo. 417, 38 Pac. 700. The only position assumed by the defendants in error is that the issue tendered by the assignee respecting the obligation of the new company to pay the debts of the old concern stands undenied. The right of a stockholder to maintain the suit is not contested, but the argument concedes this right, and attempts to sustain the judgment on the theory that the stockholders admitted the company owed the debts and was bound to pay. We cannot so read the pleadings. On an inspection of the record we find issue was directly taken on these allegations respecting the indebtedness of the company. The complaining stockholders insisted that the company did not owe the debts, that the transfer was illegitimate and without consideration, and that thereby the assignee acquired no title to the assets, and had no right to apply them to the liquidation of the alleged claims. The evidence sustains them. Manifestly, if this proposition is true, the stockholders can maintain the bill, and are entitled to restrain the assignee from misappropriating the assets of the company. The judgment of the court below does not accord with these views, and it must accordingly be reversed. Reversed.

LEWIS v. MUTUAL LIFE INS. CO. OF NEW YORK.

(Court of Appeals of Colorado. Oct. 12, 1896.)
CONTRACTS—CONSTRUCTION—ACTION ON CONTRACT
— EVIDENCE.

A contract recited that "it is mutually agreed by S., general agent of" an insurance company named, "and L. that the latter shall act as special agent for this company under the schedule of commissions attached," and that he should receive a guaranty of a certain sum per month. Such schedule followed, and was signed by "S., General Agent," and L. Held, that though prima facie it was the contract of S., and not of the insurance company, parol evidence was admissible to show that S., in making the contract, acted for the insurance company.

Rever to district court, Arapahoe county.

Action by John H. Lewis against the Mutual Life Insurance Company of New York to recover a balance alleged to be due plaintiff for services as special agent of defendant under a written contract between the parties. There was a judgment for defendant, and plaintiff brings error. Reversed.

W. Henry Smith and Geo. C. Norris, for plaintiff in error. John S. MacBeth, for defendant in error.

THOMSON, J. J. H. Lewis brought this suit against the Mutual Life Insurance Company of New York to recover a balance of \$775.93 alleged to be due him for services as special agent of the defendant. The complaint sets forth in full a contract in writing, in pursuance of which the services are alleged to have been rendered, and upon which the plaintiff bases his right to recover. That contract is as follows: "Denver, Colo., February 17, 1893. It is mutually agreed between John L. Stearns, general agent of the Mutual Life Insurance Company of New York, and Mr. J. H. Lewis that the latter shall act as special agent for this company under the schedule of commission attached, and that he shall receive a guaranty of \$200 per month for one year from date, said guaranty to be deducted from commission earnings. It is further agreed that all traveling expenses for business done outside of Denver by said J. H. Lewis shall be borne by said J. L. Stearns. The following is the schedule of compensation referred to above." Here follows the schedule mentioned, below which are the signatures: "John L. Stearns, General Agent. John H. Lewis." The complaint alleges that the writing was the contract of the defendant, that he rendered the services under the direction of the defendant, and that the defendant paid him from time to time for his services various sums, aggregating \$1,635.57, leaving due the balance he seeks to recover. A demurrer to the complaint on the ground that it did not state facts sufficient to constitute a cause of action was sustained, and the ruling was followed by final judgment, from which the plaintiff prosecutes error.

The defendant's contention is that there is no liability against it on account of the plaintiff's employment, because it is not a party to the contract, and that whatever liability exists is

against John L. Stearns, while it is urged for the plaintiff that under the allegations of the complaint he was entitled to prove that Stearns executed the contract in a representative capacity, and that it was the intention of the parties to bind the defendant. In the body of the contract Stearns described himself as general agent of the defendant, and he signed it "John L. Stearns, General Agent"; but it does not appear on the face of the writing that Stearns was acting for or in behalf of the defendant, or that the words which followed his name were intended to have any significance except as descriptive of the person. If he was in fact the agent of the defendant, with authority to bind it by such a contract, and if it was understood and intended by the parties that in entering into the contract he acted merely as agent, and executed it for the defendant as such agent, those facts may be shown by evidence outside of the paper itself. Without such proof the writing was the contract of Stearns, but evidence is admissible to show that in making it he acted for the defendant. In Pratt v. Beaupre, 13 Minn. 187, the court said: "The rule is that when words which may be either descriptive of the person, or indicative of the character in which a person contracts, are affixed to the name of a contracting party, prima facie they are descriptive of the person only; but the fact that they were not intended by the parties as descriptive of the person, but were understood as determining the character in which the party contracted, may be shown by extrinsic evidence, but the burden of proof rests upon the party seeking to change the prima facie character of the contract." To the same effect is the opinion in Rhone v. Powell, 20 Colo. 41, 36 Pac. 890. We think the complaint contains allegations sufficient to enable the plaintiff to introduce evidence concerning the capacity in which Stearns acted in making the contract, and that the demurrer was therefore improperly sustained. The judgment will be reversed. Reversed.

CITY OF DENVER v. JOHNSON.

(Court of Appeals of Colorado. Oct. 12, 1896.)
STREETS — UNPROTECTED DITCH — ACCIDENT TO TRAVELER—PROXIMATE CAUSE.

In an action for personal injuries it appeared that plaintiff was driving a wagon along the south side of defendant's street; that there was a ditch on that side, which, at the point where the accident occurred, was open and unprotected; that the sides of the ditch were precipitate, the opening being 2 feet deep, and the ditch 13 feet wide; that from the ditch to car tracks in the street the driveway, much used, was 9 feet wide; that a tramway car overtook plaintiff, and to avoid the car, from which projected a side step 2 feet wide, he pulled his team away from the track; that one of the horses went into the ditch, and, being frightened, struggled to get out, and brought the wagon into such a position that it was struck by the car, and plaintiff was thrown out under the horses. Held, that the open ditch was the proximate cause of the accident, and hence the city was liable.

Appeal from district court, Arapahoe county.

Action by J. D. Johnson against the city of Denver for personal injuries. From a judg-

ment in favor of plaintiff, defendant appeals. Affirmed.

Appellee brought suit against the city for damages for injuries received by the alleged negligence of the city to keep the streets in repair. The allegations of the complaint charging the negligence and stating the injury are as follows: "Plaintiff says Fifteenth street in said city, between the Platte river and Larimer street, is now, and has been for more than one year last past, a public street and highway, over upon which there is a great amount of travel by the public. Plaintiff says that said defendant corporation, disregarding its duty, as aforesaid, to keep said public street in repair and in safe condition, and particularly that portion of said Fifteenth street aforesaid, negligently, carelessly, and wrongfully permitted an excavation three feet deep and more than three feet in diameter to be and remain in said Fifteenth street between the points aforesaid, and about opposite No. 2134 on said street, on or about February 9, 1904, uncovered and unguarded, and without barricade or obstruction about it to prevent persons or animals from falling into the same; that said excavation was not caused by, nor was it the result of, the negligence of some person other than an employé of said defendant city; that the plaintiff, on the day aforesaid, was lawfully traveling on said Fifteenth street between the points aforesaid, riding in a wagon drawn by two horses, having no knowledge of said excavation, and not apprehending danger, and when about opposite the point aforesaid was suddenly precipitated into the excavation aforesaid, and was badly injured thereby, was bruised and made lame and sick and sore thereby, and without any fault or carelessness or negligence or blame on the part of the plaintiff, but he avers that the said injuries were caused wholly by reason of the said negligence of the defendant as aforesaid. Plaintiff says that by reason of the said negligence of the defendant he was injured as aforesaid, and has been rendered lame and sick and sore thereby, and unable to work for the space of one month, and has been compelled to expend twenty-five dollars for medicines, medical treatment, and nursing in consequence thereof, whereas he was well and strong and able to work before being injured as aforesaid; that by reason of all the matters herein stated he has been injured and damaged in the sum of two thousand dollars." Answer denying the existence of an excavation as stated in the complaint, and all the material allegations of the complaint. Further answering, said: "That at the said point on Fifteenth street there is a ditch or gutter at the side thereof of about the depth given by plaintiff, which said ditch or gutter is described in the complaint as an excavation, but that such ditch or gutter is necessarily there, and is used to carry off the accumulation of surface water from said street into the Platte river; that ample space is left between said ditch or gutter and the opposite side of the street for the passage of vehicles and teams, and that said ditch

is not dangerous to travelers using said street; that at the time and place plaintiff claims to have been injured the buggy or wagon he was riding in was run into by an electric car belonging to the Consolidated Tramway Company, whose lines pass through said street, and by said No. 2134, and whatever injuries he received were caused wholly by such collision; that said buggy or wagon in which plaintiff was riding did not run into said gutter at the time and place described in the complaint, nor was it thrown therein when struck by said electric car." A replication was filed, denying the allegations of the second answer. A trial was had to the court without a jury, resulting in a judgment for the plaintiff for \$500, from which an appeal was prosecuted to this court.

F. A. Williams and G. Q. Richmond, for appellant. W. W. Pardee and Doud & Towler, for appellee.

REED, P. J. (after stating the facts). The principal facts are clearly established by the evidence without serious conflict. Appellee, driving a two-horse grocery delivery wagon, crossed the bridge from North Denver, and was driving east on Fifteenth street, on the south side. There is a ditch or drain on that side of the street for carrying water into the river. For about two blocks from the river the ditch is covered, then for a space it is open and unprotected. At this point (the open ditch) the accident occurred. The sides of the ditch slope quite abruptly to the bottom. The opening was 2 feet and 3 inches in depth, and the ditch 18 feet wide on the surface. There are two tramway car tracks in the street. From the ditch to track upon that side was a driveway, much used, 9 feet in width; then occurs the car track, some 4 feet in width; then a central drive, some 20 feet in width; then the other track; then a narrow driveway north of the track. Appellee and Hamilton were in the wagon, the former driving, the team trotting. A tramway car going in the same direction was not observed until close upon them. Appellee, to avoid it, pulled his team to the right, and the off horse went over the bank into the open ditch, was frightened, jumped or plunged to get out, and in so doing placed the wagon in such position that the hind wheel was struck by the car, wagon and team thrown into the ditch, appellee thrown out under the horses, and received his injuries. As to the circumstances and cause of the collision the evidence was conflicting, as it always is in that class of cases, each party testifying to exonerate itself from the charge of negligence in causing it. But in this case, as the suit is not against the tramway company, but the city, and the only question being whether the leaving the street and ditch in that condition was negligence for which the city could be held liable, by whose fault the collision occurred becomes unimportant. Although, except for the collision, the accident could not have occurred, it is apparent from the evidence that, except for the ditch and obstruction, the collision would not have occurred. Nearly the entire argument

of appellant is devoted to the contention that the accident was caused by the tramway car collision. I quote the language: "The ditch or gutter did not frighten the horses. The ditch or gutter was not the cause of the plaintiff being thrown out of the wagon. On the contrary, the proximate cause was the rapidly approaching car striking the rear end of the vehicle." In support of the position that the excavation was not the "proximate" cause, Jones, Neg. Mun. Corp. §§ 9, 193, 195, is cited. In section 9 it is said: "It is often said that the negligence must be the 'proximate cause' of the damage in order to create liability. * * * But it is to be noticed that it is not necessary that the negligent act should be the last cause, the primary cause, or the sole cause. Indeed, the only essential matter is that, in view of all the circumstances of the case, it shall be just and reasonable to attribute the damage to the negligence charged, and to nothing else. Where it is so, the responsible cause is reached, and this, for convenience sake, may be designated as the proximate cause." In section 193 I find nothing to change the well-established rule as stated above. In section 194 it is said: "Without attempting to discuss the many rules that have been formulated upon the subject of proximate cause. * * * It may be said that one principle lies at the bottom of all of them, namely, that a reasonable connection between the negligence shown and the damage that has been received must be disclosed, or there can be no recovery." In section 195: " * * * The question in regard to which they are most frequently resorted to and most fully illustrated by the authorities relates to accidents upon highways, although in all instances the municipality will escape liability if it can show that some other cause than its own negligence is in justice responsible for the damage received." Testing the case made by the authorities thus relied upon for reversal, we must find the proximate or responsible cause of the damage the negligence of the city. Looking at the facts as established by the evidence of a city engineer sworn on the part of appellant, we find: That up to that point the ditch was covered. For a short distance only it was uncovered. And the street, besides being incumbered by two railway tracks, was upon that side, at that place, narrowed 13 feet, the width of the ditch. That the sides were abrupt, and the ditch 2½ feet deep, with only 9 feet between it and the car track. That the step or foot-board of the car projected a foot and a half or 2 feet, leaving only at most 7 feet for carriages on that side of a much-traveled business street. At that particular point appellee was overtaken, and, by reason of the want of room and fright of horses, the injury occurred. Had the street been full width, the collision would have been readily avoided; and, if it had occurred, and the parties been thrown out, the fall would have been but about one-half of the distance. It does not seem necessary to say that such an excavation, beginning and ending abruptly, and narrowing the street at that

point 13 feet, was a dangerous one. Not only are municipal corporations held for damages occurring through defects or excavations in the street or highway, but for dangerous excavations adjoining a highway. At common law, and under the statutes, and by numberless decisions it is declared: "The specific duty resting upon every municipal corporation with regard to the streets under its control is that it shall exercise reasonable care to see that they are safe for lawful use by any member of the public for any of the purposes for which a public street is designed." Jones, Neg. Mun. Corp. p. 131, § 72. Counsel, in relying on Jones, Neg. Mun. Corp., overlooked section 197: "If a defect exists in a public street, this would seem to be the true cause of an injury from contact with that defect. What might have happened had there been no such contact, is wholly speculation, and it cannot be assumed that similar damage, or even any damage, would have resulted, had it not been for the unsafe character of the highway." Counsel cite from and rely upon the case of *Elythe v. Railway Co.*, 15 Colo. 838, 25 Pac. 702. In that the plaintiff sought to recover the value of goods destroyed in transit. A high wind blew the ear from the track, tipped it over, and partly demolished it. It took fire from the overturning of the stove, and the goods were consumed. The jury found the tornado the proximate cause, and exonerated the company from the charge of negligence, the finding was held correct, as both the fire and the loss of goods were results from the cause. I am at a loss to see any analogy between that and the damage caused by a dangerous excavation in the street. The ditch did not occur by reason of the collision, but, according to the evidence, the collision occurred by reason of the existence of the ditch. In *Campbell v. City of Stillwater*, 82 Minn. 308, 20 N. W. 321, Gillilan, C. J., very tersely and clearly stated the law to be: "In cases of tort, the application in this court of the rule as the proximate cause is that, where several concurring acts or conditions of things—one of them the wrongful act or omission of the defendant—produce the injury, and it would not have been produced but for such wrongful act or omission, such act or omission is the proximate cause of the injury if the injury be one which might reasonably be anticipated as a natural consequence of the act or omission." Tested by this,—and almost innumerable authorities to the same effect might be cited,—there is no doubt that the excavation was the proximate cause and the city liable.

It has been frequently held that there might be two proximate causes. In *Ring v. City of Cohoes*, 77 N. Y. 83, it was said by the court: "When two causes combine to produce an injury to a traveler upon a highway, both of which are in their nature proximate, the one being a culpable defect in the highway and the other some occurrence for which neither party is responsible, the municipality is liable, provided the injury would not have been sus-

tained but for such defect." In *Palmer v. Inhabitants of Andover*, 2 Cush. 601, it was said: "If the injury resulted from one of the causes, or from the two combined, if such cause would not have existed but for the neglect of the city, then it would have been liable, if there was no failure on the part of plaintiff to exercise due care." Although, in this case, the three causes co-operated,—the falling, the excavation in the street, fright and foundering of the horse, producing the collision and the latter precipitating the parties into the ditch,—the liability of the city, under the authorities, is clear. See, also, *Ehrgott v. Mayor*, etc., 96 N. Y. 264; *Ward v. Town of North Haven*, 43 Conn. 148; *Hey v. Philadelphia*, 81 Pa. St. 44; *Wagner v. Township of Jackson*, 133 Pa. St. 61, 19 Atl. 312; *Hampson v. Taylor*, 15 R. I. 83, 8 Atl. 331, and 23 Atl. 732; *Lake v. Milliken*, 62 Me. 240; *Hayes v. Inhabitants of Hyde Park*, 153 Mass. 514, 27 N. E. 522; *Pratt v. Weymouth*, 147 Mass. 245, 17 N. E. 538; *Flagg v. Hudson*, 142 Mass. 280, 8 N. E. 42. The horse becoming frightened and participating in the injury in no way modifies the liability. There are numerous cases where the municipality has been held liable for injuries to the horse by reason of defects in the street, when the horse had become frightened and unmanageable. See *Higgins v. City of Boston*, 148 Mass. 484, 20 N. E. 105; *Spaulding v. Inhabitants of Winslow*, 74 Me. 528. In *Kennedy v. Mayor*, etc., 73 N. Y. 365, where a horse on a wharf belonging to the city got beyond the control of his driver, and, owing to the absence of string pieces on the wharf, backed off into the water, the city was held liable. And see *Macauley v. Mayor*, etc., 67 N. Y. 602. The contention of counsel having been directed entirely to the questions above discussed and found untenable, the judgment must be affirmed.

There is one incident connected with the trial I cannot let pass unnoticed. W. E. Kelly, the motorman driving the colliding car, testified for the defendant. He is supposed to have been in a position to see all that occurred, and state it correctly. His version of the facts are so at variance with that of all the other witnesses and the physical facts obvious from the nature of the injury, and so contradictory of itself, it should not have been allowed to pass unnoticed by the court. He said: "I was ringing the bell to attract his attention, * * * and all at once he pulled right across the track, and where that ditch is, and stopped right on the track. * * * He had pulled across the track so quick that I saw I could not stop the car, so I reversed the car, and also hollered, rang the bell. * * * We didn't get off the track, and the car—the step of the car, one step of the car—just struck his hind wheel, and pushed it to one side, * * * and the horses jumped, and I believe jumped over into the gutter, and the man fell out. Only one fell out." If, as stated, the team was across the track in front of the car, and the horses jumped, it would of

necessity be away from the ditch; and, if across the track in front, the collision must have occurred from the front, not from the step, with the hind wheel; while the fact is clearly established that both, instead of one, were thrown out. The judgment of the district court will be affirmed. Affirmed.

VAUGHN v. GRIGSBY.

(Court of Appeals of Colorado. Oct. 12, 1896.)

JUSTICES OF THE PEACE—JURISDICTION—SUIT INVOLVING TITLE TO REAL ESTATE—ACTION FOR INJURY TO LAND—BY WHOM MAINTAINED—SUFFICIENCY OF EVIDENCE.

1. The grantor in a trust deed executed a chattel mortgage on a windmill situated on the land described in the deed, and the chattel mortgagee removed the mill. *Held*, that an action by the beneficiary in the trust deed against the chattel mortgagee for injury to the land, in which plaintiff claimed that the windmill was a part of the realty and passed by the deed, did not involve title to real estate, within Gen. St. p. 619, providing that if, in any action before a justice of the peace relating to real estate, it appear that the title is in dispute, the justice shall certify the cause to the district court.

2. The beneficiary in a trust deed given to secure a debt may maintain an action for injury to the land described in the deed, though not in possession, or entitled to possession.

3. The beneficiary in a trust deed purchased the land at sale under the deed for \$100 less than the principal of the debt secured by it. In an action by him against one who removed from the land a windmill under a chattel mortgage executed by the grantor in the deed, for injuries to the land, the court found the value of the windmill to be \$75. *Held*, that the facts supported a judgment for plaintiff for \$75.

Error to Yuma county court.

Action by W. C. Grigsby against G. B. Vaughn to recover damages for injuries to real estate, commenced before a justice of the peace, and taken on appeal by defendant to the county court. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Quilman Brown, for plaintiff in error.
Granville Pendleton and Allen & Webster, for defendant in error.

THOMSON, J. W. C. Grigsby brought suit before a justice of the peace against G. B. Vaughn to recover damages for injuries to real estate. The case went from the justice to the county court, where the plaintiff had judgment. The defendant prosecutes error.

On January 15, 1893, William Cox conveyed the land to J. J. Grigsby in trust to secure the payment of \$150 to the plaintiff. At the time of the execution of the trust deed there was a windmill on the land, which had been sold by the defendant to Cox. On the 31st of March, 1894,—more than a year after the trust deed was given,—the defendant received from Cox a chattel mortgage on the windmill, to secure the payment on the 1st day of October, 1894, of the balance of the purchase money. Default having been made by Cox, the defendant took possession of the windmill, and removed it from the farm, claiming title under his chattel

mortgage. The plaintiff's claim is that the mill was part of the realty. We think it clearly shown by the evidence that the mill was affixed to the soil in such manner that, taking into consideration the purpose of its erection, it was incorporated into the freehold, and passed with the land. It was conveyed by the trust deed, and, as against the rights acquired by that instrument, the chattel mortgage, subsequently executed, is ineffective.

It is contended for the defendant that the justice had no jurisdiction to hear and determine the controversy, because title to real estate was involved. The statute provides that "if, in any action before a justice of the peace, relating to real estate, it shall appear that the title or boundaries are in dispute, the justice shall certify the cause, and transmit the papers to the district court of the same county." Gen. St. p. 619. It is argued for the defendant that, as the plaintiff claimed the windmill as real estate, and the defendant claimed it as personal property, therefore the title to real estate was in dispute. We do not think that the controversy over the character of this property involved a dispute concerning title to real estate within the meaning of the law. Cox's title to the land is not questioned, nor is it denied that he conveyed his title to the trustee. The question was whether, as between mortgagor and mortgagee, the mill was so attached to the land as to be part of it; in other words, whether the windmill was personal property or real estate. In our opinion, the objection to the jurisdiction is not well taken.

Prior to the commencement of this suit, proceedings had been instituted for the foreclosure of the trust deed, and some days before the justice rendered his judgment foreclosure had been perfected, the property sold, and a deed executed to the purchaser. The plaintiff was the highest and best bidder at the sale, and it was struck off to him for \$50. At the time the suit was commenced the plaintiff had neither title nor possession. The title was in the trustee, the possession was in Cox, and the plaintiff was simply a beneficiary, entitled, if his debt was not paid by Cox, to cause the land to be subjected to its payment. If, therefore, this were an action of trespass *quare clausum fregit*, it could not be maintained. *Railroad Co. v. Beshoar*, 8 Colo. 32, 5 Pac. 639; *Gooding v. Shea*, 103 Mass. 360. But a suit may be maintained by a mortgagee, or a beneficiary in a trust deed, for an injury done to his security. He need not have possession, or right to possession, of the land. His right of action grows out of the impairment of his security. *Gooding v. Shea*, *supra*; *Chouteau v. Boughton*, 100 Mo. 406, 13 S. W. 877. This suit was commenced before a justice of the peace. There were, therefore, no written pleadings, and the nature of the action must be determined from the evidence. We think the evidence warranted the judgment. The land sold for \$50,—\$100 less than the principal of the debt. The removal of the

windmill reduced the security upon which the plaintiff relied by an amount equal to the value of the mill at the time of its removal. That value the court found to be \$75. The loss sustained by the plaintiff was, therefore, \$75, and the judgment given for that amount must be affirmed. Affirmed.

FITZHUGH v. SPEAR.

(Court of Appeals of Colorado. Oct. 12, 1896.)

ORDER FOR NURSERY STOCK—SIGNED BY ONE PARTY—PAROL EVIDENCE—INSTRUCTIONS.

In an action for nursery stock furnished on an order signed by the buyer only, possible error in charging that the order formed the contract between the parties, and was the only means of ascertaining the agreement, was cured by the further instruction that, the order being silent as to the place where the stock was to have been grown, this might be shown by parol; the principal defense having been placed on this issue, and all evidence offered thereon having been admitted.

Appeal from El Paso county court.

Action by George J. Spear against Mrs. H. M. Fitzhugh for a balance due for nursery stock. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

George Q. Richmond, for appellant.

REED, P. J. Appellee (plaintiff below), a nurseryman, brought suit before a justice of the peace to recover a balance claimed to be due for nursery stock sold and delivered. A trial was had, with judgment for the defendant (appellant), an appeal taken to the county court, a trial had to a jury, verdict for the plaintiff for \$24.80, judgment upon the verdict, and an appeal to this court. There is no appearance for the appellee. There are 12 errors assigned, of which the eleventh is as follows: "That the court erred in giving instructions numbered from 1 to 12, inclusive." This is the only error of the supposed 12 relied upon for reversal, and is confined to the first part of the third instruction. The argument is confined to this third instruction, which is as follows: "The contract between the parties is contained in a partly-printed order signed by the defendant, and addressed to the plaintiff, which has been introduced in evidence and marked 'Plaintiff's Exhibit A.' With regard to this contract, you are instructed, as a matter of law, that all oral negotiations or stipulations between the parties which preceded or accompanied the execution of the instrument are to be regarded as merged in it, and the written instrument is to be treated as the exclusive instrument of ascertaining the agreement by which the contractors bound themselves. Where there is any ambiguity apparent upon the face of a written instrument, the jury may take into consideration the oral testimony introduced for the purpose of explaining that ambiguity. There is an apparent ambiguity in this contract, as to the place from which the trees were to be dug, and the jury may determine from the testimony whether or not it was agreed between plaintiff's agent and the defendant that the trees and nur-

ery stock mentioned in the contract were to be dug or grown in Colorado or elsewhere." Upon the trial a paper was introduced in evidence, signed by the appellant, but not by appellee, and on examination proves to be an order for the nursery stock purchased, with the prices carried out, the whole bill purchased amounting to \$20. This is the paper called a "contract" in the instruction. If a contract at all, it was certainly unilateral,—was only the contract of appellant. Consequently the first part of the instruction, if taken alone, would be misleading and erroneous; but the instruction must be taken as a whole, and the latter part modifies the former and renders it innocuous. The court charged that, where there was any ambiguity apparent upon the face of a written instrument, the ambiguity might be explained by oral testimony. He stated that there was an apparent ambiguity in the contract, as to the place from which the trees were to be dug, and whether by the agreement the trees were to be those grown in Colorado or elsewhere was a fact the jury were to find from the evidence. The contract in that respect could hardly be called ambiguous, as it contained nothing on the subject whatever. Consequently the court was correct in submitting to the jury the questions as to what the contract of appellee was. Analyzed, the instruction would appear to be that if the written contract was unambiguous it would be conclusive in itself, but being ambiguous it was inconclusive, and the fact must be found from the evidence. On examination of the bill of exceptions, I find the principal defense consisted in the claim that the agreement was that the stock should be Colorado grown, whereas the stock delivered was from the interior of Nebraska; but the court admitted all the evidence offered in regard to the contract, also considerable evidence in regard to the comparative merits of the stock from the two localities. Then, the court having charged the jury in the latter part of the instruction that the fact must be determined from the evidence, regardless of the contract, I cannot see that the appellant was injured or the jury misled by the first part. It is true, the first might have been safely omitted, and might be, like the charge made against the paper, rather ambiguous, had the jury not, in the latter clause, been charged to disregard it. The jury evidently found from the evidence either that it was not the contract, or that if it was it was immaterial, or the jury may have found, as there was evidence to support such a finding, that appellant knowing that the trees were not Colorado but Nebraska grown, and having protested against receiving them for that reason at first, and having afterwards employed the agent with whom she dealt to set the trees out upon her premises, it was a waiver of the former objection, and an acceptance with full knowledge of the fact relied upon as a defense. The supposed error in the instruction being the only one relied upon, and appellant having been allowed great latitude in evidence upon the trial, the verdict of the jury and judgment of the court will not be disturbed. Affirmed.

GIFFORD v. CALLAWAY, County Treasurer.

(Court of Appeals of Colorado, Oct. 12, 1896.)

TAXES ON PERSONAL PROPERTY—LIEN—REAL ESTATE—PRIOR INCUMBRANCE—PRIORITIES.

Under Gen. St. § 2818, which declares in terms that all taxes shall be levied at a fixed date, and shall be a perpetual lien upon all land subject to taxation until the taxes and penalty are paid, as modified by sections 2819 et seq., which make taxes levied and assessed upon personal property a lien on the property against which the taxes are assessed, and give the counties power to protect themselves by distraint,—none of which, however, contain an express declaration that the taxes shall be a lien superior to all antecedent incumbrances,—taxes levied against the personal property of an owner subsequent to the execution of an incumbrance on land in favor of a third party are not a lien superior in right to that security.

Error to district court, Montrose county.

Petition by James M. Gifford for a writ of mandamus to compel D. A. Callaway, county treasurer of Montrose county, to receive a definite sum assessed as taxes on certain real estate, and issue a receipt as for all the taxes assessed. From a judgment in favor of defendant, plaintiff brings error. Reversed.

The matters presented by this record are raised by the demurrer of Callaway, the county treasurer of Montrose county, to a complaint filed by Gifford to obtain a mandamus to compel the treasurer to receive the definite sum of \$363.30, which was the amount of the taxes levied on certain real property, and to issue a receipt as for all the taxes assessed. The substantial allegations with which we are concerned are, generally, the plaintiff's ownership of certain property in Montrose county; that title was acquired by a foreclosure on the 9th of September, 1893, of a deed of trust theretofore executed by the then owner, David Wood, on the 1st of April, 1889. The assessment and levy of taxes for the year 1891 in the sum of \$363.30 was stated, together with the plaintiff's tender of the sum requisite to liquidate them. The tender was refused, although it was said to be the full amount of the taxes assessed against the property, and the treasurer demanded the further sum of \$299.30, which was the amount of taxes levied on the personal property of David Wood for the year 1891. The dispute between the owner and the treasurer led to the sale of the property, which was recorded in the treasurer's records of Montrose county, and constituted a cloud on the title. The plaintiff's willingness to pay the taxes levied against the realty was charged, and such other averments made as were essential to establish the plaintiff's cause of action, if any he had. The controversy is over the matter of the lien for personal taxes on realty. To bring the matter in issue out clearly, the statutes which control it must be stated. As in most states, the legislature has attempted to provide for and regulate the collection of all taxes. The only enactments embracing this subject are the following:

Section 2818: "All taxes shall be levied for the fiscal year ending November thirty (30) (thirtieth) in each year, and shall be a perpetual lien upon all real estate subject to taxation, until such taxes and any penalty, charges and interest which have accrued thereon, shall be paid; and any property, real or personal, which has by mistake or oversight been omitted from the tax list for any year or years, shall be subject to assessment for all back taxes properly chargeable thereon."

Section 2819: "All taxes levied or assessed upon personal property of any kind whatsoever, shall be and remain a perpetual lien upon the property so levied upon, until the whole amount of such tax is paid; and if such tax shall not be paid on or before the first day of January next succeeding each levy, it is hereby made the duty of the county treasurer to collect the same by distress and sale of any of the personal property so taxed, or of any other personal property of the person assessed; and if such property so taxed, or any part thereof, shall have been removed from the county wherein the same was taxed, or is so conditioned that the treasurer cannot find or obtain the same, then the county treasurer shall sue the person so taxed, in an action of debt before any court of his county having jurisdiction; and upon the trial of any such cause the tax roll or a certificate from the county treasurer of the amount of such tax, and that the same is not paid, shall be prima facie evidence that the amount claimed is due and unpaid, and may obtain a judgment for the amount of such tax, together with all costs, interest and charges thereon, and may have execution therefor against any of the property, real or personal, of such person: provided, however, that nothing in this section shall be so construed as to prevent the treasurer from distraint and sale of such property, as provided in section fifty-six of this act, nor to operate as a change or repeal of section ten of this act."

Section 2887: "No personal demand of taxes shall be necessary; but it is the duty of every person subject to taxation to attend at the office of the treasurer, between the first day of November and the thirtieth day of December of each year, and pay his taxes; and if any person shall neglect or fail to pay such tax, until after the thirtieth day of December following the levy of the same, the treasurer may make the same by distress and sale of any of his personal property."

Section 2880: "If the treasurer has reason to believe that any person charged with taxes upon personal property is about to remove such property from the county, or to sell, transfer, assign, convey or conceal, or otherwise dispose of the same, or to cause the same to be done, such treasurer may at any time after such taxes are due proceed to collect the same, with costs and charges, by distress and sale of any personal property of such person in the manner provided in this act."

Section 2912: "The county treasurer shall, before the twentieth day of April in each year, make out a list of all lands and town lots subject to sale, describing such lands and town lots as the same are described on the tax roll, with an accompanying notice stating that so much of each tract of land or town lot described in said list as may be necessary for that purpose, will, on a day specified thereafter, and the next succeeding days, be sold by him at public auction at the county treasurer's office, for the taxes and charges thereon, and taxes and charges assessed against the owner thereof for personal property." Then follows the form of the list with a general direction in regard to the giving of notice of the publication of the tax list.

All the general details to be observed by the treasurer in enforcing the collection and payment of delinquent taxes are provided for in the statute. These need not be noticed, for the case is not at all dependent on the proceedings taken by the treasurer, nor are his acts questioned because of any irregularities. The demurrer was sustained, and error is prosecuted.

Black & Catlin, for plaintiff in error. John Gray, for defendants in error. Talbot, Denison & Wadley and Edward D. Upham, amici curiae.

BISSELL, J. (after stating the facts). The issue between the taxpayer and the authorities is very sharply defined. The treasurer insists the statutes make all personal taxes a lien on realty which is superior to any other incumbrance, and to all classes of securities, whether prior in time or subsequent. In the oral argument as well as in the briefs counsel have discussed not only the question which is necessarily involved, but also the general proposition respecting the existence or non-existence of a lien on realty for personal taxes. It is quite possible, under some circumstances we might feel compelled to discuss and decide it. Possibly the determination of this question would be quite as satisfactory as the settlement of the precise issue. But our conclusions respecting the particular matter presented will wholly adjudicate the case, and we do not feel quite at liberty to pursue the other line of inquiry, notwithstanding its very great public importance and the general interest manifested respecting it. Wherever courts depart from the lines which must be necessarily followed, somewhat of the binding force of the opinion is destroyed by the suggestion that the matter is in reality obiter to the decision, even though therein might be found a very substantial basis on which to rest it. We therefore leave this matter of the general lien for personal taxes undetermined. Whatever appears to be a discussion of this question must be taken as limited to the one thing decided, and that is that taxes levied against the personal property of an owner subsequent to the execution of an incumbrance on land

in favor of a third party are not a lien superior in right to that security. The fundamental right of all governments to levy taxes is universally recognized. The power is broad enough to include authority to make the taxes a lien which shall override any other security or incumbrance, whether created anterior to the levy, or subsequent to the assessment. To ascertain whether it has been exercised in any given case, we must resort to the particular legislation respecting it in the jurisdiction wherein the lien is asserted. In the absence of legislation, the state must first look to the personal property of the taxpayer for the satisfaction of its imposts, and only resort to the land when that remedy has been fully exhausted. 1 Blackw. Tax Titles, c. 9, § 340 et seq.; *Pettit v. Black*, 8 Neb. 52; *Abbott v. Edgerton*, 58 Ind. 196; *Johnson v. Hahn*, 4 Neb. 139. In no general sense are these authorities applicable, because there is affirmative legislation on the subject. Under some conditions taxes are a lien on realty, but they have this force because of the enactments. Legislation directly charging the realty is prerequisite to its existence; without it, taxes are not thus collectible, either as against the owner or an incumbrancer. *Meriwether v. Garrett*, 102 U. S. 472; *Heine v. Commissioners*, 19 Wall. 655; *Jodon v. City of Brenham*, 57 Tex. 655.

Power being conceded, and legislation directed to that end in force, we are next to determine the extent and scope of the statutes relating to the subject. Rules for the construction of statutes are of such an elastic character, and so generally applied with reference to the subject-matter, and the end to be accomplished, that it is always a difficult and a delicate task to use terms which in strict precision shall exactly express what must control the courts in the exercise of their functions. The construction of revenue laws has been the subject of many judicial determinations, and has occupied the attention of learned writers. They universally agree that special consideration must be given to the purposes for which such laws are enacted. They are intended to provide the revenues which are essential to governmental existence. In construing such laws, great care must be taken not only to secure to the government what is essential, and prevent the taxpayer from escaping the burden justly laid on him, but also to see that the citizen's property is not taken unless it is subject to the tax. On this general basis the courts have declared that revenue statutes must be strictly construed, and the words used taken according to their natural and obvious import. This will give the government the amplest power to effectuate its objects, and relieve the citizen from all unjust burdens. This is equitable to the government, and it is fair to the citizen. The construction is sometimes termed strict, and at other times the rule is said to require an interpretation which shall favor the public. As put by one learned author: "When there is any ambiguity found, the construction must be in favor of the public, because it is a

general rule that, where the public are to be charged with the burden, the intention of the legislature to impose that burden must be explicitly and distinctly shown." *Potter, Dwar. St. p. 255.* This is in harmony with the adjudicated cases and the opinions of text writers. *Cooley, Tax'n, c. 9; Suth. St. Const. c. 14; Hubbard v. Brainard*, 35 Conn. 563. The principle has been clearly recognized by our supreme court. *Gomer v. Chaffee*, 6 Colo. 314; *Aggers v. People*, 20 Colo. 348, 38 Pac. 386. Many of the difficulties which might otherwise attend the construction of the statutes are therefore very largely removed. The defendants in error rely chiefly on the general phraseology of section 2818 of the General Statutes quoted in the statement. Its language is comprehensive and significant, and in terms declares that all taxes shall be levied at a fixed date, and shall be a perpetual lien upon all real estate subject to taxation until the taxes and penalty are paid. The plaintiff in error contends that it was the purpose of the legislature to provide only that the taxes on any piece of realty should be a lien on it until it was paid. The county insists that the section is an evident expression of the legislative intent to make taxes of all descriptions, whether on realty or personalty, a lien on the lands of the person against whom the taxes are assessed. We need not decide which construction is legitimate, nor whether only those taxes are a lien which are levied on a particular piece of land, nor whether, under any other circumstances, like those which would be present if the personalty against which the taxes were levied had been removed from the county or the state, whereby the government was liable to lose its revenues, the tax would be a lien on realty, because no such case is presented. Furthermore, the subsequent section compels a different conclusion with reference to the priority of the incumbrance. According to section 2819, taxes levied and assessed upon personal property are a lien upon the property against which the taxes are assessed. If the taxes be not paid by the date named, the treasurer is by that and subsequent sections authorized to proceed to collect them by a distraint of the personal property on which the lien exists. The right of the treasurer to distraint extends not only to a seizure at the time the taxes are due, but he may at any time after the taxes are assessed, if he apprehends danger of loss, proceed to seize and sell the property on which the statute has given a lien. So broad is this power, and so ample for the purposes of protecting the government, that it may well be doubted whether, in any case, personalty taxes may be charged as a lien on land. But we do not intend to express an authoritative opinion on that subject. We simply hold that, where the language is not direct, positive, and specific, it cannot be held to create a lien on land for taxes which is superior to antecedent incumbrances. Such a construction would unjustly destroy the security; it would annul the most solemn contracts; it would take one man's property to pay another man's debt, for the citizen who takes the incumbrance ante-

cedent to the levy acquires a vested interest in the property, which can only be taken away from him by the exercise of some power which has been directly conferred by a legislative act. The subject has been exhaustively discussed in many cases, and the rule which we announce has received the approval of most courts in which the question has been considered. *State v. Mayor, etc., of Newark*, 42 N. J. Law, 38; *Miller v. Anderson*, 1 S. D. 539, 47 N. W. 957; *Gormley's Appeal*, 27 Pa. St. 49; *Bibbins v. Clark*, 90 Iowa, 230, 57 N. W. 884, and 59 N. W. 290; *Cooper v. Corbin*, 105 Ill. 224. Some states have statutes which directly provide that the lien for taxes shall be superior to all other charges and incumbrances and securities. Wherever there is such legislation, it is always conceded to have the force and effect contended for by the defendant in error, and to give the government a lien superior to that which the citizen holds by virtue of the prior incumbrance. Such legislation would not be unconstitutional. Governmental necessities must be permitted to override individual equities, and the sovereignty must be accorded the broadest powers for the conservation of its own existence. We have been referred to no case which extends the lien beyond what is deemed to be the necessary and inevitable import of the language used by the legislature. Some decisions undoubtedly hold general language which makes all taxes a lien broad enough to give the state a lien on real estate for the taxes imposed on personalty. The authorities are not in harmony, and the courts—as notably in Iowa—have not always adhered to their first impressions. We are less embarrassed in this matter, because the general phraseology of section 2818 must be held to be modified by the language of the subsequent sections, and by the evident purpose of the legislature. Counties have full authority and power to protect themselves by the process of distraint, and by the broader authority given them, in case of anticipated danger, to seize the property on which the taxes have been levied. In the absence of a direct act declaring that the taxes shall be a lien superior to all antecedent incumbrances, we do not believe these revenue laws can be held to cut out and destroy the contractual rights acquired by the third person who is under no obligation to pay the tax. This construction is fully supported by the authorities, protects the sovereignty in the collection of its dues, and the citizen in the enjoyment of his rights. We have been referred to a case in the 11th Colorado (*Larimer County v. National State Bank*, 11 Colo. 564, 19 Pac. 537), where the bank attempted to recover from the county money previously paid to redeem certain property from a tax sale. The court held the payment voluntary, and the money not recoverable. At the conclusion of the opinion reference was made to section 2912 of the statutes, which authorizes the sale of land for taxes and for the taxes assessed against the owner of personal property. The statute seems to have been attacked by counsel for uncertainty, and as against public policy. The court declares the contentions not

to be well founded, but does not attempt to construe the statute, declare its force, or its operative effect. Possibly the opinion lends some support to the theory contended for by the defendant in error, but, if that is its necessary construction, this decision in no manner conflicts with it. We have expressly declared our intention not to decide the existence or non-existence of a lien on realty for personal taxes, except in so far as we are compelled to decide it in order to hold, as we do, that the lien, if it does exist, is inferior to that of an antecedent incumbrance. The ruling of the court below on demurrer is not in accord with these views, and the judgment will accordingly be reversed. Reversed.

BOARD OF COM'RS OF EL PASO COUNTY v. FINCH.

(Court of Appeals of Colorado. Oct. 12, 1896.)
SCHOOLS — COUNTY SUPERINTENDENT — DEPUTY —
COMPENSATION.

1. Mills' Ann. St. § 3981, provides that, if for any cause the county superintendent is unable to attend to the duties of his office, he may appoint a deputy, who may exercise all the functions of the superintendent, "but such deputy shall draw no salary from the public fund: provided that the superintendent may receive a per diem for the service of such deputy"; and section 3989 provides that for the time necessarily spent in the discharge of his duty the superintendent shall receive \$5 per day. *Held*, that the deputy was to be paid by the superintendent.

2. Laws 1891, p. 312, § 14, providing a salary for county superintendents of schools, as compensation for their services, and making no provision for fees, assistance, or incidental expenses, repeals any statutory provisions authorizing the superintendent to hire a deputy at the expense of the county.

Appeal from district court, El Paso county.

Action by Clarence O. Finch against the board of county commissioners of El Paso county. Judgment for plaintiff. Defendant appeals. Reversed.

On January 9, 1894, appellee became county superintendent of public schools of El Paso county. On January 10, 1894, he appointed his wife deputy superintendent. On October 1, 1894, appellee filed with the county commissioners the following bill:

"County of El Paso to Clarence O. Finch, Dr.	
Expenses visiting schools.....	\$ 25 00
Services of deputy:	
July, 20 days, at \$3.50.....	70 00
Aug., 15 days, at \$3.50.....	52 50
Sept., 18 days, at \$3.50.....	63 00
Total	\$211 40"

—And by the board disallowed October 5th. On January 15, 1895, he filed the following bill:

"County of El Paso to Clarence O. Finch, Dr.	
Services of deputy:	
Aug. 1. July, 20 days.....	\$ 70 00
Sept. 1. August, 15 days.....	52 50
Oct. 1. Sept., 18 days.....	63 00
Nov. 1. Oct., 27 days.....	94 00
Dec. 1. Nov., 26 days.....	91 00
Jan. 1. Dec., 24 days.....	84 00
Total	\$455 00"

—Which was disallowed February 7, 1895. Up to this date it appears that no claim for services of the deputy from January 10th to July had been made or bill presented to the board of commissioners. On February 20, 1895, a bill was filed, commencing at the date of the appointment of the deputy and ending with the year, embracing the two former bills from July to December. On same date the entire bill was rejected by the county commissioners. An appeal was taken from the decision of the board of county commissioners to the district court of El Paso county. On the 4th day of March, 1895, a trial was had to the court without a jury; a finding against the county for the services of the deputy, amounting to \$987. The further item of the account of \$75.90 for expenses of visiting schools was rejected. The board of county commissioners appealed to this court from such judgment.

Pearl S. Kitz, T. B. Stuart, and Chas. A. Murray, for appellant. J. K. Goudy, for appellee.

REED, P. J. (after stating the facts). The question squarely presented in this case is: Under the statutes in force January, 1894, had the county superintendent of public instruction authority to appoint and maintain a permanent deputy in his office to assist him in his duties, and charge and collect fees from the county for the services of such deputy? It appears that appellee was the first to assume the right to appoint a permanent deputy in the county of El Paso, and that he decided upon the authority to do so, and the necessity for such action, before entering upon the duties of his office, as he entered the office January 9th and appointed his wife on the 10th. The county commissioners denied such authority, and rejected all bills presented for such services. The court held, in effect, that the appointment of the deputy was a matter of discretion with the county superintendent; that he was to decide upon the necessity of such appointment, and his decision was conclusive. The language of the court's finding is: "When the county superintendent presented an itemized bill for the services of such deputy, duly verified, it became the duty of the commissioners to examine the bill; and, as no stated per diem for the services of a deputy is fixed, it became their duty to fix a reasonable per diem for such services, and if the per diem charged was reasonable the bill should have been approved,"—divesting the commissioners of all power in the premises except as to the amount of compensation to which the deputy was entitled, making the payment of some reasonable per diem compensation obligatory.

It is contended by counsel for appellee that the provisions of the statute in force prior to 1891 in regard to the appointment and compensation of a deputy were not repealed by the act of 1891. The provisions of the statute, previous to the act of 1891, necessary to be considered, are: Section 3979, Mills' Ann. St. "If attendance upon the examination at the

county seat work a hardship to one or more teachers in the county, he may provide for such teacher or teachers to take the examination at some convenient place under the direction of a deputy, who shall transmit to the county superintendent the written answers of each application as soon as the same examination is completed. Such deputy shall receive the sum of five dollars per day for conducting such examinations, when such examinations are certified to the county commissioners by the county superintendent." Section 3981, Id.: "If for any cause the superintendent is unable to attend to the duties of his office, he may appoint a deputy, who shall take the usual oath of office, and who may exercise all the functions of the county superintendent, but such deputy shall draw no salary from the public fund: provided that the superintendent may receive a per diem for the service of such deputy." Section 3989, Id.: "For the time necessarily spent in the discharge of his duty, he [the superintendent] shall receive five dollars per day and fifteen cents for each mile necessarily traveled one way. He shall, as far as practicable, render an itemized bill of his services and mileage," etc.

Before proceeding to the question of the repeal of those provisions by the act of 1891, it will be necessary to examine them and ascertain under what circumstances a deputy could be appointed and how paid. When it worked a hardship upon teachers at a distance to attend examination at the county seat, the superintendent, in his discretion, was allowed to appoint a special deputy to make the examination at a convenient place. Such deputy was required to transmit to the county superintendent the written answers of each applicant, making the duty of the deputy purely clerical, and leaving the principal to decide upon the fitness of the candidate. Such examinations are to be certified by the superintendent to the county commissioners, who are required to allow such deputy five dollars per day for the services. It is obvious that such compensation was to be paid from the general fund, under the control of the board of commissioners, and such board had no discretion in regard to the amount to be paid, nor the necessity for the appointment; but such authorization was by the statute to be only temporary, to cover the exigencies of the occasion, and with the close of the examination and transmission of the written report his appointment, duties, and compensation ended.

Section 3981: "If for any cause the superintendent is unable to attend to the duties of his office, he may appoint a deputy," etc. There was no provision for the appointment of a deputy to assist the superintendent in the duties of his office. When the superintendent was "unable" he was allowed to appoint a deputy in his place and stead, and, having taken the oath of office required, he was, as to the administration of the duties of the office and as to the public, the county superintendent, and his official acts entitled to the same

recognition and consideration as those of his principal, when administering the office. But here it stops, for it is especially provided, "Such deputy shall draw no salary from the public fund." Consequently, the appointment, compensation, and payment of the deputy were matters in which the board of county commissioners had no discretion or interest whatever. There was no provision for the payment from the county fund of the deputy, nor any provision for the payment of two persons. The deputy was employed and paid by the superintendent during his disability, and could only perform the duties of superintendent during such disability; and the statute makes no provision for any payment to the deputy, but expressly provides that the superintendent shall receive his own per diem compensation, as provided in the next section, for the service of his deputy in his place, during his incapacity to perform the duties. Under the statutes relied upon there is no authority to employ a deputy to be paid by the county, except for brief periods, and for a temporary, specific duty, and the employment of any other deputy to be paid from the public fund is expressly prohibited by section 3981. Even when unable to perform the duties of his office the county superintendent must employ and pay the deputy, and the only compensation for administering the office was the five dollars a day provided by the statute. I must conclude that even under the former statute, upon which appellee relies, there was no authority to employ a deputy to be paid by the county commissioners from the public fund under their control.

In 1891 the legislature deemed it advisable to make certain offices salaried instead of fee offices, depending upon the duties performed. Among these was the office of county superintendent of schools. In section 14 of the act (Sess. Laws 1891, p. 312) it is provided: "County superintendents of schools * * * shall receive the following compensation for their services to be paid quarterly out of the county treasury, to wit, * * *. In counties of the second class the sum of twenty-five hundred dollars." El Paso county was by the act, in section 1, made second class. "Section 26. All acts and parts of acts inconsistent with the provisions of this act are hereby repealed." There is no provision for the employment of a deputy. The learned district judge held the appointment of a deputy in the discretion of the superintendent. He undoubtedly had the right to appoint a deputy if he saw fit. The question is not in regard to his right to appoint, but in regard to the payment of such deputy. The suit was brought to compel the county commissioners to pay from the public fund. In the statute relied upon by appellee and the court, the court, in citing the provisions of section 3981, overlooked and failed to cite the important clause, "but such deputy shall draw no salary from the public fund." It is clear, from the express language of the statutes, that the sum of \$2,500 was to be the compensation for

the performance of the entire duties of the office; there being no provision for fees, assistance, or incidental expenses. Consequently, an administration that involved greater expense, or payment of any greater sum from the county treasury, was clearly impliedly forbidden, and any provision of the former law that might be construed as authority to employ at the expense of the county was, in so many words, repealed. As shown above, the only provision for employment of a deputy to be paid from the public fund was that for the examination of teachers at a distance from the county seat. That, as far as the payment was concerned, was inconsistent with the later act, and was repealed by the act of 1891. That the \$2,500 per annum was intended by the legislature as the entire compensation appears to have been partially recognized by the learned court in his decision. In the former statute it was provided that the superintendent should receive "fifteen cents for each mile necessarily traveled one way." This was held to have been repealed,—a clear recognition of the fact that the salary was to be the only compensation. Why this should be regarded as repealed, and other far more questionable provisions retained, I cannot understand.

Upon the trial, testimony was allowed to show the necessity of a deputy. Assistance may have been necessary, but if such was the fact it was clearly the intention of the legislature that it should be paid by the superintendent from his salary. There is no provision for the payment for the administration of the office, by the commissioners, of any amount except the salary, which is to be paid quarterly. The question of help in the office, and necessity, are not factors in the controversy. The county commissioners are not invested with any discretion in regard to the disbursement of funds intrusted to them. They can only be applied as directed by law. For any unwarranted use of county money without legal authority, they would be responsible individually. It follows that the county commissioners were warranted in rejecting the bills and refusing payment. To give the statute any other construction would place any county in the state within the control of the county superintendent. He could decide upon the necessity, and swear to it if necessary, and his conclusion be final; and in the exercise of what was held to be discretionary he could appoint a deputy to transact the business, who would, upon the certificate of the superintendent, receive his pay direct from the county treasury, and such certificate would be conclusive upon the commissioners, and divest them of the control of county money to the extent of the amount appropriated by the superintendent. It would enable an unscrupulous officer to employ a deputy to do the work, who should be paid from the public fund on his order, while he drew his salary quarterly for performing such duties. If such is the law, the passage of the law of 1891 by the legislature to correct former abuses was a great mistake.

One pertinent fact brought out upon the trial was that although appellee decided in advance of the necessity of a deputy, and appointed his wife on the second day of his incumbency, he did not at that time, nor for months after, put the construction upon the law afterwards adopted. Although the deputy was appointed January 10, 1894, no bill was presented or payment demanded for her services for the first six months, until February 20, 1895, when suit was brought. On October 1, 1894, a bill was presented for the months of July, August, and September; on January 15, 1895, a copy of the former bill, to which was added the months of October, November, and December, the whole amount claimed being \$455. Afterwards, as stated, a bill was put in for \$987, embracing the services for the first six months. The explanation in the testimony of appellee was: "I put in a bill for July, August, and September. I did not file one for the preceding months. I do not know why I did not. The deputy was employed on those days prior to the 1st of July the same as after the 1st day of July. * * * I will say I did not do it because I did not think the board would allow it, and I had not made up my mind to sue." Although conclusive of nothing, it is very suggestive. No bill was presented or claim made for services until October 1st, when nine months of the year were gone. The judgment of the district court must be reversed, and cause remanded, with instructions to dismiss the suit. Judgment reversed.

MOUNT LINCOLN COAL CO. v. LANE.
(Supreme Court of Colorado. Sept. 21, 1896.)

SALÉ—EVIDENCE.

1. In an action for price, the purchase, though denied by defendant, is sufficiently shown by evidence that the bill of sale, signed by the vendor alone, was placed in escrow, with memoranda as to the manner of payments, that a payment was made by defendant in accordance therewith, and that he took possession and mortgaged the property.

2. In an action for price, the purchase being denied by defendant, evidence of the execution by him of a mortgage on the property is admissible to prove the sale.

Appeal from district court, Mesa county.

Action by James V. Lane against the Mount Lincoln Coal Company. There was a judgment for plaintiff, and defendant appeals. Modified.

Bucklin, Staley & Safley, for appellant. H. T. Sale and W. J. Thomas, for appellee.

HAYT, O. J. This suit was instituted by James V. Lane, appellee, against the Mount Lincoln Coal Company, to recover an alleged balance due upon the purchase price of a one-third interest in certain coal mine improvements, consisting of buildings, coal cars, tracks, mining tools, and other personal property used in working the Mount Lincoln Coal Mine, in Mesa county, Colo. An attachment

in aid was sued out at the time of the institution of the suit. As grounds of attachment, it was alleged, in the affidavit, that the money was overdue on a contract in writing; second, that the defendant had failed and refused to pay the price or value of certain described property, which it should have paid for at the time of the delivery thereof. The issue having been formed by a traverse of these grounds of attachment, it was tried by the court without the intervention of a jury. The trial of this issue resulted in a finding for the defendant, but the court allowed the plaintiff to amend his affidavit, by inserting an additional ground of attachment, viz. that the defendant was indebted to the plaintiff upon an overdue book account. We have examined the record carefully, and find no evidence in support of this ground of attachment. There is nothing to show that the defendant was indebted to the plaintiff on an overdue book account, and, there being no evidence to establish any of the grounds relied upon, the attachment should have been dissolved. It is therefore unnecessary to consider the effect of the amendments of 1894 to the attachment act, although the same went into effect prior to the rendition of the judgment in this cause. The effect of such amendments has not been argued, and will not be determined in this proceeding.

The action is based upon an instrument in writing designated as a "quitclaim deed," but in fact it is a bill of sale, executed by James V. Lane and others to the Mount Lincoln Coal Company. This instrument was placed in escrow, with a memorandum as to the manner in which the payments were to be made. As neither of these papers was signed by the Mount Lincoln Coal Company, the company was, perhaps, not bound to pay the purchase price; but the evidence shows that the bill of sale was placed in escrow by the vendors at the instance of the Mount Lincoln Coal Company, and afterwards this company paid \$500 to Lane upon the purchase price, according to the escrow instructions. The evidence further shows that appellant took possession of the property described in these papers, and has retained the same from the date of the bill of sale to the time of the trial in the district court. It is further shown that its officers and agents repeatedly promised to pay the balance of the purchase price. In these circumstances, the finding of the district court that the company was liable cannot be disturbed. In fact, a reading of the record in this cause convinces us that the defendant is endeavoring to keep this property without paying the consideration for the same.

A number of assignments of error are based upon the admission of testimony for plaintiff, but only one of these is of sufficient importance to require consideration. After the company had taken possession of the property described in the bill of sale, it executed a mortgage thereon to third parties. Evidence of this mortgage was properly admitted, the claim of

the defendant being that it had never purchased the property in controversy. The mortgage was competent evidence to overthrow this claim. The defendant, in mortgaging this property, exercised a right only consistent with ownership; hence the evidence was material and competent to show that the defendant claimed to be the owner of the property. For the reasons given, the judgment of the district court sustaining the attachment is reversed, and the judgment on the merits affirmed. Judgment modified.

CONTINENTAL DIVIDE MINING INV.
CO. v. BLILEY.

(Supreme Court of Colorado. Oct. 19, 1896.)

PARTNERSHIP—ACCOUNTING BETWEEN PARTNERS—
PLEADING—MISFING PARTNERSHIP—CON-
VERSION—MEASURE OF DAMAGES.

1. A bill by a partner for an accounting is not insufficient by reason of the omission of an offer therein to pay any balance that may be found due from plaintiff to defendant on such accounting.

2. Where one of two partners in a mining lease surrenders it before its expiration, and takes another to himself alone, the new lease, as to the other partner, will be held to be a continuation of the old.

3. The fact that one partner in a mining lease failed for 90 days to pay his proportion of the expense of working the property does not work a forfeiture of his interest in the partnership, in the absence of any proceeding to that end.

4. The measure of damages for the conversion of the stock of a corporation is its value at the time of the conversion, with legal interest.

5. The value of the stock of a corporation at a particular time may be established by the testimony of brokers, showing the prices at which actual sales in the open market were made at such time.

6. The commencement of an action for an accounting by one partner against his co-partner in possession of the firm property is equivalent to a demand by plaintiff for his share of such property, and defendant, who resists recovery, will be treated as having converted it at said time, and held liable for its value.

Appeal from district court, Pitkin county.

Action by Alexander Bliley against the Continental Divide Mining Investment Company. Judgment for plaintiff, and defendant appeals. Affirmed.

This action was instituted by appellee, Alexander Bliley, against the Continental Divide Mining Investment Company, for an accounting of a mining partnership between appellant, appellee, and others in a lease and option to purchase certain mining property in Roaring Fork mining district, Pitkin county, Colo. In the winter of 1887 and 1888 one B. Clark Wheeler was in possession of the Bushwhacker and Alpine lode-mining claims, under a lease from the then owners of the property. This lease, by its terms, was to expire on the 10th day of September, 1887; but before the appellee acquired any rights in it it was amended so as to run for six months after the discovery of pay ore in the property. Some time in 1888 the Continental Divide Mining Investment Company, the present appellant, was organized as a corporation by Mr. Wheeler, who

was at all times hereinafter mentioned its president and general manager. In March, 1888, Mr. Wheeler conveyed to this corporation the lease in question, and all his right, title, and interest in the properties covered by the lease. Thereafter, and on the 28th day of April, 1888, appellant conveyed to appellee a one-fiftieth interest in the Alpine and Bushwhacker mining claims, and a one thirty-second interest in other properties. This transaction was witnessed by the following written instrument, which was duly recorded: "This assignment of interest in bond and lease made this 28th day of April, A. D. 1888, between the Continental Divide Mining Investment Company, of the first part, and Alex. Bliley, of the second part, witnesseth: That the said party of the first part, for and in consideration of the sum of seven hundred dollars, to it paid by the said party of the second part, the receipt whereof is hereby acknowledged, has sold and assigned to said party of the second part an undivided one thirty-second interest in a certain lease and bond on the Iowa, Joplin, and Cascade claims, made April 8th, 1887, by John Harkins et al. to Vincent Johnson, and an undivided one-fiftieth interest in a certain lease and bond on the Alpine and Bushwhacker lode-mining claims, made —, 1887, by W. E. Stone et al. to B. Clark Wheeler. Signed, sealed, and delivered on the day first above written." The appellant, with appellee and other parties, continued work under the lease until the 20th day of August, 1889, when pay ore was discovered in the property. Owing to the value of \$40,000 was taken out and marketed between the date of discovery and the first of the succeeding month of April. In December, 1889, when the lease, by its terms, had several months yet to run, the appellant, together with all other parties interested in the lease, except appellee, surrendered up said lease for cancellation; and on the same day the owners of the property made a new lease for the term of six months to the Continental Divide Mining Investment Company alone. This company continued to extract ore from the property until the month of April following, when the Bushwhacker Mining Company was organized by Mr. Wheeler and others, to which company appellant conveyed the lease, leasehold, and all other interests held by it in the Bushwhacker and Alpine claims. The Bushwhacker Mining Company was capitalized at 2,000,000 shares of the par value of one dollar per share. 1,680,000 shares of this stock were named in the instrument as the consideration for the conveyance from the Continental Divide Mining Investment Company, as aforesaid. Of this amount, 1,090,000 shares were given to the other parties, or used as treasury stock, leaving a balance of 600,000 shares to the grantor. It appears that appellee paid his share of all expenses incurred in the operation of the properties under the lease, until some time in the month of June, 1889; but from June until August 20th—the date when pay ore was discovered—appellee was in

default. Upon these facts the court found that a partnership existed between the parties, and ordered an accounting. The referee appointed to take the account found that the amount of cash received from sales of ore and sales of the property balanced the disbursements made by appellant under the lease and the amount paid as the purchase price under the various bonds and options. The referee further found that the Bushwhacker stock received by appellant was the profits of the partnership. This amounted to 600,000 shares, of which one-fiftieth, or 12,000 shares, was found to be the property of appellee. No demand having been made for this stock prior to the institution of this suit, the commencement of the action was treated by the district court as such a demand, and the conversion of the stock fixed as of April, 1891. Upon evidence adduced, the referee found the market value of the stock at 35 cents per share. He further found that appellee had expended \$105, which amount he was entitled to recover. On these findings final judgment was rendered for the sum of \$4,805. To reverse this judgment the cause is brought here by appellee.

William O'Brien, for appellant. Downing, Stinson & McNair, for appellee.

HAYT, O. J. (after stating the facts). There are 13 assignments of error in the record. Following the order of the argument of counsel, we shall first consider the last assignment of error, to wit, that the amended complaint does not state facts sufficient to constitute a cause of action. The particular defect pointed out is the omission of an allegation to the effect that plaintiff offered to pay his one-fiftieth part of the purchase price fixed by the bond for the transfer of the property to defendant. It appears to have been at one time necessary, in a suit for an accounting between partners, to state in the bill an offer on the part of the plaintiff to do equity, in the nature of an avowment of his willingness to pay any balance that might be found due the defendant from him; but under our practice a bill is not defective because such an avowment is omitted. *Craig v. Chandler*, 6 Colo. 543.

The first, second, and third assignments of error are next argued by counsel. These assignments of error bring up for review the ruling of the district court in rejecting certain evidence offered for the purpose of showing that the new lease and bond were made with the Continental Divide Mining Investment Company upon an independent consideration. The offer embraced proof that the lessors had claimed a forfeiture of the prior lease and bond by reason of an alleged failure of the lessee and his assigns to comply with the terms and conditions of such instruments. The evidence shows that the plaintiff and defendant occupied the relation of mining partners to each other. They had together operated the lease, appellee contributing, from time to time, his proportion of the expense of the same. The principle which

requires mining partners to exercise the utmost good faith in their dealings inter sese must be applied to the surrender of the old lease and the execution of the new one. The old lease had not expired at the time the new lease was executed. In these circumstances, the law regards the new lease as a continuation of, or as "grafted on," the old lease; and we think the district court correctly decided that appellee's interests continued under the new lease. *Meagher v. Reed*, 14 Colo. 235, 24 Pac. 681; 2 Pom. Eq. Jur. § 1050; *Clegg v. Fishwick*, 1 Macn. & G. 208; *Mitchell v. Reed*, 61 N. Y. 129; *Bates, Partn.* § 305.

The defendant offered to prove at the trial that for a period of about three months the plaintiff failed to pay his proportion of the expenses of working the lease. This offer was made for the purpose of showing a forfeiture of his interests in the lease; but we know of no principle of law that would visit such a result upon a co-partner. It is not claimed that any proceedings were taken to have a forfeiture declared, and certainly the fact that plaintiff failed to pay for a period of 90 days his proportion of the expenses did not work a forfeiture of his interest in the co-partnership. *Meagher v. Reed*, *supra*.

The referee found that the expenses of operating the mine under the lease, with salary of officers, etc., balanced the receipts, leaving a new profit to the partnership of the 600,000 shares of Bushwhacker stock, as the net consideration for the sale to that company. One-fiftieth part of this was found to belong to appellee. Objection is made to the nature of the evidence by which the value of the stock is shown, and also to the time fixed as the date of the conversion; this being the time to which the evidence of value is directed. There is some conflict in the evidence as to the value of this stock, but it is not contended that we should review the evidence for the purpose of substituting the judgment of this court for that of the referee and of the district court upon the weight of such evidence. To establish the value of this stock, plaintiff introduced a number of stockbrokers, who were actively engaged in that business at the town of Aspen, in the month of April, 1891, this place being the nearest business place to the mines. These stockbrokers were allowed to introduce their books, showing sales made by them during the month of April, 1891. With one firm the sales recorded were 4 in number, and with the other 21. These sales were made in the open market, at various times during the month, the price of the stock varying from 34 to 38 cents per share. This evidence was not only competent, but the best evidence of value that could be obtained. The sales were made in blocks of from 100 to 5,000 shares, in the ordinary course of business, and furnish competent evidence of the value of the stock. It was directed to the value of the stock in April, 1891, upon the theory that the conversion was made at that time. The following rules as to the measure of value of stock unlawfully converted have been announced

from time to time in different jurisdictions: (1) The market value of the stock upon the day of the conversion, to wit, the time when the owner, being entitled to immediate possession of the stock, demands the same, and is refused. (2) In England, and in some American states, the correct measure of damages has been declared to be the value of the stock at the time of the trial. (3) The rule in a few jurisdictions has been held to be the highest market value of the stock between the date of the conversion and the time of the trial. Each of these several rules finds support in the opinions of courts of last resort under varying circumstances, but the tendency of modern decisions has been in support of the rule, fixing the measure of damages at the value of the stock at the time of the conversion, with legal interest added. Cook, Stock & S. § 581 et seq. Perhaps exceptions to the rule should be allowed in some cases, but in this instance the rule adopted is as favorable to the appellant as the law will warrant. It is not only supported by the weight of authority, but is founded upon sound reason. When a demand is made for stock, the party holding it is given notice of the claim, and he is presumably aware of the value of the stock at that time, and knows the extent of his liability in case his refusal to deliver the stock is unwarranted. In this case suit was commenced and summons served in the month of April, 1891. There being no other demand for this stock, and no unreasonable delay in bringing suit, the commencement of the action was properly taken as the time of the conversion.

Finding no error in the record, the judgment of the district court will be affirmed. Affirmed.

BOYKIN v. PEOPLE.

(Supreme Court of Colorado. Oct. 31, 1896.)

COSTS—CRIMINAL CASE.

1. In the absence of statutory authority, costs on appeal in a criminal case cannot be taxed against the county in which the offense was committed.

2. Code 1887, § 407 (Mills' Ann. St. § 971), authorizing the supreme court to make necessary rules of practice, and to enforce obedience to them, does not impliedly authorize the taxation of costs on appeal in a criminal case against the county in which the offense was committed.

Error to district court, Arapahoe county.

Application for taxation of costs in supreme court on error by Robert J. Boykin, on conviction of a crime.

David G. Taylor and Victor A. Elliott, for plaintiff in error. Goudy & Twitchell, for county commissioners of Arapahoe county.

PER CURIAM. The plaintiff in error, as defendant below, was convicted of murder in the district court of Arapahoe county. At the April term of this court the conviction was set aside. In entering up the judgment the clerk, in accordance with the prevailing practice, included therein the costs incurred by the defendant in this court, but without specifying

the amount thereof. Upon presentation by plaintiff in error of his bill for these costs to the board of county commissioners of Arapahoe county, it was disallowed. He thereupon made a motion in this court to retax the costs, and to have included in the same certain items not theretofore embraced. This motion was denied, but the exact amount of costs to be included in the judgment was fixed by this court, and the judgment as thus corrected was entered. The board of county commissioners still refusing to pay these costs, the parties to this action, by their counsel, stipulated that a rehearing might be had, which was granted, and this is treated as an original application for an order to tax defendant's costs. There is thus presented for our determination the question whether, upon the reversal by this court of a conviction in a criminal case, the costs incurred by the defendant in the prosecution of his action in this court can be taxed and recovered against the county of the venue where the offense was laid. The position of counsel for the county is—First, that, the county not being a party to the action, no judgment of any kind, in any event, can be rendered against it; second, that in this state the costs incurred by a defendant in a criminal case, in the prosecution of a writ of error in the supreme court, cannot be taxed either against the county or the state.

The court of appeals, in an able opinion by Mr. Justice Thomson, in the case of Fremont Co. v. Wilson, 8 Colo. App. 492, 34 Pac. 265, has held that there is no liability against the county for costs of the defendant in a criminal case tried in the district court, unless the defendant has availed himself of the provisions of section 1001 of the General Statutes of 1883 (Mills' Ann. St. § 1507), which section, it may be said, is not applicable here. Counsel for plaintiff in error is not disposed to question the soundness of that opinion, but says that it is inapplicable to the case now before us. The argument is that although costs were unknown to the common law, and as such are solely the creature of the statute, and cannot be taxed in the absence of a law so providing, nevertheless the inherent power of the supreme court to make necessary rules of practice and to enforce obedience to them, reinforced and sanctioned as it is by statutes (Mills' Ann. St. § 971; Code 1887, § 407), carries with it the implied power, in case of a reversal of a criminal case, to tax against the county in which the offense was committed the costs incurred by the defendant in prosecuting his suit in this court. We fail, however, to see any distinction in principle between the case decided by the court of appeals and the one at bar. The district court has the same inherent power, and also the same statutory power, as has the supreme court for making rules of practice and enforcing obedience to them. These rules of practice, however, by express provision of the statutes cited, must not be inconsistent with the constitution or statute laws of the state. There is no statute giving costs to a defendant

in a case like this, and this court cannot award them under the guise of a power to prescribe rules of practice. We are cited to article 6 of section 9 of the constitution, relating to the clerk of the supreme court, which provides that his "duties and emoluments shall be as prescribed by law, and by the rules of the supreme court," as conferring a power broad enough to authorize the taxing against the county of the costs of the clerk for services rendered by him to a defendant. Section 19 of the same article is, in some respects, a similar provision applicable to the clerks of districts courts. Whatever may be the proper construction of these provisions touching the exclusiveness of the control of these courts over the emoluments of their clerks, we are satisfied that the power of this court to mulct a county for costs made by a defendant in a criminal case cannot be deduced from them. We approve of the decision of the court of appeals above referred to, and hold the principle thereof applicable to the case which we are now considering.

To the point that the county not being a party to the suit, and not entitled to institute or control the prosecution, no judgment can be rendered against it, we are cited to *Patterson v. Officers Court*, 11 Ala. 740, and *Edgar Co. v. Mayo*, 3 Gilman, 82; and *Vise v. Hamilton Co.*, 19 Ill. 78, which hold that this cannot be done. Aside from this, this decision can safely be put upon the broader proposition that, in the absence of a statute expressly so providing, costs incurred in this court by a successful defendant in a criminal case cannot be taxed either against the county or the state. To this effect and to this point see *Franklin Co. v. Conrad*, 36 Pa. St. 317; *Carpenter v. People*, 3 Gilman, 147; 4 Am. & Eng. Enc. Law, pp. 314, 315, 323, 324, and cases cited; *Prince v. State*, 7 Humph. 137; *Faust v. State*, 45 Wis. 273; *Noyes v. State*, 46 Wis. 250, 1 N. W. 1. We are cited to no case holding to the contrary. The rule of this court which contemplates the taxation of costs against the unsuccessful party must therefore be construed as applicable to civil cases only. It may be true that the practice prevailing in this court hitherto has been to enter up judgments for costs, as was done in this case, both in civil and criminal cases. The right to do so in a criminal case has not heretofore been questioned, and so the question involved here has not until now been called to the attention of, or passed upon by, this court. It follows from the foregoing that the defendant is not entitled to recover his costs in this case, and the judgment should be according to the views herein expressed.

PABLO v. PEOPLE.

(Supreme Court of Colorado. Oct. 5, 1896.)

CRIMES COMMITTED BY INDIANS—JURISDICTION OF STATE.

Under Act Cong. March 3, 1885, giving territorial and federal courts jurisdiction to punish

Indians for murder and other crimes committed by one Indian against another, whether on or off a reservation, an Indian, tribal or otherwise, is amenable to state jurisdiction for the murder of another Indian outside of the reservation.

Error to district court, Montezuma county.

Pablo, alias Jimmie Hatch, alias James Hatch, was convicted of murder, and brings error. Affirmed.

S. W. Carpenter, for plaintiff in error. B. L. Carr, Atty. Gen., Calvin E. Reed, Asst. Atty. Gen., and George H. Thorne, Asst. Atty. Gen., for the People.

GODDARD, J. Pablo, an Indian, was convicted of murder of the first degree, in the district court of Montezuma county, and sentenced to suffer the death penalty, for killing one Eweep, also an Indian. The record discloses that Pablo and Eweep were both members of a tribe of Southern Ute Indians, and resided on their reservation in Colorado. At the time of the killing they were absent from, and the crime was committed off of, the reservation, and within the county of Montezuma. The only error argued and relied on for reversal of this sentence is the want of jurisdiction in the district court to try and punish plaintiff in error for the offense charged. This contention is predicated upon the ground that the accused, being a member of the same Indian tribe with deceased, is not amenable to our laws, or the jurisdiction of the state courts, but is answerable to the tribe of which they were both members, and punishable only under its tribal laws or customs. Apparent support is found for this claim in the case of *State v. McKenney*, 18 Nev. 182, 2 Pac. 171; but under the existing legislation on the subject by congress the reasons controlling that decision no longer exist, and the doctrine therein announced is at the present time, we think, inapplicable. The right of the Indians to self-government in matters appertaining to themselves, so long as they preserved their tribal relations, being then recognized by the laws and treaties of congress, it was therein held that, if congress intended to permit the territory to do away with such customs, and declare as to themselves what acts should constitute crime, and prescribe punishment therefor, it would have used words clearly expressing such intention in the organic act. Not having done so, and such jurisdiction not having been conferred by an affirmative act of the legislature or self-acting clause of the constitution, the court concluded that the jurisdiction to punish tribal Indians for offenses against each other was retained by the tribe to which they belonged. But since that decision was announced congress has, by the act of March 3, 1885, expressly done away with the tribal jurisdiction over certain crimes (among them murder) when perpetrated by one Indian against another, and conferred upon the territorial and federal courts the exclusive jurisdiction to try and punish such offenses when committed within a territory, or within the

boundaries of a reservation within a state. This act provides two conditions under which Indians may be punished for the same crimes: First, by the territorial courts, and under territorial laws, when committed within the limits of a territory, whether on or off a reservation; second, by the federal courts, and under the laws of the United States, when the offense is committed on an Indian reservation within the limits of a state. It seems to us evident that by this departure from its former policy, and by subjecting tribal Indians to the jurisdiction of territorial courts and to punishment under territorial laws for crimes committed within a territory, whether on or off a reservation, and in limiting the jurisdiction of the federal courts to the same offenses when committed on a reservation if within a state, congress has not only taken such jurisdiction from the tribe, but has, by clear intentment, left the Indian, tribal or otherwise, amenable to state jurisdiction for offenses committed outside the reservation. To hold otherwise would extend a tribal jurisdiction over offenses committed outside the reservation which does not exist within its limits,—a conclusion that, in our opinion, cannot for a moment be entertained. The state of Colorado was admitted into the Union "upon equal footing with the original states, in all respects whatsoever," and is sovereign within its territorial limits. "Prima facie, all persons within the state are subject to its criminal law, and within the jurisdiction of its courts. If any exception exists, it must be shown." *State v. Ta-cha-natah*, 64 N. C. 614. There is nothing in our enabling act that curtails the jurisdiction of the state over Indians for offenses committed off their reservation; nor is such jurisdiction in any way limited by the act of congress referred to, whatever its effect may be in depriving the state of jurisdiction within the limits of a reservation. In the case of *U. S. v. Kagama*, 118 U. S. 375, 6 Sup. Ct. 1113, that act was under consideration. Justice Miller, speaking for the court, said: "The statute itself contains no express limitation upon the powers of a state or the jurisdiction of its courts. If there be any limitation in either of these, it grows out of the implication arising from the fact that congress has defined a crime committed within the state, and made it punishable in the courts of the United States. * * * It will be seen at once that the nature of the offense [murder] is one which in almost all cases of its commission is punishable by the laws of the states, and within the jurisdiction of their courts. The distinction is claimed to be that the offense under the statute is committed by an Indian, that it is committed on a reservation set apart within the state for residence of the tribe of Indians by the United States, and the fair inference is that the offending Indian shall belong to that or some other tribe. It does not interfere with the process of the state courts within the reservation, nor with the operation of state laws upon white people found there. Its ef-

fect is confined to the acts of an Indian of some tribe, of a criminal character, committed within the limits of the reservation." We think, therefore, that the Ute Indians are subject to our state laws, and amenable to the jurisdiction of our courts for offenses committed outside the limits of their reservation. This is the only question presented by this record, and all we determine. A very different question would be presented if the state courts should assert jurisdiction over an offense committed by an Indian within the limits of the reservation. Our conclusion, we think, is correct on principle, and supported by the weight of authority. *State v. Williams*, 13 Wash. 335, 48 Pac. 15; *Hunt v. State*, 4 Kan. 51; *U. S. v. Yellow Sun*, 1 Dill. 271, Fed. Cas. No. 16,780; *Ward v. Race Horse*, 163 U. S. 504, 16 Sup. Ct. 1076; *In re Wolf*, 27 Fed. 606. The sentence and judgment of the district court will therefore be affirmed, and an order will be entered of record appointing and designating the calendar week commencing October 25th as the week for carrying the judgment of the district court into effect, as the statute provides. Affirmed.

BENEDICT v. PEOPLE.

(Supreme Court of Colorado. Sept. 21, 1896.)

CRIMINAL LAW—AMENDING—RECORD.

1. During the term the court, in a criminal case, has power to amend the record to show the fact that accused was furnished with a copy of the information and list of the state's witnesses as required by statute.

2. The exclusion from the court room during the trial of all persons except members of the bar, law students, officers of the court, and the witnesses does not prevent the trial from being public, as guaranteed by the constitution.

3. A refusal of an instruction which had already been given in substance is no ground for reversal.

Error to district court, Gilpin county.

Antonio Benedict was convicted of a crime, and brings error. Affirmed.

J. McD. Livesay, for plaintiff in error. B. L. Carr, Atty. Gen., F. P. Secor, Asst. Atty. Gen., Calvin E. Reed, Asst. Atty. Gen., and L. W. Doloff, for the People.

CAMPBELL, J. The defendant was tried and convicted of the infamous crime against nature, and sentenced to the penitentiary. To reverse the judgment a number of errors are assigned, only three of which are argued by counsel for plaintiff in error, and they are the only ones that require consideration.

The point is made that the defendant was not furnished, previous to or at the time of his arraignment, with a copy of the information and a list of the jurors and of the people's witnesses, as the statute prescribes. As originally made up, the record does not affirmatively show that this requirement was observed. When, however, this imperfection in the record was called to its attention, the trial court,

at the same term, and upon a showing made, ordered the record to be amended to speak the truth in this respect. The record, as now before us, shows that the statute was fully complied with in the particular mentioned. The right of the court thus to amend its own records is unquestioned, and, for aught that appears, there was abundant evidence before the court to justify the order directing the amendment to be made.

Another objection urged pertains to an alleged error of the court in refusing an instruction asked by defendant's counsel based upon the supposed mental incapacity of the defendant to form a criminal intent at the time of the alleged offense. In order to raise this objection the evidence must be properly preserved by a bill of exceptions. But no bill has been filed in this court, and, so far as we know, none was tendered to the trial judge, or signed by him. Nevertheless, counsel for plaintiff in error seeks to evade this rule of practice and avail himself of the objection in the following way: He filed a motion for a new trial upon the ground, *inter alia*, that the defendant was incapable of forming a criminal intent, and that an instruction asked by him, applicable to this issue, was improperly refused by the court. In support of this motion he claims that he produced before the court the affidavits of three of the jurors to the effect that such was their belief as to the defendant's mental condition, and the clerk certifies that such affidavits were filed in the case. Such a method of preserving the evidence is not only unknown to our practice, but certainly would not be tolerated by any reasonable rule of practice framed with a view to accuracy and good faith in the trial of causes. For this reason we might altogether ignore these affidavits, but an examination of the record, incomplete as it is, discloses that there is no reason for a reversal upon this ground. Jurors cannot be permitted thus to impeach their own verdict by their own affidavits; and, if an additional reason for reversing this point against the plaintiff in error is necessary, it is to be found in the fact that this particular instruction, the refusal to give which is assigned as error, was in substance given by the court in another portion of its charge.

The remaining objection is that the defendant did not have a public trial. The fact that he did not is called to our attention by what purport to be affidavits of some of the court officials, which the clerk certifies were filed in the case, in which it is stated that the court made an order excluding from the court room during the progress of the trial all persons except members of the bar, officers of the court, students at law, and witnesses in the case. These affidavits also might be disregarded for the reason above given, and for the additional reason that such an order of the court is properly presented by a duly-authenticated copy of the record, and not by affidavits. But if we waive these essential requirements, and consider this objection upon its supposed mer-

its, it will be found that there is nothing in it. In a criminal case the trial must be public, not secret. But a public trial does not necessarily contemplate that every person whose morbid curiosity for indecent details draws him thither shall have that curiosity gratified by being permitted to be present in the court room to listen to the recital of disgusting facts. *Cooley*, Const. Lim. (5th Ed.) 380 (*312); 1 Bish. Cr. Proc. §§ 958, 959; *People v. Swafford*, 65 Cal. 223, 3 Pac. 809; *People v. Kerrigan*, 73 Cal. 222, 14 Pac. 849; *Grimmett v. State*, 22 Tex. App. 36, 2 S. W. 631; *State v. Brooks*, 92 Mo. 542, 5 S. W. 257, 330. If the order of exclusion was made as claimed by the counsel for the accused, we are satisfied that no prejudice was done to the defendant. The burden of showing error or prejudice rests upon one assigning it, and no attempt is made by the defendant to show that any objection to the order was made by him at the time; and in the absence of a contrary showing, under the general rule that the proceedings of a court of record are presumed to be regular, we are justified in assuming that it was made at the request or with the consent of the accused himself. It follows that the judgment of the court should be affirmed, and it is so ordered. Affirmed.

**BOARD OF COMRS OF ARAPAHOE
COUNTY v. McINTIRE et al., State
Board of Equalization.**

(Supreme Court of Colorado. Oct. 5, 1896.)

APPELLATE JURISDICTION—AGREEMENT OF PARTIES
—ACTION BY COUNTY.

1. Parties, by stipulation on appeal, waiving all questions raised below except a constitutional question, cannot give the supreme court jurisdiction on the ground that the construction of a provision of the constitution is necessary to the determination of the case, when it might be disposed of on one of the other grounds raised below.

2. A county cannot maintain a suit to prevent action under a tax law on the ground that the law discriminates against the individual taxpayers of the county in favor of those living in other counties.

Error to district court, Arapahoe county.

Action by the board of county commissioners of Arapahoe county against Albert W. McIntire and others, sitting as the state board of equalization. A demurrer to the complaint was sustained, and plaintiff brings error. Dismissed.

Grant L. Hudson, Charles C. Butler, Wm. H. Wadley, F. C. Goudy, and L. F. Twitchell, for plaintiff in error. Eugene Engley, H. T. Sole, and Byron L. Carr, for defendants in error.

CAMPBELL, J. This action was instituted by the board of county commissioners of Arapahoe county to restrain the state board of equalization from assessing the railroad property of the state and distributing the valuation thereof among the various counties of the state, in accordance with the provisions of the revenue act of 1891 (Sess. Laws 1891, p. 290).

et seq.). The defendants demurred to the complaint upon several grounds. The district court sustained the demurrer, and dismissed the action. To review this judgment of dismissal the board of commissioners prosecutes its writ of error.

Upon what ground the decision of the court below was predicated we are not advised. In the printed briefs several legal propositions are discussed, but, after they were filed, counsel for the respective parties entered into a stipulation in this court waiving all questions raised in the district court, and again presented in the briefs, except the one relating to the alleged unconstitutionality of said statute. The amount of the judgment below does not confer jurisdiction upon this court of this writ of error. Neither does the matter in controversy relate to a franchise or a freehold. Unless, therefore, the construction of a provision of the constitution is necessary to the determination of this case, this court has not jurisdiction of it. *Hurd v. Carille*, 18 Colo. 401, 83 Pac. 164; *McCandless v. Green*, 20 Colo. 519, 39 Pac. 64; *Mills' Ann. Code*, p. 727, § 406a, and cases cited. We are of the opinion that this court has not jurisdiction of this case for the following reasons: (1) Parties to a suit, after it has reached a court of review, have not the right, by agreement, to make a case different from the one decided by the trial court, for, among other reasons, had the case been presented below as sought to be submitted upon review, the decision might have been such as would have avoided the necessity of further proceedings. (2) Jurisdiction of an appeal or writ of error, which otherwise does not exist, cannot thus be conferred by act of the parties. *Sons of America Bldg. & Inv. Ass'n v. City of Denver*, 15 Colo. 592, 25 Pac. 1091. An examination of the record satisfies us that a decision of the constitutional question is not necessary to the determination of this case. On the contrary, it might well be disposed of upon one or more of the other grounds raised by the demurrer to the complaint, neither of which is of a character to give to this court jurisdiction to review the judgment. Both parties, however, strenuously insist that a speedy determination of this constitutional question ought to be had, because it relates to the public revenue. Instead of being impressed with the argument for haste upon this ground, the very fact that the taxing power, to a limited extent, is involved, makes us hesitate, and decline to proceed merely because the present litigants request it. The railroads of the state seem to be paying their taxes as ascertained under this act, and there is no claim that the amount thereof is less than it ought to be, or would be, if the tax were determined in accordance with the methods which the plaintiff asks to have applied. The theory upon which the county bases its right to maintain this action is that, under the scheme contemplated by this statute, property of large value situate in Arapahoe county is withdrawn therefrom for the purposes of taxation, and the

benefit of the revenue derived from the tax is apportioned to other counties, and thus the individual taxpayers of Arapahoe county are discriminated against in favor of those living in other counties. We are not aware that the county, which is but one of the subdivisions of the state, and but one of its agencies, is the trustee for its taxpayers as a body, or that it is its duty to seek to set aside an act of the legislature upon the ground that it operates to the prejudice of any particular class of its inhabitants and in favor of another. We need not determine whether aggrieved taxpayers of Arapahoe county could maintain this action. It is sufficient to say that, in our judgment, this question should not be decided except in a case where the owners of the property most concerned are parties, and where the issues demand it. Indeed, we are advised that one of the railroad companies of the state which has paid the tax upon its property in Arapahoe county as ascertained under this act has brought suit against the treasurer of the county, who threatens to sell the property because the tax based upon a valuation fixed by the county assessor has not been paid. If this case reaches us, and the point is properly preserved in the record, we can then determine the important question involved with due regard to the rights of all parties whose interests are affected. The writ of error should, therefore, be dismissed. Writ of error dismissed.

REYNOLDS v. CAMPLING.

(Supreme Court of Colorado. Sept. 21, 1896.)

ABSENCE OF COUNSEL—CONTINUANCE—QUIETING TITLE—PLAINTIFF'S POSSESSION—COPY OF INSTRUMENT—EVIDENCE.

1. In a county where but two terms of district court are held in a year, it is not an abuse of discretion to refuse a continuance on account of the necessary absence of counsel, where defendant is represented by associate counsel who are in attendance on the court.

2. In an action to quiet title, under Civ. Code, § 265, which requires plaintiff to allege and prove possession at the time the action was begun, where the evidence shows a sufficient possession on the part of plaintiff at a certain date, and the record is silent as to the time the action was in fact instituted, the finding of the trial court for plaintiff on the question of possession will not be disturbed.

3. Where the loss of an original, unacknowledged instrument is not accounted for, and no attempt is made to prove its execution in any way, the admission of a copy of it as evidence of a material issue is reversible error.

Appeal from district court, Otero county.

Action by Mary B. Campling against A. E. Reynolds to remove a cloud from the title of certain real estate. From a judgment in favor of plaintiff, defendant appeals. Reversed.

This action was brought by Mary B. Campling, as plaintiff, for the purpose of removing a cloud from the title of 640 acres of land, situate in Otero county, Colo., and known as "Indian Claim No. 12," for which a patent was issued on the 20th day of September, 1870, to one

Armama Smith. The plaintiff in her complaint alleges possession and ownership of the land in controversy, and avers that the defendant claims some adverse title or interest therein. The defendant in his answer denies the possession of plaintiff; denies plaintiff's title; alleges fee-simple title in himself, and the payment of taxes upon the property for 15 consecutive years prior to the institution of this suit. A trial to the court upon these issues resulted in a decree in accordance with the prayer of the complaint. To reverse this judgment the cause is brought here upon appeal.

Tyson S. Dines and Charles J. Hughes, for appellant. A. F. Thompson and L. B. Gibson, for appellee.

HAYT, C. J. (after stating the facts). Both parties to this action claim title to the premises in controversy under a United States patent. The patentee, Armama Smith, is described in the patent as a half-breed Indian, "who claims (under the fifth article of the treaty concluded October 14, 1865, between the United States and the Cheyenne and Arapahoe tribes of Indians) 640 acres of land." This treaty, in so far as it is necessary to be considered upon this review, reads as follows: "Treaty between the United States of America and the Cheyenne and Arapahoe tribes of Indians, concluded October 14, 1865. Ratification advised, with amendments, May 22, 1866. Amendments accepted November 19, 1866. * * * Art. 5. * * * At the special request of the Cheyenne and Arapahoe Indians, parties to this treaty, the United States agrees to grant by patent in fee simple, to the following named persons, all of whom are related to the Cheyennes or Arapahoes by blood, to each an amount of land equal to one section of six hundred and forty (640) acres, viz.: To the children of John S. Smith, Interpreter, William Gilpin Smith, and daughter Armama. * * * Said lands to be selected under the directions of the secretary of the Interior from the reservation established by the first article of their treaty of February 18, A. D. 1861." Plaintiff, to establish her title, introduced proof tending to show that Armama Smith, the patentee, died with smallpox in the year 1862, leaving as her sole heir John S. Smith, her father, who died in the year 1871. Plaintiff then introduced various mesne conveyances tending to show her ownership of such interest as may have been inherited by John S. Smith. The defendant claims, and introduced evidence to show, that the patentee, Armama Smith, was still living in 1894, at the time of the trial in the court below, and that she, by her warranty deed, dated and acknowledged on the 16th day of November, 1872, conveyed the premises to the defendant. This deed was duly recorded in the county where the lands were situate on the 28th day of April, 1873. The grantee paid taxes under said deed for the years 1877 to 1889, inclusive. A large number of errors have been assigned; but, as the

decree of the district court must be reversed the consideration of several of the assignments of error becomes unnecessary, while others will require but brief consideration.

The first assignment of error discussed brings up for review the ruling denying a continuance asked by the appellant on the 29th of April, 1893, and forcing him to trial on May 15, 1893. This continuance was based upon motion, supported by an affidavit showing that Charles J. Hughes, one of counsel for the defendant, was absent trying an important case in a neighboring state, and that he could not be present at the trial of this cause during the term of the district court of Otero county that was then being held, and at which the cause was subsequently tried; also, upon the claim that a number of defendant's important witnesses were Indians belonging to, and at the time with, roving bands, and for this reason could not be obtained in time for the trial at that term of court. In so far as the absence of counsel is urged, it is sufficient to say that the record shows that the defendant was represented by Mr. T. S. Dines, who was associated with Mr. Hughes, and that Mr. Dines was at all times present when any steps were taken in the cause. Perhaps Mr. Hughes was more familiar with the controversy than Mr. Dines, and for this reason could have been of more assistance to the defendant; but this would not entitle the defendant to a continuance as a matter of law. A large discretion is vested in the trial courts with reference to such matters, and this discretion should be exercised according to the circumstances of each case. In a county having a large population, where the courts are almost constantly in session, such matters can usually be easily arranged without serious inconvenience; but in a sparsely-settled county like Otero, having but two terms of the district court per year, a continuance for a few days may carry the case beyond the term, and a continuance of six months or more would in many cases work a great hardship to at least one of the parties to the controversy. When a continuance is asked on account of the necessary absence of counsel, and the granting of the same will work no particular hardship to the other side, courts should, and usually do, grant the indulgence; but the discretion of the trial courts in these matters will only be interfered with in case of gross abuse, and we do not think this is such a case. As there was no showing made as to the absent witnesses, the motion for a continuance was properly overruled, although we think that the interests of all parties would have been better subserved if a continuance had been granted, thereby enabling both parties to have fully presented the facts which are essential to a correct adjudication.

This action having been instituted under section 255 of our Civil Code, it was necessary for plaintiff to allege and prove her possession at the time this action was begun, this allegation having been put in issue. *Bank v. Newton*, 13 Colo. 245, 22 Pac. 444; *Wall v. Magnes*, 17

Colo. 476, 30 Pac. 56; Walker v. Pogue, 2 Colo. App. 149, 29 Pac. 1017. The district court found this issue in favor of plaintiff, and this is made the basis of one of the assignments of error. The evidence shows sufficient possession on the part of plaintiff in the year 1891 to maintain the action, and, the record being silent as to the time the action was in fact instituted, the finding of the trial court upon the question of possession will not be disturbed. Plaintiff, to show title in herself, attempted to show that the patentee, Armama Smith, died of smallpox in 1862 or 1863, and that, under the law of descent, her father became the sole owner of her estate; that upon his death, which occurred in 1871, his son, William Gilpin Smith, became his sole heir; that William Gilpin Smith, by warranty deed executed in 1888, conveyed the land to plaintiff. The defendant denies title through the patent to Armama Smith by warranty deed executed by the patentee to him in 1872. This deed appears to have been regularly acknowledged before a notary public, who certified that Armama Smith, the grantor, was personally known to him, and that she appeared before him, and acknowledged the instrument to be her free act and deed. The execution of this deed was witnessed by one Edmund Guerrier, a half-breed Cheyenne Indian, who testified at the trial that he personally knew Armama Smith, the grantor, and that she was a half-breed Indian, the daughter of John S. Smith, interpreter. This witness further testified that this Armama Smith was living in the Indian Territory at the time of the trial. Other witnesses, introduced by the defendant, testified that they were acquainted with the Armama Smith, the grantor in the warranty deed to appellant. These witnesses detailed many circumstances going to show that the Armama Smith who executed this deed is the identical Armama Smith named in the government patent. The learned judge who tried the case in the district court was under the impression, and so stated, that the Armama Smith who executed this warranty deed was not by blood related to the Cheyennes or Arapahoes, but was a captive Sioux, and therefore did not answer the description of the grantee to be found in the government patent. The evidence of the witness Guerrier is given as the authority for this finding. The record shows that the district court was in error as to the testimony of this witness. Although he said that he had been acquainted with Armama Smith from her childhood, and had known both her mother and father, and that her father was John S. Smith, the interpreter, and her mother a squaw taken in war by the Cheyennes, and "known as a Cheyenne woman," he swears positively that she was not a Sioux. In answer to further interrogatories, the witness stated that he witnessed the deed from Armama Smith to A. E. Reynolds, and that the grantor was the person named in the treaty with the Indians and in the government patent. This evidence is corroborated by the testimony of the defendant and one Weiglein, who were post traders selling

goods to the Cheyennes and Arapahoes. These witnesses each testify that she was known as the daughter of John S. Smith, the interpreter, and was well known among the Indians as "Armama," alias Armama Smith, and that she was the only person by that name with the Cheyennes. It is also shown that this Indian girl received the government muniment of title from the United States during the lifetime of John S. Smith, and that, under such circumstances as are only consistent with his knowledge of this fact, she retained possession of that instrument until the execution of her warranty deed, when both were given to Mr. Reynolds. At the trial plaintiff introduced evidence to show that the Armama Smith to whom the patent was issued died in 1862 or 1863. In the oral argument before this court counsel called attention to this evidence, and argued that the death of Armama Smith occurred under such peculiar circumstances as to leave no doubt of the time being as stated. These circumstances were as follows: She was suffering from smallpox and that, when the fever rose, she ran and jumped into a stream of water, as was the custom of the Cheyenne Indians, and that death followed immediately. It is provided by section 2448 of the Revised Statutes of the United States that, "where patents for public lands have been or may be issued, in pursuance of any law of the United States, to a person who has died, or who hereafter dies, before the date of such patent, the title to the land designated therein shall inure to and become vested in the heirs, devisees, or assignees of such deceased patentee as if the patent had issued to the deceased person during life." If, therefore, Armama Smith, the patentee, died before the patent issued, the title would inure to and become vested in her heirs as claimed by plaintiff. It should not, however, be overlooked that the treaty under which this patent was issued was not made until the year 1865, and was not finally ratified until the year 1868. This treaty presupposes that at the time of its execution the persons therein named as beneficiaries were living. The fact that the lands were thereafter to be selected is strongly corroborative of this, if any corroboration is needed. To suppose, therefore, that the patent was, in fact, issued to the Armama Smith who died years before the treaty was made, is to assume that a fraud was practiced upon the government.

To overcome the force of this evidence, and to show that John S. Smith claimed title by descent from his daughter Armama as early as 1866, and to show that he then recognized no living daughter by the name of Armama, the following instrument was introduced by plaintiff, against the objection of the defendant:

"Bill of Sale.

"Know all men by these presents, that I grant, bargain, sell, and quitclaim unto my nieces, Eliza Barron and Bridget Wetherell, and their heirs, all my right, title, and interest in a certain tract of land on the Upper Arkansas river, Colorado territory, known as the 'Jack

Smith Claim,' six hundred and forty acres of land; also all my right, title, and interest in the claim known as the 'Armama Smith Claim,' six hundred and forty acres of land on the Upper Arkansas river, Colorado, for the sum of one dollar in hand paid, this fifth day of May, one thousand eight hundred and sixty-seven. John S. Smith. Witness: William McCarty.

"State of Colorado, Bent County—ss.: I, John W. Jay, county clerk in and for Bent county, in the state aforesaid, do hereby certify that the foregoing is a true and correct copy of the record of the bill of sale given by John S. Smith to Eliza Barron and Bridget Wetherell, as the same appears of record in Book 2, page 46, of the records of my office. Witness my hand and seal at Las Animas, this 15th day of December, A. D. 1886. John W. Jay, County Clerk. [Bent County Seal.]

"State of Colorado, County of Otero—ss.: I, J. E. Ganger, county clerk and recorder in and for said county, in the state aforesaid, do hereby certify that the foregoing is a full, true, and correct copy of bill of sale as the same appears upon the records of my office. Given under my hand and official seal, this 15th day of May, A. D. 1893, at 120 o'clock p. m. [Signed] J. E. Ganger, County Clerk and Recorder, by H. G. Bourne, Deputy. [Seal, Otero County, Colorado.]"

This instrument was improperly admitted. The original was not offered or its loss accounted for. It was not acknowledged, and no attempt was made to prove its execution in any way. This evidence, evidently, was given much weight, and its admission constitutes reversible error.

As the case is now presented upon the record, the defendant seems to have the superior title, and the errors pointed out certainly require a reversal of the judgment. We reach this conclusion the more willingly because we are satisfied that, upon a new trial, witnesses can be procured who will settle the identity of the patentee beyond controversy. Judgment reversed and cause remanded.

ATLANTIC TRUST CO. v. BEHREND et al.
(Supreme Court of Washington. Nov. 9, 1896.)

MORTGAGES—FORECLOSURE BY ASSIGNEE—SUFFICIENCY OF TITLE.

In an action to foreclose a mortgage of which plaintiff was the assignee, it appeared that the assignment was executed by one of the vice presidents of the mortgagee corporation, that the seal of the corporation was attached thereto, and that this same officer had been in the habit of assigning like securities at different times extending over a considerable period. Held that, as the assignor was estopped from disputing the vice president's authority, the mortgagor could not question the right of the assignee to foreclose.

Appeal from superior court, Spokane county; James Z. Moore, Judge.

Action by Atlantic Trust Company, a cor-

poration, against Frederick C. Behrend, W. H. Plummer, and Aggie Plummer, to foreclose a mortgage. From a decree in favor of plaintiff, defendants Plummer appeal. Affirmed.

W. J. Thayer, for appellants. O. G. Ellis and H. D. Crow, for respondent.

HOYT, C. J. This appeal is from a decree foreclosing a mortgage, and the only reason suggested why such decree should be reversed is that the evidence was not sufficient to show that the mortgage and note accompanying the same had been assigned to the plaintiff in the action. It was claimed that the evidence was insufficient for two reasons: First, that the Lombard Investment Company, to whom the mortgage was made, had no power under its articles of incorporation as set out in the pleadings to make the assignment; and, second, that, if it did have such power, the purported assignment was not shown to have been executed by authority of the corporation. We do not find it necessary to enter into the technical discussion contained in the briefs of counsel, for the reason that the defendant was not interested in this assignment except to the extent of seeing that the Lombard Investment Company had so parted with its title to the plaintiff that it could not afterwards claim ownership of the note and mortgage. Hence it is immaterial whether or not all the forms prescribed for the assignment of the mortgage had been observed, if enough had been done by the mortgagee to estop it or those claiming under it from afterwards asserting title to the mortgage. That such was the effect of what was shown by the evidence seems to us clear. It was proven that the assignment was executed by one of the vice presidents of the corporation, and that the seal of the corporation was attached thereto; that this same officer had been in the habit of assigning like securities at different times extending over a considerable period. This being so, we are under the impression that the corporation which had thus allowed one of its officers to act and use its seal to authenticate the papers made by him, could not thereafter question his authority to do what he had done; and, if the assignor could not question the assignment, then the assignee took such a title as it was necessary for it to have to maintain an action to foreclose the mortgage. The decree will be in all things affirmed.

GORDON, SCOTT, ANDERS, and DUNBAR, JJ., concur.

ROBERTS et al. v. PRESCOTT et al.
(Supreme Court of Washington. Nov. 9, 1896.)
SCHOOLS—DISTRICT WARRANTS—INDORSEMENT BY COUNTY TREASURER—LIABILITY.

Act March 10, 1893, § 7, which makes it the duty of a county treasurer not to register and indorse warrants issued by school-district officers unless the signatures thereon shall correspond with the signatures of the officers of the

district on file in his office, was passed for the benefit of the school districts and of the county treasurer's office, and not at all for the benefit of the public at large; and hence a county treasurer's indorsement of a warrant is not a guaranty of its genuineness on which he is liable to an assignee of the warrant.

Appeal from superior court, Spokane county; Norman Buck, Judge.

Action by W. B. and L. S. Roberts, partners by the firm name of Roberts Bros., against David S. Prescott and others, on indorsements of school-district warrants. From a judgment in favor of defendants, plaintiffs appeal. Affirmed.

Cyrus Happy, for appellants. James E. Fenton, for respondents.

HOYT, C. J. This action was brought against the treasurer of Spokane county and the sureties on his bond to recover damages alleged to have been occasioned by the wrongful act of the treasurer in indorsing certain warrants which appeared to have been issued by the officers of certain school districts in said county, which it was alleged they were induced to purchase by reason of the fact of such indorsement by the treasurer. The ground upon which it was claimed that the action of the treasurer was wrongful was that in making the indorsements he acted in violation of section 7 of the act of March 10, 1893, which made it his duty not to register and indorse such warrants unless the signatures thereon corresponded with the signatures of the officers of the district on file in his office; and the first question presented by the record is as to the object for which this section was enacted. If such object was solely for the protection of the county and the school districts therein, the plaintiffs could not maintain an action for its violation by the county treasurer. If it was enacted for the benefit of the public, and to encourage dealing in the warrants of school districts, the right of the plaintiffs to maintain the action for its violation might, under a certain line of authorities, be sustained. Hence it is necessary to first determine as to the object of the enactment of this section as disclosed by its language. Warrants of a school district, though payable to order or bearer, are not negotiable under the rules of the law merchant. They may be transferred from one to another, but such transfer has no effect upon any equities which may exist in favor of the district against such warrants. This being so, it is not reasonable to suppose that the legislature had in view the protection of those who should buy such warrants when it enacted the section under consideration. It is more reasonable to suppose that this section was passed for the purpose of providing an orderly course for the transaction of business as between the county treasurer's office and the several school districts of the county. It was in the interest of school districts that the treasurer should not pay warrants without proof of their genuineness, and it was also to their interest that warrants should not be registered as having been issued by them and entered on the books of the treas-

urer without like proof of their genuineness. To enable the treasurer to determine as to the genuineness of such warrants, it was necessary that there should be accessible to him the genuine signatures of the officers authorized to issue the warrants. This being so, it will not be presumed that such provisions were for the benefit of the public at large, unless the intent to that end clearly appears. If the warrants were intended to circulate as negotiable paper, there might be reason for some provision which would prevent their getting into circulation before their genuineness had been determined. But, as they are not negotiable, and not intended for general circulation, there could be little need for any provision for the protection of those into whose hands they might come. The county treasurer's office is accessible to the public, and it is equally within the power of one who is about to buy a school warrant to determine as to its genuineness by comparison with the signatures on file in such office as for the treasurer himself to do so. All things considered, we are satisfied that the lower court was right in holding that this section was passed for the benefit of the school districts and of the county treasurer's office, and not at all for the benefit of the public at large. Hence the judgment rendered by it for the defendants was right, and must be affirmed.

SCOTT, ANDERS, DUNBAR, and GORDON, JJ., concur.

BUCHANAN v. ADAMS COUNTY.

(Supreme Court of Washington. Nov. 9, 1896.)

BOARD OF EQUALIZATION—ORDERS—APPEAL.

Hill's Code, § 298, authorizing an appeal from any decision or order of the board of county commissioners, does not authorize an appeal from its decision or order while acting as a board of equalization, under Laws 1893, c. 124, § 59. *Olympia Waterworks v. Board of Equalization of Thurston Co.* (Wash.) 44 Pac. 267, followed.

Appeal from superior court, Adams county; Wallace Mount, Judge.

The board of commissioners of Adams county, sitting as a board of equalization, disallowed D. Buchanan the exemption of \$300 in personal property from taxation, as a householder and head of a family. From this order Buchanan appealed to the superior court, where the case was submitted on an agreed statement of facts. From an order in favor of Buchanan, the board of commissioners appeal. Reversed.

O. R. Holcomb and James A. Haight, for appellant. D. Buchanan, in pro. per.

PER CURIAM. Under the rule announced by this court in *Olympia Waterworks v. Board of Equalization of Thurston Co.* (Wash.) 44 Pac. 267, an appeal did not lie from the order made by the board of equalization to the superior court. Such court was therefore without jurisdiction to make the order from which this appeal has been prosecuted. It will be reversed, and the proceeding dismissed.

In re AULT.

Appeal of INTERSTATE SAVINGS & LOAN ASS'N.

(Supreme Court of Washington. Oct. 23, 1896.)

APPEAL—RIGHT TO PROSECUTE—DISBARMENT PROCEEDINGS—INTEREST OF APPELLANT.

A private corporation has no such interest involved in the dismissal by the court of its petition for the disbarment of an attorney as will entitle it to prosecute an appeal.

Appeal from superior court, Snohomish county; John C. Denney, Judge.

Application by the Interstate Savings & Loan Association for the disbarment of John B. Ault. From a dismissal of its petition, the applicant appeals. Appeal dismissed.

Shank & Smith, for appellant. Coleman & Hart, for respondent.

DUNBAR, J. An application was filed in the superior court of Snohomish county by the Interstate Savings & Loan Association alleging many delinquencies on the part of the respondent, John B. Ault, and praying the court for an order citing said John B. Ault to appear and show cause, if any he had, why he should not be forthwith disbarred, and his name stricken from the roll of attorneys of said court. Respondent demurred to the petition upon the grounds (1) that the court had no jurisdiction of the person of the respondent in this proceeding; (2) that it had no jurisdiction of the subject-matter of the proceeding; (3) that the petition did not state facts sufficient to constitute a cause of action; and (4) that the proceeding was not being prosecuted upon the court's own motion. This demurrer was sustained by the court, and judgment of dismissal entered, from which judgment an appeal is taken to this court. The respondent now moves the court to dismiss this appeal for the reason that this court has no jurisdiction of an appeal from the order from which this appeal is taken, that the notice of appeal was not served or filed within the time limited by law, and that the appellant has no appealable interest in the subject-matter of this appeal, and is not entitled to prosecute it. Without noticing the first two alleged grounds for dismissal, we think the last one, namely, that the appellant has no appealable interest in the subject-matter of this appeal, must be sustained. The record does not disclose the ground upon which the court sustained the demurrer. It was indicated by the appellant, in oral argument, that it was because the lower court did not think it had jurisdiction to try the cause, and it is insisted that if the appeal is dismissed the effect would be to assume the very thing in controversy. However that may be, an appeal is a statutory right, and, if not given by the statute, cannot be entertained by this court. The statute provides that a party who is aggrieved may prosecute appeals. We cannot understand how the appellant in this action

is, in any sense, aggrieved. It is not a sentimental grievance that the statute contemplates, but it is a grievance that amounts to an interest. There can be but two parties in interest in a case of this kind, outside of the respondent, namely, the court and the public. The respondent is an officer of the court, and the law provides a method by which the court can determine the fitness or unfitness of an attorney for that position, and, no doubt, the interests of the public can be protected by an action authorized by some one who represents the public; but the appellant in this case neither represents the court nor the public, and it can be of no interest to it who the attorneys of the courts of the state of Washington are. If the judgment of the court had been against the attorney, of course he could appeal, for he would certainly be a party in interest, the judgment depriving him of the right to practice his profession; but we are unable to discover any interest which the appellant in this case has in the matter in controversy. The motion to dismiss will therefore be granted.

HOYT, C. J., and ANDERS, SCOTT, and GORDON, JJ., concur.

STATE ex rel. TRADERS' NAT. BANK OF SPOKANE v. WINTER, Treasurer.

(Supreme Court of Washington. Oct. 19, 1896.)

MUNICIPAL CORPORATIONS—ASSUMING ILLEGAL INDEBTEDNESS—POWER OF LEGISLATURE TO AUTHORIZE—ORDINANCES.

1. Laws 1891, p. 279, and Laws 1893, p. 183, intended to authorize, and to ratify and confirm, the action of any municipal corporation in assuming indebtedness created by the residents of the same territory while acting in a corporate capacity under the act of February 2, 1888, of the territory, thereafter declared unconstitutional, are within the limits of legislative power, and are valid and effective.

2. Where a town by ordinance expressly recognized and assumed an indebtedness created in good faith for public improvements made while acting under an illegal organization, the ordinance is not invalid because it delegated to the mayor and clerk the duty of taking up the warrants evidencing such indebtedness and directed them to issue new ones in their stead.

Appeal from superior court, Stevens county; Jesse Arthur, Judge.

Action for mandamus on relation of the Traders' National Bank of Spokane against Arthur T. Winter, treasurer of the town of Colville. Judgment for defendant, and plaintiff appeals. Reversed.

Graves, Wolf & Graves, for appellant. S. & J. W. Douglas and W. M. Murray, for respondent.

GORDON, J. This was an application in the lower court for a writ of mandate compelling the respondent, as treasurer of the town of Colville (a municipal corporation of the fourth class), to pay certain warrants of said municipality held and owned by the

relator. An issue of fact having been formed, the case was tried below upon an agreed statement of facts, and from a judgment dismissing the application the relator has appealed. From the agreed statement of facts which has been brought to this court it appears that some time in the year 1888 the territory now embraced within and constituting the present town of Colville was incorporated under the corporate name of "The Town of Colville," under and by virtue of an act of the legislature of the territory of Washington approved March 27, 1888. This act was subsequently declared to be unconstitutional. *Territory v. Stewart*, 1 Wash. St. 98, 23 Pac. 405. After its attempted incorporation, and prior to the decision in *Territory v. Stewart*, supra, said town proceeded to exercise corporate functions, to elect officers, and incur indebtedness for street improvements and otherwise, in payment of which indebtedness warrants were issued upon its treasury. The statement shows that "the said town became indebted to the Stevens County Bank for various and divers sums of money, being the same sums of money as are expressed upon the face of the warrants herein referred to, and in discharge of said indebtedness the then mayor and the then clerk of said old town, duly and regularly in all things, as required by law, drew the several warrants of the said town in payment thereof, and the same were delivered to the said Stevens County Bank. * * * That said warrants would have been valid and binding upon said town but for the unconstitutionality of the act under which its then incorporation was had." It further appears from said statement that, after the act under which the old town attempted to incorporate had been declared unconstitutional, and prior to the 23d of December, 1890, the territory and inhabitants embraced within the town of Colville, as incorporated under the act of February 2, 1888, already referred to, incorporated under an act of the legislature of the state of Washington approved March 27, 1890; that thereafter, on the 6th of January, 1891, the town council of said town as at present organized passed Ordinance No. 22, entitled "An ordinance to provide for the payment of an indebtedness of the town of Colville, Washington, by the redemption of old warrants, and for the issuance of new ones therefor representing said indebtedness." Said ordinance, among other things, recites: "That, whereas the said town of Colville, Washington, by and through the board of trustees thereof, incurred a large indebtedness for public improvements and other necessary and legitimate purposes, and did issue its municipal warrants or orders in payment thereof; and whereas the said town of Colville, Washington, is desirous of paying the just indebtedness aforesaid of the said town, and having received and enjoyed the benefits derived from said indebtedness, and as a just and

proper municipal indebtedness therefor." The ordinance then provides for the surrendering and filing with the town clerk of said town of the warrants of the old town for redemption and cancellation, and authorizes the issuing of new warrants by said town as at present incorporated, "in all respects as other warrants are now issued by said town council," for the amount or amounts due upon said redeemed and canceled warrants.

Upon the part of the respondent it is contended (1) that the town of Colville did not have the power to assume and pay indebtedness incurred by the old town organization acting under the unconstitutional law of 1888; (2) that the ordinance authorizing the issuance of warrants of the present town in lieu of the old warrants was and is invalid because it was a delegation to the mayor and town clerk of power residing in the council. We think that neither of these positions can be maintained. As to the first, section 165 of the act of March 27, 1890, under which the present town is incorporated, as amended by the act of March 7, 1891 (*Sess. Laws 1891*, p. 279), provides that "nothing in this chapter contained shall be construed to prevent any town having a bonded or other indebtedness contracted under laws heretofore passed from levying and collecting such taxes for the payment of such indebtedness; * * * and provided further that any ordinance duly passed by the town council of any town prior to the passage of this act authorizing the payment of said indebtedness, shall be and the same is hereby declared valid and legal and binding." The action of the trustees of the old town in making improvements and incurring the supposed valid indebtedness evidenced by its warrants constituted a moral obligation upon the inhabitants and territory thereafter included within the corporate limits of the present town, and the legislative enactment above referred to was for the purpose of legalizing and validating ordinances of the scope and character of Ordinance No. 22, supra. It is not contended that it was not competent for the legislature to pass such validating enactment, but if any doubt could exist as to the effect of the passage of the ordinance and the mandatory act of 1891, supra, that doubt, we think, is removed by the further act of March 9, 1893 (*Sess. Laws 1893*, p. 183), which provides that "the incorporation of all cities and towns in this state heretofore had or attempted under sections one, two and three of an act entitled, 'An act providing for the organization, classification, incorporation and government of municipal corporations, and declaring an emergency,' (being the act under which the present town is incorporated,) * * * is hereby for all purposes declared legal and valid. * * * And all contracts and obligations heretofore made, entered into or incurred, by any such city or town so incorporated or re-incorporated are hereby declared legal and valid and of full

force and effect." It is competent for the legislature to direct the payment, by a municipal corporation, of a claim that the law does not recognize as a legal obligation, and to ratify any act which it could have authorized to be done. 1 Dill. Mun. Corp. (4th Ed.) § 75; New Orleans v. Clark, 95 U. S. 644; Mayor, etc., of New York v. Tenth Nat. Bank, 111 N. Y. 446, 18 N. E. 618; Mayor, etc., of Guthrie v. Territory (Okla.) 31 Pac. 190; Baker v. City of Seattle, 2 Wash. St. 576, 27 Pac. 462. Indeed, this question can scarcely be considered an open one in this state since the decision in Abernethy v. Town of Medical Lake, 9 Wash. 112, 37 Pac. 306, a case which presented almost the identical questions which we are here considering. As to the second objection urged by the respondent, viz. that the ordinance is invalid because attempting to delegate power belonging to the council, we think that the ordinance itself contains sufficient evidence of the fact that the warrants in question were audited by the council, and expressly recognizes the validity of the claims upon which the warrants in question were issued. Such recognition and authority to its ministerial officers to issue the warrants is all that is required to constitute the auditing and allowance of a claim on the part of the council. Upon the pleadings in the case and the agreed statement of facts, we think that judgment should have been for the relator, and the cause will be remanded for further proceedings in accordance with this opinion.

HOYT, C. J., and ANDERS, DUNBAR, and SCOTT, JJ., concur.

STATE v. DOWNING.

(Supreme Court of Washington. Oct. 21, 1896.)

EMBEZZLEMENT BY COUNTY OFFICERS—INDICTMENT—INSTRUCTIONS.

1. An information charging that a county clerk and ex officio clerk of the superior court, entitled only to a salary, having as such officer received fines which he should have paid over to the county treasurer, failed and refused to do so, but "unlawfully, * * * fraudulently, and feloniously did take, convert to his own use, and embezzle" the same, is sufficient, under Pen. Code, § 57, providing, if any county officer use any money intrusted to him for safe-keeping for any purpose not authorized by law, he shall be deemed guilty of a felony.

2. On a prosecution of a county clerk and ex officio clerk of the superior court, under Pen. Code, § 57, declaring that, if a county officer use any money intrusted to him for safe-keeping for any purpose not authorized by law, he shall be deemed guilty of a felony, the information charging that he refused to pay over fines received by him, but "unlawfully, * * * fraudulently, and feloniously did take, convert to his own use, and embezzle" the same, it is proper to charge that defendant received the money as a fine, and failed to pay it over to the treasurer, but retained it, with the intention to convert it to his own use, and did so convert it, he should be found guilty as charged, though section 1335, 2 Hill's Code, makes it a misdemeanor for an officer to refuse or neglect to pay over a fine to the

county treasurer within a month after it has been received.

Appeal from superior court, Spokane county; Norman Buck, Judge.

C. O. Downing appeals from a conviction. Affirmed.

Griffitts & Nuzum and Henley & Kellam, for appellant. J. W. Feighan, for the State.

PER CURIAM. The information upon which appellant was convicted in the superior court is as follows: "That on, to wit, the 19th day of December, A. D. 1894, the said C. O. Downing was the duly elected, qualified, and acting county clerk in and for the county of Spokane, and state of Washington, and the ex officio clerk of the superior court in and for said county and state, and, as such county clerk and ex officio clerk of the superior court, was not allowed by law to be paid or to receive any money, fees, or compensation for his services as such county clerk and ex officio clerk of the superior court, except the salary provided and allowed to be paid him by law as such county clerk and ex officio clerk of the superior court. That as such county clerk it became and was the duty, imposed by law, to receive certain moneys, fees, and deposits by virtue of the said office; and that on said 19th day of December, A. D. 1894, at the county of Spokane, and state of Washington, the said C. O. Downing, then and there being, did receive and there was paid to him as such county clerk and ex officio clerk of the superior court, and by virtue of said office, the sum of seventy-two and $\frac{35}{100}$ dollars (\$72.35), lawful money of the United States, of the value of seventy-two and $\frac{35}{100}$ dollars (\$72.35), which said prosecuting attorney is unable more particularly to describe, the same being money, fees, charges, fines, and deposits in the case of the State of Washington v. C. E. Bartholomew, which said money, fees, charges, fines, and deposits were paid to him, the said C. O. Downing, as county clerk and ex officio clerk of the superior court, and should have been paid and delivered to the treasurer of Spokane county by him, the said C. O. Downing, on the first Monday of January, 1895, according to law. That said C. O. Downing, as such county clerk and ex officio clerk of the superior court, having received the said sum of seventy-two and $\frac{35}{100}$ dollars (\$72.35) as aforesaid, at and in said county and state as aforesaid, then and there being, did then and there, on the said 19th day of December, 1894, aforesaid, unlawfully, willfully, knowingly, fraudulently, and feloniously fail and refuse, and still fails and refuses, to pay the said sum, or any portion thereof, to the county treasurer as required by law, but unlawfully, willfully, knowingly, fraudulently, and feloniously did take, convert to his own use, and embezzle the said sum of seventy-two and $\frac{35}{100}$ dollars (\$72.35), received by him as aforesaid. That said sum embezzled as aforesaid was the money and property of the county of Spokane and state of Washington."

It is urged as ground for reversal that the court erred in overruling appellant's demurrer. Counsel for the appellant in a very able and exhaustive brief urge that the information is insufficient to charge an offense under section 2 of the act of March 9, 1893 (Sess. Laws, p. 184), making it embezzlement for any county officer to whom a salary is paid to fail to pay to the county treasury all sums which shall come into his hands for fees and charges in his office. Also that it does not charge an offense under section 57 of the Penal Code (2 Hill's Code, p. 667), which is as follows: "Sec. 57. If any state, county, township, city, town, village, or other officer elected or appointed under the constitution or laws of this state, court commissioner, or any officer of any court, or any clerk, agent, servant or employé of any such officer, shall, in any manner not authorized by law, use any portion of the money intrusted to him for safe-keeping, in order to make a profit out of the same, or shall use the same for any purpose not authorized by law, he shall be deemed guilty of a felony, and on conviction thereof shall be imprisoned in the penitentiary not less than one nor more than ten years." Singularly enough, counsel for the appellant as well as for the state have overlooked the decision of this court in *State v. Isensee*, 12 Wash. 254, 40 Pac. 985, which we think is directly in point. The defendant in that case was city treasurer of the city of Whatcom, and the information charged him with receiving into his possession, custody, and control by virtue of his office \$60,000 of the money and property of said city, which money he "unlawfully, fraudulently, and feloniously did misapply, embezzle, appropriate, and convert to his own use." This court held that the information in that case was sufficient, under section 57, *supra*; and, being satisfied with the conclusion there reached, it follows, upon the authority of that case, that no error was committed in overruling the demurrer herein. And for the same reason it was not error for the court to give instruction No. 3.

Exception was taken to the giving of the following instruction to the jury: "The court instructs you that all fines imposed upon any person by the provisions of the laws of this state, where the same shall be collected, shall be paid to the county treasurer of the county; and, if the jury find that the defendant in this case received by virtue of his office the sum of \$72.35, as charged in the information, as a fine and costs, and that the defendant failed to pay said sum over to the county treasurer, but retained the same with the intention to convert it to his own use, and did convert the same to his own use, the jury will find the defendant guilty as charged in the information." Section 1335, 2 Hill's Code, provides that: "All fines imposed on any person by the provisions of this Code, where the same shall be collected, shall be paid to the county treasurer of the county where such conviction shall have been had, to go into the gen-

eral county fund. The county treasurer shall give duplicate receipts therefor, one of which shall be filed with the county auditor; and all officers refusing or neglecting to pay over any fines within one month after they shall have been received shall, upon conviction thereof, be fined in fourfold the amount of such fines so received." And it is insisted that the instruction complained of is erroneous for the reason that the penalty provided for a failure or neglect to pay over to the county treasury any fines under section 1335 is punishable as a misdemeanor only, and not as a felony; but we repeat that the prosecution in this case is under section 57, and that the defendant is charged with something more than a mere failure to pay over moneys to the county treasurer within a month after their receipt. He is charged here with using them in a manner and for a purpose not authorized by law, namely, with "unlawfully, willfully, knowingly, fraudulently, and feloniously converting the same to his own use." No error appearing of record, the judgment and sentence will be affirmed.

STATE ex rel. WOLF v. MOORE, Superior Court Judge.

(Supreme Court of Washington. Nov. 5, 1896.)
MANDAMUS—PRACTICE—RECITAL OF FACTS—ALTERNATIVE WRIT.

The alternative writ of mandate issued and served on a respondent must set out the facts relied on as the ground of relief, or a copy of the petition stating such facts must be served therewith, and referred to therein.

Petition by Charles H. Wolf for writ of mandate against James Z. Moore, judge of the superior court of Spokane county. Demurrer to alternative writ sustained.

Graves, Wolf & Graves, for relator. W. S. Dawson and Forster & Wakefield, for respondent.

PER OURIAM. The alternative writ issued in this cause contained no recital of the facts set out in the petition upon which it was issued. Nor was there any reference therein to such petition, or direction that a copy thereof should be served with the writ. Respondent has interposed a demurrer, which must be sustained. Whatever may have been the rule adopted by this court before the act of 1893, under said act it is clearly necessary that the facts relied upon as ground of relief should be set out, either in the alternative writ, or in a petition served therewith, referred to therein. The demurrer will be sustained, with leave to file an amended writ.

WATSON v. REED et al.

(Supreme Court of Washington. Nov. 5, 1896.)
QUOTIENT VERDICT.

That the jury, after the requisite number had agreed that plaintiff was entitled to recover

er, by ballot ascertained the average sense of the jury as to the amount of damages, without any agreement that they should be bound thereby, does not invalidate the verdict, of a slightly greater amount, which they finally agreed on.

Appeal from superior court, Yakimo county; Carroll B. Graves, Judge.

Action by W. W. Watson against W. H. Reed and another. A verdict for plaintiff was set aside, and he appeals. Reversed.

Frank H. Rudkin, for appellant. Reavis & Englehart and Whitson & Parker, for respondents.

GORDON, J. This action was brought to recover damages for a breach of a contract to execute a lease. A verdict for the appellant (plaintiff below) in the sum of \$165 was returned by the jury, which verdict was thereafter set aside, and a new trial awarded, in the lower court, upon the sole ground that it was "arrived at by a resort to the determination of chance or lot." From the order setting aside said verdict and granting a new trial, the plaintiff has appealed.

Subdivision 2, § 400, of the Code, makes the affidavits of one or more of the jurors admissible for the purpose of showing that a verdict was arrived at in the manner claimed in this case. The affidavits of two jurors who served in the cause were considered upon the hearing of the motion. In one of them it is stated that, "as soon as ten jurors in the cause agreed upon a verdict in favor of the plaintiff, the jury proceeded to ascertain and fix the amount of such verdict. The foreman of said jury suggested that each juror write down on a slip of paper the amount he deemed plaintiff entitled to; that said several amounts be added together, and the sum so ascertained be divided by twelve; that each of the twelve jurors did so, and the sum of the several amounts was divided by twelve, which gave a quotient of about \$163." It is further stated "that there was no agreement on the part of any of said jurors to return a verdict for the amount ascertained in the manner above stated, but that said method of ascertaining the amount was resorted to for the sole purpose of ascertaining the average sense of the jury on the question of damages; that the sum of \$163 was the final and only amount agreed upon by the jury in said cause, and none of the jurors in said cause ever agreed to be bound by, or to return into court, a verdict for any other or different amount, or to be bound by the result of any lot or chance in arriving at the amount of said verdict." The affidavit from which we have quoted was submitted by the plaintiff in the lower court in opposition to the motion for a new trial. It does not differ materially from the statement made by the only other juror who made an affidavit, but it sets out more fully, and in detail, the manner in which the jury proceeded. Section 1 of the act of March 8, 1896 (Sess. Laws, p. 59), authorizes the return of a verdict in a civil action by 10 or more jurors. We think the showing made was in-

sufficient to authorize the setting aside of the verdict. The case differs from that of *Gordon v. Trevathan* (Mont.) 34 Pac. 185, wherein it appeared that an agreement was entered into by the jury to arrive at the result by a quotient verdict, and it appeared that at least one juror was induced to assent to the verdict because of the agreement so reached. And so, too, in *Improvement Co. v. Adams* (Colo. App.) 28 Pac. 662, the verdict was obtained by averaging the estimates of the individual jurors under an agreement to be bound by the result. In the present case it appears that a requisite number of jurors had concluded that the plaintiff was entitled to a verdict, and the marking was for the purpose of getting the average sense of the jury as to the amount of the recovery, as a basis of discussion or further consideration, but there was no agreement or understanding that the average so obtained should be the sum of their verdict. In other words, the jurors, and each of them, were free to act on the result of the general average, unrestricted and unembarrassed by any previous arrangement or agreement to be bound by the general average; and we agree with counsel for the appellant that there is no impropriety in a jury resorting to this method for the sole purpose of arriving at an agreement, when the minds of the jurors are free to deliberate and act upon the result. And this view, we think, is sustained by the authorities. *Grinnell v. Phillips*, 1 Mass. 530; *Dorr v. Fenno*, 12 Pick. 521; *Dana v. Tucker*, 4 Johns. 487; *Hayne*, New Trial & App. § 71; *Hill*, New Trial (2d Ed.) p. 161, § 13. The cause will be remanded, and the lower court is directed to vacate its order awarding a new trial, and to enter judgment upon the verdict, in accordance with this opinion.

HOYT, C. J., and DUNBAR, SCOTT and ANDERS, JJ., concur.

PLUMMER v. WEIL.

(Supreme Court of Washington. Nov. 5, 1896.)

BILL OF PARTICULARS — INSUFFICIENCY — MOTION FOR DEFAULT — PLEADING — DISMISSAL OF ACTION.

1. Where the record does not show the grounds on which appellant's motion for a default was refused, it must be presumed that sufficient was shown to justify the exercise of the trial court's discretion in that regard.

2. The filing of a motion for a bill of particulars ipso facto extends the time for answering.

3. The court can order a further and amended bill of particulars, where the one already furnished is insufficient.

4. In an action to recover the aggregate value of professional services extending over a period of three years, and which plaintiff is unable to itemize, the insufficiency of the bill of particulars cannot be excused on the ground that plaintiff kept no books, and cannot specify the services or state their values.

5. An order directing an amended bill of particulars to be furnished is "an order concerning the proceedings in the action," for a failure to comply with which the court may dismiss the action, under the authority of 2 Hill's Code, § 409.

Appeal from superior court, Spokane county; Norman Buck, Judge.

Action by W. H. Plummer against R. Weil to recover for professional services. From a judgment of dismissal, plaintiff appeals. Affirmed.

W. J. Thayer, for appellant. Graves, Wolf & Graves, for respondent.

GORDON, J. This action was brought to recover for professional services alleged to have been performed by the law firm of Plummer & Thayer, at the instance of the defendant (respondent), during the years 1892, 1893, and 1894. The complaint alleges that the services were reasonably worth the sum of \$1,000, and that the sum due therefor was, prior to the commencement of this action, assigned by said firm to the plaintiff (appellant herein). The record shows that a so-called bill of particulars had been furnished defendant's counsel upon demand, and that, not being satisfied therewith, they moved the court for an order directing the plaintiff to furnish an amended bill. This motion was allowed, and the order granting it directed that the defendant should plead "within five days after the service of said bill of particulars." It appears that the clause fixing the time within which defendant was required to plead was inserted by plaintiff, and there is some disagreement between counsel as to whether the attorneys for defendant had any knowledge of the insertion of this clause, but we deem that question wholly immaterial, in view of the subsequent action of the court. On the same day, namely, January 18, 1896, an amended bill was furnished; and thereafter, on January 24th, the plaintiff filed his motion for default, supported by affidavit showing the service of his amended bill on January 18th, and that the defendant had failed to plead thereto within five days, as directed by the order of January 18th. On the same day that default was claimed, the defendant moved the court for an order requiring plaintiff to furnish a more particular statement and bill of particulars, and thereupon the court denied plaintiff's motion for a default, and granted defendant's motion for a further and amended bill; and plaintiff having refused to furnish the same, and elected to stand upon the record, a judgment of dismissal was entered, from which this appeal was taken. The appellant assigns as error (1) the order of the court denying his motion for default; (2) the order of the court requiring plaintiff to further amend his bill of particulars; (3) the order dismissing plaintiff's action.

1. As already observed, a difference exists between the parties as to whether counsel for the defendant had any knowledge of the order of January 18th, which required defendant to plead within five days after the service of the amended bill of particulars upon him. But the lower court denied appellant's motion for default, and it must be presumed that sufficient was shown to justify the exercise of its dis-

cretion in that regard. *Mason v. McLean*, 6 Wash. 35, 32 Pac. 1006. Appellant further contends that the filing of a motion for a bill of particulars does not ipso facto extend the time for answering. We think the authorities do not sustain this contention. 3 Enc. Pl. & Prac. p. 548. Besides, in this case the order did fix the time in which defendant was permitted to plead, and operated as a stay.

2. That the court has authority to order a further and amended bill of particulars, where the one already furnished is insufficient, is a proposition which cannot well be doubted. *Isam v. Parker*, 3 Wash. St. 755, 29 Pac. 835. In the bill of particulars furnished, plaintiff says that no account was kept of the transactions with defendant, and, further, that "it is impossible for him to comply with the order of the court any better than he has already done, or to make said bill of particulars any more specific on the points directed in the order of the court." Plaintiff has sued to recover the value of professional services, but, when asked to particularize the services, he replies that he has kept no books, and is unable to do so, except as to particular items of service, the dates of which he does not undertake to give, other than to state that they were performed during the years 1892, 1893, and 1894, and the value of which items of service he refuses to specify. We think the bill of particulars furnished was insufficient, and its insufficiency cannot be excused upon the ground that plaintiff kept no books, and cannot specify the services or state their value. He assumed the burden of so doing when he brought his action in the present form. "The burden of proof is on him to show in what the services consisted, and their value. * * * The failure to keep an account of these services is the fault of the plaintiff, and he must suffer for it, if any one." *Hughes v. Investment Co.*, 21 Fed. 169. It is probably true that, under the circumstances stated, plaintiff might maintain an action to recover an annual retainer. *Hughes v. Investment Co.*, supra. But the complaint in the present case lacks the necessary allegations to entitle plaintiff to such recovery.

3. 2 Hill's Code, § 409, provides that "an action may be dismissed or a judgment of nonsuit entered * * * by the court, for disobedience of the plaintiff to an order concerning the proceedings in the action"; and the court acted rightly in dismissing the action upon failure of the plaintiff to comply with the order directing an amended bill of particulars to be furnished.

We regret that we feel compelled to notice another feature of the case. The brief of counsel for the respondent refers to the appellant in language that is grossly improper and unseemly. The intimation is that plaintiff is guilty of attempting "to mislead and circumvent the court and honest attorneys by chicanery and fraud." We find nothing in the record tending in the slightest degree to support the insinuation, or which furnishes any justification for this rude assault upon an honorable and upright member of the bar, in whose professional in-

integrity this court has full and entire confidence. To say that it constitutes a grave breach of professional courtesy is to characterize it mildly. "Where the character of the parties or the attorneys is not involved in the case, all references and comments of a personal nature by a party in his briefs are entirely out of place, and are in the nature of an admission that there is not sufficient merit in his side of the controversy to warrant him in relying thereon, and hence that it is necessary to direct attention to the faults or failings of the adverse party or his attorney. It is not complimentary to a court to suppose that such statements would divert its attention from the points at issue, or be given the slightest weight." *Flanagan v. Elton* (Neb.) 51 N. W. 967. We will add that an impropriety so flagrant will in future be regarded as sufficient to require that any brief containing such objectionable matter shall be stricken from the files. The judgment will be affirmed, but respondent will not recover costs for the printing of his brief.

HOYT, O. J., and ANDERS and DUNBAR, JJ., concur.

STATE v. HOWARD et al.

(Supreme Court of Washington. Oct. 29, 1896.)

CRIMINAL LAW—APPEAL—BILL OF EXCEPTIONS—SETTLEMENT—PAPERS—HOW BROUGHT INTO THE RECORD.

1. Act March 8, 1893, § 9 (Sess. Laws, p. 114), which requires a party desiring to have a bill of exceptions settled to file it in the cause, and serve a copy on the opposite party, with not less than three nor more than ten days' notice of an application to be made to the trial judge to have the bill settled, is mandatory; and, where no notice of any kind appears to have been given, the purported bill must be stricken.

2. To be considered a part of the transcript, papers used in support of motions for a continuance and for a new trial, and alleged improper statements of counsel to the jury, must have been brought in by a bill of exceptions, or statement of facts settled upon notice.

Appeal from superior court, Douglas county; Wallace Mount, Judge.

Lee Howard and Robert Owens were convicted of horse stealing, and appeal from the judgment and sentence. Affirmed.

W. J. Canton, for appellants. M. B. Malloy, for the State.

PER CURIAM. The appellants have appealed from the judgment and sentence of the superior court of Douglas county, entered upon a verdict of the jury finding them guilty of the crime of horse stealing. Counsel for the state have moved the court to strike from the transcript what purports to be a bill of exceptions, for the reason that no notice of the statement of the same was ever given or served as required by law. The motion must be granted. Section 9 of the act of March 8, 1893 (Sess. Laws, p. 114), requires a party de-

siring to have a bill of exceptions or statement of facts certified to prepare the same as proposed by him, file it in the cause, and serve a copy thereof upon the adverse party, and to give such opposite party not less than three nor more than ten days' notice of the time when and where he will apply to the trial judge to have such bill of exceptions or statement of facts settled and certified. No notice of any kind or character appears to have been given in this case. It follows that the purported bill or statement must be stricken.

A further motion is made to strike from the transcript what purport to be copies of the motion and affidavit for continuance, also certain purported statements of the prosecuting attorney to the jury, and certain papers purporting to have been used upon a motion for a new trial, for the reason that they have not been preserved or made part of the record in the cause by any bill of exceptions or statement of facts, and this motion must also be granted. Such papers, unless authenticated by the certificate of the trial judge, and brought into the record upon proper bill of exceptions or statement of facts settled upon notice, cannot be considered, because in no other way can it be determined that they formed any part of the proceedings below, or that the attention of the trial court was ever directed to them. *Clay v. Irrigation Co.* (Wash.) 45 Pac. 141. It is not enough that such papers had been filed by counsel with the clerk of the superior court. It does not follow from such findings that the court's attention had been directed to them. The act of filing is ex parte, and all such papers (other than the technical record or judgment roll) upon which reliance is had in this court, or to which the attention of this court is to be directed upon appeal, should be brought into the record by an appropriate bill of exceptions or statement of facts. We have examined the information, and think that it sufficiently charges the crime. It follows that the judgment and sentence must be affirmed.

REDFORD v. SPOKANE ST. RY. CO.

(Supreme Court of Washington. Oct. 27, 1896.)

JURORS—QUALIFICATION—CONSTITUTIONAL LAW—STREET-RAILWAY COLLISION—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

1. Act March 19, 1895, requiring that jurors be householders, does not violate Const. art. 1, § 12, providing "no law shall be passed granting to any citizen or class of citizens * * * privileges or immunities which, upon the same terms, shall not equally belong to all citizens," and it is immaterial that this is not a requisite qualification of jurors summoned on an open venire.

2. That one driving along a street, after crossing a street-car track, stopped so near it, to converse with a person, that there was not room enough for a car to pass, is not negligence contributory to the collision, but merely a "condition."

3. One cannot be impeached by a transcript

of the stenographer's notes of his testimony on a former trial, but the stenographer, or some one else who heard the testimony, should be called.

Appeal from superior court, Spokane county; Jesse Arthur, Judge.

Action by Oliver W. Redford against the Spokane Street-Railway Company, a corporation. Judgment for plaintiff. Defendant appeals. Affirmed.

Griffitts & Nuzum, for appellant. Forster & Wakefield and Everett C. Ellis, for respondent.

GORDON, J. This action was brought to recover damages for injuries resulting from a collision between a car operated by the appellant and a vehicle owned and occupied by the respondent. The cause was before this court upon a former appeal, and is reported in 9 Wash., at page 55, 38 Pac. 1065. Upon such appeal this court reversed a judgment entered upon the verdict of the jury in favor of the plaintiff therein (respondent here), and awarded a new trial, which resulted in another verdict favorable to the respondent, and from the judgment entered thereupon in his favor the cause is again before it.

As a first ground of error relied upon for a reversal the appellant complains of an order of the lower court denying its motion to set aside the panel and venire from which the trial jury was drawn. In support of this claim appellant insists that the act of March 19, 1895 (Sess. Laws 1895, p. 139), is unconstitutional, for the reason that it discriminates "against citizens as jurors, if they are not householders. It makes it necessary to be a householder when no such requirement is made of jurors summoned on an open venire"; and that "it is unequal, and discriminates against certain classes of citizens, and requires qualification for duty inconsistent with the constitution of the state." The particular sections of the constitution relied upon are sections 12, 21, and 22 of article 1. We are unable to perceive (and the brief of counsel in no way makes it clear) what bearing sections 21 and 22, supra, have upon the question. Section 12, however, provides: "No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations." The learned counsel for the appellant cites no authority in support of his contention that the act in question is obnoxious to this provision. On the other hand, we think that the act is constitutional, and must be sustained upon the authority of *McAunich v. Railroad Co.*, 20 Iowa, 338; *State v. Consolidated Va. Min. Co.*, 16 Nev. 432; *Cordova v. State*, 6 Tex. App. 207. That the act requires that jurors shall be householders—a qualification not required by the old law—furnishes no sufficient reason, in our judgment, for holding that it is unconstitutional, nor is the question affected

by the further fact that that qualification is not a requisite of jurors summoned upon an open venire. The act of 1895 is uniform in its operations in so far as it operates at all, and its constitutionality is not affected by the number of persons within the scope of its operation.

2. The court, at the instance of the appellant, submitted to the jury two special requests for findings, as follows: "(1) After the plaintiff stopped his horse and buggy at the place of the accident, and before or just at the time of the collision, was the buggy backed or moved closer to the street-car track than where it was when the plaintiff first stopped?" "No." "(2) When the plaintiff stopped his horse and buggy on Bridge street at the point of the accident, was the buggy far enough from the railroad track so that a car could pass in safety if the buggy had remained stationary at the exact place it was when plaintiff first stopped?" "No." It is insisted that these special findings are inconsistent with the general verdict, and that they are sufficient to show that respondent was guilty of contributory negligence which would defeat a recovery, and that appellant is entitled to judgment notwithstanding the general verdict. In connection therewith, we may also consider the failure of the court to instruct the jury in accordance with appellant's request No. 20, which is as follows: "If plaintiff, while riding along the street described in this case as 'Bridge Street,' stopped in the street, it was his duty in law to stop in such a position as to allow the defendant's car to pass without striking his vehicle, and to look and see that such was his position; and, if he failed to do so, such failure would of itself constitute such contributory negligence as would defeat a recovery in this case, and your verdict should be for the defendant." The refusal of the court to give this instruction is assigned as error. Considering these assignments together, the theory of appellant is fully disclosed, and we do not think it can be maintained. It appears from the evidence that plaintiff had driven across appellant's track, and, after crossing, stopped to converse with a friend, and that, while so engaged, the collision occurred; and the claim of appellant is that, if the respondent stopped his vehicle in such close proximity to appellant's track as not to enable its car to pass without colliding with the vehicle, he was guilty of contributory negligence, and cannot recover. We agree with counsel for respondent that plaintiff's nearness to the track was a "condition" of the injury, and not the cause of it, and we think that the jury were fully and fairly instructed that plaintiff could not recover unless the defendant's negligence was the proximate cause. "When the defendant's negligence is the proximate cause of the injury, while that of the plaintiff is only a remote cause, or a mere condition of it, the action will lie." *Beach, Contrib. Neg.* (2d Ed.) § 54; *Gothard v. Railroad Co.*, 67 Ala. 114; *Lay*

v. Railroad Co., 106 N. C. 404, 11 S. E. 412; Newcomb v. Boston Protective Department, 146 Mass. 596, 16 N. E. 555; Norris v. Litchfield, 35 N. H. 271; Davies v. Mann, 10 Mees. & W. 546. The court, in substance, instructed the jury that the rights of the parties to the use of the street were mutual, and that in operating its cars along the street the company was required to exercise ordinary care and prudence to avoid injury to others; that persons traveling the street were also held to the same degree of care to avoid injury to themselves; and that such persons, when upon streets on which cars are run, should "look and listen, and be otherwise watchful." The charge, as a whole, was as favorable to appellant as it had the right to demand, and we think that no reversible error can be predicated upon the charge.

3. For the purpose of contradicting the respondent, the appellant offered in evidence what purported to be a certified copy of the transcript containing respondent's testimony given upon the former trial. It was excluded upon respondent's objection, and this ruling is assigned as error. The proper method of impeachment would have been to produce the stenographer or some one else who had heard the testimony given by the respondent on the former trial; but a transcript of the stenographer's notes was not competent evidence, and the objection was properly sustained. 1 Thomp. Trials, § 504; Phares v. Barber, 61 Ill. 271; State v. Hayden, 45 Iowa, 11; State v. Adams, 78 Iowa, 292, 43 N. W. 194. The other rulings complained of have been examined, and, no error calling for a reversal being found, the judgment appealed from is affirmed.

ANDERS and DUNBAR, JJ., concur.

STATE v. HOLEDGER.

(Supreme Court of Washington. Nov. 6, 1896.)

OBSCENE LITERATURE—INDICTMENT—SCIENTER—JURY—WITNESSES.

1. An information charging that defendant did "knowingly * * * compose, edit, print, sell, * * * a certain * * * obscene * * * newspaper," need not further allege that he knew the paper was obscene.

2. An indictment charging that defendant did compose, edit, print, sell, etc., a certain obscene newspaper, charges but a single crime, under Pen. Code, § 205, declaring a punishment if any person shall "import, print, publish, sell, rent, give away, distribute or show * * * any obscene * * * book, * * * newspaper, * * * or photograph."

3. A juror cannot be asked, "Would you attach more importance or credibility to the word of a preacher outside of court than any other gentleman?" or "Would you attach more credence to the testimony of * * * a minister * * * than that of any one else?"

4. For the court to ask counsel, in the hearing of the jury, if they had any objection to separation of the jury, while not good practice, is not

ground for reversal, resulting prejudice not being shown.

5. Indorsement by the prosecution of the name of a witness on the information after swearing of the jury is not ground for reversal, but merely for continuance.

Appeal from superior court, Spokane county; Norman Buck, Judge.

Frank Holedger appeals from a conviction. Affirmed.

Fenton & Saunders and James L. Crotty, for appellant. J. W. Feighan, for respondent.

DUNBAR, J. The appellant was indicted for the crime of publishing, editing, and selling obscene and indecent literature in Spokane county, Wash. The essential part of the information was as follows: "Frank Holedger is hereby charged with the crime of publishing, editing, and selling obscene and indecent literature, committed as follows, to wit: That on the 12th day of January, A. D. 1895, at the county of Spokane, and state of Washington, Frank Holedger, then and there being, did then and there knowingly, unlawfully, maliciously, scandalously, and feloniously compose, edit, print, sell, distribute, and offer for sale and distribution a certain lewd, scandalous, obscene, and indecent newspaper of the date of January 12, 1895, commonly known as the 'Spokane Sunday Sun,'—contrary to the statute," etc. To this information a demurrer was interposed on the following grounds: (1) That the said information does not substantially conform to the requirements of the Code of Washington; (2) that the facts charged in the information do not constitute a crime. The appellant relies upon the statute which provides that the indictment or information must be direct and certain as it regards (1) the party charged, (2) the crime charged, (3) the particular circumstances of the crime charged, when they are necessary to a complete crime, as specified in section 1236, vol. 2, of Hill's Code, and § 1238, Id., which provides that "the indictment or information must charge but one crime and in one form only, except that where the crime may be committed by the use of different means, indictment or information may allege the means in the alternative." It is urged by the appellant that the facts charged in this information do not constitute a crime; that the words, "knowingly, unlawfully, maliciously, scandalously, and feloniously," as used in the information, qualify the acts, "compose, edit, print, sell, distribute, and offer for sale and distribution"; that the information should allege that the defendant not only knowingly, unlawfully, scandalously, and feloniously composed, edited, printed, etc., a certain lewd, scandalous, obscene, and indecent newspaper, but that he should have done some one of these acts with the knowledge that the said paper was scandalous, obscene, and indecent; that the scienter or guilty knowledge is one of the principal ingredients of this offense. The statute upon which this information is

based is section 205 of the Penal Code, and is to the effect that: "If any person shall import, print, publish, sell, rent, give away, distribute or show, or have in his possession, with intent to sell or give away or to show or advertise or otherwise offer for loan, gift, sale and distribution, any obscene or indecent book, magazine, pamphlet, newspaper, story-paper, writing-paper, picture, engraving, drawing or photograph, or if any person shall design, copy, draw, photograph, utter, publish or otherwise prepare any article mentioned in this section, or shall write or print or cause to be written or printed," etc., "he shall be punished," etc. The appellant has cited a number of cases in support of this contention, but we do not think, from an investigation of them, that they are in point so far as this particular kind of a crime is concerned. For instance, in the case of *Com. v. Boynton*, 12 Cush. 499, where an indictment charged that the defendant "did knowingly sell unto one Jeremiah Barker a certain piece of diseased, corrupted, and unwholesome provision, to wit, one hind leg of veal, the said Boynton not then and there making known fully to said Barker that the same was diseased, corrupted, and unwholesome," etc., the indictment was held bad, and the court rightfully held that the guilty knowledge or evil intent of a party in selling meat was the foundation of the indictment; and it might very well happen that a person engaged in the business of selling meat would knowingly sell it, and of course he would knowingly sell it if he sold it at all, without knowing that it was diseased meat; and in a case of that kind, as a matter of course, the allegation of the knowledge that the meat was diseased would be necessary. But this is not a kindred proposition, for here the appellant is charged with knowingly, unlawfully, maliciously, scandalously, and feloniously composing, editing, printing, selling, distributing, and offering for sale, etc., a certain lewd, scandalous, obscene, and indecent newspaper. If one can edit and compose a publication without knowledge of its obscene character being conclusively presumed, then it would be idle to allege knowledge of its obscene character, because there would be no way of proving that he did have such knowledge. Such knowledge must be conclusively presumed from the fact of his editing and composing the publication, and we have no doubt that a person of reasonable understanding could readily determine what he was charged with by the knowledge conveyed in this information.

The other contention—that more than one crime is charged in the indictment—we think is clearly without foundation. In the case of *State v. Carr*, 6 Or. 183, under a statute substantially like ours, it was held that the indictment was sufficient. That case was decided on the law as pronounced in 1 Bish. Cr. Proc. (3d Ed.) § 586, which is as follows: "If a statute makes it a crime to do this or that, mentioning several things disjunctively,

all may indeed, in general, be charged, in a single count; but it must use the conjunctive 'and' where 'or' occurs in the statute, else it will be defective as being uncertain. All are but one offense, laid as committed in different ways. And proof of it in any one of the ways will sustain the allegation. On the other hand, the indictment may equally well charge what comes within a single clause of the statute, and still it embraces the complete proportions of an offense." This doctrine, we think, has been followed by the courts generally. We think the information was in all particulars good.

The second assignment of error is in relation to appellant's challenge and objection to the panel of jurors summoned and impaneled in the cause, based on the idea that the statute in relation to the qualifications of jurors, viz. page 139 of the Laws of 1895, which provides that the county commissioners shall select from the persons qualified to act as jurors the names of householders, is in conflict with section 12 of article 1 of the constitution of the state of Washington. This has been decided adversely to the appellant's contention by this court in a recent case, to wit, *Redford v. Railway Co.*, 46 Pac. 650, not yet officially reported.

Assignment 3 falls under the same ruling.

The fourth assignment is that the court erred in overruling the challenge of appellant to Juror Calvert. We are satisfied from the testimony that the juror Calvert was a householder, and a proper juror.

The fifth assignment of error is that the court erred in sustaining the objection of the state to the questions propounded to Juror Calvert. The questions were: "Would you attach more importance or credibility to the word of a preacher outside of court than any other gentleman?" And, second, "Would you attach more credence to the testimony of Dr. McInturff, a minister of the gospel, than that of any one else?" These questions are so apparently improper and irrelevant that we do not feel called upon to enter into a discussion of them.

Assignments 6, 7, and 8 are of the same character.

The appellant complains in his ninth assignment that the court erred in asking counsel for appellant in the presence and hearing of the jury if they had any objection to the separation of the jury. In the absence of any proof to the effect that the appellant was prejudiced in any way by the action of the court, we do not feel like reversing a case on this ground alone; but we desire to take occasion to say that, considering the difficulty of making such showing of injury by the party who claims to be aggrieved, we think it is a practice which should not be indulged in by trial courts, because, as appellant complains, if they did entertain any objection to the separation of the jury, they were called upon to so state in the presence of the jury, and would thereby run the risk of incurring the displeasure of

some juror. The court could very easily call counsel to him, and ascertain privately, and without the knowledge of the jury, whether there were any objections to their separation.

The next assignment, viz. that the jury was not drawn in the manner and by the officers provided by law, we think cannot be sustained. Under the proviso to section 3, p. 139, c. 78, of the Session Laws of 1895, we think the jury was properly drawn. We are also satisfied from the record that the juror Claven was the person intended to be drawn under the name of Klawn.

The eleventh assignment is that the court erred in permitting the state, over the objection of the appellant, after the jury in the cause had been accepted and sworn to try the cause, to indorse the name of Albert J. Brill as a witness for the state upon the information. It has been frequently held by this court that such act on the part of the prosecuting attorney would only entitle the defense to a continuance. It not appearing from the record that a continuance was asked for in this cause, for the reason alleged, the objection will not be sustained.

The twelfth assignment is based on the insufficiency of the information, and has already been discussed.

The allegations of error in regard to the overruling of the objection of appellant to certain testimony, we think, without specially reviewing the questions, are without merit. The questions were all pertinent and admissible under the indictment.

The twenty-second assignment, that the court erred in overruling appellant's motion, made at the close of the state's testimony, for a peremptory instruction to the jury to find a verdict for the appellant of not guilty, on the ground that there was no evidence to sustain any of the allegations in the information, and that the evidence was wholly insufficient in law and in fact to sustain the charge against the defendant, cannot be sustained. From a review of the testimony in this case, we think the evidence was amply sufficient to sustain the verdict.

Many instructions of the court are assigned as error, and error is assigned for the reason that certain instructions asked for by the appellant were not given by the court. Many of the objections to the instructions are exceedingly strained, and some of them seem to us to be entirely captious. On the whole, we are satisfied that the law was correctly given by the court, and that the requests for instructions which were refused had either in substance been given by the court, or did not embrace the law governing the case.

We do not think that the affidavit made by the witness Mechem is sufficient, conceding his right to make the affidavit at all, to work a reversal of the case. The judgment will be affirmed.

HOYT, C. J., and SCOTT, ANDERS, and GORDON, JJ., concur.

**CORNELL UNIVERSITY v. DENNY
HOTEL CO. OF SEATTLE et al.¹**

POTVIN v. SAME.

(Supreme Court of Washington. Nov. 5, 1896.)

**APPEARANCE—NOTICE OF APPEAL—SUBSTITUTED
SERVICE—NECESSARY PARTIES.**

1. Under Code 1881, § 72, providing that a defendant appears in an action when he answers, demurs, or gives the plaintiff written notice of his appearance, or when an attorney gives notice of appearance for him, a written acknowledgment of service attached to the summons when returned, signed by the attorneys for a defendant, in which they enter a general appearance, is sufficient to constitute an appearance.

2. Where, after default has been entered against a defendant, he participates by counsel in the proceedings in the cause, and is served by plaintiff with notice of motions, he is to be considered as in court, and entitled to notice of an appeal by plaintiff, notwithstanding the default.

3. Laws 1893, p. 121, § 5, providing for substituted service of notice of appeal where neither a party nor his attorney can be found within the county, "of which fact a return by the sheriff that they cannot be so found shall be proof," makes such return the sole evidence upon which a substituted service can be based, and an affidavit by a private party will not authorize such service.

4. Service of notice of appeal on an attorney as attorney for one party does not constitute service on another party, though the attorney represents both.

5. Where causes have been consolidated in the trial court, and the rights of all parties determined by a single decree, all parties who have appeared must be made parties to an appeal by joining in the appeal or by being served with notice.

Appeal from superior court, King county; J. W. Langley, Judge.

Consolidated actions by the Cornell University against the Denny Hotel Company. Fabian S. Potvin, and others, and by Fabian S. Potvin against the Denny Hotel Company, the Cornell University, and others. The Cornell University and the Denny Hotel Company appeal. Appeal dismissed.

Cole, Heaton & Dawes and S. D. Halliday, for Cornell University. Stratton, Lewis & Gilman, James J. Easley, George E. De Steiguer, and Wiley & Bostwick, for Potvin. George E. De Steiguer and Wiley & Bostwick, for Huttig Bros. Manuf'g Co.

GORDON, J. A motion has been made on the part of certain respondents in this cause to dismiss the appeal upon several grounds hereinafter noticed. It appears from the record that a building known as the "Denny Hotel" was constructed in the city of Seattle under contract between the Denny Hotel Company, as owner, and Fabian S. Potvin, contractor. Subsequent to the commencement of the work, the Cornell University, one of the appellants herein, made a loan of \$100,000 to the hotel company, taking as security therefor a mortgage on the premises whereon the hotel was constructed. A notice of lien was filed on the part of Contractor Potvin,

¹ Rehearing pending.

and various other lien notices were also filed by subcontractors and material men, among whom were Peter Stark, John Leck, and the Western Mill Company. The parties last mentioned reduced their claims and liens upon the property to judgment, and subsequent thereto the appellant Cornell University commenced an action in the superior court for the foreclosure of its mortgage, making the contractor, Potvin, and all of the subcontractors and material men, including those whose claims and liens had been reduced to judgment, parties defendant in said foreclosure suit. About the same time Potvin commenced an action in the same court for the foreclosure of his lien, making the university company and the hotel company parties defendant therein. These two actions were consolidated, and tried together, the principal point in dispute being as to the priority of the lien claims and the mortgage of the university. Service of the summons and complaint in the action commenced by the Cornell University Company, plaintiff, was had upon Peter Stark, defendant therein, and an indorsement of service, together with what purports to be an appearance of the defendant in the action, is attached to the summons, and is in the following language: "We hereby admit due personal service upon us of a copy of the summons and amended complaint in the above-entitled action, and enter our general appearance as defendants herein. Dated at Seattle, this 15th day of March, 1892. Lewis & Humphrey, Attorneys for Peter Stark." Defendant John Leck was personally served with summons. The defendant the Western Mill Company, through its attorneys, Lyon & Denny, filed a written notice of appearance in said action. Default was entered against defendant Leck on May 14, 1892, and the default of defendant Stark on July 14, 1892. Subsequently the consolidated case was sent to a referee, who made findings of fact and conclusions giving the lien of the Cornell University mortgage a preference over the liens of the various other claimants. To the findings and conclusions of the referee, Peter Stark, John Leck, and the Western Mill Company, by their respective attorneys, excepted, and thereafter the university company gave the attorneys for each of said parties notice of its motion to confirm the report of said referee, and, upon said last-mentioned motion coming on for hearing, each of said parties appeared and participated (in connection with the various other parties to the cause) in the proceedings. The court set aside the report of the referee, and entered findings and conclusions of its own, upon which judgment and decree was entered giving the various liens of Stark, Leck, the Western Mill Company, and other claimants, priority and preference over the lien of the mortgage held by the Cornell University. From this decree the Cornell University, the hotel company, and Dexter, Horton & Co. have appealed.

The motion to dismiss is urged upon the ground that no service of the notice of appeal was made upon respondents Peter Stark, John Leck, and the Western Mill Company. In opposition to the motion it is urged by the appellants that neither Stark nor Leck was entitled to notice of appeal; that they had not appeared in the action, and their defaults had been entered; and that as to the Western Mill Company substituted service of the notice of appeal as provided by statute was had. It is strenuously insisted that the acceptance of service of the summons and complaint and the so-called "notice of appearance" indorsed upon and attached thereto does constitute an appearance within the meaning of section 72 of the Code of 1881, then in force. That section is as follows: "A defendant appears in an action when he answers, demurs, or gives the plaintiff written notice of his appearance, or when an attorney gives notice of appearance for him. * * *" On the contrary, we think that it fully complies with the letter and spirit of the statute, and was an appearance. From what has already been stated, it appears that respondent Stark actually participated in the proceedings, served exceptions, and in turn was served with motions by appellants' counsel of subsequent proceedings, all of which was sufficient to constitute not only an appearance in the action, but a waiver of the default which had theretofore been entered. *Hill v. Supervisor*, 10 Ohio St. 621; *Jones v. Jones*, 13 Iowa, 276. And for like reasons the default of respondent Leck, upon whom the summons had been personally served, must be deemed vacated by the subsequent action of the parties. As already noticed, the attorneys for the Western Mill Company had given written notice of appearance in the action, and the appellants do not object to the sufficiency of its appearance. The notice of appeal is also directed to it as well as to respondents Stark, Leck, and various other respondents. This notice of appeal was not served upon the mill company, but substituted service is relied upon.

Section 5 of the act of March 8, 1893 (See Laws, p. 121), governing appeals, provides that: "Where the record and files in the cause do not disclose the address of a party on whom service should be made, or of his attorney, and neither such party nor his attorney can be found within the county in which the judgment or order appealed from was rendered or made, (of which fact a return by the sheriff that they cannot be so found shall be proof,) the notice of appeal need not be served on such party but the appeal may be taken by filing the notice and such sheriff's return with the clerk." Proof of substituted service in this case consists of an affidavit made by a private party, and is to the effect that neither the Western Mill Company nor its attorneys can be found within the county. But there is no return by the sheriff certifying that fact. We think the proof of service wholly insufficient. The stat-

ute has in explicit terms pointed out the method of procedure where actual service upon the party or his attorney cannot be had, and has made "a return by the sheriff" the sole evidence, as we think, by which it is ascertained that actual service upon the party or his attorney cannot be made. No attempt has been made to comply with this statute, and we are not at liberty to disregard its requirements. Cases can be brought to this court only in the manner pointed out by the statute, and the method of procedure there provided is to the exclusion of all others.

It appears from the record that the attorneys for respondent Potvin were also attorneys for Leck. Notice of appeal was served upon them as attorneys for Potvin, and it is contended that this was sufficient to charge them with notice on behalf of Leck, whom they also represented. The course of decision in this court is to the contrary. *Bank v. Bokien*, 5 Wash. 777, 32 Pac. 744; *Dewey v. Land Co.*, 11 Wash. 210, 39 Pac. 368; *Casey v. Oakes*, 13 Wash. 38, 42 Pac. 621.

Lastly, it is urged that, even if Stark, Leck, and the Western Mill Company did appear in the action, and were not served with notice of appeal, nevertheless the court should retain the case, and determine the rights of the other parties; that the appeal in this case involves two separate cases, which had been consolidated, and a single decree entered; and it is urged that the question of priority between Potvin and the Cornell University can be determined upon this appeal without affecting the rights of Stark, Leck, or the Western Mill Company. The failure to give notice to parties who have appeared in the action cannot be excused on the ground that the rights of appellants, and those upon whom the notice of appeal has been served, can be determined without affecting the rights of parties not served. The consolidation of the causes pursuant to section 1674 (volume 1 of the Code) brought all of the lien claims into one action, and their adjustment was effected by one decree. It was for the legislature to determine the manner in which causes should be brought to this court, and we have repeatedly held that "under the provisions of our statute all the parties who have appeared in the action in the court below must be made parties to the appeal, either by joining therein or having notice thereof served upon them." *Bank v. Bokien*, supra; *Dewey v. Land Co.*, supra; *Bellingham Bay Nat. Bank v. Central Hotel Co.*, 4 Wash. 642, 30 Pac. 671; *Johnson v. Lighthouse*, 3 Wash. 32, 35 Pac. 403; *Fairfield v. Binnlan*, 13 Wash. 1, 42 Pac. 632; *Casey v. Oakes*, 13 Wash. 38, 42 Pac. 621; *Jones v. Sander*, 2 Wash. St. 339, 26 Pac. 224; *Cadwell v. Bank*, 3 Wash. St. 188, 28 Pac. 365. Stark, Leck, and the mill company were, as to the appellants, as much "prevailing parties" as is the respondent Potvin, and, if we were to sustain appellants' contention, "the result would be that, instead of the object of the statute—which was to make it sure

that the rights of all the parties should be determined in a single appeal—having been accomplished, it would be possible that there would be two or more appeals before the rights of all the parties to the action would have been finally determined in this court." *Casey v. Oakes*, supra. Appeal dismissed.

DUNBAR and ANDERS, JJ., concur.
HOYT, C. J., disqualified.

DEDERICHS v. SALT LAKE CITY R. CO.
(Supreme Court of Utah. Oct. 12, 1896.)

EVIDENCE—PHOTOGRAPHS.

Where a plain picture or representation produced by the art of photography is verified as a correct representation of the locality at the time of the accident, it is admissible in evidence to enable the court or jury to understand and apply the established facts to the particular case. Such photographic scenes are admissible as appropriate aids to the jury in applying evidence, whether it relates to persons, things, or places.

(Syllabus by the Court.)

Appeal from district court, Salt Lake county; John A. Street, Judge.

Action by Joseph Dederichs against the Salt Lake City Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

Rawlins & Critchlow, for appellant. Richard B. Shepard, A. N. Cherry, and H. O. Shepard, for respondent.

MINER, J. This action was brought to recover damages arising from personal injuries claimed to have been occasioned by the appellant in negligently running its electric street cars on Second South Street in Salt Lake City. The case was before this court on a former hearing, and the decision thereon is reported in 44 Pac. 649. Upon a retrial of the same case it appears from the testimony that on October 1, 1891, respondent was driving his horse and wagon south along Eighth East street across Second South, and after he had crossed the sidewalk and ditch going south towards the street-railway track he discovered a street car coming west on the track, three or four hundred feet away. He drove on towards the track, not thinking the car was coming so rapidly, and believing there was plenty of time to cross, as the car was a considerable distance away. Plaintiff then hit his horse, which was upon the track, but the car came on without ringing the bell, sounding the gong, or applying the brakes, at the unusual rapid rate of 22 miles per hour, and ran into plaintiff's wagon, throwing plaintiff therefrom, and injuring him seriously, besides breaking his wagon. During the trial defendant offered in evidence three photographs, taken by the photographer who was a witness, showing the surroundings of the locality in question where the accident occurred, which photographs were shown to accurately represent the situation of

the locality, as taken by the camera, and accurately printed from the plates, but taken April 6, 1895. Plaintiff testified that he saw no difference in the condition in the trees, as shown in the photographs, from what they were at the time he drove across the track, and that the situation was the same as shown on the photographs that it was at the time of the accident. To the admission of these photographs in evidence the plaintiff objected. They were excluded by the court, and an exception taken. These photographs exhibited the surface condition of the streets, buildings, trees, cars, railroad track, poles, and distances, and would, no doubt, carry to the minds of the jury a better image of the locality of the accident and its surroundings, concerning which testimony was offered, than any oral description. Their accuracy as a faithful representation of the locality was shown as compared to the time of the accident. We think it must be deemed to be established that photographic scenes are admissible in evidence as appropriate aids to the jury in applying the evidence, whether it relates to persons, things, or places. It is a well-established rule, applied in everyday practice in courts, that diagrams and maps illustrating the scenes of a transaction, and the relative location of objects, if proved to be correct, are admissible in evidence, in order to enable the court or jury to understand and apply the established facts to the particular case. And it is difficult to see why a plain picture or representation produced by the art of photography is not admissible on like principles, if verified as a correct representation of the locality. If any difference had arisen concerning the photographs being taken at a different season of the year, it could have been explained. The general current of authority supports the admissibility of this class of evidence. 2 Rice, Ev. p. 1169-1172; 1 Greenl. Ev. § 92, note; Alberti v. Railroad Co., 118 N. Y. 77, 23 N. E. 35; Dyson v. Railroad Co., 57 Conn. 9, 17 Atl. 187; Archer v. Railroad Co., 106 N. Y. 589, 13 N. E. 318; People v. Buddensleek, 103 N. Y. 487, 9 N. E. 44; Com. v. Robertson, 162 Mass. 90, 38 N. E. 25; State v. O'Reilly (Mo. Sup.) 29 S. W. 577; Nies v. Broadhead (Sup.) 27 N. Y. Supp. 52; Stott v. Railway Co. (Super. N. Y.) 21 N. Y. Supp. 630. We think the testimony offered was admissible, and that the court erred in rejecting it. As this question disposes of the case, we do not deem it necessary to discuss the other questions presented. The judgment of the court below is set aside and vacated, and a new trial granted.

ZANE, C. J., and BARTCH, J., concur.

PEHRSON v. CITY COUNCIL OF CITY OF EPHRAIM.

(Supreme Court of Utah. Oct. 5, 1896.)

LIQUOR LICENSE—REVOCATION.

1. Under chapter 52, p. 57, Sess. Laws 1892, defendant issued plaintiff a license to retail liquor. v. 46 p. no. 8—42

uors, and after a quarter's license had been paid, and within a month after its issuance, revoked the same, without previously having preferred charges against the plaintiff, or having cited him to appear and show cause why the license should not be revoked; the plaintiff having, however, been notified by the mayor of the city of the intention of the defendant to consider the matter of his license, and that he might attend the meeting of the city council, and be heard, if he desired. *Held*, that the revocation, without preferring charges against the licensee and giving him an opportunity to be heard, was unlawful and void.

2. Where a thing is to be done for cause, in the exercise of discretion, the law intends a sound discretion, and that the action be based on the merits of the case, as shown by the facts in relation to it.

(Syllabus by the Court.)

Appeal from district court, Seventh district; Jacob Johnson, Judge.

Certiorari by Willard Pehrson against the city council of the city of Ephraim to review the revocation of a liquor license. From a judgment for plaintiff, defendant appeals. *Affirmed*.

L. R. Rhodes, for appellant. Wm. K. Reid, for respondent.

BARTCH, J. In this case the plaintiff made an application for the issuance of a writ of certiorari to review the action of defendant by which it revoked the license of the plaintiff to sell liquors in the city of Ephraim. The court issued the writ, and after return made, upon hearing, adjudged the action of the defendant in revoking the license to be void, and thereupon the defendant appealed. It appears from the record that on February 24, 1896, the appellant granted to the respondent a retail liquor license for the period of three months, commencing on the 11th day of March following; that he paid into the city treasury for said license the sum of \$150; that under said license the respondent carried on the business of a retail liquor dealer from the 11th to the 21st day of March, 1896, when the license was declared revoked, without having previously preferred charges against the respondent, or having cited him to appear and show cause why the license should not be revoked,—the respondent, however, having been notified by the mayor of the city of the intention of the appellant to consider the matter of his license, and that he might attend the meeting of the city council and be heard, if he so desired.

Counsel for the appellant insists that the action of the city council was authorized by the law, and that the court erred in its judgment annulling said action. The statute law material in the decision of this case is found in chapter 52, p. 57, Sess. Laws 1892. Section 1, which is an amendment to section 2158, Comp. Laws Utah 1888, referring to the granting of licenses for the sale of liquors, among other things provides "that any application for such license may be refused for good cause, in the discretion of the city council or county court. * * *" Section

2, which is an amendment to section 2169, Comp. Laws Utah 1888, relating to revocation of liquor licenses, provides that "the county court or the city council may revoke any licenses granted to the keeper of saloons, tippling houses, dram shops, or for the selling or giving away of any intoxicating drink or malt liquors, within the city or county, whenever, in the judgment of the court or city council, such action may be necessary to the peace and good order of any precinct in the county or of the city." The sections amended by the act of 1892 are both portions of the general law relating to intoxicating liquors. Both are applicable to each city and county in the state, and must be considered in determining the legislative intent respecting the revocation of liquor licenses. It will be noticed that under the first section of the act of 1892 the city council or county court may, in their discretion, for good cause, refuse to grant such a license to any applicant, but it appears that they have no power to arbitrarily deny an application. The statute vests in such court and council a legal discretion, which must be exercised in a reasonable, and not in a willful, manner, and only for cause can a license be withheld. Therefore the action by which a license is granted or withheld must be based upon such relevant facts as may come before the body which is called upon to act. If, then, those sitting to administer the law, upon lawful application therefor, can only refuse a license for cause, and must determine each case upon relevant facts, and exercise a sound discretion, can they revoke such license at mere will? Counsel for the appellant insists that section 2, above quoted, confers such power. We do not think this position tenable. Under such a construction the two sections would be in conflict with each other, or, rather, the effect and operation of the one would avoid and annul the effect and operation of the other, because, under the first section, upon application therefor, unless good cause existed for refusing, the license would have to be granted, and under the second it might be immediately revoked without cause. This would be unreasonable. The two sections must be construed together, and effect given to both, if possible; and, when the second section is considered with the first, its clear meaning is that the county court or city council may revoke any such license whenever, in their judgment, such revocation becomes necessary to the peace and good order of the public, but their judgment must be based on the existence of such relevant facts as show some cause and necessity for their action. The sale of intoxicating liquors as a beverage is one of many things which affect the public morals, and whether licenses should be granted, and how they should be granted and revoked, are legislative questions. Those who sit to administer the law should administer it fairly. Where a thing

is to be done, for cause, in the exercise of discretion, the law intends a sound discretion, and that the action be based upon the merits of the case as shown by the facts in relation to it. The statute law under consideration vests in the county court and city council a large discretion, which should be exercised primarily for the public good, and secondarily for private interests. It is admitted in this case that the license was regularly granted according to law, and there is nothing to show that the respondent had in fact violated the law or the city ordinances. Nor does the record contain any facts or show any cause which were sufficient to authorize the revocation. The action of the council was therefore without its jurisdiction and void, and the district court committed no error in setting it aside. The judgment is affirmed.

ZANE, C. J., and MINER, J., concur.

PEOPLE v. McCUNE.

(Supreme Court of Utah. Oct. 5, 1896.)

VILLAGE—WHAT CONSTITUTES.

Where it appeared from the evidence that a settlement consisted of 14 families, each family containing about 5 persons; that these reside along a stream, the distance from one extreme end of the settlement to the other being about two miles and a half, some residing within 40 rods of each other, and others being distant about a mile or more; that their chief occupation was farming; that the settlement contained a school district, a district school, and a post office; and that the nearest settlement to the north was distant about 15 miles, to the west about 12, and to the south about 6, miles,—it was not error in the court to instruct the jury that as a matter of law such a settlement was a village, within the meaning of the statute (chapter 63, p. 70, *Seem. Laws 1892*).

(Syllabus by the Court.)

Appeal from district court, Sixth district; W. M. McCarty, Judge.

Thomas McCune was convicted of befouling a stream, and appeals. Affirmed.

J. W. N. Whitecotton and George Sutherland, for appellant. The Attorney General, for the State.

BARTCH, J. This is a criminal prosecution, in which the defendant was charged with the offense of befouling the water of a certain stream, by unlawfully establishing and maintaining a camp or bedding place on the banks thereof for a large number of sheep, the waters of said stream being used by the inhabitants of a settlement called "Plateau" for domestic purposes. He was tried before a justice of the peace, convicted, and sentenced to pay a fine, and then appealed to the district court, where he was convicted, and sentenced to pay a fine and costs of prosecution. Thereupon he appealed to this court.

The main point relied upon by the appellant for a reversal of the judgment is that the court erred in instructing the jury that, as

matter of law, the settlement called "Plateau," near which the offense was charged to have been committed, is a village, under chapter 63, p. 70, Sess. Laws 1892, which is an amendment to section 2264, Comp. Laws Utah, 1888. Section 5 of said chapter was enacted as a subdivision to section 2264, and made it unlawful "to establish and maintain any corral, camp or bedding place for the purpose of herding, holding or keeping any cattle, horses or sheep, within seven miles of any city, town or village, where the refuse or filth from said corral, camp or bedding place, will naturally find its way into any stream of water used by the inhabitants of any city, town or village for domestic purposes." It is insisted by counsel for the appellant that Plateau is not such an assemblage of houses as to constitute it a village, within the meaning of this statute. It appears from the evidence, among other things, that Plateau is a settlement in Sevier county, Utah, consisting of 14 families, each family on an average containing about 5 persons; that these families reside along a stream called "Otter Creek," the distance from one extreme end of the settlement to the other being about two miles and a half, some residing within about 40 rods of each other, and others being distant about a mile or more; that their chief occupation is farming; that the settlement contains a school district, district school, and a post office; and that the nearest settlement to the north is distant about 15 miles, to the west about 12, and south about 6 miles. We think the evidence was sufficient to authorize the court to instruct the jury that, as matter of law, the settlement of Plateau is a village, within the meaning of the statute. From an examination of the act, which is amended by the section above quoted, it seems clear that by the use of the word "village" the intent of the legislature was to include such settlements as the one in question, and there appears to be no reason why the people of such a settlement, who are using the water of a stream for domestic purposes, should not have extended to them the protection which the law affords. Their health and comfort demand equal protection with those who live in larger and more densely settled villages, towns, and cities. It is a wise and beneficial law, calculated to promote the comfort and protect the health and lives of the inhabitants, and its operation and application must not be unreasonably abridged by judicial construction.

The contention, on the part of the appellant, that the venue was not proven, we think is not well taken. There is sufficient evidence on this point to show that the offense was committed in Sevier county, and hence the court had jurisdiction.

It is also insisted that the court erred in its instructions to the jury as to what constituted an establishment and maintenance of a camp or bedding place for sheep, under the statute, but a careful perusal of the instructions reveals no reversible error. We do not deem

it necessary to discuss any other question presented, because the record appears to contain no error which would warrant a reversal of the case. The judgment is affirmed.

ZANE, C. J., and MINER, J., concur.

SALT LAKE COUNTY v. RICHARDS, State Auditor.

(Supreme Court of Utah. Oct. 9, 1896.)

JURY FEES IN CIVIL CASES.

The state is not required to pay mileage and attendance of jurors in civil cases. Section 166, p. 571, Sess. Laws 1896, so far as it provides for an itemized statement "for mileage and attendance of grand jurors, for mileage and attendance of petit jurors engaged in the trial of cases in the district courts, and for mileage and attendance of witnesses summoned by or on behalf of the state in criminal cases in the district court," must be governed in its interpretation by subdivision 5, § 94, p. 548, Sess. Laws 1896; subd. 7, § 118, p. 555, id.; subd. 4, § 105, p. 571, id.; and section 151, p. 567, id.

(Syllabus by the Court.)

Appeal from district court, Salt Lake county; John A. Street, Judge.

Petition by Salt Lake County for mandamus to compel Morgan Richards, state auditor, to issue a warrant. From a judgment denying the writ, petitioner appeals. Affirmed.

C. O. Whittemore, Co. Atty. (Benner X. Smith, of counsel), for appellant. A. C. Bishop, Atty. Gen., for respondent.

ZANE, C. J. The plaintiff, Salt Lake County, presented to the district court its petition against the defendant, duly verified, alleging that the clerk of that court and the county attorney had duly issued their certificates for mileage and attendance of grand and petit jurors; that such certificates amounted to \$5,425.60. These certificates included the mileage and attendance of petit jurors between January 4 and June 5, 1896, in civil as well as criminal cases, without indicating how much was due in either. The petition also alleged that the county treasurer and county auditor had made their statements, under oath, for that amount, and that the state auditor had refused to issue a warrant on the state treasurer for the same. The petition contained a prayer for a writ of mandamus compelling him to issue such warrant. The defendant demurred to the petition, because it did not state how much was due for mileage and attendance of jurors in criminal cases and how much in civil cases. The court below sustained the demurrer, and dismissed the suit, the plaintiff having elected to stand on its petition. From this judgment of dismissal the plaintiff has appealed to this court, and assigns the ruling of the court upon the demurrer as error. Is the state required to pay mileage and attendance of jurors in civil cases? Is the question presented for our consideration and decision? The plaintiff relies upon section 166 of "An act to establish a uniform system of county government," approved April 14, 1896 (Sess.

Laws 1896, p. 571), as follows: "At such times as the board of county commissioners may designate, it shall be the duty of the county treasurer and the county auditor of each county to prepare in duplicate and verify under oath a full and complete itemized statement of all certificates issued by the clerk of the district court and county attorney since the date of the last statement (or, in case no former statement has been made, then since January 4th, 1896), for mileage and attendance of grand jurors, for mileage and attendance of petit jurors engaged in the trial of cases in the district court, and for mileage and attendance of witnesses summoned by or on behalf of the state in criminal cases in the district court; also a statement for all warrants drawn for salaries of the county attorney, the county treasurer, the county assessor; such statement shall set forth in detail the number of certificate or warrant, the date of same, the name of the person or persons in whose favor issued, the nature of the service rendered, and such other information as may be necessary. One of such statements shall be transmitted to the state auditor, and the other shall be filed in the office of the county clerk. Upon the receipt of said statement by the state auditor, he shall, unless he find the same to be incorrect, draw his warrant in favor of the county treasurer upon the state treasurer for the whole amount of said juror and witness certificates, as shown by said statement, and for one half of the whole amount of said warrants shown in said statement, and shall transmit the same to the county treasurer. The county treasurer shall hold the funds so drawn from the state treasury upon the warrant aforesaid as a separate fund for the redemption of the juror and witness certificates and for the part payment of the warrants set forth in the statement above described." This section makes it the duty of the county treasurer and the county auditor to prepare in duplicate an itemized statement of all certificates issued by the clerk of the district court and county attorney for mileage and attendance of grand jurors, for mileage and attendance of petit jurors, and for mileage and attendance of witnesses summoned by or on behalf of the state in criminal cases. The statement should embrace only such certificates as may have been issued by the clerk and county attorney. If the mileage and attendance of jurors in civil cases should not be embraced in those certificates, such mileage and attendance should not be included by the county treasurer and county auditor in their itemized statement. It is upon this statement the state auditor draws his warrant upon the treasurer. Therefore it is necessary to ascertain the mileage and attendance of petit jurors required to be embraced in the certificate of the district clerk and county attorney. Subdivision 5 of section 94 of the above-mentioned act is as follows: "As clerk of the district court he shall issue a certificate of the attendance and mileage of all jurors and of witnesses in criminal cases." A reasonable construction of this language limits the mileage and attendance of ju-

rors and witnesses to criminal cases. It limits the certificate of the clerk to the mileage and attendance of jurors; in criminal cases, as it does the mileage and attendance of witnesses. Subdivision 7 of section 118 of the same act, requiring the approval and signature of the county attorney, is to the same effect, to wit: "He shall examine and when approved by him, attach his approval and signature to the certificate of attendance and mileage of all jurors and of witnesses in criminal cases issued by the county clerk." This provision requires the county attorney to examine the certificates of the clerk of mileage and attendance of witnesses and jurors in criminal cases, and, if he finds it to be correct, to approve it, and attach his signature to it. These officers have no right to include in this certificate the mileage and attendance of jurors or witnesses in civil cases. Nor are the county treasurer and county auditor authorized to include in their statement required in section 163, above quoted, to be presented to the state auditor, upon which he is required to draw his warrant on the state treasurer, mileage and attendance of jurors or witnesses in civil cases. Section 165—immediately preceding the one requiring the county treasurer and county auditor to make their statement upon which the state auditor draws his warrant upon the state treasurer—declares that "the sums required by law to be paid to jurors in civil cases" shall be a county charge. Why require sums that are a county charge to be certified to the state for payment? Section 151 of the same act makes it the duty of either party to any civil cause pending in the district court desiring a jury trial to notify the clerk in writing thereof before the cause is set for trial, or such other time as the court shall direct, and at the time of such notice to deposit with the clerk the sum of five dollars, and the clerk is required to deposit the same in the county treasury. Why require this jury fee to be paid into the county treasury if the state is to pay the fee of the jurors? The minutes of the clerk should show the time jurors serve in the trial of civil causes; also the time in criminal causes; and the mileage should be divided between the two classes of service proportionally to the time occupied by each respectively. The clerk should give the juror a statement of his attendance in the trial of civil cases, and of his mileage, that he may present it to the proper county officer or officers to be audited and paid. We cannot assume that the legislature would have made the sums required by law to be paid to jurors in civil cases a county charge, and would have required jury fees collected of litigants paid into the county treasury, if it had intended the state should pay such mileage and attendance. We hold that the county should pay jurors their mileage and attendance in civil cases, and that the state is not liable therefor, and that the court below did not err in sustaining defendant's demurrer to plaintiff's petition. The judgment of the court below is affirmed.

BARTCH and MINER, JJ., concur.

BROWN et al. v. LEVAN et al.

(Supreme Court of Idaho. June 1, 1896.)

LOCATION OF MINING CLAIM—DESCRIPTION—PERMANENT MONUMENTS.

1. In locating mining claims it has become the settled law that section 2324 of the United States Revised Statutes must be complied with.

2. That the record must contain such a description of the claim by reference to some natural object or permanent monument as will identify the claim.

3. Such reference to a natural object or permanent monument must be such as to furnish a reasonable certainty that the locus of the claim has not been, and could not well be, changed.

4. Permanent monuments may be erected for the purpose of tying the claim to them, but then courses and distances from them to discovery stake or corner stakes, or some other object on the ground, must be stated with reasonable accuracy.

(Syllabus by the Court.)

Appeal from district court, Boise county; J. H. Richards, Judge.

Action by John Brown and others against E. B. Levan and others. From a judgment of nonsuit, plaintiffs appeal. Affirmed.

In this case the plaintiffs allege that they were and are the owners of and in possession of the Magpie mining claim on the north side of Willow creek, in Boise county, Idaho, in what was then an unorganized district, now known as "West View Mining District." The claim was located September 10, 1892, by John Brown. William Francis wrote the notice of location for plaintiff. The Magpie and two other claims, named the "Kid" and "Greyhound," were recorded on the same day, but it appears from the evidence that the two latter claims were located after the Magpie. Brown, the plaintiff, testified that he took the notice off of the discovery stake of the Magpie, and took it to Boise City, to T. J. Curtis. The latter copied it, and Brown took the copy thus written to the recorder, and had it recorded in the recorder's office of Ada county. It was discovered afterwards that the ground located was in Boise county. Then the same notice was taken to the recorder's office in Boise county, and there recorded. The original notice was taken back, and placed on the stake as before. It remained there some time, and was finally washed off. Brown, the plaintiff and locator, states that he worked nearly two months on the claim in 1892; 60 or 61 days in 1893; that he went to the claim in 1894, some time in August, and found the defendant Levan there with his men. Brown and Levan had a dispute over the claim at that time. The stakes that had been erected as shown by the evidence of Brown and others were then down and removed from the claim, and the discovery shaft, as plaintiff describes it, "was filled up just about natural, and the claim showed no work anywhere." Brown states further that Francis wrote the notice for him; that he himself, not being able to write, does not know what was in the notice. A copy of the notice was introduced in evi-

dence, which was in part as follows: "The mining claim hereby located is situated in — mining district, Boise county, state of Idaho, and is more particularly described as follows, to wit: Being situated and located on the north side of North Willow creek, about one-half mile from the Hurt mines, the direction being southwest. The adjoining claims are the 'Gem of the Woods' claim on the north, and the 'Kid' claim on the south, and the 'Greyhound' on the east. This location is distinctly marked on the ground, so that its boundaries can be readily traced by a stake set at discovery shaft, where this notice and statement is posted, this 10th day of September, 1892, and by substantial posts or monuments of stone at each corner of the claim, and the exterior boundaries of the claim as marked by said posts or monuments are as follows, to wit: Beginning at discovery stake, and running thence in a northerly direction 300 feet, to a stake; thence in a westerly direction 1,500 feet, to a monument; thence in a southerly direction 600 feet, to a stake; thence in an easterly direction 1,500 feet, to a stake; thence in a northerly direction 300 feet, to the place of beginning,—including all surface ground within said boundaries. The undersigned intend to hold this claim under and according to the laws of the United States and of the state of Idaho, and to record this notice and statement under oath in the county recorder's office of said county, as provided by law. Dated this 10th day of September, 1892. [Signed] John Brown, John Ransom, Locator and Claimant." Evidence was also introduced as to the manner in which the boundaries of the claim were marked on the ground, and also testimony to show what was known as the "Hurt Mines," and where they were situated. Much other testimony was introduced, some of which will be referred to hereafter. The plaintiff then rested, and the defendant moved a nonsuit, which was allowed by the court.

L. Vineyard and W. H. Clagett, for appellants. John T. Morrison, W. E. Borah, and Hawley & Puckett, for respondents.

MORGAN, C. J. (after stating the facts). The specifications of error are as follows: "First. The court erred in granting the motion for and entering judgment of nonsuit. Second. The court erred in refusing to admit the evidence of Hastings as to the value of the ore extracted from the Magpie claim by defendants, based upon samples taken by witnesses from the vein surrounding the ore that had been extracted." The ground upon which the motion for nonsuit was made and sustained is: "Because said location notice fails to designate either natural objects or permanent monuments, as required by the Revised Statutes of the United States (section 2324), so that the location of the claim could be accurately determined; and because said notice does not contain a description of the locality of the claim by reference to natural landmarks or fixed objects and contiguous

claims, so as to render the situation or locality of the claim reasonably certain, as required by section 3102, Rev. St. Idaho." Section 2324, Rev. St. U. S., requires that all records of mining claims shall contain such a description of the claim or claims, located by reference to some natural object or permanent monuments, as will identify the claim. In the case of *Drummond v. Long*, 9 Colo. 533, 13 Pac. 543, the location notice, after describing the boundaries of the claim, states further: "The discovery shaft being situate upon said lode within the lines of said claim in Uncompaghe mining district, county of La Plata, territory of Colorado, on the southwest side of Mt. Hardon, in Portland gulch, about 1,500 feet north of the Hawkeye lode." With reference to this location notice, the court says: "In the certificate before us we do not find any such reference to either a natural object or a permanent monument as meets the substantial requirements of the statute. Describing the lode as being on the southwest side of Mt. Hardon and in Portland gulch, locates the lode generally. It is not, however, that definite location by reference which the statute contemplates,"—citing *Faxon v. Barnard*, 4 Fed. 702. "The certificate also describes the discovery shaft of the Portland as being about 1,500 feet north of the Hawkeye lode. The evidence discloses nothing respecting the character of the Hawkeye lode. We assume, however, that it has been duly located in compliance with the laws of congress and of the state; that it is in the usual form of a parallelogram, 1,500 feet in length by 300 feet in width; and that it contains about 10 acres. A tract of land of such dimensions cannot be treated either as a natural object or permanent monument within the meaning of the act of congress. The discovery shaft of the Portland is not tied definitely to any corner or monument of either the location or lode. From what point on the Hawkeye location or lode is one to start to find and identify the discovery shaft of the Portland? With the starting point anywhere in a parallelogram of 10 acres, the discovery shaft is anywhere about 1,500 feet distant in 10 acres to the north. * * * Under such conditions, identification with that reasonable certainty required by the statute is an impossibility, and it cannot be said that the statute in this respect has been complied with. To hold otherwise would leave the requirement of but little practical utility. The insufficiency of the location certificate is apparent upon its face, and we do not see that it can be aided by evidence aliunde. The effect of the omission is to leave the certificate of location void,"—citing *Mining Co. v. Drake*, 8 Colo. 586, 9 Pac. 787. In *Gleeson v. Mining Co.*, 13 Nev. 462, the court says: "The object of the law in requiring the location to be marked on the ground is to fix the claim, to prevent floating or swinging, so that those who in good faith are looking for unoccupied claims in the vicinity of previous locations may be enabled to ascertain exactly what has been appropriated in order to make their locations upon the residue. We concede that the provisions

of the law designed for the attainment of this object are most important and beneficent, and they ought not to be frittered away by construction." In *Faxon v. Barnard*, 2 McCrary, 46, 4 Fed. 704, the court says: "The description of the location of the mining claim is as follows: 'Situate on the north side of Iowa gulch, about timber line, on the west side of Bald Mountain. Said claim is staked and marked as the law directs.' Of this the court says: 'It is utterly impossible to find in this language any reference to a natural object or permanent monument defining the location, and the only question is as to the effect of the omission. The act of congress requires such reference to be made in the description of a claim (Rev. St. § 2324), and the state legislature has declared that a certificate shall give such description as shall identify the claim with reasonable certainty.' In *Mining Co. v. Drake*, 8 Colo. 586, 9 Pac. 789, the description was as follows: 'Beginning at the westerly end of the Gilpin County Mining Company's property on the Williams lode in Lake Gulch mining district, running thence in a westerly direction a distance of 50 feet to the easterly end of Packard and Updegraff's property on said lode.' Of this description the court says: 'It is conceded that the claims referred to are patented claims, and they may supply the permanent monuments required by the act of congress. Still the references thereto in the location certificate, and the descriptions of the claim located, are too indefinite to enable the same to be fully identified, or its boundaries readily traced from this certificate alone. 'Beginning at the westerly end' of a certain mining claim. At what point of this westerly end? Was it at the corner, or in the center, or some other point on the line of this westerly end? The certificate does not tell. 'Running thence in a westerly direction a distance of 50 feet to the easterly end of Packard and Updegraff's property on said lode.' What part of the easterly end of this property did this line intersect? Where was the discovery shaft situated with reference to this line? To what fixed point is said shaft or any other part of said claim tied? It is apparent that no information is furnished by this certificate which will enable any one to trace the boundaries of this claim. The discovery shaft is tied to nothing definitely, nor is any corner or point of the claim, so far as appears from this record. The statute pronounces such a location certificate void. There was therefore no error in rejecting it." In *Darger v. Le Sieur* (Utah) 30 Pac. 364, the location notice was as follows: "This is to certify that we, the undersigned, have this date located and claim 1,500 feet in length on this ledge of shale and wax, and 300 feet on each side of the center of location. We claim 300 feet running east, and 1,200 feet running west from the monument. This ledge is situated up near the head of the right-hand fork of what is known as 'Tie Canyon,' about 5 miles from the D. & R. G. R. R., in Utah county," etc. With reference to this notice, the court says: "We think the court erred in admitting in evidence plaintiff's

location notices. They are fatally defective, and valid locations cannot be made under them. The Revised Statutes of the United States require that there must be such a description of the claim located, by reference to some natural object or permanent monument, as will identify it. Assuming that the D. & R. G. R. R. had a track in Utah county, an officer armed with a writ of restitution under the verdict and judgment could not, from the description given, put plaintiffs in possession of their claims. They are described as being about five miles from the railroad track, but in what direction, or from what point on the railroad, is not stated." In *Drummond v. Long*, 9 Colo. 540, 13 Pac. 545, the court says, with reference to what may be designated as a permanent monument: "The intention of the provision is to give one seeking the locus of a recorded claim something in the nature of an initial point from which to start, and, following the course or distance given, find with reasonable certainty the claim located. The identification must be by reference to some natural object or permanent monument. Stone monuments, blazed trees, the confluence of streams, the point of intersection of some well-known gulches, ravines, or roads, permanent buttes, hills, mining shafts, etc., are enumerated as satisfying the requirements of the law. In the certificate before us we do not find any such reference to either a natural object or a permanent monument as meets the substantial requirements of the statute." In *Dillon v. Baylis* (Mont.) 27 Pac. 726, the court says: "We are prepared to concede that, no matter how permanent and prominent the monument may be, or how conspicuous and certain the natural object is, yet, if there was no intelligent reference to them that would identify the claim, the description would not satisfy the requirements of the United States law. The very object of selecting a natural object or erecting or referring to a permanent monument is, in the language of the statute, to identify the claim."

Judge Hallock, in *Faxon v. Barnard*, supra, says: "The government gives its lands to those citizens who may discover precious metal ores therein, upon the condition that they will define the subject of the grant with such certainty as may be necessary to prevent mistakes on the part of the government and on the part of other citizens who may be asking the same bounty. This is reasonable and necessary to justly administer the law, and therefore it must be said that, without such description, a certificate of location is void." See, also, *Darger v. Le Sieur*, supra. To the same effect we might cite many other cases, if it were necessary.

From these authorities it is evident that it has become the settled law of the land that section 2324, Rev. St. U. S., must be complied with, to wit: "That all records of mining claims shall contain such a description of the claim or claims located by reference to some natural object or permanent monument

as will identify the claim." The location notice of the Magpie describes the mine as located on the north side of North Willow creek. This portion of the reference is, of course, so indefinite and uncertain that it amounts to no reference at all, when taken alone. It is as indefinite as the reference of the Mary Belle lode in *Darger v. Le Sieur*, supra, which described the claim as situated about five miles from the D. & R. G. R. R. track, near the head of the right-hand fork of what is known as "Tie Canyon." Concerning this notice of location and five others of the same tenor, the court in the above case says that they are fatally defective, and valid locations cannot be made under them. Putting the whole reference together, which of course is proper, and is it any better? Namely, "situated on the north side of North Willow creek, about one-half mile from the Hurt mines, the direction being southwest; the Gem of the Woods claim on the north and the Kid claim on the south and the Greyhound on the east." Concerning the Hurt mines, Bradford Hurt, the son of the first locator, testifies: "We [that is, Bradford Hurt and his father] were interested in four claims there. They were the Birthday, the Old Man, Gray Eagle, and the Silver Leaf. The mines which are known as the 'Hurt Mines' are the Birthday, Old Man, Gray Eagle, and Silver Leaf. The Silver Leaf is southeast of the Magpie; joins, or nearly joins, it. The Old Man is east of the Magpie. The Gray Eagle is east of the Old Man, and the Birthday is northeast of the Old Man. These claims do not all join. They do not connect exactly. The Silver Leaf does not join in the rest. The other three joined at the time. The Old Man is not one thousand feet from the Magpie. It possibly may be one thousand feet. It is six or eight hundred." William Francis testifies: "I know about the Hurt mines,—the Birthday, the Old Man mine, and the Silver Spray. There are a number of mines over there known as the 'Hurt Mines.' The Silver Spray is southwest of the Magpie. The Old Man is one thousand feet east of the Magpie." John Brown, the plaintiff, testifies: "Hurt has three mines on North Willow creek, I believe,—the Silver Leaf, the Old Man, and the Birthday. Some call them the 'Hurt Mines.' Some call the Birthday the 'Hurt Mine,' and some call the Old Man mine the 'Hurt Mine.' Mr. Hurt has three mines over there, I believe. Hurt has an interest in the Silver Leaf, and some call it the 'Hurt Mine' because he is in it." No attempt was made to show that there was any mistake made in writing the location notice, and we must take it as we find it, and must presume that the intention was, as stated in the notice, to refer to the Hurt mines as a permanent monument by which to identify and from which to determine the location of the Magpie. Now, if we make a diagram of the Hurt mines, and

place them in any position that will correspond with the testimony, then draw a line from the northwest to the southeast about one-half mile to the southwest of the Hurt mines, we shall see at once that half a dozen mines may be located, and each one in a southwesterly direction from the Hurt mines, and all north of North Willow creek. It is not at all surprising that Mr. Hastings, the surveyor, at first said he could not find the mine from the location notice, and then, partially taking it back, says that he did not try to. There was no discovery shaft or cut on the ground when Mr. Hastings went there to survey the claim; nothing to indicate that any work had ever been done there. The discovery stake might have been moved many times, and no one unacquainted with the location could have discovered from the location notice that it had been so moved. We think it is the duty of the court to give mining notices and records a liberal construction, to the end of upholding a location made in good faith. But where the description and reference to a natural object or permanent monument is of such a character that a mining engineer could not find the claim from the location notice, as is evident in this case, and where it is such that the claim may be floated almost anywhere to suit the ground or to cover ore that may have been since discovered, it is clearly such a notice as cannot furnish a foundation for a valid location. It appears from Mr. Hastings' testimony that he placed the discovery at the point indicated in his testimony, not from any directions in the location notice, nor on account of any indications on the ground that any work had been done there, but from statements made by plaintiff; and hence all his measurements, being made from an uncertain point, were themselves uncertain, and the court is unable to say whether this was the original location or not. We may presume that plaintiff Brown was perfectly honest in pointing out the place of discovery, and the corners of the claim, as the evidence shows he did so point out the corners, to the surveyor; but where there is such uncertainty in the location notice we have no certainty of it at all. It is evident that the reference to some natural object or permanent monument to identify the claim must be such as to furnish a reasonable certainty that the locus of the claim has not been and could not well be changed. The naming of contiguous claims is a requirement of our statute, and was complied with; but the reference to a permanent monument must be such as will enable a skilled engineer, at least, to identify the claim without reference to contiguous claims the location of which is uncertain. Permanent monuments may exist before the location, or may be erected for the purpose of tying the claim to them; but then courses and distances from them to discovery stake or corner stakes or some other object on the ground

must be stated with reasonable accuracy. The judgment of the court below is affirmed.

SULLIVAN and HUSTON, JJ., concur.

On Petition for Rehearing.

(Nov. 9, 1896.)

PER CURIAM. We have carefully examined and re-examined the petition for rehearing in this case, and the authorities therein cited, and we are unable to find anything therein which would warrant us in granting the prayer of the petition.

The petition is a very specious argument against the conclusion of the court, but it differs very little from the argument on the hearing.

The petition for rehearing is denied.

STITH v. PECKHAM et al.

(Supreme Court of Oklahoma. April 4, 1896.)

MORTGAGE — PAROL EVIDENCE — PLEADING AND PROOF.

1. Parol evidence is admissible to show that an instrument reciting the receipt of the transfer of certain lots for a certain price, payable in lumber, and containing an agreement to reconvey to the grantors on payment of their bill to the grantee, and that the parties should sell the lots within 90 days, was intended for a mortgage, and not an absolute sale of the lots, rendering the grantee liable for the price.

2. On a complaint alleging a liability for the balance of the purchase price of lots, on proof that the transaction was a mortgage to defendant to secure him for the price of lumber agreed to be furnished plaintiff, recovery cannot be had for breach of the agreement to furnish the lumber.

Appeal from probate court, Kay county.

Action by Ed L. Peckham and another against J. C. Stith. There was a judgment for plaintiffs, and defendant appeals. Reversed.

H. C. May and Ira J. McGinnis, for appellant. Charles J. Peckham, for appellees.

BIERER, J. This case is an appeal brought to the supreme court by the plaintiff in error, J. C. Stith, for review of the judgment of the probate court of Kay county rendered against him in the suit of Ed L. Peckham and Willie W. Peckham, and the matter has been submitted to me upon a written stipulation of both parties, signed and presented with the papers in the case, that I should take up and pass upon the case, and determine it for the court. Upon this written stipulation, and at the urgent request of the parties for me to decide the case, in order to save the delay on account of the great amount of business pending in the supreme court, I have consented to dispose of it. The action was brought in the court below to recover the sum of \$525, with interest from the date of the filing of the petition, which the plaintiffs alleged was due them upon a written contract of the defendant, as follows: "Rec'd from Ed L. Peckham and Willie W. Peckham transfer of lots No. 16, 17 & 18 in Block No. 92 in the town of Black-

well, Oklahoma Territory, for the purchase price of seven hundred and fifty dollars, payable in lumber and other building material. And I hereby agree that I will reconvey said lots to said parties upon the payment to me of their bill to me, together with interest thereon at the rate of 10% from the date of each purchase. And the said parties hereby agree to sell said lots within ninety days from the date hereof. Dated this 25 day of May, 1894. J. C. Stith." The plaintiffs claim that the defendant had furnished upon this contract lumber only to the amount of \$225, and that the balance of \$525 had been refused to be furnished by the defendant, and that the defendant is therefore indebted to them in that amount. The defendant, as one of his defenses set out in his amended answer, alleged that the transaction which resulted in the making of the deed to the lots mentioned in plaintiff's petition and the signing of the contract was one in which these instruments were signed and given as security for the payment to the defendant of the value of the lumber and building material to be furnished by the defendant to the plaintiffs, and that defendant took the pledge of the lots solely as security for the lumber and building material that was to be furnished by the defendant to the plaintiffs. On the trial there was considerable evidence offered tending to show that this was the real transaction between the parties. The defendant asked that certain instructions be given to the jury, to the effect that, if they found the deed to the lots was given by the plaintiffs to the defendant, and the contract given by the defendant to the plaintiffs, then the plaintiffs could not recover in the case. He also asked the submission of special questions upon this theory of the case; both and all of which were refused by the court, and exception taken.

It is claimed by the plaintiffs below (defendants in error here) that this contract is one of absolute sale by the plaintiffs to the defendant of the lots for \$750 worth of lumber, and this was the theory taken in the court below, and sustained by the trial court; and the defendant was not permitted to present the case to the jury upon the answer alleging that the transaction was a security, and not a sale, and his evidence in support thereof. This, I think, was error. The contract is not, upon its face, such a one as will preclude evidence to show the real nature of the transaction between the parties. The first portion of it does speak of it as a transfer of the lots for the purchase price of \$750, payable in lumber. It then contains a defeasance clause, under which the defendant was to reconvey to the plaintiffs upon their payment of a certain bill mentioned, but not specifically defined, with interest thereon. And it also contains another clause, whereby the parties agree to sell the lots within 90 days. These latter provisions are inconsistent in themselves with the theory of an absolute sale, and are such as would at least entitle the defendant to show what was actually intended by the arrangement between the parties. There was evidence tending to

show that the plaintiffs had made a payment of \$18, consisting of cash and an attorney's fee upon an account for lumber delivered by the defendant under the arrangement between the parties. There was evidence tending to show that after the delivery of the deed the plaintiff Ed L. Peckham had employed carpenters to do work upon a house on these very lots. And it was clearly proper for the defendant to show that the transaction was actually one whereby the deed to the lots was given, not as an absolute transfer, but as security for a debt. *Moore v. Wade*, 8 Kan. 256; *Bennett v. Wolverton*, 24 Kan. 208; *Overstreet v. Baxter*, 80 Kan. 51, 1 Pac. 825; *McDonald v. Graham*, 30 Kan. 170, 2 Pac. 507.

The defendants in error claim that the defendant filed no appropriate motion for a new trial; that the motion for new trial attacked the decision of the court, and not the verdict of the jury. The motion is not very skillfully prepared, but it does sufficiently show that the defendant asked a new trial, and that the proceedings of the court and the jury were attacked in the motion. No objection to the form of the motion seems to have been made in the court below, and this objection is too technical to be entitled to serious consideration in the supreme court.

Defendants in error further contend that the defendant, in his own testimony, showed that this transaction was a sale of the lots, and not one of security for the payment of a debt. It is true, the defendant answered: "My understanding was that he [meaning Ed L. Peckham] would make an effort at the time to sell the lots. If so, my bill would be paid for that I furnished him; if not, would belong to me." There is nothing in this answer to so completely contradict the other positive and direct evidence given by the defendant tending to show that the transaction was one of security for the payment of his bill of lumber, which he claimed amounted to \$275.83, less a credit of \$18, as to prevent the defendant from presenting the case to the jury on his theory of security instead of a sale. The defendant's testimony shows that his idea was that he was to take the lots as security for the account for the lumber that was agreed to be and was furnished. If the plaintiffs paid the bill, he was to retransfer the lots; if they did not, he was to keep the lots. This would not, however, prevent the transaction being one of security instead of an absolute sale.

The defendants in error claim, too, that, even though the transaction were one of security instead of absolute sale, the defendant below would be liable to them in the balance of the sum of \$750 above the amount of lumber actually furnished. That theory of the law cannot be sustained upon the petition upon which the case was tried. The petition sued for the recovery of money as a balance due for the purchase price of the lots. It does not allege any damage sustained by reason of the defendant's failure to perform his contract to furnish lumber. Of course, if the contract was one to furnish lumber and to take the lots as a

security on that contract, damages would have to be alleged and proven on account of the breach of that contract, before the plaintiffs could recover. There is no allegation of that kind in the petition, and the case was not attempted to be tried before the jury on that theory.

There are many errors assigned, but the question referred to is the principal one, and the one that goes to the merits of the case. The judgment below must be reversed, with directions to grant a new trial, at the costs of defendants in error.

McCAUGHEY v. SCHUETTE et al. (L. A. 115.)¹

(Supreme Court of California. Oct. 22, 1896.)

EJECTMENT—PLEADING.

A complaint in ejectment, alleging the execution by defendant to plaintiff of a deed to the premises, without further allegation of ownership or right of possession, is demurrable, as pleading evidentiary, instead of ultimate, facts.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Action by O. McCaughey against H. C. Schuette and another. From a judgment for plaintiff, and from an order denying a new trial, defendants appeal. Reversed.

A. McConoughey and E. Parker, for appellants. Wm. Humphrey, for respondent.

SEARLS, C. This is an action to recover possession from the defendants, who are appellants here, of lots A, B, C, J, K, and L in block 131 of Horton's addition to San Diego, county of San Diego, state of California. Plaintiff had judgment, from which judgment, and from an order denying their motion for a new trial, defendants appeal.

The complaint was demurred to upon the ground, among others, that it does not state facts sufficient to constitute a cause of action. We think the demurrer should have been sustained. The complaint may be summarized thus: (1) December 22, 1891, defendants made their promissory note to plaintiff for \$2,000, and to secure the payment thereof executed a mortgage upon the lots of land sought to be recovered in this action. (2) Afterwards, and on the 22d day of March, 1893, plaintiff and defendants entered into an agreement by the terms of which said defendants agreed to convey to plaintiff, and the latter agreed to take, said real property in full payment of the note, and to release defendants from liability thereon, and deliver the same up to defendants, and to discharge of record the mortgage. (3) That on the 23d day of December, 1893, defendants delivered to plaintiff their grant deed of said premises, and the latter delivered up the note and discharged the mortgage of record. Said deed from defendants to plaintiff and the note

and mortgage are made part of the complaint.

(4) At the date of the delivery of the deed there was \$2,501.28 due on the note, and the deed was made in payment thereof. (5) Defendants are in possession of the premises, and plaintiff has demanded possession thereof, which said defendants refused to deliver up, and exclude plaintiff therefrom against his will and right. Wherefore he demands judgment for the delivery of possession of said premises, etc. It is a fundamental rule of our code pleading that ultimate, and not probative, facts are to be averred in a pleading. *Miles v. McDermott*, 81 Cal. 271. In *Thomas v. Desmond*, 63 Cal. 428, it was said, in substance, that, where a complaint merely states the evidence from which ultimate facts are deducible, a demurrer lies. In *Siter v. Jewett*, 33 Cal. 92, it was held that averments in a complaint of the facts constituting a derangement of title are but averments of evidence, and are not admitted by a failure to deny them in the answer. *Racoullet v. Rene*, 32 Cal. 450, is to like effect. In *Gates v. Salmon*, 46 Cal. 361, it was held that an allegation in a complaint that B. executed an instrument in writing, purporting to convey to T. a tract of land, which is recorded (stating where), is a mere allegation of evidence, and may be disregarded as surplusage. Such evidentiary matters should be stricken out in an action of ejectment. *Willson v. Cleveland*, 30 Cal. 192. See, also, *San Joaquin Co. v. Budd*, 96 Cal. 47, 30 Pac. 967. It will be observed that in the complaint in the present case there is no averment of seisin, or ownership, or possession, or right of possession to the demanded premises, but the pleader contents himself with a statement of evidentiary facts which, if proven at the trial, would authorize the court in finding the ultimate fact of ownership and right to possession in the plaintiff. In *Fredericks v. Tracy*, 98 Cal. 658, 33 Pac. 750, it was said of such a pleading that it was insufficient, and that a complaint which stated only facts from which the ultimate fact might be deduced was subject to a demurrer. In *City of Los Angeles v. Signorel*, 50 Cal. 298, the action was to enforce a lien for the construction of a sewer. The complaint referred to an exhibit, attached to and made a part thereof, for particulars, which exhibit recited the various steps necessary to create the lien, but on demurrer the pleading was held insufficient. The complaint here is argumentative; that is to say, the affirmative existence of the ultimate fact is left to inference or argument. Such pleading was bad at common law, and is none the less so under our code system. To uphold such a pleading is to encourage prolixity, and a wide departure from that definiteness, certainty, and perspicuity which it was one of the paramount objects sought to be enforced by the code system of pleading, and that, too, with no resultant effect, except to incumber the record with verbiage, and enhance the cost of litigation. We recommend that the judgment and order appealed from be reversed, and that the court below be directed to sus-

¹ Rehearing granted.

tain the demurrer to plaintiff's complaint, and that he have leave to amend.

I concur: BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and the court below directed to sustain the demurrer to plaintiff's complaint, and that he have leave to amend.

GLAS v. GLAS. (Sac. 120.)

(Supreme Court of California. Oct. 22, 1896.)

HOMESTEAD—SALE—NOTES—OPTION TO DECLARE
NOTE DUE—WAIVER—MORTGAGE—RECORD.

1. Under Civ. Code, § 1241, subd. 4, providing that the homestead is subject to forced sale on debt secured by mortgage on the premises, executed and recorded before the declaration of homestead was filed, a husband, after executing a mortgage to his wife which was recorded, cannot defeat her right to foreclose by filing a declaration of homestead.

2. A delay of eight months by the payee to declare the mortgage note due for nonpayment of interest is not a waiver of the provision in the note authorizing the payee, at his option, to declare the note due on default in payment of interest, though the note also provides that interest not paid when due shall be added to, and bear interest with, the principal.

3. The certificate of the recorder of the receipt of the mortgage for record need not be under seal.

Commissioners' decision. Department 1. Appeal from superior court, Madera county; W. M. Conley, Judge.

Action by Kunigunde Glas against Frank Glas, Sr. There was a judgment for plaintiff, and defendant appeals. Affirmed.

Robert L. Hargrove, for appellant. Geo. B. Church, for respondent.

HAYNES, C. This action is prosecuted to foreclose a mortgage executed by the defendant to plaintiff. The plaintiff had judgment, and this appeal is from the judgment, and from an order denying defendant's motion for a new trial. After the execution of the note and mortgage the defendant filed a declaration of homestead upon the mortgaged premises, and appellant's principal contention is that the plaintiff, who is the wife of the defendant, cannot foreclose the mortgage, because of the declaration of homestead so filed by the husband.

1. This contention can be best stated in the pathetic language of his brief: "Can respondent, by aid of the judicial arm, invade the home and fireside, destroy the homestead and the sanctum of virtue and truth, in an action by her against her husband to foreclose a mortgage, when the husband has no other suitable place of abode? Can the homestead be abandoned in this manner? Will equity permit the wife to destroy the home provided for her by her husband, and destroy his means of support, and cast him out to the world in his dotage, simply to satisfy her avariciousness, or a demand for her pound of flesh?" Terrible as the consequences may appear to be, we are

constrained to hold that the husband cannot defeat the mortgage as a lien, nor its foreclosure, by subsequently filing a declaration of homestead upon the mortgaged premises. Section 1241 of the Civil Code provides: "The homestead is subject to execution or forced sale in satisfaction of judgments obtained: * * * (4) On debts secured by mortgages on the premises executed and recorded before the declaration of homestead was filed for record." That the parties to the note and mortgage are husband and wife does not affect the rights of the plaintiff. Section 158 of the Civil Code provides: "Either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which either might if unmarried. * * * Appellant's contention would nullify the provisions of the foregoing section, and would enable the husband to obtain his wife's money upon the faith of the security given by the mortgage, and yet defeat the security thus given, by his separate and independent act, without her knowledge, consent, or concurrence.

2. The note secured by the mortgage was dated August 25, 1892, and made payable three years after date, and this action was commenced before the expiration of the time above stated. The note, however, contained a provision for annual payment of interest, and another provision, "that, if not so paid when it became due, it should be added to the principal, and become a part thereof, and bear interest at the same rate as said principal sum." The note, however, contained this further stipulation: "But, if default be made in the payment of interest as above prescribed, then this note shall immediately become due, at the option of the holder thereof." And the mortgage contained the provision "that, in case of default in payment of any installment of the interest, then the whole sum of interest and principal should be due, at the option of the said party of the second part, or assigns, and suit may be immediately brought," etc. This suit was brought eight months after the delinquent installment of interest became due, and it is contended by appellant that this delay in making demand and bringing the action was a waiver of the default in the payment of interest. This contention cannot be sustained. The cases cited by the appellant to this point do not sustain his contention. In *Campbell v. West*, 86 Cal. 197, 24 Pac. 1000, it was held that, the plaintiff having failed to exercise the option upon the first default, he was not bound to waive its exercise at any subsequent default; and that was really the only question in the case, as the installment of interest upon which the plaintiff exercised his option fell due on Saturday, and on the following Monday the plaintiff notified the defendant of his option to consider the whole amount of principal and interest due. In the other case cited by appellant, namely, *Hewitt v. Dean*, 91 Cal. 5, 10, 27 Pac. 424, it was said: "Although the plaintiff might have dealt with the defendants in such a way that he would be estopped from asserting his right of option, or by some act

of his waive such right, yet mere forbearance or inaction would not cause such waiver. His leniency toward the defendants, by forbearing to make an election within a reasonable time, could not impair his right, or be regarded by them as a waiver thereof."

3. It is further claimed that the installment of interest alleged to be in arrears was in fact paid. The court found that, of the installment of \$220, but \$90 had been paid, and this finding we think justified by the evidence.

4. Upon the trial the mortgage, together with the indorsements thereon, showing the date of its filing for record, and the volume and page where it was recorded, was received in evidence over an objection made by counsel for defendant; and afterwards, in a motion for nonsuit, one of the grounds specified was that plaintiff failed to prove that said mortgage had been recorded. This objection was not made at the time of the introduction of the mortgage in evidence, and it is now contended that the indorsement upon the back of the mortgage that it was filed and recorded, though signed by the recorder, was not evidence, in the absence of the seal of that officer. There is no statutory requirement that the certificate of the recorder of the receipt of the mortgage for record, and that it had been recorded, indorsed upon the original mortgage, should be attested by his seal. It is only certified copies that must be so attested.

5. The defendant attempted to set up in his answer, by way of counterclaim, that, between the 1st day of July, 1888, and the commencement of the action, in April, 1894, he had paid, laid out, and expended, and loaned to the plaintiff for her use and benefit, divers sums of money, which, with the value of labor, work, and services rendered her, amounted to the sum of \$2,000, and proceeded at great length to state that the defendant had borrowed money upon his separate property, and that the greater part of said sums was advanced to the plaintiff for improving her separate property. The allegations, however, are so indefinite and uncertain that it is difficult, if not impossible, to form a reasonable conjecture either as to the time when such alleged advances were made or labor performed, or the amount or value of either. Upon the trial the defendant was asked some general preliminary questions with a view to sustaining said counterclaim. After testifying to the alleged payments on account of interest on the mortgage, he was asked the following question: "I will ask if you have laid out and expended any other money for the plaintiff which she applied to her separate property?" Answer. "Yes, sir." He was again asked as follows: "I will ask you if you have laid out, paid out, or expended of your own separate property within two years last past, at the special instance and request of the plaintiff, which she applied to her own separate property?" An objection to this question was overruled, and the witness answered, "I did." Similar questions were subsequently put to the witness, and objections were made and sustained, and exceptions taken by the defendant. These questions were all preliminary, and, if

answered by the witness, must have been answered "Yes" or "No," and would not have shown that any specified sum of money had been loaned or advanced to the plaintiff, nor that any specified value of labor had been done or performed for her. These special interrogatories were continued at great length, until finally the court suggested to counsel for defendant that he might shorten the matter by stating what he expected to prove by the witness, and make his offer of proof so that the matter might be ruled on at once, without so many rulings and exceptions. Counsel thereupon made a statement, covering more than four pages of the printed transcript, of the facts which he expected to prove by the witness; but this offer related exclusively to the homestead, and there was not a word touching the alleged counterclaim, or of any fact bearing upon it, nor were any of the numerous questions put to the witness prior to this general statement so framed as to show any amount, whether of money advanced or labor performed, which could be the basis of any finding or computation of amount or value. Under these circumstances, if it be conceded that these preliminary questions should have been allowed, it is clear that the answer, if favorable to the defendant, could not have supported a finding in his favor upon the counterclaim. Besides, more than four years of the time covered by these alleged transactions transpired before the date of the note and mortgage here in suit, and it is scarcely probable that the defendant would have executed the note and mortgage without deducting all sums which she may then have owed to him. This complete lack of evidence to sustain the defendant's counterclaim fully justified the court in finding against the defendant upon that issue.

Numerous other questions arising upon the admission or exclusion of evidence are specified by appellant, but they are without merit, and are not of such character as to justify comment. The judgment and order appealed from should be affirmed.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

COLFAX MOUNTAIN FRUIT CO. v. SOUTHERN PAC. CO. (Sac. 87.)¹

(Supreme Court of California. Oct. 24, 1896.)
CARRIERS OF GOODS—CONNECTING LINES—CONSTRUCTION OF FREIGHT CONTRACT—LIABILITY FOR DELAY—BURDEN OF PROOF.

1. Under Civ. Code, § 2201, declaring that the liability of a carrier who accepts freight for a place beyond his route ceases on delivery to a connecting line, "unless he stipulates otherwise," a provision in a freight contract that the carrier's responsibility shall cease at the connecting point is not rendered ineffective by a further stipulation for through passenger train service.

¹ Rehearing granted.

2. There being no repugnancy between the provision limiting the carrier's liability to its own line and the stipulation for through passenger train service, the fact that the first is printed, while the last is in writing, is immaterial in construing the contract.

3. Where a railroad company receives freight for shipment under an agreement to forward it to its destination, and the stipulation that its liability as carrier shall cease on delivery of the goods to the first connecting line, the contract also providing for "passenger service through," the duty of the company as forwarding agent continues till the goods arrive at their ultimate destination, and it is therefore liable for any delay caused by its failure to notify each successive connecting road of the conditions of the contract in respect to the manner of transportation.

4. In an action by the shipper against the contracting carrier for damages caused by such delay, the burden is on defendant to show that it notified each successive connecting road of the conditions regarding the manner of transportation, or, if it did not, that the delay was not attributable to its default in this respect.

Commissioners' decision. Department 1. Appeal from superior court, Placer county; J. H. Prewitt, Judge.

Action by the Colfax Mountain Fruit Company against the Southern Pacific Company to recover damages resulting from delay in the transmission of freight. Judgment for plaintiff, and defendant appeals. Reversed.

Foshay Walker, for appellant. Ben P. Tabor, for respondent.

BRITT, C. At the trial of this case the parties agreed on the facts by written stipulation which was adopted by the court as its findings. It thus appears that on October 24, 1890, defendant was a common carrier operating a line of railroad between Colfax, in Placer county, Cal., and Ogden, Utah, the latter point being the terminus of its route in the direction of the city of New York. On that day defendant received from plaintiff at Colfax a car load of fruit for transportation according to the terms of a written contract called a "shipping order" signed by plaintiff, describing the goods to be carried, stating that the same were to be forwarded to Ogden station and there delivered, and containing also the following matter: "Consignee, marks, and destination: Sgobel & Day, New York. * * * Care C. & N. W., via Erie Dispatch, New York. Passenger train service, U. P. 32009. Agent Southern Pacific Company will please forward subject to conditions and agreements indorsed hereon." One of such conditions was that: "The company agrees to forward the property to the place of destination named, but its responsibility as a common carrier is to cease at the station where the freight leaves this road, when the property is to be delivered to connecting roads or carriers." It seems that the characters "U. P. 32009" meant "Union Pacific car No. 32,009." Concurrently with the execution by plaintiff of such shipping order, the defendant gave to plaintiff a "shipping receipt," which differed from the order mainly, for present purposes, in that it contained the words "passenger service through," instead of "passenger train service," as in the order. At this time there was a

traffic agreement in force between defendant and several other carriers, whose routes, by successively connecting, formed a through line, viz. the Union Pacific Railway Company, the Chicago & Northwestern Railway Company, and the Erie Dispatch Company, and pursuant to such traffic agreement said car of fruit was carried to New York. There the Erie Dispatch Company delivered it to the consignees, and collected of them the whole amount of freight charges for the haul from Colfax, which amount was divided in gross among the several connecting carriers for the carriage by them respectively furnished to the goods in accordance with their said arrangement. Defendant transported the car in question, by passenger train, over its road to Ogden, and there delivered it to the Union Pacific Railway Company, the next connecting carrier, with request that the last-named company "and its connection between Ogden and New York City should, until the arrival of said car at final destination, accord to it passenger train service." After such delivery to the Union Pacific Company—but on what line does not appear—delay occurred in the transmission of the car, so that it was three days overdue on arrival at New York, and in consequence the fruit suffered decay, and was sold at a loss to plaintiff. For the amount of such loss the court below held defendant liable, and rendered judgment in plaintiff's favor.

With us it is declared by statute that the liability of a common carrier who accepts freight for a place beyond his usual route ceases upon delivery of the freight at the end of his route in that direction to some other competent carrier carrying to the place of address, or connected with those who thus carry, unless he stipulates otherwise. Civ. Code, 2201. Plaintiff contends that the defendant in this instance "stipulated otherwise." It is not argued that any relation of partnership arose between the connecting carriers on account of their said traffic agreement (Darling v. Railroad Co., 11 Allen, 298; Hutch. Carr. § 169), but that by the contract with plaintiff defendant itself undertook to furnish passenger train service for the car from Colfax to New York, the connecting lines being its agents for this purpose. For defendant it is claimed that upon delivery of the car at Ogden to the next connecting carrier, with instruction for continued passenger train service, defendant's obligation under the contract terminated. We are unable to agree with either contention. Conceding, as plaintiff maintains, that the words "passenger service through," in the shipping receipt, are to be read as part of the agreement of the parties,—although in the stipulation on which the case was tried such contract is said to be contained in the shipping order signed by plaintiff,—there is yet no repugnancy between the provision for such service and the condition indorsed on both order and receipt that the responsibility of defendant as a common carrier shall cease at Ogden when the property is delivered to a connecting road; and, in the absence of conflict between the provisions, the fact asserted by counsel, that the language "passenger service through"

was in writing, while said indorsement was printed only, is of no influence in the proper construction of the instrument. *Vorwerk v. Nolte*, 87 Cal. 236, 25 Pac. 412. The stipulation for through passenger train service, understood as it must be in connection with the agreement to deliver at Ogden, and with other parts of the contract, imports that defendant will, as a common carrier, afford service of that description over its own line to Ogden, and thereafter will, as a forwarding agent, do those things incumbent upon it to secure like service for the car to the place of final destination. The car, as marked and accepted, was "through" freight, yet this did not bind defendant to give it transportation beyond its own route. *Civ. Code*, 2201; *Palmer v. Railroad Co.*, 101 Cal. 187, 85 Pac. 630. To stipulate for passenger train service, then, was but to particularize the means of transmission, not to change the parties by whom, without those words, transmission was unquestionably to be effected. Nothing different is held in *Pereira v. Railroad Co.*, 66 Cal. 92, 4 Pac. 968. Hence, the responsibility of defendant as common carrier having ended at Ogden, no sufficient facts are found to make it liable for the subsequent delay. But the terms of the contract show that defendant's duty of forwarding agent existed after its relation of common carrier ceased, and continued to the end of the route. This is an important feature of such a contract. "The owner does not and cannot always accompany [the goods], and give his personal directions to each one of the successive carriers. He therefore necessarily, in his own absence, devolves upon the carrier to whom he delivers the goods the duty and invests him with authority to give the requisite and proper instructions to each successive carrier to whom, in due course of transportation, they shall be passed over for the purpose of being forwarded to the place of their ultimate destination. Otherwise they would never reach that place." *Briggs v. Railroad Co.*, 6 Allen, 246, 249. See, also, *Northern R. Co. v. Fitchburg R. Co.*, 6 Allen, 258. This duty it performed on delivery of the goods to the first intermediate carrier, the Union Pacific Company, but the record fails to show whether it gave or caused to be given any request or direction to the Chicago & Northwestern Railway Company, or to the Erie Dispatch Company, concerning the service to be afforded the car when it came into their hands respectively. Defendant took the risk of obedience to its request to the Union Pacific Company for communication of such instructions. If the delay complained of occurred by reason of failure in this particular, defendant is responsible for it. Plaintiff had not authorized delegation of its agency as forwarder. If, however, proper and timely instructions were given to each successive carrier, then defendant is not liable for failure of any of them to observe the same. *Hooper v. Wells, Fargo & Co.*, 27 Cal. 11, 27; *Northern R. Co. v. Fitchburg R. Co.*, 6 Allen, 254.

There are therefore absent from the record material findings necessary to the rendition of

judgment, and the case must be tried anew. Upon such trial the question of the burden of proof may be important. The authorities having a bearing on this subject by analogy are not harmonious, but in our opinion the better and juster reason requires that, the facts appearing in the present record being established, defendant shall have the burden of proof to show that, as bailee of the goods for the purpose of forwarding them from Ogden to New York, it performed or caused to be performed the obligations assumed by it under the contract with plaintiff as to each successive carrier, or, if it did not, then that the delay in transmission was not attributable to its default in this regard. *Boles v. Railroad Co.*, 37 Conn. 272; *American Exp. Co. v. Second Nat. Bank of Titusville*, 60 Pa. St. 394, 402; *Clark v. Spence*, 10 Watts, 235, 337; *Funkhouser v. Wagner*, 62 Ill. 59; *Collins v. Bennett*, 46 N. Y. 490; *Onderkirk v. Bank*, 119 N. Y. 263, 23 N. E. 875.

The contract between the parties as stipulated at the trial varied greatly from that alleged in the complaint, but it seems no objection was made by defendant on this ground in the court below, and we think the plaintiff should have leave to amend on return of the case to that court. The judgment should be reversed, and the cause remanded for a new trial.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the cause remanded for a new trial.

MULLAN v. STATE (S. F. 442)

(Supreme Court of California. Oct. 24, 1896.)

ACTION ON CONTRACT WITH STATE—DEMURRER—JUDICIAL NOTICE—RATIFICATION BY LEGISLATURE—POWER OF GOVERNOR TO EMPLOY AGENT—ESTOPPEL NOT AVAILABLE AGAINST STATE.

1. Where a complaint alleges that plaintiff, at the special instance and request of defendant state, rendered certain services as its agent, and seeks to recover the agreed compensation therefor, the objection that the alleged employment was illegal may be raised by demurrer, since the court will take cognizance of the fact that there could be no valid contract without legislative authority, and by *Code Civ. Proc.* § 1875, subds. 2, 3, is charged with knowledge of all public and private acts.

2. Under *Const.* art. 4, § 15, declaring that "no law shall be passed except by bill," and section 32, forbidding the legislature to pay or to authorize the payment of any claim created against the state by a contract "made without express authority of law," and providing that such unauthorized contracts shall be null and void, the legislature cannot, by mere resolution, ratify the act of the governor in assuming to employ an agent to collect a claim in favor of the state.

3. *Pol. Code*, § 380, subd. 5, providing that whenever any suit or legal proceeding is pending against the state, or which may affect the title of the state to property, or which may result in any claim against the state, the governor may direct the attorney general to appear in behalf of the state, "and may employ such additional counsel as he may judge expedient," does not authorize the governor to employ one not an attorney as a mere agent to collect a claim in favor of the state against the United States.

4. The state, by accepting the benefit of a

contract made in its behalf with an individual, without authority of law, does not estop itself from denying the validity of the contract.

Department 1. Appeal from superior court, city and county of San Francisco; Charles W. Slack, Judge.

Action by John Mullan against the state of California to recover on a contract of employment. A demurrer to the complaint was sustained, and plaintiff appeals. Affirmed.

Reddy, Campbell & Metson, for appellant. Atty. Gen. Fitzgerald, for the State.

VAN FLEET, J. Appeal from the judgment entered upon failure to amend after demurrer sustained to the complaint. The complaint is in two counts. The first count alleges the following facts: That between the 12th day of December, 1878, and the 1st day of May, 1891, the plaintiff rendered services to the defendant, at its special instance and request, as the agent of said state, in acting in its behalf in the matter of recovering certain moneys paid by the state to the United States under the provisions of a certain act of congress approved August 5, 1861, entitled "An act to provide increased revenue from imports to pay interest upon the public debt, and for other purposes"; that the defendant promised to pay plaintiff therefor 20 per cent. of all such moneys collected by him from the United States; that thereafter plaintiff collected from the United States, as such agent, and caused to be paid to said state, the sum of \$216,357.87; that no part of said 20 per cent. of said sum has been paid to plaintiff; and that said plaintiff has presented his claim for the sum due him to the state board of examiners, as provided by law, and said board has refused to allow said claim, either in whole or in part. The second count is upon a similar cause of action for a smaller amount. The demurrer was sustained upon the ground that the alleged employment of plaintiff was unauthorized and void, and created no valid obligation against the state. It is suggested by appellant in limine that this objection does not arise on demurrer; that the allegation that plaintiff was employed by the state as its agent is one of fact, and is admitted by the demurrer; that, if such employment was not legal because made in a manner not binding upon the state, that question can only be raised by answer and disclosed by evidence, but does not appear upon the face of the complaint. But the court will take cognizance of the fact that there could be no valid employment of plaintiff by the state for the purpose alleged without authorization by the law-making power; and, as we are further charged with knowledge of whatever is established by law, and of all public as well as private acts of the legislative, executive, and judicial departments of the state (Code Civ. Proc. § 1875, subds. 2, 3), the complaint must be regarded as laying before us whatever of authority there may exist in the law for plaintiff's employment, to the same extent as if such authority were expressly alleged. *Whiting v. Townsend*, 57 Cal. 515;

Fackler v. Wright, 86 Cal. 210, 24 Pac. 996; *Cole v. Segraves*, 88 Cal. 105, 25 Pac. 1102.

Proceeding, then, to inquire as to the authority under which plaintiff assumed to act in the premises, we find that the only thing relied upon as tending to establish any special legislative authorization for the alleged employment is based upon these facts: In his biennial message to the legislature at its twenty-fifth session the governor made a statement that he had received information with reference to proceedings before congress looking to the reimbursement of this state for certain expenditures made by it in suppressing Indian hostilities during the Modoc war, and in repelling prior Indian invasions and hostilities, and also of certain sums assessed against this state under the act of congress approved August 5, 1861, to pay the interest on the public debt, and for other purposes, and wherein it is stated that he had appointed Capt. John Mullan to represent this state in said matters before the authorities at Washington, and recommends to the legislature "that these appointments be ratified and confirmed by you, and that you provide for his compensation to be paid out of the sums he may recover for the state, contingent, however, upon his success, it having been expressly understood that such compensation should be left entirely to your judgment and discretion." (Volume 1. Appendix to Journal of Senate and Assembly, 25th Sess. pp. 22, 23.) Acting upon this recommendation of the governor, the legislature, on March 8, 1883, adopted the following resolution: "Assembly Concurrent Resolution No. 20, relative to directing the governor to fix the compensation for services rendered by Captain John Mullan in collections of claims due the state from the United States. Whereas, the governor and state surveyor-general of this state have heretofore appointed Captain John Mullan, of San Francisco, California, agent and attorney to represent the interests of the state of California before the proper authorities of the United States at Washington, D. C., in the matter of the claim of this state to the five per cent. net proceeds of the sales of the public lands by the United States in this state; and also in the matter of the direct tax levied upon this state by the United States, under the act of congress of August sixth, eighteen hundred and sixty-one; and also of her claim arising during the Modoc war in eighteen hundred and seventy-two; and also under the provisions of the act of congress of June twenty-seventh, eighteen hundred and eighty-two; therefore, be it resolved by the assembly of California, the senate concurring, that the appointments so conferred upon Captain John Mullan by the governor and surveyor-general, respectively, are hereby ratified and confirmed, and the governor of this state be, and he is hereby, authorized and directed to fix the compensation for the services by Captain John Mullan heretofore and that may be by him hereafter rendered, at twenty per cent. of each of the sums or claims that may be by him collected from the United States, and to pay to

him such per cent. out of the moneys that may be collected by him and paid to this state on account of each of the foregoing matters respectively; provided, however, that this state shall not in any event become liable for any expenses, fees and salaries of any nature whatever other than such contingent commission." The resolution further provides for the turning over to Capt. Mullan of all papers and vouchers with reference to the claims involved, and the taking of his receipt therefor. The references in the resolution to the appointment of Mullan by the surveyor general to represent the state in its claim to the 5 per cent. proceeds on sales of lands is not here involved.

It is contended by the attorney general, and we think correctly, that these proceedings did not constitute any competent basis for the contract alleged within the provisions of the constitution of this state. Section 32 of article 4, of our constitution, so far as pertinent to the question involved, provides: "The legislature shall have no power * * * to pay or to authorize the payment of any claim hereafter created against the state * * * under any agreement or contract made without express authority of law; and all such unauthorized agreements or contracts shall be null and void." And section 15 of the same article provides that "no law shall be passed except by bill." That the action of the governor and legislature did not constitute the enactment of a "law" within the purview of the constitution is quite obvious. It is, in fact, not contended that the resolution is to be regarded as a "bill" within the meaning of the constitution, but it is urged that the words "express authority of law," as there used, have a broader signification than that of a valid statute law enacted with all the formalities requisite in the case of a bill, and that it was competent for the legislature to ratify the act of the governor in assuming to appoint the plaintiff by a resolution such as the one here quoted, and that such action constitutes "express authority of law." But we are unable to coincide in this view. The language of the constitution is in itself a complete answer to the proposition. It provides in express terms that there shall be but one mode of enacting a "law" thereunder, and that mode is the exclusive measure of the power of the legislature in that regard. A mere resolution, therefore, is not a competent method of expressing the legislative will, where that expression is to have the force of law, and bind others than the members of the house or houses adopting it. The fact that it may have been intended to subserve such purpose can make no difference. The requirements of the constitution are not met by that method of legislation. "Nothing becomes law simply and solely because men who possess the legislative power will that it shall be, unless they express their determination to that effect in the mode appointed by the instrument which invests them with power, and under all the forms which that instrument has rendered essential." *Cooley, Const. Lim. p. 155, c. 6.* It is true, as contended, that legis-

lation for certain limited purposes by means of resolutions or legislative orders is in use to some extent in certain of the states and in congress. But it will be found that in most, if not all, instances it is under a constitution which either expressly recognizes it, as does the constitution of the United States, or one which at least does not forbid it. And it will be usually found to take the form of a resolution, requiring the assent of the executive to give it effect. In congress this form of legislation is regarded as a bill, and treated with the same formalities. Even if this mode of legislation were competent under our constitution, the resolution relied upon would not arise to the dignity of law, since it lacks the essential of executive approval. In *Lithographing Co. v. Henderson* (Colo. Sup.) 32 Pac. 417, under a constitution containing restrictions similar to those found in that of California, it was held that a resolution adopted by both houses of the legislature for a purpose not dissimilar in principle from that intended to be subserved by the one under consideration was not "a law of the state," as it "was not passed by bill." And see *People v. Toal*, 85 Cal. 333, 24 Pac. 608.

The case of *Miller v. Dunn*, 72 Cal. 462, 14 Pac. 27, 29, is cited by appellant as authority for the proposition that the language "express authority of law" is not confined in its meaning to a statute law enacted in the manner prescribed in the constitution. But in that case the statute under which the contract was made and the service performed had in fact been passed with all the formalities requisite under the constitution to a valid law, and it was held that such an act, although unconstitutional, was nevertheless a "law" in the sense that it would support an appropriation to pay for the work done under color of its apparent grant of authority, and before its invalidity had been declared by the courts. In this case the legislature did not pretend to follow the formal requirements of the constitution in its attempt to grant authority for the contract, and its action lent no color of regularity to plaintiff's employment. Moreover, we are not disposed to extend the doctrine announced in *Miller v. Dunn*. The case of *Brooks v. Fischer*, 79 Cal. 173, 21 Pac. 652, merely holds that, under section 8 of article 11 of the constitution, a city charter, adopted by the freeholders of a municipality, may be approved by a concurrent resolution of the two houses of the legislature, without the consent of the executive, because that provision only requires the assent of the "legislature," and does not contemplate the passing of an act for the purposes of such approval; it being expressly held "that the legislature is one thing and the lawmaking power of the state another." It is not authority for the proposition that the legislature can enact "laws" without submitting them to the governor for his consent.

There is no merit in the claim that the employment of plaintiff was authorized by section 380, subd. 5, of the Political Code, which, in defining the powers of the governor, provides

that: "Whenever any suit or legal proceeding is pending against this state, or which may affect the title of this state to property, or which may result in any claim against the state, he may direct the attorney general to appear on behalf of the state, and may employ such additional counsel as he may judge expedient." That provision has no application to the facts of this case. The action of the governor was not attempted to be taken under that section, nor is the action brought upon any such theory. The complaint does not aver that plaintiff was employed as counsel, or even that he was an attorney at law, and so eligible for the character of employment there provided for. He was employed as a mere agent. While an attorney might be employed as agent, one not an attorney could not be employed for the service contemplated in that section. Nor is there anything in the point that the state is now estopped from denying the validity of the contract with plaintiff, since he has in good faith performed the service. The question of equity or good faith cannot affect our consideration in this case. It is not like a transaction between private individuals. As suggested in *Miller v. Dunn*, supra: "There is no moral obligation on the part of the state which can be enforced upon equitable principles, nor does the good faith of the party dealing with the state cut any figure in the case, if in fact the work was done 'without express authority of law,' for this provision was placed in the constitution to cut off all claims based upon mere good faith and equity." And says Mr. Bishop: "The government is never estopped, as an individual or private corporation may be, on the ground that the agent is acting under an apparent authority which is not real; the conclusive presumption that his powers are known rendering such a consequence impossible. So that the government is bound only when there is an actual authorization." *Bish. Cont.* § 993. One dealing with public officers is charged with the knowledge of, and is bound at his peril to ascertain, the extent of their powers to bind the state for which they seem to act. And, if they exceed their authority, the state is not bound thereby to any extent. *Throop, Pub. Off.* § 551. See, also, *State v. Horton*, 21 Nev. 466, 34 Pac. 316. We think the demurrer was properly sustained, and the judgment is affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

POTTKAMP v. BUSS et al. (S. F. 183.)
(Supreme Court of California. Oct. 29, 1896.)
In bank. Petition for rehearing. Denied.
For original opinion, see 46 Pac. 169.

PER OURIAM. The opinion is modified by striking out the last sentence in division 2 thereof, and inserting in lieu thereof the following, viz.: "The last amended complaint was filed February 20, 1893, and would au-

thorize a recovery for all the rents received by the defendants within five years prior to that date. Code Civ. Proc. § 336, subd. 2. As the court was authorized to apply the amounts paid by the defendants for repairs, taxes, etc., in liquidation of the earliest items of rents collected by them, it is clear that the amount for which the judgment was rendered was not barred by the statute of limitations." Rehearing denied.

MARVIN v. STIMPSON et al.
(Supreme Court of Colorado. Oct. 19, 1896.)

DEED—DELIVERY—EQUITY.

1. An agreement for the dissolution of a partnership recited that one partner "doth consent to sever himself from the partnership, * * * and doth hereby agree to convey" to the other partner his interest in the firm property by deed "executed and delivered contemporaneously with this agreement," and also contained a covenant on his part not to sell or convey any of the firm property. The deed and agreement were deposited with a bank, and an indorsement made on the package that it was the property of the partners, to be delivered to both, or on the death of either to the survivor. The grantee took immediate possession. *Held*, in an action by the retiring partner, on the death of his co-partner, to rescind the agreement, that the terms of the agreement, and an averment in his complaint that he had complied with the terms of the agreement, showed a delivery of the deed.

2. Where, by a contract for the dissolution of a partnership, an obligation was imposed upon one of the partners to convey, by a good deed, to the other partner, all his right and interest in firm property to which the other partner held the legal title, in an equitable proceeding under such contract the duty to convey will be treated as equivalent to a conveyance.

Appeal from district court, Pueblo county.

Action by Norman R. Barnard against Georgia A. Stimpson, executrix of the estate of George B. Stimpson, and others. There was a judgment for defendants, and William E. Marvin, executor of the estate of said Barnard, appeals. Affirmed.

This is a suit in equity instituted by Norman R. Barnard against the widow and heirs at law of George B. Stimpson, deceased, for the rescission of a certain contract entered into by the plaintiff and said Stimpson. The complaint, in substance, avers that from the 17th day of July, 1886, to the 15th day of December, 1890, the plaintiff and George B. Stimpson were co-partners, and as such owned in equal parts certain described real and personal property, the legal title to which stood in the name of Stimpson; that on the 15th day of December, 1890, the said Barnard and Stimpson entered into a certain written agreement, which by stipulation of counsel is set out in full and made part of the complaint, and which, after reciting the existing co-partnership between plaintiff and Stimpson, and that they were equally interested in the property, real and personal, held in the name of Stimpson, and that such co-partnership was indebted to divers persons, contains

the following covenants: "Now, therefore, the said Norman R. Barnard, in consideration of the sum of five thousand dollars (\$5,000.00) immediately upon the death of the said Norman R. Barnard to be paid by the said George B. Stimpson to Amanda M. Cullings, the sister of said Barnard, her heirs or assigns, and the further consideration that the said George B. Stimpson shall and will maintain, support, and provide the necessities of life for the said Norman R. Barnard, in a suitable and decent manner, during the lifetime of the said Norman R. Barnard, doth hereby consent to sever himself from the said co-partnership with the said George B. Stimpson, and doth hereby agree to grant, assign, transfer, set over, and convey unto the said George B. Stimpson, his heirs and assigns, forever, by good and sufficient deed executed and delivered contemporaneously with this agreement, all the right, property, and interest whatsoever which he, the said Norman R. Barnard, hath or should have in and to, all and singular, the goods and debts and other property, both real and personal, held by and being in the name of said George B. Stimpson, and owned by them as co-partners, the said real property to be conveyed being described as follows: * * * And the said Norman R. Barnard, for himself, his heirs, executors, administrators, and assigns, does covenant with the said George B. Stimpson, his heirs and assigns, that he, the said Barnard, shall not release, discharge, sell, or convey, in any manner whatsoever, any of the goods, debts, or other property, real, personal, or mixed, hereinbefore mentioned as belonging to the said co-partners; or do any act to hinder the said Stimpson from receiving and enjoying the same, but will permit the said Stimpson to recover, receive, hold, and possess the same absolutely to his own use, without any account to be rendered therefor to the said Norman R. Barnard, and that the said Norman R. Barnard, upon request, will do any and all reasonable acts which may be necessary or convenient to assist the said Stimpson to recover and receive the same. And the said George B. Stimpson, for himself, his heirs, executors, administrators, and assigns, does covenant that he will at the death of the said Norman R. Barnard, as aforesaid, pay to the said Amanda M. Cullings, her heirs or assigns, the said sum of five thousand dollars (\$5,000.00); that he will maintain, support, and provide for the said Norman R. Barnard, during the lifetime of said Barnard, in a decent and suitable manner; and that he will at all times hereafter pay and satisfy all the creditors to whom the said Norman R. Barnard may stand chargeable or indebted for and concerning all the affairs and dealings of the said copartnership, and will at all times hereafter indemnify and save harmless the said Norman R. Barnard, his heirs, executors, administrators, from all the debts and liabilities, and every of them, of the said copartnership." It is further stipulated that the

deed mentioned and referred to in said contract is in words and figures following, to wit: "Know all men by these presents, that I, Norman R. Barnard, of the county of Pueblo and state of Colorado, for and in consideration of the sum of one dollar (\$1) to me in hand paid by George B. Stimpson, of the county of Pueblo and state of Colorado, the receipt whereof is hereby acknowledged, and in further consideration of the covenants and conditions contained herein, and of the signing and sealing and delivery of a certain article of agreement bearing even date and made contemporaneously herewith, the said covenants and conditions to be kept and performed by the grantee herein, have remised, released, and quitclaimed, and by these presents do remise, release, and quitclaim, unto the said George B. Stimpson, and to his heirs and assigns forever, all the following described premises, situated in the county of Pueblo and state of Colorado, to wit: * * * Together with, all and singular, the hereditaments and appurtenances thereunto belonging or in any wise appertaining, and all the estate, right, title, interest, claim, or demand whatever by me, the said Norman R. Barnard, either in law or equity, of, in, and to the above-bargained premises. To have and to hold the same to the said George B. Stimpson and to his heirs and assigns forever. In witness whereof I have hereunto set my hand and seal this 15th day of December, A. D. 1890. [Signed] Norman R. Barnard. [Seal] Signed, sealed, and delivered in the presence of: —." Which deed was duly acknowledged in due form of law. On the 21st day of November, 1892, George B. Stimpson died, leaving surviving him the appellees, as his only heirs at law; and by his last will and testament, made on August 27, 1892, he bequeathed to his widow all the property, both real and personal (except a few articles of personal property to his son William), and ordered and directed her to make adequate and suitable provision for the support and maintenance of the plaintiff during his lifetime. It is further stipulated and agreed by and between the respective counsel, and admitted as fact, that at the time of the death of George B. Stimpson said contract and deed were both inclosed in a sealed envelope, which envelope, with said contents, was then in the custody of the First National Bank of Pueblo, which envelope bore the following indorsement thereon: "The property of Norman R. Barnard and George B. Stimpson, to be delivered at the death of either party to the survivor, or to both, whenever demanded, both parties being present. [Signed] John H. Mitchell, Atty. for said Parties." The complaint avers "that the plaintiff has at all times complied with, and stood ready and willing to perform his obligations under, the contract," and a failure on the part of George B. Stimpson to support and provide for plaintiff from June, 1891, to January, 1892, inclusive, and an insufficient compliance with the terms of

the agreement on the part of Georgia A. Stimpson from January to August 1893, inclusive. It appears that George B. Stimpson, after the execution of the agreement, assumed exclusive ownership and control of the partnership property, and on August 22, 1892, conveyed a portion thereof to his daughter Adelaide, and that since his death his widow and sole devisee has exercised exclusive control and ownership over the rest of the property in controversy. Among other relief, plaintiff asks a rescission of the contract, and that said co-partnership be decreed to exist, and for an accounting, etc. The appellees interposed a general and special demurrer to this complaint, which was sustained, and the action dismissed. To reverse this judgment, appellant, as executor of the estate of Norman R. Barnard, deceased, prosecutes this appeal.

B. F. McDaniel and F. W. Schrock, for appellant. Waldron & Devine, for appellees.

GODDARD, J. (after stating the facts). The foregoing statement sufficiently presents the material averments of the complaint upon which appellant pred'cates his right to the relief asked; his contention being that the deed referred to in the stipulation was never delivered to the grantee, George B. Stimpson, so as to become an operative transfer to him of Barnard's interest in the property; and that the written contract entered into on the 15th day of December, 1890, is executory, and subject to rescission at any time for the nonperformance of its covenants by Stimpson or his representatives; it being, as we understand, conceded by counsel that if the contract had been executed, and the transfer of Barnard's interest in the property to Stimpson consummated, the present action cannot be maintained. The question therefore submitted for our determination is whether, under the circumstances surrounding the transaction, the facts alleged and admitted constitute in law a delivery of the deed mentioned, and also what effect should be given to the agreement itself as a conveyance of Barnard's equity in the property. Upon the first proposition, we find in the written agreement language, unequivocal in its import, to evidence the delivery of the deed. In the covenant on the part of Barnard the following language is used: "Now, therefore, the said Norman R. Barnard, in consideration, * * * doth hereby consent to sever himself from the said co-partnership with the said George B. Stimpson, and doth hereby agree to grant, assign, transfer, set over, and convey unto said George B. Stimpson, his heirs and assigns, forever, by good and sufficient deed, executed and delivered contemporaneously with this agreement, all the right, property," etc. And again the following: "And the said Norman R. Barnard, for himself, his heirs, executors, administrators, and assigns, does covenant with the said George B. Stimpson, his heirs and assigns, that he, the said Barnard, shall not release, discharge, sell, or convey, in any manner whatsoever, any of the

goods, debts, or other property, real, personal, or mixed, hereinbefore mentioned as belonging to the said co-partners, or do any act to hinder said Stimpson from receiving and enjoying the same, but will permit the said Stimpson to recover, receive, and hold the same absolutely to his own use, without any account to be rendered therefor to said Norman R. Barnard, and that the said Norman R. Barnard, upon request, will do any and all reasonable acts which may be necessary or convenient to assist said Stimpson to recover and receive the same." In addition to this express agreement to transfer and convey all his right and interest in the property by a deed "executed and delivered contemporaneously with the agreement," the complaint avers "that plaintiff has at all times complied with * * * his obligations under the contract." We think the language of this agreement, when read in the light of all the circumstances surrounding the transaction as set out in the complaint, clearly imposed an obligation upon the plaintiff to convey his interest in the partnership property contemporaneously with the execution of the agreement, and to deliver the deed at that time; and the averment that plaintiff had complied with his obligations, in effect, avers such a delivery. It appears from other averments in the complaint that, upon entering into the contract, Stimpson assumed control over and held the property absolutely as his own, exercised acts of ownership over it, and transferred, by a voluntary conveyance, an interest in a portion of the property to his daughter, and by his last will and testament bequeathed all of the remainder to his widow. It also appears that plaintiff did, in compliance with his obligation, immediately sever himself from the co-partnership, and permit Stimpson to receive and hold the partnership property absolutely as his individual property; and we think it would be doing violence, not only to the plain import of the language used in the agreement, but to the evident intent of the parties, to construe the delivery therein provided as contemplating any other than one in present. What is essential in law to constitute a delivery of a deed has been considered in many of the adjudged cases, and the generally accepted rule is that when, from the acts and agreements of the parties, the intention of the grantor to invest the grantee with the immediate ownership of the property, and of the grantee to accept the same, is manifest, such intent and purpose are sufficient to constitute a constructive delivery of the deed, even though the actual custody thereof remained in the grantor or some third person. In *Ruckman v. Ruckman*, 32 N. J. Eq. 261, the rule is thus concisely stated: "Whenever it appears that the contract or arrangement between the parties has been so far executed or completed that they must have understood that the grantor had divested himself of title, and that the grantee was invested with it, delivery will be considered complete, though the instrument itself still remains in the hands of the grantor." The supreme court of Oregon, in the case of *Flint v.*

Phipps, 16 Or. 437, 19 Pac. 545, states the rule thus: "It is conceded that no particular form of words is necessary to constitute a delivery. 'It is not necessary,' said Lord, C. J., in *Fain v. Smith*, 14 Or. 82, 12 Pac. 367, 'there should be an actual handing over the instrument, to constitute a delivery. A deed may be delivered by doing something and saying nothing, or by saying something and doing nothing, or it may be by both.'" To the same effect are *Brown v. Brown*, 66 Me. 316; *Moore v. Hazelton*, 9 Allen, 102; *Gould v. Day*, 94 U. S. 405. Under this rule, that which is admitted to have been said and done by Barnard and Stimpson would certainly constitute such a delivery of the deed as would vest the grantee with the title, notwithstanding the fact that at the time of Stimpson's death, which occurred nearly two years after the admitted execution of the agreement, the deed and agreement were found in the First National Bank of Pueblo, inclosed in a sealed envelope, bearing the indorsement set forth in the stipulation. This circumstance, unexplained, is at most a recognition of the joint ownership of the parties in the documents, which could not have existed if the deed had not been delivered. Without any authority being shown for John H. Mitchell to make such an indorsement, it would be unwarranted, we think, to give to it the force and effect of an escrow that would contradict the express covenant on the part of Barnard to deliver the deed contemporaneously with the execution of the contract, and put it in his power, upon Stimpson's death, no matter how faithfully he might have complied with every provision of the agreement on his part, to prevent the deed from ever taking effect. That Stimpson never contemplated such a contingency is evidenced by his dealings with and disposition of the property, and by the direction in his last will for the carrying out of such provisions by his widow. But we do not regard the actual delivery of the deed in question as controlling in this controversy, or as essential to the transfer to Stimpson of Barnard's equity in the partnership property, since the effect of the contract of dissolution, in and of itself, was to divest Barnard of such equity, and vest it in Stimpson. This contract was duly entered into by the parties on the 15th day of December, 1890, and became mutually obligatory upon each from the date of its execution. The obligation thus imposed upon Barnard was to "grant, assign, transfer, set over, and convey, * * * by good and sufficient deed, executed and delivered contemporaneously with the agreement," all his right, property, and interest in the partnership property to George B. Stimpson, who already held the legal title. A present obligation and duty to convey will be treated, in an equitable proceeding like this, as equivalent to a conveyance, under the maxim that "equity considers that done which ought to be done." In discussing this principle, and the manner in which equity deals with executory contracts for the sale of land, Pomeroy, in his work on Equity Jurisprudence (section 368), says: "The full significance of the principle

that equity regards and treats as done what ought to be done, throughout the whole scope of its effects upon equity jurisprudence, is disclosed in the clearest light by the manner in which equity deals with executory contracts for the sale of land. * * * In some respects, and for some purposes, the contract is executory in equity as well as at law; but, so far as the interest or estate in the land of the two parties is concerned, it is regarded as executed, and as operating to transfer the estate from the vendor and to vest it in the vendee. By the terms of the contract the land ought to be conveyed to the vendee, and the purchase price ought to be transferred to the vendor. Equity therefore regards these as done; the vendee as having acquired the property in the land, and the vendor as having acquired the property in the price. The vendee is looked upon and treated as the owner of the land. An equitable estate has vested in him commensurate with that provided for by the contract, whether in fee, for life, or for years. Although the vendor remains owner of the legal estate, he holds it as a trustee for the vendee, to whom all the beneficial interest has passed, having a lien on the land, even if in possession of the vendee, as security for any unpaid portion of the purchase money. * * * As the vendee has acquired the full equitable estate, although still wanting the confirmation of the legal title for purposes of security against third persons, he may convey or incur it; may devise it by will. On his death intestate, it descends to his heirs, and not to his administrators." Story, Eq. Jur. § 790. Tested by this principle, the agreement under consideration must be treated as fully executed on the part of plaintiff, and as operating to transfer his interest in the property to Stimpson at the time of its execution. It follows that this action cannot be maintained, and the judgment of the court below, dismissing the complaint, must be affirmed. Affirmed.

ROBINSON v. PEOPLE.

(Supreme Court of Colorado. Sept. 21, 1896.)

DENTISTRY—RIGHT TO PRACTICE—LICENSE.

Laws 1891, p. 134, amending Laws 1889, p. 122, § 1, prohibiting the practice of dentistry without a license from the board of dental examiners, prohibits any one "to engage in the practice of dentistry * * * or to receive a license from the board of dental examiners, unless in addition to the other qualifications prescribed by said board, such person has * * * received a diploma from the faculty of a reputable chartered institution where this specialty is taught, * * * or shall have received a license from the board of dental examiners of any other state." Held, that a license from the board of dental examiners is not necessary to entitle a person to practice dentistry, who has the required diploma, or a license from the board of examiners in another state.

Error to Pueblo county court.

Rufus Robinson was convicted of a crime, and brings error. Reversed.

Dixon & Dixon and George Q. Richmond, for plaintiff in error. B. L. Carr, Atty. Gen.,

and Calvin E. Reed, Asst. Atty. Gen., for the People.

CAMPBELL, J. The defendant was tried and convicted under an information charging him with practicing dentistry in this state without having graduated and received a diploma from a reputable chartered institution where the specialty of dentistry is taught, and not then having received a license from the board of dental examiners of this state, or of any other state, and not then having a permit temporarily to practice. He was thereupon sentenced to pay a fine of \$100, which judgment, upon this writ of error, he seeks to reverse.

Only one of the errors assigned will be considered, as its commission by the trial court is fatal to the judgment. The record discloses an admission by the defendant that he was engaged in the practice of dentistry without a license, either permanent or temporary, from the Colorado state board of dental examiners, and upon this admission the court below adjudged him guilty. If guilty, it is because some statute so declares, for, in the absence of such a prohibitory enactment, any person may lawfully engage in the practice of dentistry in this state. The law under which the defendant is being prosecuted is to be found in the Session Laws of 1889, at page 122, and of 1891, at page 134. Section 1 of the act of 1889 prohibits every person from practicing dentistry in this state without a permanent or temporary license therefor, issued by the state board of dental examiners. Section 4 provides for the issuing by the secretary of the board of a temporary permit to those already engaged in the practice in this state when the act took effect, with a provision for a subsequent examination by the full board of those holding these temporary permits, and the granting of certificates by the officers of the board to such as successfully pass the required examination, which certificates entitle the holders to continue in their profession. Section 5 applies to all persons desiring, in the first instance, to engage in the practice, and provides for granting a license to those satisfactorily passing the examination to which they are subjected. The act of 1891 amends section 1 of the former act, and is as follows: "Section 1. From and after the passage of this act it shall be unlawful for any person to engage in the practice of dentistry in this state, or to receive a license from the board of dental examiners, unless in addition to the other qualifications prescribed by said board, such person has graduated and received a diploma from the faculty of a reputable chartered institution where this specialty is taught, either under the authority of one of the states of the United States, or of a foreign government acknowledged as such or shall have received a license from the board of dental examiners of any other state. * * *" It will thus be seen that by section 1 of the act of 1889 the possession of a license, either permanent or temporary, from the board of dental examiners of this state, was a condition

precedent to the right to engage in the practice of dentistry. This section, however, was repealed by the amendment of 1891, which latter act now makes it lawful for any person to practice dentistry in this state if he possesses the "other qualifications" prescribed by the board, and, in addition thereto, is a graduate of, and holds a diploma from, a reputable chartered institution where the specialty of dentistry is taught, or if he has received a license to practice from the board of dental examiners of any other state. The act, as now in force, nowhere declares that a license from the board of examiners of this state is necessary, nor does it make unlawful the practicing of dentistry in this state without such a license. If, therefore, one possesses the "other qualifications," and is a graduate, and holds the prescribed diploma, or a license from a board of examiners of another state, he may, so far as this act is concerned, lawfully practice dentistry in this state. Doubtless, it was the design to provide that proof of graduation and possession of the diploma or foreign license should be made to the board of examiners of this state, and also that, if the applicant possessed the "other qualifications" called for by the act, the board should then issue him a license; and it may be conceded that it was also the intention to provide that no one not holding such a license should engage in the practice of dentistry; but, if such was the intention, the legislature has not so expressed it; and in passing upon a penal statute, such as this is, we must not extend it by a forced construction to cover cases not within its provisions. In the state of this record it appears that the defendant possesses the "other qualifications" which the act requires (at least, it is not charged that he does not), and that he is also a graduate of a reputable institution, and holds the prescribed diploma. The mere fact that the defendant does not hold a license from the state board of dental examiners of this state—it not being required by the statute—does not render him guilty of violating its provisions. The judgment is reversed, with instructions to discontinue further proceedings under this information. Reversed.

McCLURE et al. v. BOARD OF COM'RS OF LA PLATA COUNTY.

(Supreme Court of Colorado. Sept. 21, 1896.)

ADMINISTRATORS—UNINVENTORIED ASSETS—ACTION—PRAYER FOR RELIEF—JUDGMENT—LIMITATIONS.

1. In an action to establish a trust, and to follow the trust funds into the hands of the trustee's administrators, and to compel them to apply such funds to the satisfaction of plaintiff's judgment before satisfying any other claims against the estate, the mere fact that the evidence does not warrant the court in following the trust fund, and impressing upon it a lien, does not preclude it from rendering a judgment against defendants for such sum as it may find to be due.

2. Under Mills' Ann. St. § 4780, subd. 4, which provides that all demands against an estate not exhibited in the county court within one year

from administration shall be barred, unless such creditor shall find other estate of the deceased not inventoried; and section 4792, which provides that creditors who may sue in the district court within one year from the issuing of letters shall share in the proceeds of the estate in the same manner as if such demand had been exhibited in the county court within the same time,—an action brought by a claimant in the district court after one year from the issuance of letters is not barred by the one-year limitation, but the judgment therein rendered can be satisfied only from the uninventoried property of the estate.

Appeal from district court, La Plata county.

Action by the board of county commissioners of the county of La Plata against T. J. McClure and others, administrators of the estate of John Reid, deceased, to recover taxes alleged to have been collected by decedent in his lifetime, and unaccounted for to the county. From a judgment in favor of plaintiffs, defendants appeal. Affirmed.

Russell & Ritter, for appellants. Galbreath & Searcy, for appellees.

CAMPBELL, J. In 1887, John Reid was elected county treasurer of La Plata county. During his term of office he collected taxes belonging to the county, some of which were not accounted for by him, or turned over to the county in his behalf. In 1890 he died intestate, leaving property which came into the hands of the administrators of his estate, who were appointed and qualified as such in March of that year. This action was instituted by the board of county commissioners in January, 1892, against the administrators to recover the amount of taxes belonging to the county not turned over to it; and additional relief was prayed that the judgment for the sum found to be due should be made a preferred claim against the property that had come into the hands of the administrators, upon the ground that it was, in part, at least, the proceeds of the trust funds of the county. Upon the first trial the district court gave judgment against the administrators of the estate for the amount found to be due, and made the same a first lien upon the assets of the estate then under their control. Upon an appeal to this court from that judgment it was reversed on the ground of a failure in the proof to show that any of the trust funds wrongfully converted by the treasurer went into the assets that came into the hands of the administrators. The opinion is reported in 19 Colo. 122, 34 Pac. 763. At the second trial the district court found that the sum of \$13,330.07 was due to the county, and gave judgment for that sum; but, inasmuch as the action was not brought until after the expiration of more than one year from the time letters of administration were granted, it was adjudged that this amount was "to be recovered and paid out of property belonging to the estate of said John Reid, deceased, which has not been inventoried, in accordance with the provisions of subdivision 4, § 4780, Mills' Ann. St." From this judgment the administrators have appealed, and seek to reverse it upon two principal grounds.

The section of the statute cited provides that all demands not exhibited in the county court for allowance within one year from the time letters of administration are granted shall be forever barred, unless such creditor shall find other estate of the deceased not inventoried or accounted for by the administrator, in which case his claim shall be paid pro rata out of such subsequently discovered estate. Section 4792, Mills' Ann. St., provides that creditors who may bring their actions in the district court at any time within one year from the issuing of letters of administration shall share in the proceeds of the estate in the same manner as if such demand had been exhibited in the county court within the same time.

The first error assigned and argued is that this action was instituted to establish a trust, and to follow the trust funds belonging to the county into the hands of the administrators, and to compel them to apply such funds to the satisfaction of plaintiff's judgment, before satisfying any other claims against the estate. Failing in this, it is said that the court lost jurisdiction to proceed further, and to do so would change the character of the action from one in equity into an ordinary action at law for the recovery of a money judgment. This, however, is a misconception of the character of the action, as well as an error as to the scope and effect of our code procedure. If the facts set forth in the complaint are established by the evidence, any relief to which the plaintiff is entitled should be given by the court, regardless of the prayer for relief. Before the court, in any event, could establish a lien, it was necessary that a money judgment should be rendered. The mere fact that the evidence does not warrant the court in following the trust fund and impressing upon it a lien does not preclude it from rendering a judgment against the defendants for such sum as it may find to be due. *Kayser v. Maugham*, 8 Colo. 232, 6 Pac. 803; *Nevin v. Lulu & White Silver Min. Co.*, 10 Colo. 357, 15 Pac. 611.

The other objection is that, since the board did not begin this action in the district court, or exhibit its claim in the county court, within one year from the time letters of administration were granted, it could not thereafter sue upon the claim in the district court, but must go before the county court, there file its claim, and, if successful in discovering property belonging to the estate not then inventoried or accounted for, the county court may allow its claim to be paid out of such discovered assets. We think this objection not tenable. A proper construction of the sections of the statute cited is that claims which are sued upon in the district court within the year stand upon an equal footing with those filed in the county court within the same time, and that actions on claims may, in the first instance, be brought in the district court after the expiration of one year (and are not barred), the same as can claims be exhibited in the county court after the expiration of that period; but the judgments upon such claims in the district court

are to be satisfied the same as are claims filed in the county court after the year, viz. out of property not inventoried or accounted for by the administrators. In the case of *Thorn v. Watson*, 5 Gilman, 26,—a case similar to the one at bar,—the supreme court of Illinois, in construing a section of their statute from which ours seems to be taken, held that it did not prevent the bringing of an action at any distance of time, provided the same was not barred by some other statute, if the creditor could discover property not inventoried or accounted for by the administrator; and that such creditor had the right to have his claim passed upon by the court, and recover a judgment presently for the amount due, if anything, to be satisfied out of any estate that might be found not inventoried or accounted for by the administrator. The doctrine of this case was followed by the same court in the cases of *Judy v. Kelley*, 11 Ill. 211; *Bradford v. Jones*, 17 Ill. 93; *Peacock v. Haven*, 22 Ill. 23; *Rosenthal v. Magee*, 41 Ill. 370. These cases are authority for the proposition that, although the claim of the creditor is not sued upon in the district court within the year, nevertheless the same is not thereby barred. The only effect of such failure to sue within that time is that the creditor is deprived of the right to a distributive share in the inventoried assets. The suit may proceed to judgment, which, however, must be special in character, and limited, as in the judgment here reviewed, to a satisfaction out of uninventoried property of the estate. Perceiving no error in the record, the judgment below is affirmed. Affirmed.

BROWN et al. v. CHALLIS.

(Supreme Court of Colorado. Oct. 5, 1896.)

RETROSPECTIVE LAWS—PARTITION OF MINING PROPERTY.

The act of April 8, 1893, amending Mills' Ann. St. § 3346, relating to the partition or sale, if partition cannot be had, of lands held in tenancy in common or joint tenancy, etc., and declaring that the provisions of that section shall not apply to lode mines or lode-mining claims when it appears that the property cannot be partitioned without prejudice to the owners, is prospective merely, and does not affect actions for the partition of property commenced before the passage of such act.

Error to district court, Gunnison county.

Action by George T. Challis against James P. Brown and others for the partition of a mining claim. From an order directing a sale of the property and a division of the proceeds among the owners, the defendants bring error. Affirmed.

This action was commenced by George T. Challis, defendant in error, against plaintiffs in error, for the partition of the Iron Duke Lode-Mining Claim, situate in Elk mining district, Gunnison county, Colo. At the time the action was instituted, the following statute was in force: "When any lands, tenements or hereditaments shall be held in joint tenancy, tenancy in common or coparcenary, wheth-

er such right or title be derived by purchase, devise or descent, or whether any, all or a part of such claimants be of full age, or minors, it shall be lawful for one or more of the persons interested, by themselves, if of full age, or by their guardians, if minors, to present to the district court of the county where such lands or tenements lie; or where the lands and tenements lie in different counties, in the district court of the county in which the major part of such lands lie; but if the major part of such lands do not lie in any one county, then to the district court of any county in which any of such lands lie, their petition praying for a division and partition of such premises, according to the respective rights of the parties interested therein, and for a sale thereof, if it shall appear that partition can not be made without great prejudice to the owners." Mills' Ann. St. § 3346. While the action was pending, and before judgment, viz. April 8, 1893, the foregoing section was amended by adding the following: "Provided, that the provisions of this act shall not apply to lode mines, or lode mining claims, or to mining property where the commissioners appointed by the court report that the same cannot be partitioned consistently with the interests of the estate, or without great prejudice to the owners." Sess. Laws 1893, p. 358. It is admitted that the parties to the suit, plaintiff and defendants, were tenants in common in the Iron Duke Lode-Mining Claim. It is further admitted that the premises cannot be partitioned without great prejudice to the owners. The court thereupon ordered a sale of the property, and a division of the proceeds between the owners.

The following provisions of the constitution and statutes are referred to in the opinion:

"That no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges, franchises or immunities, shall be passed by the general assembly." Bill of Rights, § 11.

"Section 1. That chapter 101 of the General Statutes of the state of Colorado, entitled 'Statutes,' be amended by adding thereto the following section, which shall stand as section 6: Sec. 6. The repeal, revision, amendment or consolidation of any statute, or part of a statute, or section or part of a section of any statute shall not have the effect to release, extinguish, alter, modify or change in whole or in part any penalty, forfeiture, or liability, either civil or criminal, which shall have been incurred under such statute, unless the repealing, revising, amending or consolidating act shall so expressly provide; and such statute or part of a statute, or section or part of a section of a statute so repealed, amended or revised, shall be treated and held as still remaining in force for the purpose of sustaining any and all proper actions, suits, proceedings and prosecutions, as well criminal as civil, for the enforcement of such penalty, forfeiture or liability, as well as for the purpose of sus-

taining any judgment, decree or order which can or may be rendered, entered or made in such actions, suits, proceedings or prosecutions imposing, inflicting or declaring such penalty, forfeiture or liability." Sess. Laws 1891, p. 366.

Thomas C. Brown, for plaintiffs in error. S. D. Crump, for defendant in error.

HAYT, O. J. (after stating the facts). The right of the district court to order a sale of mining property under the statute, where it cannot be partitioned without great prejudice to the owners, in a cause commenced before the adoption of the amendment of 1893, is the single question presented by this record. It is admitted that if the proviso of April 8, 1893, which in terms prohibits the sale of mining property in a partition proceeding, applies to this case, then the judgment of the district court is erroneous, and must be reversed. Appellants claim that the act in question affects merely the remedy, and is, therefore, not obnoxious to the constitutional provision. The action having been commenced prior to the passage of the act, the district court held that the amendment did not govern, but that the cause of action was protected by the provision of the bill of rights inhibiting retrospective legislation. Retrospective legislation has always been condemned by the courts as unfair and prejudicial, so that, in the absence of any constitutional restriction, the courts have universally construed all legislation as prospective only in its operation, unless by the plain and positive language of the act an intent was manifest to make its provisions retrospective. As this ruling of the courts was founded upon the plainest principles of natural justice, it has been extended, and given a place in the constitutions of several of the states, including Colorado. These constitutional provisions, although couched in somewhat different phraseology, aim at the same evils, and are substantially alike. They have been before the courts for consideration in numerous instances, and, as a result of the decisions, the rule has become fixed, which, on the one hand, denies the right of the legislature to create a new ground for the support of an existing cause of action, or to take away any legal defense to such action, while, on the other, any ground upon which an action is founded cannot be annulled, or any new bar thereto created. *Railway Co. v. Woodward*, 4 Colo. 162; *French v. Deane*, 19 Colo. 504, 36 Pac. 609; *Rich v. Flanders*, 39 N. H. 847; *Kent v. Gray*, 53 N. H. 576; *De Cordova v. City of Galveston*, 4 Tex. 470. Mining property, from its very nature, is not, as a rule, susceptible of partition. The ores are unevenly distributed, while the values are purely conjectural until tested by extended development and careful tests, which can only be ob-

tained as the result of a vast expenditure of money and time; so that it is known in advance of bringing suit for partition that the only feasible relief that can be awarded is a decree for the sale of the property. Take away this relief, and no cause of action can be maintained. This is not a case where a substantial remedy has been left under the statute, but where the nature and extent of such remedy has been abridged; for, if we give the statute the construction contended for by appellants, no relief whatsoever can be had. But the action must be dismissed, although a perfect right of action existed at the time the proceeding was instituted. Of such a statute, in *Kent v. Gray*, 53 N. H. 579, it is said: "A statute abolishing the action of assumpsit, and substituting for it the action of debt, might be applied, without injustice, to existing causes of action not in suit; but it could not be constitutionally applied to oppress a plaintiff in a pending suit in assumpsit. Having incurred expense in bringing a proper suit, and pursuing a remedy provided by law, it would be unjust to turn him out of court, render a judgment against him for the defendant's costs, and leave him to another remedy, in the pursuit of which he might again be defeated in the same manner by another statute. In one sense, such legislation would affect the remedy only; but, in the constitutional sense, it would be retrospective, injurious, oppressive, and unjust, and therefore unconstitutional; and it is not apparent how the constitutional sense, in such a case, would be elucidated by a distinction between a right and a remedy. The injustice would be manifest, and the test given by the bill of rights is, not the distinction between right and remedy, but the distinction between right and wrong. On other subjects the ground of judicial decision is not ordinarily understood to be so broad as the general principles of justice, but, on this subject of retrospective legislation, those principles are the constitutional ground amply supported by the authorities." It is idle to attempt to draw a distinction in law between a right which does not exist and one that cannot be enforced. Right and remedy are reciprocal. Take away a plaintiff's remedy, and you destroy the value of his right. A constitutional inhibition goes to the substance of the evil, not the shadow. This was evidently the view taken by the district court, and its judgment must be upheld upon constitutional grounds, without reference to the saving act of 1893. This statute appears to have been largely copied from the Revised Statutes of the United States. Originally, it applied to criminal cases only; but, as adopted by our legislature, it embraces civil as well as criminal matters. See *U. S. v. Reisinger*, 128 U. S. 398, 9 Sup. Ct. 99. As the judgment of the district court must be upheld upon constitutional grounds, the effect of this act will not be determined. Judgment affirmed.

PEOPLE ex rel. McGAFFEY et al. v. DISTRICT COURT OF ARAPAHOE COUNTY et al.

(Supreme Court of Colorado. Oct. 14, 1896.)

CONSTITUTIONAL LAW — STATUTE PASSED AT SPECIAL SESSION — GOVERNOR'S PROCLAMATION — ELECTIONS — CERTIFICATION OF NOMINATIONS — JURISDICTION OF DISTRICT COURT.

1. Under Const. art. 4, § 9, providing that the governor may convene the legislature in special session by proclamation stating the purpose thereof, but that such session shall transact no business other than that specifically designated therein, a proclamation calling a special session, and naming as one of the objects "to enact that the law relating to elections, etc., be amended so as to provide," mentioning in detail the amendments desired, submitted the whole subject-matter to the legislature, rendering valid an amendment relating to the jurisdiction of the district court to determine controversies arising between officials charged with the duties under the election laws and any candidate or the officers or representatives of any political party, even though such amendment was not specifically named in the proclamation.

2. Two factions of the People's party of Colorado held separate conventions, one at Denver and one at Pueblo, each claiming to be the genuine convention of the party. Both conventions adopted the same emblem, and nominated tickets. The secretary of state decided that the ticket nominated at Denver was the regular People's party ticket, and entitled to use the emblem named, to the exclusion of the other. Thereupon the representatives of the Pueblo convention made application to the district court for an order directing the secretary of state to certify the ticket nominated at Pueblo as the regular People's party ticket, giving to such party the emblem chosen. Held, that this was a controversy between an official charged with a duty under the election laws and the representatives of a political party, within the meaning of Act 1894, amending the election law, and giving to the district court jurisdiction of such controversies.

Application by A. B. McGaffey and others for a writ of prohibition directed to the district court of Arapahoe county and others. Writ denied.

This action grows out of a contest between two factions, each claiming the right to file nominations of and for the People's party, and to use the emblem of that party, to wit, the device known as the "Cottage Home." Each party claims that it constitutes the only genuine People's party; one convention having met in the city of Denver, on September 7, 1896, and the other in the city of Pueblo, two days later. The contest originally arose before the secretary of state, who decided in favor of the list of nominees nominated at Denver, and that the ticket so nominated was entitled to use the "Cottage Home" emblem. From the secretary of state the matter was carried into the district court of Arapahoe county. That court, upon a final hearing, decided in favor of the ticket nominated at Pueblo, and against the ticket nominated in Denver, and directed the secretary of state to certify only the former of the two tickets upon the official ballots, giving to such ticket the emblem and name of the People's party. The unsuccessful party now applies to this court for a writ of prohibition to

restrain the district court from carrying into effect its judgment.

Alexander Stewart and George W. Taylor, for relators. Patterson, Richardson & Hawkins and W. J. Thomas, for respondents.

PER CURIAM. The jurisdiction of the district court to entertain the proceeding instituted before it is alone challenged in this proceeding. The merits of the controversy between the two contending factions of the Populist party are, therefore, in no manner before this court. If the district court had jurisdiction, its judgment is conclusive upon the parties until set aside or modified upon review by appeal or writ of error. Such a review is not here sought. The jurisdiction of the district court is, however, attacked upon two grounds: (1) The act relied upon to support the jurisdiction having been passed at the special 1894 session of the legislature, it is claimed it is void, and of no force or effect, because not embraced within the call by the governor for such special session. (2) The second claim is that the act, if constitutional, confers upon the courts named therein jurisdiction to hear and determine only such matters as the secretary might have determined in the first instance, to wit, matters of form; and not such a controversy as was raised by the pleadings, and was, in fact, determined by the judgment of the district court. In support of the first ground, section 9, art. 4, of the state constitution is relied upon. It reads: "Sec. 9. The governor may, on extraordinary occasions, convene the general assembly by proclamation, stating therein the purpose for which it is to assemble, but at such special session no business shall be transacted other than that specifically named in the proclamation." The call for the special session of the legislature in 1894 issued in pursuance of the foregoing constitutional provision contained, among other subjects submitted for legislation, the following: "29. To enact that the law in relation to elections, etc., in this state, known as the 'Australian Ballot Law,' be amended so as to provide." This is followed by paragraphs designating in detail the amendments which the executive desired the legislature to make. The governor, by specially designating in the proclamation convening the general assembly, as one of the subjects of legislation, the law in relation to elections, etc., in this state, known as the "Australian Ballot Law," for amendment, must be held to have submitted the whole subject-matter of such act for legislative action thereon. He had no more authority to go further than this, and specify the particular character of the amendments that were to be voted upon, than he would have had to have prepared the bills, and attached them to his call, and directed the legislature to have passed or rejected the same, without amendment. Such specific instructions can, at best, be regarded as advisory only, and not as limiting the character of legislation that might be had upon the general subject of the Australian ballot law. In re Governor's Proclamation, 19 Colo. 333, 35 Pac. 530.

The second objection urged to the jurisdiction of the district court calls for a determination of the force and effect of the amendment to the Australian ballot law made at the special session. In order that we may pass intelligently upon this amendment, it will be necessary to consider the state of the law prior thereto, and the defects, if any, which the legislature had in mind at the time of making the change. What is known as the "Australian Ballot Law" was adopted by the Eighth general assembly of the state of Colorado, in the year 1891. While the act in its main features follows the Australian ballot system in force elsewhere, some new provisions are inserted, while others are modified in many essential particulars. Soon after the taking effect of the act, controversies arose with reference to the proper construction to be placed upon certain portions of the statute. The case of *People v. District Court*, 18 Colo. 26, 31 Pac. 339, was a contest between rival factions of a political party; but in this case the two contending factions are claiming the same emblem, while in the case reported in 18 Colo., 31 Pac., different emblems were adopted. In that case it was held, after careful consideration, that the controversy presented was not one contemplated by the legislature at the time of the passage of the act, and therefore not provided for; that under the law as it then existed neither the secretary of state nor the courts were empowered to determine as between two contending factions of a political party, which, if either, was entitled to represent such party. In passing upon that case the court plainly intimated that additional legislation was necessary in order that the full benefits of ballot reform might be secured. This is apparent from the following extracts, taken from the opinion: "Here we have to deal with two conventions, each claiming the right to represent the same political party. The act itself will be searched in vain for any provision for such a contingency. It was not contemplated by the legislature, and therefore not provided for. It should not be a matter of surprise that the act, as originally passed, is not perfect in all particulars. The beneficent laws of the world have grown with time, as the result of experiment and amendment. * * * Our conclusion is that under the circumstances disclosed by this record, neither the secretary of state nor the courts are called upon to decide which of the two rival conventions was entitled to act for the Democratic party of Colorado. Until some statute clothes some tribunal with such power, the matter should, in our judgment, be left for adjustment elsewhere." The statute prohibits the use of the same emblem for two sets of nominations. The importance of a strict enforcement of this provision arises from another provision of the act, to the effect that the voter may vote for a whole set of nominations by placing a cross upon the official ballot opposite the emblem of the party making such nominations, and depositing the same in the ballot box. A cross opposite an

emblem used in common by two parties would necessitate the rejection of the ballot, for the reason that the intent of the voter could not be ascertained. Consequently, where, as here, the emblem is in controversy between two factions, unless some officer, board, or tribunal is authorized to settle such dispute, the beneficent provisions of the act would be defeated. By keeping in mind these facts, we shall be greatly aided in interpreting the amendment of 1894, under which the district court acted in assuming jurisdiction of the present controversy. This amendment reads as follows: "Whenever any controversy shall arise between any official charged with any duty or function under this act, and any candidate, or the officers or representatives of any political party, or persons who have made nominations, upon the filing of a petition by any such official or persons, setting forth in concise form the nature of such controversy and the relief sought, which petition shall be under oath, it shall be the duty of such court, or the judge thereof in vacation, to issue an order commanding the respondent in such petition to be and appear before the court or judge, and answer under oath to such petition; and it shall be the duty of the court or judge to summarily hear and dispose of any such issues, with a view of obtaining a substantial compliance with the provisions of this act by the parties to such controversy, and to make and enter orders and judgments, and issue the writ of process of such court, to enforce all such orders and judgments. The provisions of this act shall be liberally construed, so as to carry out the intent of this act, and of political parties, nominees and others, in proceedings under this act." Laws 1894, p. 65. The contention of petitioners is that this act was not intended to clothe any tribunal, such as the district court, with power to hear and decide which of two rival conventions was entitled to act for a given political party. The argument in support of this contention is based upon the letter of the amendment. It is urged that the controversy here is not one that the secretary of state is given power to determine, for the reason that it is not a controversy between any official charged with any duty or function, and any candidate, etc., and, therefore, not embraced within the amendment. The secretary, in this case, has assumed jurisdiction, and has, in fact, decided the controversy; and, being about to carry into effect his judgment by excluding one ticket from the official ballot, and by awarding the "Cottage Home" emblem to the ticket nominated at Denver, the claim now advanced by his counsel to defeat the jurisdiction of the district court, upon the ground that the action of the secretary of state was had upon a matter over which he had no jurisdiction, cannot be allowed to prevail. *Skinner v. Beshoar*, 2 Colo. 383-387. The defeated party applied to the district court for relief, challenging the authority of the secretary to decide the controversy; and also contesting his decision upon

the merits. We are unanimously of the opinion that this constituted such a controversy as is embraced within the amendment of 1894, and over which the district court is given jurisdiction by the express letter of the statute. Moreover, the statute being remedial in character, it must be liberally construed, in order that the intent may be given effect. The intent of the legislature, expressed in the amendment, in giving the district court jurisdiction, was for the purpose of enforcing by the courts a "substantial compliance with the provisions of this act by the parties to such controversy." It is manifest that the construction now contended for by relator would defeat the very purpose of the act, if adopted. Upon the record presented our conclusion is, that the district court had jurisdiction to entertain the cause, and determine the controversy. The writ of prohibition must, therefore, be denied, and the proceeding dismissed. Writ denied.

CHRIST v. FLANNAGAN et al.

(Supreme Court of Colorado. Oct. 15, 1896.)
JURISDICTION—WAIVER—EXECUTION—SALE—
VALIDITY.

1. Defendant, after a change of venue has been granted, by proceeding to trial without objection, waives any question to the jurisdiction, due to the order for change of venue.

2. A sale on execution sued out by the assignee of the judgment without revival of the judgment after the death of the judgment creditor, is not void.

3. The fact that an execution was issued against a deceased defendant and another does not render void the sale thereunder of his co-defendant's land, both defendants having been jointly liable.

Error to district court, El Paso county.

Action by George Christ against Frank Flannagan and another. There was a judgment for defendants, and plaintiff brings error. Affirmed.

This action was instituted by plaintiff in error against the defendants in error to remove an alleged cloud from the title to certain lots in Colorado City, El Paso county, Colo. There is no dispute in reference to the facts, which are as follows: In 1875 a judgment was duly rendered in one of the justice courts of El Paso county in favor of E. T. Colton and against one Fred Holderer for the sum of \$290. From this judgment an appeal was duly taken to the district court of El Paso county, the sureties upon the appeal bond being George Christ, plaintiff in error, and one F. X. Roman. While the case was pending in the district court, an order was made and entered of record, upon application of the defendant, changing the venue to the district court of Pueblo county. This order does not appear to have been set aside, but afterwards all parties appeared in the district court, and a trial upon the merits was had, resulting in a verdict against the defendant Holderer for the same amount as the judgment rendered by the justice of

the peace. Upon this verdict a judgment was duly rendered in the month of November, 1876, against the defendant and the sureties upon his appeal bond. To enforce this judgment, several alias and pluries executions were issued, but nothing was collected thereon. The judgment was thereafter duly assigned to E. A. Colburn and Frank Flannagan. After such assignment, both Colton and Roman died, the evidence not definitely showing the date of such deaths, or of either of them. After the death of Colton and Roman, an execution was sued out in the name of E. T. Colton, plaintiff, against all the defendants, including Roman. Upon this execution the property in controversy was levied upon and sold as the property of plaintiff in error. The defendants now claim title by reason of this judicial sale. Soon thereafter this action was commenced by Christ to quiet title to the property in controversy. Upon these facts a decree was entered in favor of the purchasers. To reverse this decree the cause is brought here upon error.

William Harrison and J. K. Vanatta, for plaintiff in error. George W. Musser and C. H. Dudley, for defendants in error.

HAYT, C. J. (after stating the facts). Upon this record three questions are presented: First. Did the district court of El Paso county have jurisdiction to proceed to judgment in the original cause after having granted defendants' application for a change of venue without a formal order setting the same aside? Second. Plaintiff, Colton, having died prior to the issuance of the execution upon which the property was sold, was such execution and sale void? Third. Roman, one of the judgment debtors, having died before such execution was issued, did the fact that the same was issued with his name as one of the defendants render void the sale of his co-defendant's property thereunder?

The original action was an action of trespass, transitory in character. It is undisputed that the district court of El Paso county had jurisdiction of the subject-matter. A number of authorities have been cited to show that jurisdiction over the subject-matter cannot be conferred by consent. This we concede, but in all other cases jurisdiction may be waived by consent of parties, and it will be held to have been so waived if objection to the jurisdiction is not promptly taken. The record imports absolute verity, and we must assume that no other order with reference to venue was made except the one appearing in the transcript. When the district court made that order, it surrendered jurisdiction over the particular case then before it; but when the parties thereafter voluntarily appeared, and went to trial without objection, they thereby reinvested the district court with jurisdiction. Having thus voluntarily submitted their controversy to a court

having jurisdiction of the subject-matter, they cannot now be allowed to question the authority of such tribunal. *Edwards v. Smith*, 16 Colo. 530, 27 Pac. 809; *Reed v. Cates*, 11 Colo. 527, 19 Pac. 464; *Smith v. District Court*, 4 Colo. 236; *Yater v. State*, 58 Ind. 299; *Gager v. Doe*, 29 Ala. 341.

We may next consider what effect, if any, the death of Colton, the judgment debtor, had upon the execution thereafter issued. Counsel for plaintiff in error claim that the execution so issued and all proceedings thereunder were absolutely void. This claim is based in part upon section 2571 of *Mills' Ann. St.* This provides, in effect, that upon the death of a judgment plaintiff the executor or administrator may proceed to collect the amount of the judgment. It is clear, however, that this statute only applies where the property in the judgment remains in the judgment plaintiff. The statute does not reach the case of a judgment plaintiff who has parted with all interest in the judgment by assignment. Executors or administrators are only given control of the property owned by the decedent at the time of his death. Such representatives have no control over or duties in connection with property which the deceased has sold and transferred prior to his death. The estate having no interest in the judgment, it would have been a useless thing to have made the representative of the deceased a party to the action. It would have been proper, under our practice, to have substituted the assignee for the judgment plaintiff, but a failure so to do did not render the sale subject to this collateral attack. In this case there were three judgment debtors, one of whom died before the issuance of the execution upon which the sale was made. The levy was made upon the real property of one who survived. No new party was sought to be charged, nor was the property of the deceased sought to be taken. The judgment, being joint and several, might be satisfied out of the property of any one of the judgment debtors. At common law the lands of the defendant were not subject to execution, but were made so by the statute of *Westm. II.* (13 Edw. I.). Under this statute each judgment debtor had the right to demand that the lands of his co-defendant share the burden with him, hence the necessity of a revivor in the case of the death of one. Under our statutes lands are subject to levy and sale the same as personal property, and the lands of one judgment debtor may be sold to satisfy a judgment without reference to the property of other judgment debtors, in the same manner as the personal property of one might be sold under the English statute. The reason upon which the English rule with reference to real estate was founded does not exist in this state, and the rule itself must, therefore, fall. In order that the execution might conform to the judgment, it was necessary to use the name of the deceased, but, as the property of Christ

was only sought to be subjected to the process, it was entirely unnecessary, and would have been a useless expense to have sued out a *scire facias* to the representatives of the deceased. *Freem. Ex'ns* (2d Ed.) § 36; *Martin v. Branch Bank*, 15 Ala. 594; *Reed v. Garfield*, 15 Ill. App. 290; *Ransom v. Williams*, 2 Wall. 313. Finding no error in the record, the judgment will be affirmed. Affirmed.

RIETHMANN et al v. GODSMAN.

(Supreme Court of Colorado. Oct. 5, 1896.)

WRONGFUL ATTACHMENT—NOTICE OF OWNERSHIP—EVIDENCE—FRAUDULENT CONVEYANCE—NOTICE TO PURCHASER—BURDEN OF PROOF.

1. A writing served by plaintiff on defendant immediately after levy by defendant on goods as the property of another, in which plaintiff protested against it, claimed them as his own, and demanded return thereof, is admissible in an action for their wrongful taking and conversion, as well as an oral protest to the like effect, made at the time of the levy.

2. In an action against plaintiffs in attachment by another than defendant in attachment for wrongful taking and conversion of his property, plaintiff is not restricted in his proof of the seizure to the record of the attachment suit, but may show it by the testimony of eyewitnesses.

3. An attachment creditor is liable for wrongful taking, though he did not direct the officer to levy on the particular property, where he ratifies the officer's acts by knowingly approving of them and receiving the benefit thereof.

4. Recovery can be had for wrongful taking and conversion by attachment of property of another than the attachment defendant, notwithstanding a previous wrongful attachment of it.

5. A purchaser for valuable consideration cannot be charged as a participant in the seller's fraud in putting beyond the reach of creditors, unless he has either actual notice of the fraudulent intent or knowledge of circumstances equivalent to actual notice.

6. One who justifies his attachment of goods, which had been sold by the attachment defendant, on the ground that the conveyance was in fraud of creditors, has the burden of proving the fraud.

Appeal from district court, Arapahoe county.

Action by P. B. Godsmann against John J. Riethmann and others. Judgment for plaintiff, and certain defendants appeal. Affirmed.

This was an action brought by P. B. Godsmann, as plaintiff, against the defendants Riethmann & Co. and W. K. Burchinell, for damages alleged to have been sustained by him on account of the wrongful taking and conversion by the defendants of his stock of drugs and druggists' merchandise. There are two defenses in the answer; one a general denial, the other an admission of the taking and a justification. The justification is that the property in question never belonged to the plaintiff, but that it was the property of one J. J. Dunnagan, and, as such, was, by Burchinell, as sheriff, levied upon under a writ of attachment issued in an action then pending between Riethmann & Co., as plaintiffs, and J. J. Dunnagan, as defendant; and that thereafter judgment was duly rendered in said action for the plaintiffs against the defendant, and the property theretofore attach-

ed was sold under an execution sued out under the said judgment, and the proceeds of such sale applied in part satisfaction of said judgment; that the pretended sale of the property by Dunnagan to Godsmann before the levy of the writ of attachment was void, because made with intent on the part of Dunnagan to delay his creditors, of which Godsmann had notice. The affirmative defense was denied in the replication, and upon the issues thus joined trial was had before a jury, whose verdict was in favor of the defendant Burchinell, but against the defendants Riethmann & Co., and in favor of the plaintiff, for \$3,216.50, on which a judgment was entered. Upon the plaintiff's motion for a new trial as to the defendant Burchinell, the court granted the same, and subsequently plaintiff dismissed the action as to Burchinell without prejudice. From the judgment against them, Riethmann & Co. have appealed to this court.

Rising, Brown & Malone, for appellants. J. E. Robinson, for appellee.

CAMPBELL, J. (after stating the facts). Of the numerous errors assigned, only such as are argued in the briefs are considered.

1. At the trial the plaintiff testified that when the deputy sheriff, accompanied by one of the members of the firm of Riethmann & Co., came into his store to levy the writ of attachment, he informed them orally that the goods were his own, protested against their seizure, and, when taken by the officer, demanded their return. Immediately thereafter, and in connection therewith, he served upon the officer and the defendants Riethmann & Co. a written protest to the same effect. A copy of this writing was admitted in evidence over the defendants' objection, and this ruling is assigned as error. Its admission is said to be improper, because it was not necessary to refresh the memory of the witness, and that it was a self-serving declaration of the plaintiff, because therein was a statement of the plaintiff that the goods were claimed to be attached by Riethmann & Co. The ruling, however, was right. Both the oral claim of ownership and the written demand and protest were admissible, neither one to prove or assist the other, but each as independent evidence of the facts of claim of ownership, a protest against seizure, and a demand for the return of the property. *Greenl. Ev.* (14th Ed.) § 90.

2. Oral testimony was admitted for the plaintiff as to what Duggan (the deputy sheriff) did in the way of taking possession of the goods. This is said to be error, on the ground that the best evidence of the sheriff's execution of the attachment writ is the return of that officer to the writ. In some cases, and for some purposes, this may be true. In this case the plaintiff sues the defendants, as individuals, for the wrongful taking and conversion of his property. It certainly is not incumbent on plaintiff to prove the seizure by the introduction of court records and the files of a case to which he is

not a party. He is not bound by the judgment in that case, nor is he restricted to record evidence of the taking and conversion of his property. He may, if he can, show this by the testimony of eyewitnesses. When the defendants come to their justification for the taking, then they may, by their attachment writ and the return of the sheriff, show what they did to the property. Moreover, if the admission of oral testimony was error, it was abundantly cured when the plaintiff introduced the attachment writ and the return, and when both parties, during the progress of the trial, referred to and commented upon the same.

3. It is further contended that, inasmuch as Riethmann & Co., the attaching creditors, did not direct the sheriff to levy the writ upon this particular property, they are not jointly liable with the sheriff, even though the taking was wrongful. Authorities to this effect are cited. The rule, however, is inapplicable to this case, for the joint answer of the defendants alleges that the property did not belong to the plaintiff, but was Dunnagan's, when seized by the sheriff. The plaintiffs in the attachment suit gave the sheriff an indemnity bond before he would levy on this property, and their joint answer, as well as their own evidence, further shows that after the recovery of the judgment by them against Riethmann they caused a special execution to be issued upon that judgment, commanding the sheriff to sell this same property; and such sale was made, and the proceeds thereof applied in satisfaction of their judgment. There can be no stronger case of ratification of the officer's acts than by the attaching creditors thus knowingly approving of them and receiving their benefits, and this makes them jointly liable with the sheriff. *Cooley, Torts*, pp. 129-137; *Dyett v. Eymann*, 129 N. Y. 351, 20 N. E. 261; *Drake, Attachm.* § 196. The fact that some of these acts of ratification were subsequent in time to the date of the wrongful taking, as alleged in the complaint, is not material, for Riethmann & Co., in their answer, set up, and in their evidence proved, these subsequent acts as their justification for the taking.

4. Another point is that the record shows that this property was levied upon under a prior writ of attachment, and, thus being in the custody of the law, for a subsequent levy thereon the plaintiff in the second suit is not liable. To this we are referred to *Drake, Attachm.* § 196b. The case of *Ginsberg v. Pohl*, 35 Md. 505, is cited by the author as authority for the proposition. An examination of the opinion shows that the ruling was based upon previous decisions of the same court holding the goods levied upon under a valid writ of attachment, whether belonging to the debtor or to a third person, are in the custody of the law; and the true owner thereof cannot maintain an action of replevin for them. The rule is otherwise in New York, and so, also, in this state. *Wilde v. Rawles*, 13 Colo. 583, 22 Pac. 897; *Mills' Ann. Code*, p. 258, note 20; 26 Am. & Eng. Enc. Law, p. 602, and notes; *Thomp-*

son v. Button, 14 Johns. 86; Clark v. Skinner, 20 Johns. 465. It would seem to follow that in this state an action for damages by the true owner for such a levy will lie. We are not obliged, however, to pass upon this proposition, for there was no competent evidence that the goods were levied upon under a prior writ of attachment. True it is, that in the return upon the writ in question there is a statement to this effect, and this statement may bind the officer and the parties to that suit. But in this case the evidence upon this point (so far as there is anything in the record upon this question at all) is that the actual levy and taking of the goods under the two writs of attachment were at the same time. If this be true, the plaintiffs in both actions may be liable for the taking. Neither is there proof of any sort that the alleged prior levy was under a valid writ of attachment; and hence, if the previous attachment was wrongful, as it was if the property belonged to Godsmann, certainly he, as owner of the property, may maintain his action for the second wrongful levy. Schluter v. Jacobs, 10 Colo. 449, 15 Pac. 813; Cox v. Hall, 18 Vt. 191; 6 Wait, Act. & Def. p. 110, § 2.

5. The remaining objections relate to the instructions. The evidence is uncontradicted that the goods were sold by Dunnagan to Godsmann, a bill of sale therefor given, and the possession required by our statute taken by the vendee, and continuously held by him until the attachment writ was levied. The sale is attacked, however, upon the grounds that the consideration was not sufficient, and that, in selling, Dunnagan intended to delay his creditors, of which intent Godsmann had knowledge. As to the value, the only evidence in the record is that Godsmann paid a full and adequate consideration for the stock of goods. He did not have actual knowledge of the alleged fraudulent intent of his grantor, but the defendants insist that he knew, or might have known, of facts and circumstances sufficient to put a reasonable man upon inquiry, which, if followed up, would have resulted in actual knowledge of the seller's wrong. With apparent confidence, also, the appellants claim that by Dunnagan's own admission it appears that his intention in selling was to delay his creditors. It is well settled that a sale of property, though for a full consideration, made by the owner with the intent on his part to hinder, delay, or defraud any of his creditors, is void as against all of his creditors if the vendee participated in such intent. There seems to be some controversy between counsel as to the nature of this participation; whether mere knowledge by the vendee of the vendor's fraudulent intent makes the former a participant in the fraud, or whether something more is necessary. The appellee cites Stearns v. Gage, 79 N. Y. 102; Farley v. Carpenter, 27 Hun, 850; and Parker v. Conner, 93 N. Y. 119,—as authority that the doctrine of constructive notice does not apply to the case of a fraudulent sale of property, and that "circumstances to put

the purchaser on inquiry where a full value has been paid are not sufficient." It would seem, under the authority of these cases, that the purchaser for a valuable consideration, without previous notice, is not chargeable with constructive notice of the fraudulent intent of his vendor; but under these authorities, as well as under former decisions of this court (Smith v. Jensen, 13 Colo. 213, 22 Pac. 434; Grimes v. Hill, 15 Colo. 359, 25 Pac. 698; and Seeleman v. Hoagland, 19 Colo. 231, 34 Pac. 895), knowledge of circumstances may be equivalent to actual notice, although constructive notice is insufficient. Under no authorities, however, which we have examined, can a purchaser for a valuable consideration be charged as a participant in the fraud, unless he has either actual notice or knowledge of such equivalent circumstances. By the instructions of the refusal of which appellants complain, the court was asked to charge the jury that knowledge by the vendee of the vendor's fraudulent intent rendered the sale void. It may be conceded that, as a general proposition, this is correct. We observe, first, that in our judgment it is a grave question whether there is any evidence that the vendor was guilty of the fraud charged. There may be facts and circumstances in the record from which, by inference, a suspicion thereof might be warranted. To say the least, the weight of the evidence is against it. The vendee certainly had no actual notice of such intent, if any there was. Unless, therefore, he knew of circumstances sufficient to put a reasonable person on inquiry which would have given actual notice, even the appellants concede that the sale was valid. We have examined the entire record with care, and fail to find any competent evidence that the plaintiff, as vendee, knew of any circumstances which could be regarded as the equivalent of actual notice, and so, for this reason, the instruction upon this branch of the case was properly refused.

As to other instructions refused by the court, in which the jury were informed that they might consider certain facts and circumstances, so far as known by the vendee, as bearing upon the question of knowledge by him of his vendor's fraudulent intent, we observe, in the first place, that some of these things did not exist until after the sale was completed, of others there is no evidence at all, others were not of a character to excite suspicion; and so the instructions were properly refused. 2 Thomp. Trials, § 2349. But a more satisfactory reason for their rejection is that such alleged facts were not brought home to the vendee's knowledge.

In charging that the burden of proof was upon the defendants to establish the fraud alleged by them, there was no error. The correctness of this proposition of law as a general rule is conceded by appellants, but they insist that it was misleading in this case, because, when Dunnagan admitted that his intention was to delay his creditors, the burden shifted, and the plaintiff was put to his proof to show

that he was a holder in good faith, and for value. To this are cited *Lerch Hardware Co. v. First Nat. Bank*, 109 Pa. St. 241; *Kyle v. Ward*, 81 Ala. 120, 1 South. 468. This contention assumes that there was proof showing an intention by Dunnagan to defraud, as to which nothing need now be said. For the reason heretofore given, the instruction was properly refused, because there was no evidence that Godsman was not a holder in good faith, and for value. Besides this, no error can be assigned to this ruling for the reason that the defendants asked of the court no instruction embodying the modification which they claim should have been submitted. In this connection it is fitting to say that, although the court, probably out of an abundant caution, saw fit to submit to the jury the question of fraud, nevertheless it might, with safety, have withdrawn the same, because there was a failure to connect Godsman therewith.

Other questions have been called to our attention by the appellants, but we do not deem it necessary to further notice them. Indeed, were the propositions involved resolved in favor of the appellants, still the judgment must be affirmed, for we are satisfied that the failure of the proof to show the fraudulent sale must, in any event, result in a judgment in favor of the plaintiff, and that any other judgment, based upon this record, could not be sustained. The judgment is affirmed. Affirmed.

MICHIGAN FIRE & MARINE INS. CO. v. WICH.¹

(Court of Appeals of Colorado. Jan. 10, 1896.)

**CONTRACT OF INSURANCE—OWNERSHIP OF PROPERTY
—NOTICE TO AGENT—PRACTICE ON
APPEAL—TRIAL.**

1. Where a policy of insurance was issued without any written application having been made, and without an agreement on the part of the insured to make one on which the policy should be based, an application thereafter made, at the request of the agent of the company, is not part of the contract of insurance.

2. The equitable owner of property, the legal title to which was conveyed to himself and others under an agreement that the others should own a part interest therein on the payment of a certain sum by a specified time, which they had failed to make, may insure the property as his own, and the conveyance of the title to him while the policy is in force is not a change of ownership which avoids the policy.

3. Where a solicitor for a firm of insurance agents procured an application for insurance on property, and the firm, being unable to place the entire risk in companies represented by them, applied to another firm of agents, who issued a policy on the property, and authorized the same solicitor to obtain from the insured an application to be delivered to them, which he did, they and the company for which they issued the policy are bound by whatever information or knowledge as to the title to the property was imparted to the solicitor, who, for such purpose, was their representative.

4. To entitle a party on appeal to urge error in the refusal of the court to admit affidavits or other papers in evidence, such papers must be

copied in the abstract in accordance with the rules of the court.

5. Where it is sought to impeach a witness by proving a statement made by him, his attention must be specifically called to such statement, and the opportunity given him of explaining it, otherwise proof of the statement is inadmissible.

6. Permitting a witness to refresh his recollection by reference to a memorandum made by him is a matter largely discretionary with the trial court.

7. A party at whose request special findings are made by a jury will not be heard to object on appeal that the facts so found were not properly involved in the issues.

Appeal from district court, Arapahoe county.

Action by John Wich against the Michigan Fire & Marine Insurance Company on a policy of insurance. Judgment for plaintiff, and defendant appeals. Affirmed.

Charles J. Hughes, Jr., and Tyson S. Dines, for appellant. Stuart D. Walling and C. M. Bice, for appellee.

BISSELL, J. This is evidently one of a series of suits brought by the same plaintiff against various insurance companies to recover the loss resulting from the destruction of a brewery property in 1889. The insurance was taken out at the same time, to wit, early in February, 1889, through the insurance agency of Perkins, Hart & Co., of Denver. The total amount of insurance was \$15,000, a part of which was represented on policies issued by the companies of which this firm were the representatives, and part of it by policies which that firm procured through Packard & Piper, the representatives of the other corporations. The plaintiff is the same in the different actions. Probably the companies all concurred in contesting the validity of the policies, and it would presumably be ample for us to refer to the antecedent suit for a statement of the facts which have been developed by the litigation. To make the present appeal intelligible, however, we shall briefly set forth some of the most salient features of the controversy, point out the difference between the situation in the present case and that existing when the other case was before us, though referring generally to it and to the opinions therein for a complete history of the litigations and for a more elaborate statement of the law. The other case is *Sun Fire Office v. Wich*, wherein two opinions were written. They are found in 39 Pac., at page 587 et seq., and will appear in the sixth volume of the Court of Appeals Reports (page 103). The property involved was a brewery, situated at Florence. It was bought in the latter part of 1888 by Wich, who negotiated the purchase, and paid the owner therefor \$4,000 in cash and gave a mortgage for a little upwards of \$8,000 for the unpaid portion of the purchase money. The title was taken in the names of Wich, Ell, Voght, and Hess, who joined with Wich in giving the notes which represented the unpaid portion of the purchase money. The principal contention,

¹ Rehearing denied November 9, 1896.

and the real basis for the reversal of the judgment which Wich got against the Sun Fire Office, turned on the proof respecting this particular matter. On the former trial it was not made clear what the circumstances were under which the purchase was made, nor the extent and character of Wich's actual interest, or his equitable title, nor was the matter settled by the verdict. In the present case it was in evidence that the negotiations for the purchase were made and completed by Wich under an agreement between him and the other three persons, substantially, that he should make the purchase, and that they should have an interest of a definite amount, provided within the next 60 days thereafter they paid their part of the purchase money. The agreement was not in writing, and the proceeding was not aptly carried on for the perfect protection of Wich's interests. The nature of this contract was not deemed settled by the former judgment, because the question was not submitted with definite instructions respecting it. This has been entirely cured by the present trial, and the verdict absolutely determines the fact to be that Wich bought the property, and had the sole interest in it, subject only to the agreement that the other three were to become co-owners on the performance of a condition precedent settled by the contract of purchase. By the agreement, the parties would become vested with an absolute title only on performance of the condition. These parties did not pay the money, and subsequently transferred the legal title which they acquired by the conveyance from McCandless. Wich assumed the notes, and was alone obligated to pay the balance of the consideration. The finding of the jury on this question relieves the case of a very great difficulty. Another equally troublesome question was also resolved against the insurance company. The jury not only rendered a general verdict, but were required by the company to answer a very large number of special questions, every one of which were answered adversely to the company's claim. But for the special findings, we might be still embarrassed by some matters presented in the record. According to them, Wich constituted the Arkansas Brewery Company at the date of the execution of the policy, the 4th of February, 1889, and was the sole party in interest when the fire occurred, the 5th of September following. The value of the brewery building and contents was found to be a little upwards of \$24,000, which is very close to the value stated by Wich when the policies were procured. The question of the circumstances under which the policies were delivered was also settled. At the time of the original negotiations for insurance an application was prepared and signed by Wich, and thereafter all the policies, including the one sued on, were made out and delivered to Wich, who paid the premium. This applica-

tion, however, does not figure in the suit. It was not produced, its terms were not relied on, and we are not advised as to what it was. Probably the present policy was not issued on the strength of it, but presumably with the expectation of subsequently getting an application to file in the office. At all events, there was a second application made out by the agents themselves, and taken to Wich, who signed it, as he states, and as the jury concluded, without information as to its contents, and on the request of the agent, Carleton. All the statements which Wich made concerning the property and its value, its surroundings and circumstances, the jury found to be true. No other facts seem necessary to a requisite comprehension of the case, and, if a fuller understanding is desired, the antecedent opinions can be referred to.

We shall make no attempt to follow and dispose of the 38 different propositions stated in the arguments of counsel. The labor would subserve no useful purpose, and we shall content ourselves simply with observing that we have carefully examined the record with reference to the law which is attempted to be applied, and have reached a general result which compels the affirmance of the judgment. We do not feel obligated to do more than dispose of the principal questions suggested. The alleged discrepancy between the application, the statements in the policy, and the facts as developed by the evidence will be entirely disregarded. The findings relieve us of the labor. If the policy in suit had been issued on the original application, and that put in evidence, we might then have been compelled to inquire whether its statements were borne out by the proof, whether they were warranties, and whether or not the company was released from any obligation because of an alleged breach. On the trial the present policy was assumed to have been issued on the second application. Strenuous objection was interposed to the introduction of the policy, because it was unaccompanied by this application. The objections were not well taken, because the application followed the issuance of the policy. Evidence enough to convince the jury that the policy had been delivered on the faith and strength of an agreement to furnish an application or statement as a basis for the insurance was not produced. Under these circumstances it is tolerably well settled the application is of little consequence, and is in reality no part of the proof which the plaintiff must make to sustain his case. *Le Roy v. Insurance Co.*, 39 N. Y. 56; *Rankin v. Insurance Co.*, 89 Cal. 203, 26 Pac. 872.

The jury found the policy was not issued on a written application. Perkins, Hart & Co. procured part of the insurance from Packard & Piper, who were agents of other companies. Wich did not apply to Packard & Piper for this insurance, and in reality had nothing to do with the making out of an ap-

plication for it. He was approached by Carleton, who had some connection with Perkins, Hart & Co. He had examined the property, solicited the insurance, and practically ascertained the amount which the companies would probably be willing to carry. It is quite possible Carleton would, for some purposes, be treated simply as a solicitor, and with reference to the policies issued by Perkins, Hart & Co. he may have occupied this position. In reality, and in the procurement of the policy in suit, he appears to have been with that firm, the practical representative of Packard & Piper, who were the conceded agents of the appellants. What he did with reference to the second application, what he said about it to Wich, and the circumstances of its procurement, in our judgment conspire to make him the representative of Packard & Piper, and bind them, as the agents of the company. Of course, there is a wide discrepancy in the testimony between Carleton, Shreve, and Wich as to the circumstances attending the second application. Expressing no personal opinion respecting it, we accept the verdict, and conclude that Carleton filled out the application, took it to Wich to sign after the policies had been delivered, and without any understanding or agreement that the application was to be made out either before or after the delivery of the policy. Under these circumstances it would be of no avail to the insurance company as a defense to the policy. We are not unmindful of a principle settled by some cases that, where the assured agrees to make out a subsequent survey or application, which is to be taken as the basis for the policy, the application or survey may be available to the company if the statements be untrue, though its execution may follow the delivery of the policy. In such a case the agreement is to be taken as a part and parcel of the policy, and the application is to be regarded as attached to it as a condition. No such stipulation was made. The jury find the policy was not issued on the strength of a written application at all, and therefore the entire argument based on its terms or conditions, or the circumstances attending its execution, are of no avail to defeat the appellant's liability.

We shall dispose in the same general way with the errors which are laid on the refusal of the court to permit counsel to cross-examine the witnesses respecting the condition of the brewery and its occupation, and sundry matters concerning the opinions they gave as to the value of the insured property. This disposes of some objections which otherwise might have force. Much of the attempted cross-examination was not pertinent to the examination in chief, and it was not error for the court to exclude it. If some of the questions should have been permitted, we are unable to discover that the error did the appellant any harm, or that it affords a basis for the reversal of the judgment.

It is wholly unimportant to determine whether Carleton was so far the representative of Pack-

ard & Piper in the procurement of the further insurance as to bind them by the statements which he made to Wich concerning the situation and character of the property and the conditions under which the insurance would be issued. If Packard & Piper saw fit to deliver the policy without an application, trusting to Carleton to procure one subsequently, they would certainly be bound by whatever Carleton might do, and his statements would undoubtedly be admissible as against the company, whose agents Packard & Piper conceded were. With reference to this application, Carleton was not a soliciting agent, but was the actual representative of the agents of the company, by whose acts the company would certainly be bound. It was not error to admit his statements. If it were otherwise, the error was harmless, because the jury found the policy was issued without any application at all.

The proof and the verdict determine the equitable title to have been in Wich from the date of the purchase to the execution of the deed by the other three parties. The verdict was rendered under instructions which accurately limited, and must have controlled, the judgment of the jury. There was no room for prejudice or mistake. The opinions in the other case amply demonstrate the insurability of an equitable title, and the simple circumstance of the existence of a legal title in Hess, Ell, and Voght does not deprive Wich of his insurable interest. Their title was a naked one, unaccompanied with an interest, except upon the performance of a condition, which was never complied with. Subsequently, in accordance with the arrangement, the naked legal title was transferred to Wich, whereby he became vested with both the legal and equitable title, prior to the time of the occurrence of the fire. As was before demonstrated, the transfer of title was not such as to be a breach of the condition named in the policy concerning conveyances. As to the present policy, Packard & Piper, through their agent, Carleton, were presumably completely informed of the situation and circumstances of the title when the policy was issued. Assuming Carleton to be the representative of Packard & Piper, the information which he procured about it was sufficient to advise the company respecting its status, and, the policy having been issued without warranty, would be a binding and enforceable contract against the company. The limitations on the authority of an agent are not always available. The extent to which the assured is charged with notice of the limits of the agent's authority has been the subject of much consideration, but the better authorities seem to require either actual knowledge of the limitation or else something in the circumstances which would bring the matter to the attention and knowledge of the policy holder. *Insurance Co. v. Taylor*, 14 Colo. 500, 24 Pac. 333; *Insurance Co. v. Wilkinson*, 13 Wall. 222. The case does not present this question in such form as

to require a very exhaustive discussion or analysis. While Carleton may possibly have been simply a solicitor in his relations to Perkins, Hart & Co., he occupied no such position with reference to this particular policy which was issued by Packard & Piper. The insurance had been applied for, and the first-named firm was engaged in placing it, when they applied to the representatives of the plaintiff company to procure the additional policies. They were not, in the sense of the term, solicitors, for the application had already been made to Perkins, Hart & Co. Packard & Piper had the right to insist on an application in full form, and protect the companies by insisting on statements and warranties concerning value, title, and status, according to the usual custom. Doubtless they might issue the policy, and authorize Carleton to deliver it, relying on his obtaining a subsequent application which would subserve their purpose. In that event they were the agents of their own concerns, by whose proceeding the company would be bound when once the policy was issued, and the contract completed. In the transaction of the business between Wich and Packard & Piper, Carleton was an agent having apparent general authority, and there is nothing in the record to show any actual limitation of it. We think, under these circumstances, the information Carleton acquired about the title, the statements Wich made to him about it, and his declarations concerning the requirements of the companies, were matters competent to be submitted to the jury. The knowledge which Carleton thus obtained, and the statements which he then made, would, on sufficient proof, charge the company with the same information. The statements were, therefore, admissible, though we regard them, in any event, as of being of very slight consequence in the settlement of the issue. The whole equitable title was in Wich, and had never been divested by the performance of the condition precedent. The legal title subsequently became vested in him by a transfer which violates no law or condition of insurance, because it was between quasi partners.

We do not regard the affidavits which were rejected as before us. They were not examined, because they are not in the abstract. Parties who desire to urge error on the refusal to admit documents must put them in the abstract for the convenience of the court, or it will be assumed the errors are not well laid, and that there is not sufficient basis to urge them in this court. References to the transcript of record are not in compliance with the rules, and we decline to assume the labor requisite to the examination of documents which can only be found there. So far as we can judge by the arguments of counsel and from what is in the abstract, the case is brought very clearly within the rule laid down by the supreme court of the United States, which holds evidence of this sort inadmissible for the purposes of impeachment without a foundation laid by an examination of the witnesses upon the subject. A wit-

ness is assumed to have the right to explain the statement which is to be used to contradict him. His attention must be specifically directed to it, and the opportunity thus afforded him; otherwise the contradiction will not be taken as effectual for the purposes of impeachment. The *Charles Morgan*, 115 U. S. 69, 5 Sup. Ct. 1172. The significance and importance of this adjudication is quite apparent from the circumstances under which the affidavits were obtained from Runkle, Wich, and the other witnesses. The parties were not dealing at arm's length. The agent was seeking to procure testimony to defeat the contract into which his company had entered. From the constant litigation into which their companies are engaged to defeat their contracts, these astute dealers in fire insurance policies are very well advised of what is essential for the purposes of defense, and their sole efforts are directed, not to the ascertainment of the exact facts surrounding the transaction, but to the procurement of incriminating admissions and statements of facts which can be ultimately used to the prejudice of the policy holder. For the purpose of establishing what the truth may be, such affidavits are of little value, and the witnesses should be accorded the largest and fullest privilege to state the circumstances under which they were procured, and to explain any statements which are contained in them. We are unable to discover any error in refusing the cross-examination asked, and in permitting the explanations to be made, and in ultimately refusing permission to introduce them.

During the progress of the examination of the witness Runkle the court permitted him to refresh his recollection by reference to a memorandum made directly after the fire, and, after this examination, to testify generally concerning the facts about which he had made the record. In this ruling we discover no error which would be sufficiently prejudicial to the appellant to affect the ultimate judgment, nor can we find that the court disregarded the general rule which prevails in such cases. The memoranda were made at a time so nearly concurrent with the happening of the events of which they were the record as to be substantially contemporaneous accounts of the events which had transpired, and, so long as the witness was able to speak from memory after he had thus refreshed his recollection, the use of the record was quite in accordance with the recognized rule. Matters of this sort are largely in the discretion of the trial court, and, so long as the discretion is not abused, and there is nothing which directly infracts the rights of the complaining party, the action of the court is not a legitimate subject-matter of complaint. *Lawson v. Glass*, 6 Colo. 134.

We are unable to appreciate the force of the contention that the special findings of the jury respected matters not properly involved in the issue, and unsupported by the evidence. Just how the appellant can rightfully assert this position and complain of the results is not apparent. The questions were propounded by the

insurance company. At the appellant's request, they were asked to determine these specific matters of fact. Under these circumstances it does not lie with the appellant to say they were harmed by the procedure, and that the verdict should be set aside because the jury evidently determined facts unwarranted by the evidence. If the matter was not involved, the question should not have been propounded. Being propounded at the appellant's request, the company cannot be heard to say the case did not justify this consideration by the jury, and, in so far as the conclusions, if taken as true, are hurtful to the appellant, the result was achieved through their own procedure. It is entirely analogous to a request for instructions, which is always taken as conclusive on the person who requests them; and the requesting party can never be heard to challenge the correctness of instructions given on his own application. *Railroad Co. v. Latimer*, 128 Ill. 163, 21 N. E. 7; *Lahr v. Railway Co.*, 104 N. Y. 268, 10 N. E. 528; *New York El. R. Co. v. Fifth Nat. Bank*, 135 U. S. 482, 10 Sup. Ct. 743.

We have thus disposed of all the matters which seem to require specific attention, and, the main proposition being determined against the appellant, there is nothing urged as error which would justify a reversal of the judgment. The case was fairly tried. The jury were very carefully and accurately instructed regarding the law. Their findings, as well as their general verdict, were against the appellant; and, being accepted as conclusive on all questions of fact, the ultimate judgment was correctly rendered thereon. We shall therefore affirm the judgment. Affirmed.

MORRIS et al. v. PEOPLE, to Use of
SIMMONDS.¹

(Court of Appeals of Colorado. Oct. 12, 1896.)

JUSTICE OF THE PEACE — CONSTITUTIONAL LAW —
CREATION OF NEW PRECINCTS — FAILURE TO SUR-
RENDER OFFICE — LIABILITY OF SURETIES.

1. Gen. St. p. 284, § 146, authorizing county boards to create new justices' precincts on petition, is not in conflict with Const. art. 14, § 11, which fixes the number of justices and constables in each precinct at two, but authorizes the number to be increased as provided by law in precincts containing 5,000 or more inhabitants.

2. Under Gen. St. p. 284, § 146, authorizing a county board, on the petition of the voters of any justices' precinct, to change the same or to create other precincts, it is not necessary to the jurisdiction of the board to create a new precinct that the petitioners shall designate themselves as voters, the legality and sufficiency of the petition being a matter for the board's determination; and that a petition on which it has acted was sufficient will be presumed in the absence of proof.

3. Under Gen. St. p. 650, § 142, providing that a justice of the peace and the sureties on his official bond shall be liable to all persons interested for all damages and losses sustained by reason of his failure or refusal to deliver the dockets, books, and papers pertaining to the office to his successor at the expiration of his term, a justice wrongfully withholding the of-

fice from his successor, claiming to hold over on the ground that the election of his successor was illegal, is liable to such successor on his bond for the fees of the office received by him during such time.

Error to district court, Arapahoe county.

Action by the people, for the use of George Simmonds, against Robert Morris and the sureties on his bond as a justice of the peace. Judgment for plaintiff, and defendants bring error. Affirmed.

Chas. G. Clement, for plaintiffs in error.
George Simmonds, pro se.

THOMSON, J. This suit was brought upon the official bond of Robert Morris as justice of the peace, and resulted in a judgment against the defendants, from which they have prosecuted error to this court. The facts are not in controversy. The disagreement between parties relates to the law which should be applied to the facts. At the general election held in Arapahoe county in November, 1888, the defendant Morris was duly elected justice of the peace for precinct No. 2, in that county. Before entering upon the duties of his office, he gave bond pursuant to law, with the other defendants as sureties, conditioned for the faithful discharge of the duties of the office, and the delivery to his successors of all books, papers, and other things which might be so required by law. Morris thereupon entered into his office, and discharged the duties pertaining to it for the statutory term of two years. On the 5th day of May, 1890, upon the petition of certain persons styling themselves "residents of justice precinct No. 2, in Arapahoe county," the board of county commissioners divided the precinct, and carved out of it another precinct, which they designated as "No. 12." The relator and Morris both resided in precinct No. 2, as it was constituted after the division. At the general election held in Arapahoe county in November, 1890, the term of office for which Morris was elected being about to expire, himself and the relator were opposing candidates for the office of justice of the peace of the new precinct, No. 2, and both participated in and voted at the election. The relator was the successful candidate, and Morris was defeated. Upon the expiration of Morris' term, the relator, as his successor, having duly qualified for the purpose, demanded of him the books, dockets, and papers pertaining to the office; but he refused to deliver them, and retained them, and continued to act as justice until April 7, 1891. Upon the refusal of Morris to comply with the relator's demand, the latter instituted proceedings in mandamus in the district court of Arapahoe county to compel the delivery by Morris to the relator of the books, dockets, and papers belonging to the office. Upon the hearing of the case a peremptory writ was ordered as prayed. Morris appealed from the judgment to the supreme court, which declined

¹ Rehearing denied November 9, 1896.

jurisdiction of the case, and dismissed the appeal. Thereupon, on April 7, 1891, Morris turned over the books, etc., to the relator. During the time Morris had possession of them he received as fees out of business brought to him as justice \$331.35. The grounds upon which the defendants in error rely for a reversal of the judgment are: First. That the act of the legislature in pursuance of which the board of commissioners made the order dividing precinct No. 2 is in conflict with section 11 of article 14 of the constitution, and therefore void; that, the order being void, precinct No. 2 has never been divided, and retains its original boundaries; that the election held in November, 1890, for justice of the peace in the alleged new precinct No. 2, was held without authority of law, and that, the only claim of the relator to the office being by virtue of that election, he was without title. Second. That, supposing the statute to be constitutional, the petition upon which the board acted in making the order was not in conformity with the requirements of the statute, and did not authorize the action of the board, and that for that reason the order was invalid, and the attempted division of the precinct nugatory. And, third, that, waiving the foregoing objections to a recovery, the doings of Morris in acting as justice, and receiving the fees and emoluments of the office, after the relator had been elected and qualified as his successor, do not constitute a breach of the conditions of the bond. We shall examine these several positions taken by counsel in the order in which they are stated.

1. The following is section 11 of article 14 of the constitution: "There shall, at the first election at which county officers are chosen, and annually thereafter, be elected in each precinct one justice of the peace and one constable, who shall each hold his office for the term of two years; provided, that in precincts containing five thousand or more inhabitants, the number of justices and constables may be increased as provided by law." The act pursuant to which the order of the board was made provides as follows: "The boards of county commissioners of the several counties of this state shall at their July meeting, next after the passage of this act, divide their respective counties into as many justices' precincts as the necessities of the county may require, and upon the petition of the voters of any such precinct may change the same, or create other such precincts, and shall cause to be entered in the journal of their proceedings a record of such precincts, giving accurate boundaries thereof." Gen. St. p. 284, § 146. There is no obvious conflict between the constitutional provision and the statute. The constitution makes no provision concerning the creation of justices' precincts. It contains no limitation upon the power of the legislature to provide for the division of counties into justices' precincts, and for the creation of such new precincts as changing circum-

stances made from time to time demand. A precinct may become so populous that one justice is unable to transact its business, and the legislature is authorized to provide for additional justices in precincts containing more than 5,000 inhabitants. On the other hand, the territorial area of a precinct containing less than 5,000 people may be so large that the convenience of the inhabitants requires its division, or, by unsettled portions of a county becoming occupied, new precincts may be necessary to accommodate the new population. There is a wide difference between increasing the number of justices in the same precinct and creating new precincts, and there is no constitutional inhibition against legislation looking to the increase or alteration of precincts. The legislature has the authority to provide for the division of counties into justices' precincts in the first instance, and by the same authority it may provide for dividing precincts, changing their boundaries, or establishing new ones. The only constitutional limitation upon its power in the matter of justices' precincts relates to increasing the number of justices in the same precinct. In *Board v. Smith* (Colo.) 45 Pac. 357, Chief Justice Hayt, incidentally speaking of the statutory provision which we have quoted, said, "We know of no provision of the constitution with which the act conflicts," and we are unable to see how a limitation upon the power of the legislature to provide for additional justices in the same precinct affects, or can affect, its authority to provide for establishing precincts originally, or for changing them or adding to their number after they are established. We must hold the act in question to be in harmony with the constitution.

2. The statute empowers the commissioners, upon petition of the voters of a precinct, to change the precinct, or create other precincts. In this case the petitioners described themselves, not as voters, but as residents, of precinct No. 2; and hence it is contended that the board had no authority to act upon the petition. We do not think the argument sound. In our opinion, it is entirely unimportant how the petitioners may have designated themselves in their petition. The statute does not empower the commissioners to act upon a petition of persons representing themselves as voters of the precinct, without more. They must be voters in fact, and the commissioners must be legally satisfied that they are voters. That they style themselves voters would not relieve the commissioners of the duty of ascertaining whether they are such. No legal formality is necessary in such a petition, and it is immaterial whether the petitioners call themselves residents or voters, provided the petition is otherwise sufficient, and an investigation shows that they are voters. As, in this case, the commissioners made the order, and as ample power was conferred upon them for that purpose, we must presume that they satisfied themselves that the petitioners were voters of the precinct, and that all the

conditions necessary to the exercise of the power existed. The presumption being in favor of the legality of the order, without proof of facts which invalidated it, it must be upheld. But the position taken by Morris in this litigation is at least equivocal. He submitted his claim to the office to the voters of the precinct, and they rejected it. He was a candidate against the relator. He took an active part in the election, and the result was unfavorable to him. He does not seem to have entered the contest with any intention of abiding the event, unless it should be satisfactory to him. If he was successful, he could hold the office by virtue of the election. If he failed, he could repudiate the election, and hold the office by virtue of his former commission, on the ground that no successor had been legally chosen. The law does not regard a position like that with favor. He does not pretend that he participated in the election, or submitted his candidacy to the voters, without a full knowledge of all the facts; and we do not think that, even if the election was irregular, we are required to search for reasons why he was not bound by the result.

3. Were the fees received by Morris for official business transacted by him during the time he continued to act after his term had expired recoverable in this case? It is contended that, if the relator was *de jure* the justice, the acts of Morris were void; that all moneys collected by him could be recovered back by the parties paying them; and that there were, therefore, no fees or emoluments of the office for which he was liable to the relator. It is further maintained that receiving moneys after the expiration of his term, even if his acts during the time were not void, constitute no breach of any of the conditions of the bond. We do not deem it necessary to enter into any extended discussion of the validity of Morris' acts while wrongfully withholding from the relator the possession of the office. He continued in office, and discharged the duties and exercised the functions of a justice of the peace after he ceased in law to be a justice, claiming that no successor had been legally elected. He was not a usurper, or an intruder, but claimed the office, and continued to act in it, under a title which before that time he unquestionably had. He held by color of title from his original election. He was, therefore, an officer *de facto* within every definition of the term, and all his acts as such were valid as to the public and third persons. *Hamlin v. Kassafer*, 15 Or. 456, 15 Pac. 778; *State v. Williams*, 5 Wis. 308; *Petersilea v. Stone*, 119 Mass. 465; *State v. Carroll*, 38 Conn. 449. The fees which Morris exacted and received could not be recovered back by those paying them. The legal title to the office was in the relator, and the possession was in Morris. The fees and emoluments which pertained to the office after the title of the relator accrued belonged to the relator; and Morris, having by virtue of his unlawful possession taken and appropriated

them, must be held liable to the relator for the amount received. *Mayfield v. Moore*, 53 Ill. 428; *Comstock v. City of Grand Rapids*, 40 Mich. 397; *Nichols v. MacLean*, 101 N. Y. 526, 5 N. E. 347. As against Morris personally, the right of the relator is clear; but the question remains whether the money is recoverable in an action on Morris' official bond. It is vigorously contended that such an action cannot be maintained, and the reason given is that the acts complained of occurred after his term had expired, and are not covered by any condition of the obligation. This position of counsel is worth examining. In the law concerning justices and constables we find the following:

"Sec. 141. That whenever the term of office for which any justice of the peace may have been elected shall expire, it shall be the duty of such officer to deliver over his docket, statutes, and all papers relating to the business transacted before him, to his successor in office, upon demand, after such successor shall have been qualified according to law, whose duty it shall be to proceed to the completion of all unfinished business, to issue executions upon judgment remaining unsatisfied upon such docket, and to collect the same, and have the same power in respect to such docket and papers as if the same pertained to proceedings originally instituted before him.

"Sec. 142. Any justice of the peace failing or refusing to deliver any statutes, books, dockets or papers, as required by this chapter, for the space of ten days after the same are demanded, shall forfeit and pay the sum of ten dollars, to be recovered by an action of debt in the name of the county treasurer, for the benefit of the county, besides being, together with his securities in his official bond, liable to the county and to all persons interested for all damages and losses which may be sustained by reason of such failure or refusal."

Gen. St. pp. 649, 650.

Now, what damages are recoverable for the failure or refusal of a justice of the peace whose term has expired to deliver the books, records, and papers belonging to the office to his successor? It cannot be said that the person aggrieved is confined in his recovery to the market value of the things withheld. They have no substantial value, except in the hands of the person using them. The statute expressly provides for the liability of the obligors to the persons interested for all damages and losses sustained by reason of the failure or refusal to deliver them. They are the legal indicia of title, and by retaining them, and continuing to act in all respects as before, Morris withheld possession of the office from the person lawfully entitled to it. The fees and emoluments which he collected were incident to the office, and, if the relator had been in possession, he would have received them. The retention of the books, dockets, and papers after demand made was a breach of the conditions of the bond; and the damages and losses sustained by the relator were the fees

belonging to him, appropriated by Morris, and which the latter was enabled to obtain by his unlawful possession of the legal indicia of title. These damages were, therefore, the direct result of the failure and refusal of Morris to deliver the books, dockets, and papers.

In our opinion, the judgment was right, and must be affirmed. Affirmed.

STILES v. RICHIE et al.¹

(Court of Appeals of Colorado. Oct. 12, 1896.)

MASTER AND SERVANT—PLEADING—CAUSE OF ACTION NOT STATED—NEGLIGENCE—INSUFFICIENT EVIDENCE.

1. In an action for the death of plaintiff's husband, a complaint which alleges that, while the deceased was at work in defendants' mine shaft, he was killed by the caving in of the wall of the shaft; that defendants were negligent in not having timbered the shaft; that it had reached a depth of 12 feet, and said deceased had, immediately preceding his death, complained to defendants of their negligence in not timbering the same, and defendants had promised that it should be timbered; that defendants had commenced timbering when said injury occurred; that at the time deceased was killed he thought, and any man of ordinary prudence would have thought, that said shaft could be timbered before it would cave in,—does not state a cause of action.

2. In an action for the death of plaintiff's husband, it appeared that he was killed by the caving in of defendants' mine shaft, which he was employed in sinking; that he was a practical miner, and had worked in the shaft from the surface, and knew the character of the ground; that he voluntarily prosecuted the work, without informing defendants, who had not been in the shaft, that it was dangerous. *Held*, that defendants were not chargeable with negligence.

Error to district court, Arapahoe county.

Action by Cora Stiles against August Richie and others for the death of her husband. From a judgment in favor of defendants, plaintiff brings error. Affirmed.

H. B. Johnson, for plaintiff in error. Felker & Dayton, for defendants in error.

REED, P. J. This action was brought by the plaintiff in error against the defendants to recover damages for the death of her husband by the caving in of a shaft in the mine of defendants while employed by them in sinking the shaft. The part of the complaint necessary to be considered is as follows: "While the said John W. Stiles was at work in the bottom of said shaft a large body of earth and gravel fell from the side thereof, and instantly killed him; that the defendants and their agents and servants were grossly negligent in not having timbered said shaft, and thereby prevented the same from caving in as aforesaid; that said shaft at the time of said death had reached a depth of 12 feet, and said deceased had, immediately preceding his death, complained to defendants of their negligence in not timbering the same, and defend-

ants had promised that the same should be immediately timbered; that defendants in pursuance of said promise had commenced the timbering of said shaft, and were in the act of doing so at the time of said injury and death as aforesaid; that at the time deceased was killed as aforesaid he thought, and any man of ordinary prudence, with the knowledge which deceased had of the ground he was working in, would have thought, that said shaft could be timbered before it would cave in." Taking the allegations in the text as pleaded, the complaint states no cause of action. It is alleged that the shaft, at the time of his death, was 12 feet deep only; that deceased, immediately preceding his death, complained to defendants of their negligence in not timbering the same, and defendants had promised that the same should immediately be timbered. The complaint of deceased in regard to the insecurity of the shaft was made "immediately before his death." At the time of his death he was engaged in timbering the shaft. The allegation shows immediate attention to the complaint made, and an immediate fulfillment of the promise. The rule of law evidently intended to be invoked is elementary, and is that where the employer has knowledge of the danger attending the employment, and does not communicate it to the employé, and also when the danger is discovered by the employé, and he conveys the knowledge to the employer, and he promises to remedy it, and the employé, relying upon such promise, continues the employment, and the employer neglects to obviate the danger, the employer is liable in damages for any injury received by the servant; but in this case the allegation negatives the liability by the statement that the employer, on being informed, immediately proceeded to remove the cause of danger. The rule of law controlling this case is clearly and tersely stated in 2 Thomp. Neg. 992: "If the master knew, or ought to have known, and the servant did not know, and was not bound to know, of its existence [the danger], the liability of the master—the servant having been otherwise in the exercise of due care—is fixed; and it is equally true, in every case, that unless the master knew of the defect which subsequently produces the injury, or was under a duty of knowing it, he cannot be held liable, for in the absence of such knowledge, or duty of knowing, there is nothing of which negligence can be predicated." See *Elliott v. Railroad Co.*, 67 Mo. 272; *Hayden v. Manufacturing Co.*, 29 Conn. 548; *Railroad Co. v. Convey*, 61 Ill. 162; *Railroad Co. v. Troesch*, 68 Ill. 545. Again it is said in 2 Thomp. Neg. 995: "These two things must stand in conjunction,—knowledge on the part of the master, or its equivalent, negligent ignorance; and a want of knowledge on the part of the servant, or its equivalent, excusable ignorance." See *Walsh v. Valve Co.*, 110 Mass. 28; *Railroad Co. v. Thomas*, 42 Ala. 672; *Railroad Co. v. Millikin*, 8 Kan. 647; *Railroad Co. v. Love*, 10 Ind. 554. In 2

¹ Rehearing denied November 9, 1896.

Thomp. Neg. 971, 972, the negligence which will render the employer liable is stated as follows: "(1) Negligence in subjecting the servant to the risk of injury from defective or unsafe machinery, building, premises, or appliances. (2) Negligence in subjecting him to the risk of injury from unskillful, drunken, habitually negligent, or otherwise unfit fellow servants. (3) Negligence where the master, or his vice principal, personally interferes, and either does or commands the doing of the act which caused the injury. In the first two cases the unfitness of the building, premises, machine, appliance, or fellow servant must have been known to the master, or must have been such as, with reasonable diligence and attention to his business, he ought to have known. It must also have been unknown to the servant, or such as a reasonable exercise of skill and diligence in his department of service would not have discovered to him. If the master has not been personally negligent in any of these particulars, and hurt nevertheless happens to the servant, the master will not be answerable in damages therefor; but the servant's misfortune will, accordingly as the facts appear, either be ascribed to his own negligence, or ranked in the category of accidents, the risk of which, by his contract of service, he is deemed voluntarily to have assumed." See *Railroad Co. v. McGraw* (Colo. Sup.) 45 Pac. 383. In support of these two propositions almost numberless authorities are cited from nearly all the different states. The facts, as shown by the very meager evidence of Murdock Smith, who was the only witness who had any knowledge of the facts, were that defendants employed him to sink the shaft, and authorized him to hire his own men to do the work, and he employed deceased. Witness had been a miner about 14 years. Stiles had been a miner 8 or 9 years, "and fully as good if not better than the witness." The two, in company with defendant Hook, left Denver Monday, September 21st. On the way to the mine, defendant hired two men and a team, and took them along to cut and haul timber. Hook remained until Friday, the 25th, when he returned to Denver. Smith and deceased commenced sinking shaft Tuesday, 22d. Sunk the shaft three or four feet on that day, and three or four feet the next day. It was not shown when the balance to make the twelve feet was sunk, but it must have been the two following days, as Smith testified, "Before he [Hook] went away, I told him we would have to timber that shaft, and he said, 'Go ahead and timber it.'" The accident by which Stiles lost his life occurred on the following Tuesday. The shaft was then timbered up about five feet. Witness was on top, preparing timber, and Stiles in the bottom, putting in the timber, when a mass of earth fell, killing him instantly. Hook had not been there since Friday previous. Whether any sinking had been done after he left, was left in doubt, but there was sinking done the day he left. Now as to the evidence

of negligence to charge the defendants: Smith says that, when the shaft was down six or seven feet, he told Hook that it had better be timbered. Hook wanted it sunk deeper, so he could change the shaft to suit the trend of the vein. When the suggestion was made the next time, Hook instructed them to go ahead and do it. It is alleged in the complaint "that deceased had, immediately preceding his death, complained to the defendants of their negligence in not timbering the shaft." This could not have been true, as Smith swears that Hook left on Friday previous, and of course had no knowledge of affairs after that time; and what, if anything, was done afterwards to increase the danger is not shown. But during the intervening time Smith and deceased were prosecuting the work without the presence of either defendant. Smith also testified, "Mr. Hook did not meet Mr. Stiles in reference to his employment." On cross-examination he testifies that deceased had worked in the shaft from the surface, and knew the character of the ground; that Hook had never been in the shaft, and, although witness and deceased had discussed the shaft as dangerous, neither of them informed Hook that the shaft was dangerous.

To negative in advance the defense of contributory negligence, the following peculiar allegation was inserted in the complaint: "That, at the time deceased was killed as aforesaid, he thought, and any man of ordinary prudence, with the knowledge the deceased had of the ground he was working in, would have thought, that said shaft could be timbered before it would cave in." If such was the conclusion of an experienced miner, who had done the work, and would have been the conclusion of any man of "ordinary prudence," how could defendants be charged with negligence and made liable for failing to exercise extraordinary and prophetic prudence previous to the preceding Friday? It is clear, beyond controversy, that deceased had greater knowledge of the shaft and the character of the ground than Hook could have had, and that deceased, a practical miner, of years' experience, possessed of all knowledge that could be obtained, voluntarily prosecuted the work and incurred the risk incident to the employment. The unfortunate calamity was properly designated by the witness in his testimony: "I suppose this was an accident." It certainly could not have been predicted by Hook on the Friday before, for, had those engaged in the work on Tuesday recognized the impending danger, deceased would not have been in the shaft. There was no evidence of negligence on the part of the defendants to charge them with liability for the unfortunate death. *Shear. & R. Neg. § 12.* The supreme court and this court have been required to examine, in several cases, and apply the law in regard to, alleged negligence. The law has been so fully stated in *Railroad Co. v. Liehe*, 17 Colo. 280, 29 Pac. 175; *Lord v. Refining Co.*, 12 Colo. 390, 21 Pac. 148; *Anson v. Evans*, 19

Colo. 274, 35 Pac. 47; *Holman v. Security Co.*, 20 Colo. 7, 36 Pac. 797; *Cemetery Ass'n v. Davis*, 4 Colo. App. 570, 36 Pac. 911; *Deane v. Power Co.*, 5 Colo. App. 521, 39 Pac. 346; *Railroad Co. v. Budin*, 6 Colo. App. 275, 40 Pac. 503; *Iron Co. v. Lamb*, 6 Colo. App. 255, 40 Pac. 251,—that further discussion of the law of this case seems unnecessary. The judgment of nonsuit was correct. That the court had a right to withdraw the case from the jury, and cause a judgment of nonsuit to be entered. See *Shear. & R. Neg.* § 11; *Mau v. Morse*, 3 Colo. App. 359, 33 Pac. 283; *Transit Co. v. Dwyer*, 3 Colo. App. 408, 33 Pac. 815. The judgment of the district court must be affirmed. Affirmed.

AMERICAN LEAD-PENCIL CO. et al. v. CHAMPION et al.

(Supreme Court of Kansas. Nov. 7, 1896.)

CHattel Mortgages—RECORD—RIGHTS OF SUBSEQUENT MORTGAGEE.

1. The withholding of a chattel mortgage from record may cast suspicion upon the good faith of the indebtedness which it is given to secure, but, good faith being admitted or shown, the only effect of a failure to file it for record is to render it void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, until it is filed for record, or actual possession taken under it.

2. As to a chattel mortgagee having actual notice of a prior mortgage upon the same property, it is immaterial whether the prior mortgage was recorded or not; and, where the interests of the subsequent mortgagee could not have been prejudiced by the manner in which the mortgagor was permitted to deal with the mortgaged property, such subsequent mortgagee cannot successfully attack the validity of the prior mortgage on that account.

(Syllabus by the Court.)

Error from district court, Sedgwick county; C. Reed, Judge.

Action by Mary E. Champion against Charles T. Champion and others to foreclose a chattel mortgage. The American Lead-Pencil Company and others intervened. From the judgment rendered, interveners bring error, and plaintiff and defendant Hattie C. Crozier bring cross error. Affirmed.

On and before June 6, 1890, Charles T. Champion was engaged in the wholesale and retail book and stationery business at Wichita. On that day, being indebted to the Wichita National Bank in the sum of \$6,500, evidenced by several promissory notes, he executed to said bank a collateral note for that amount, and secured the same by a chattel mortgage on his entire stock of books, stationery, fixtures, and accounts, with the understanding that the same should not be filed in the office of the register of deeds of Sedgwick county, and that its existence should not be publicly known, but should be kept a secret between the parties, and said chattel mortgage was never filed for record. From June 6 to December 4, 1890, the bank allowed Champion to keep his account with

it, and deposit the proceeds of the sale of goods, and check upon the same without any restriction, and during the same time the bank loaned him a large additional amount of money, in the aggregate sufficient to increase the original indebtedness to the sum of \$8,200; and on December 6, 1890, the bank demanded security for the whole amount, and Champion executed and delivered to the bank his collateral promissory note for that amount to cover the several original notes held by the bank, and maturing at different dates, and at the same time Champion executed to the bank a chattel mortgage on his entire stock of goods, and the shelving, fixtures, notes, and accounts, to secure said indebtedness. At that time it was agreed between the bank and Champion that the bank should have possession of said stock of goods as security under said mortgage, and that Champion should remain in possession as the agent of the bank, and should account to it for all moneys received upon the sale of goods, and that the bank should have power to place any other agent in charge, if deemed necessary. The mortgage of June 6, 1890, was delivered up to Champion. Notwithstanding said agreement, and the several demands made by the bank for a compliance therewith, Champion continued the business in substantially the same manner as before, using the proceeds of sales for the payment of the claims of commercial creditors and the expenses of the business; and on December 20th the bank made another positive demand upon Champion for the sum due, but Champion claimed that he was unable to pay the indebtedness. Champion was indebted to his mother, Mary E. Champion, in the sum of \$8,400, and to his sister, Hattie C. Crozier, about \$4,400. Mrs. Champion resided at Wichita, and Mrs. Crozier in Oklahoma. Champion informed his mother that the bank would not wait any longer upon him, and thereupon Champion proposed to give to his mother and his sister each a chattel mortgage upon the same stock to secure their claims, and this was done on December 22, 1890, Champion having telegraphed to his sister, and she having, by telegraph, employed a firm of attorneys at Wichita to protect her interests. Each of said mortgages contained the following clause: "A chattel mortgage in the amount of \$8,400 was executed on the above stock of goods to the Wichita National Bank on the — day of December, 1890." These mortgages were filed in the office of the register of deeds in Sedgwick county on the same day, within a few minutes after 12 o'clock. Frank L. Champion, a brother of Charles T. Champion, was appointed by his mother and the agent of his sister to take charge of said stock of goods under said chattel mortgages, and he did so within a few minutes after they were filed; but the store was not closed, and business was being conducted in about

the same manner as before, when, during the course of the afternoon, the bank, having filed its mortgage for record at 2:15 p. m., took the possession away from said Frank L. Champion without further resistance than a protest by him, and he left the store voluntarily, and the bank closed it up. On December 24, 1890, Mary E. Champion filed her petition against Charles T. Champion, the Wichita National Bank, and Hattie C. Crozier, to foreclose her mortgage, and to have the same declared a first lien upon said personal property, and for the appointment of a receiver to take charge of and control said property, and to sell and dispose of the same under the direction of the court; and on the same day, by consent of all the parties, M. J. Oliver was duly appointed as receiver. Many of the commercial creditors of Charles T. Champion obtained judgments against him before justices of the peace and in the district court, and were allowed to intervene and become parties to said action with a view to the protection of their interests in the proceeds obtained and collected by the receiver. The goods for the value of which they obtained judgments were all sold by them to Champion between June 6 and December 22, 1890. For the purpose of obtaining credit, Champion made statements to certain commercial agencies showing the amount of his assets, and further stating that there was no mortgage upon the same. The bank did not know that said false representations had been made, and it did not at any time attempt to mislead or deceive the creditors, unless the failure to record its mortgages had that effect. All the claims of the commercial creditors and of the several mortgagees were bona fide, as between them and Charles T. Champion. The court below awarded to the bank the first lien, to Mrs. Champion the second, and to Mrs. Crozier the third, postponing the claims of all the commercial creditors thereto, and they bring the case here for review. Mary E. Champion and Hattie C. Crozier also filed cross petitions, claiming priority over the lien of the bank.

J. V. Daugherty and Adams & Adams, for plaintiffs in error. Wall & Brooks, Fred. W. Bentley and David Smyth, for defendants in error.

MARTIN, C. J. (after stating the facts). 1. We do not feel called upon to decide whether the judgment creditors stand in a position to question the validity of the several chattel mortgages, each of which was given to secure a bona fide, although a pre-existing, debt. If they secured liens upon the fund in the hands of the receiver, certainly they were subsequent in time to the recording of the chattel mortgages. It cannot be held, as a matter of law, that the entire failure of the bank to file its mortgage of June 6, 1890, and the delay in filing that of December 6 until December 22, 1890, operated as a fraud upon creditors who

relied on the false representation of Champion that his stock was not mortgaged. The mortgage of June 6th was never operative as against creditors, and that of December 6th was void as to them until December 22, 1890, unless the bank is to be treated as having the possession of the store from December 6th until December 22d. Gen. St. 1889, par. 3903. If the commercial creditors had obtained liens on or prior to December 22d they would be in a position to question any antecedent rights claimed by the bank, but on December 22d the bank not only recorded its mortgage, but also took actual possession of the store. At that time the plaintiffs in error were only simple contract creditors of Charles T. Champion, while the bank not only held a mortgage then recorded, but actual possession under it. The withholding of a chattel mortgage from record may cast suspicion upon the good faith of the indebtedness which it is given to secure, but, good faith being admitted or shown, the only effect of a failure to file it for record is to render it void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, until it is filed for record, or actual possession taken under it. *Cameron v. Marvin*, 26 Kan. 612; *McVay v. English*, 30 Kan. 368, 371, 1 Pac. 795; *Sedgwick City Bank v. Mercantile Co.*, 45 Kan. 346, 25 Pac. 888; *Gagnon v. Brown*, 47 Kan. 83, 85, 27 Pac. 104.

2. Mary E. Champion and Hattie C. Crozier, as well as the commercial creditors, attack the validity of the mortgage to the bank on the ground that Charles T. Champion was permitted to conduct the store and dispose of the proceeds of sales in his own way, and that the recording of their mortgages and taking possession thereunder were prior in point of time to the recording of the mortgage of the bank, and the possession of the bank under the same. This claim is not tenable. They had actual knowledge of the prior mortgage, and as to them it was immaterial whether that mortgage was recorded or not, and they could not have been prejudiced in any way by the manner in which the business was conducted between Charles T. Champion and the bank. They had no lien, even as against Charles T. Champion, until December 22d, and immediately after they obtained the mortgages and had them recorded they entered upon a struggle for possession with the mortgagee having the prior claim. They acted in bad faith towards the bank, and ought not to gain any advantage thereby. The conclusions of fact are favorable to the bank, and we think that they are sufficiently supported by the evidence. The record does not show the amount realized by the receiver, but we feel satisfied that the funds in his hands will be insufficient to pay the three mortgage claims, and that nothing will be left for the commercial creditors. If any balance should remain, however, they ought to have the benefit of it. The judgment of the district court will be affirmed. All the justices concurring.

STORCH v. DEWEY.

(Supreme Court of Kansas. Nov. 7, 1896.)

MORTGAGES—ACCORD AND SATISFACTION.

Where there is a bona fide dispute between the maker and the payee of promissory notes as to the date from which interest is payable under the terms of the notes, which are ambiguous, and the maker pays the amount he admits to be due, on the express condition that the notes and mortgages securing the same shall be canceled and surrendered, and the payee accordingly receives the money and cancels and surrenders the securities, the transaction amounts to a valid accord and satisfaction of the debt, and the payee cannot thereafter maintain an action to recover the balance of interest claimed by him to be due.

(Syllabus by the Court.)

Error from district court, Riley county; B. B. Spilman, Judge.

Action by George Storch against Albert B. Dewey. From a judgment for defendant, plaintiff brings error. Affirmed.

This action was brought by George Storch against A. B. Dewey to recover a balance claimed by him to be due on two promissory notes executed by the defendant. One of the notes reads as follows: "\$9,213.30. Atchison, Kansas, September 24, 1887. One year after date, for value received, I promise to pay to George Storch or order nine thousand two hundred and thirteen and $\frac{10}{100}$ dollars, at the United States National Bank, with interest from maturity at the rate of ten per cent. per annum. It is expressly understood that this note is to be paid only when patents for all the lands described in said mortgage appear on record in the county where situated. Albert B. Dewey." The other note was for \$3,500, and in all other respects in precisely the same form as the larger note. It is alleged in the petition that on the 22d day of January, 1891, the defendant paid on said first note \$9,278.83, and that on the 24th of February, 1891, he paid \$3,500 on the second note; that the defendant refused to pay anything unless the plaintiff would give up said notes and all security for their payment, which the plaintiff was compelled to do; and that the notes were at the time of filing the petition in the hands of the defendant. The defendant's answer is very long. It admits the execution of the notes set out in the plaintiff's petition, and alleges, among other things, that mortgages were executed at the same time on lands in Riley county to secure the larger note, and on lands in Geary county to secure the smaller one; that these lands were purchased by the defendant from the plaintiff, and the notes executed in part consideration therefor; that at the time the payment mentioned in the petition was made the plaintiff claimed that there was interest due on the notes, which the defendant denied, and that the sums paid, which included \$66.53 of interest, were the sums finally settled and agreed upon by the parties as the amounts due on the notes; and that they were paid and received in full satisfaction of them. It appeared on the trial that

the patent for the land in Riley county was filed for record on December 26, 1890; and for the land in Geary county, February 18, 1891. The case was tried to a jury, and a general verdict was rendered in favor of the defendant. In answer to special questions the jury found that on January 22, 1891, the time the payment was made on the larger note, there was \$11,357.64 due on the note, and that at the time the payment was made on the smaller note \$4,345.63 was due on it. They also found that there was a bona fide dispute between the plaintiff and the defendant concerning the amount due, that there was a full settlement and accord between the parties, and that the sums paid were paid and received in full satisfaction of the amounts due on the notes. They also found that the amount paid was the amount admitted by the defendant to be due. The plaintiff moved for a judgment in his favor on the special findings, and also for a new trial. Both of these motions were overruled, and judgment entered in favor of the defendant. The plaintiff brings the case here.

Tufts & Crowell, for plaintiff in error. John E. Hessin, for defendant in error.

ALLEN, J. (after stating the facts). Numerous errors are assigned on the record, but the view we take of the case renders it unnecessary to discuss them in detail. Counsel for the plaintiff in error strenuously insists that there could not be a bona fide contest as to the amount due on the notes. That there was a dispute between himself and the maker of the note concerning the date from which interest should be computed at the time the first payment was made is conceded, but his contention is that the claim made by the defendant was not urged in good faith, and was utterly without foundation. There is no dispute as to the fact that the patent for the lands in Riley county was not filed until December 26, 1890. The terms of the note are a promise to pay in one year, with interest from maturity at the rate of 10 per cent., followed by the restriction that the note is to be paid only when patents for the lands described in the mortgage appear on record in the county where situated. It does not seem to be seriously contended that the defendant was bound to pay the notes until the patents were recorded, but it is insisted that interest commenced to run at the expiration of a year from the date of the note. There was ample room for an honest disagreement as to the proper construction of the note. Indeed, we are not prepared to say that the plaintiff's construction of the instrument itself is the correct one. But whether it is or not we do not decide, for it is sufficient to defeat his claim that there was in fact a bona fide dispute between the parties; that an agreement was finally reached as to the amount to be paid in full satisfaction of the plaintiff's claim, and payment made accordingly. That this was the case

appears to us clearly from the plaintiff's own evidence, and from the written receipts indorsed on both notes and mortgages. It is alleged in the petition that the payments were made, and that the securities were delivered to the defendant. It is true that under the authorities cited on behalf of the plaintiff in error a receipt purporting to be in full of the plaintiff's demand may be contradicted by oral testimony showing either that the payment was not in fact made, or that the amount was inadequate to discharge the debt, but this is not such a case. There is no dispute with reference to the amount actually paid. Nor was there any misunderstanding by either party as to the terms of the notes. The only dispute was as to the legal construction of the notes, and the extent of the defendant's liability. The rule that the payment of a less sum than that actually due is not a valid accord and satisfaction only applies when the claim settled is liquidated and undisputed. And where the debtor offers to pay the principal of a note, and in good faith denies his liability to pay interest, if the creditor accepts the offer and surrenders the note it is an accord and satisfaction, and he cannot thereafter maintain an action to recover the interest. *Tuttle v. Tuttle*, 12 Metc. (Mass.) 551; *McGlynn v. Billings*, 16 Vt. 323; *McDaniels v. Lapham*, 21 Vt. 222; *Palmerston v. Huxford*, 4 Denio, 166; 1 Am. & Eng. Enc. Law (2d Ed.) 415. It being clear that the plaintiff cannot recover under the conceded facts of the case, the technical questions arising on the pleadings and the introduction of testimony are without substance, even though it should appear that in some particulars the rulings of the court were erroneous. The judgment is affirmed. All the justices concurring.

ROHR v. ALEXANDER.

(Supreme Court of Kansas. Nov. 7, 1896.)

DEED — PRESUMPTION OF DELIVERY — EVIDENCE.

1. The possession by a grantee of a deed purporting to convey real estate, duly executed and acknowledged, and which is absolute in form, is prima facie evidence of a delivery, which can be overthrown only by clear and convincing evidence.

2. When a deed so executed is placed in the hands of the grantee without condition or restriction, the presumption arising from such possession will not be overcome by a statement of the grantor, made some time before the execution of the deed, expressing a purpose to make a deed to the grantee which in a certain contingency could be returned and destroyed, nor by the fact that the deed remained unrecorded for several weeks, and until after the death of the grantor.

3. The testimony examined, and held to be sufficient to sustain a finding that the delivery of the deed in controversy was complete, and that it effectually transferred the title to the land described therein.

(Syllabus by the Court.)

Error from district court, Stafford county; J. H. Bailey, Judge.

Ejectment by Maria Rohr against Honrath Alexander. From a judgment for defendant, plaintiff brings error. Affirmed.

Hardy Sayre, for plaintiff in error. Moseley & Dixon, for defendant in error.

JOHNSTON, J. This was an action by Maria Rohr to recover from Honrath Alexander real estate situate in Stafford county. Prior to January 11, 1892, it was owned by Henry Rohr, and on the day mentioned he signed and acknowledged an ordinary warranty deed purporting to convey the land to Alexander. Rohr and Alexander had been partners in business, were intimate friends, and had roomed together. Rohr had been ill for some time, and had received attention from Alexander. He was not confined to his bed, but was advised by his physician to go to California for the benefit of his health. On the day before the execution of the deed he stated to William Dixon, who afterwards prepared it, that he desired to dispose of his property before going to California, and that he had concluded to convey it to Alexander by deed. In the instrument of conveyance executed on the following day the consideration named is \$17,000, but what, if any, consideration was actually paid is not shown by the record. He went to California, and died there in the latter part of the same month, leaving neither wife nor issue. Maria Rohr, who brought this action to recover the property, was the mother of Henry, and is the sole heir at law of the deceased. Her claim is that the deed signed and acknowledged by Henry was never in fact delivered, and, further, that the instrument of conveyance was testamentary in character, and, not having been executed with the formalities required in a will, was void and transferred no interest to Alexander. The deed, however, is in the usual form, and no words of a testamentary character are contained in it. There is no testimony that Rohr intended to make a will at the time the deed was executed, nor did he give any directions indicating that he desired to have it delivered as a will. The evidence as to his purposes in the transaction is very meager, and the contention that the deed was not intended to convey a present interest rests only upon the testimony of William Dixon, who prepared the deed, and before whom it was acknowledged. Some time before Dixon was asked to prepare the deed, he had a talk with Rohr in relation to the property, and Rohr then told him "that he would make the deed and give it to Alexander, and if he recovered his health the deed could be returned and destroyed." When Dixon was subsequently called upon to make the deed, he was told by Rohr that he wanted to give the property to Mr. Alexander, and to proceed, and execute the deed to him for that property. After the deed was prepared, and on the following day, Rohr delivered it to Alexander, in the presence of Dixon, saying, "Put it away for safe-

keeping." He did not say that the deed was to be kept for him, nor that it was to be afterwards returned to him. No conditions were then mentioned, nor anything said, indicating a purpose to retain control and dominion of the instrument after it was handed to Alexander. The statement that he would make a deed, and that if he recovered his health it could be returned and destroyed, was made some time previous to January 10th, but just how long before, or under what circumstances, does not appear. Nothing was said about the return or destruction of the deed when he came to make it, nor when it was delivered. Alexander was not present when he spoke of the return or destruction of the deed, and what negotiations were subsequently had between them is not disclosed. Although there was but little testimony as to the transfer, we think it is sufficient to sustain the decision of the trial court that the delivery was complete and the deed effective. The instrument was absolute in form,—just such a one as is used to pass a present interest,—and the placing of it in the hands of the grantee indicates that Rohr intended to divest himself of title. Of course, a delivery is essential, but the mere possession of the instrument by the grantee is prima facie evidence of delivery, which can be overthrown only by clear and convincing evidence. *Johnston v. Winfield Town Co.*, 14 Kan. 306; *Richmond v. Morford*, 4 Wash. 337, 30 Pac. 241, and 31 Pac. 513; *Devl. Deeds*, § 294. The possession of the deed being prima facie evidence of its delivery, the burden is thrown upon a party who questions the delivery. The presumption arising from the possession is not overcome by the statements made by Rohr prior to the making of the deed, nor by the fact that it remained unrecorded until after his death. *McFall v. McFall*, 136 Ind. 632, 36 N. E. 517; *Blair v. Howell*, 68 Iowa, 619, 28 N. W. 199. The deed itself furnishes some evidence that a consideration was paid, but outside of the instrument there is some testimony tending to show an actual transfer of title, and an unconditional delivery of the deed. It remained in the possession of Alexander at all times after the delivery. Rohr never asked for a return of the deed, and there is nothing to indicate that he desired that it should be recalled. As the case comes here, it must be held that there is testimony sustaining the finding of the court, and therefore its judgment must be affirmed. All the justices concurring.

JOHNSON v. JOHNSON.

(Supreme Court of Kansas. Nov. 7, 1896.)

DIVORCE—JURISDICTION—RESIDENCE—ALIMONY—COSTS.

1. A wife who, with her husband, is domiciled in another state, has a right to move into this state, and can acquire a residence here independent of the will of her husband, and after a residence of one year may under our statutes maintain an action for a divorce against her husband; and where he appears and successful-

ly contests her right to a divorce, the jurisdiction of the court is not divested when it is determined that she left her husband without just cause, but the court may still proceed to render such final judgment in the action as is authorized by the laws of this state.

2. Where, in an action brought by a wife against her husband to obtain a divorce and alimony, the court finds that she is not entitled to a divorce, it is error to allow the wife permanent alimony in the form of a quarterly allowance for the support of herself and minor child. In such a case, and where the husband appears and contests the wife's right to a divorce, the power of the court over the property of the parties is limited to that owned by them at the time the judgment is rendered, and as to such property it may make an order for the equitable division and disposition of it between them.

3. In such an action, where the wife asks for a divorce, and the husband merely defends, without asking for any relief against her, it is error for the court, as a part of the final judgment, to tax the defendant with a sum as attorney's fees for the plaintiff's attorneys and costs of suit.

Martin, C. J., dissenting as to judgment for costs.

(Syllabus by the Court.)

Error from district court, Bourbon county; J. S. West, Judge.

Action by E. H. Johnson against W. H. Johnson for divorce. From so much of the judgment as grants plaintiff alimony, attorney's fees, and costs, defendant brings error. Reversed.

W. C. Perry, for plaintiff in error. J. D. Hill and W. R. Biddle, for defendant in error.

ALLEN, J. This was an action for divorce and alimony brought by E. H. Johnson, who claimed to be a resident of Bourbon county, Kan., against her husband, who resided in Zanesville, Ohio. The petition is quite long, and the only ground relied on for a divorce was cruelty. The defendant answered, denying generally and specifically the charges set out in the petition, and averring misconduct of the plaintiff. The pleadings show that the parties were married at Ft. Scott, Kan., on the 15th of October, 1885; that immediately thereafter they went to Zanesville, Ohio, where they resided together until the 24th of December, 1887, when the plaintiff returned to Ft. Scott, her former home, where she has resided ever since. As the result of the trial, the court found: "First. That the defendant has not been guilty of extreme cruelty towards the plaintiff, as charged and alleged in the petition; and all the issues herein as to divorce are found for the defendant. Second. That the plaintiff is not entitled to a decree of divorce from the defendant. Third. That the plaintiff is entitled to additional alimony and an additional amount for attorney's fees, and that the defendant should pay the costs of this action. Fourth. That the plaintiff is entitled to the care, custody, and control of the minor child, Lucas Havens Johnson, as hereinafter provided, until the further order of the court or judge." Thereupon the court rendered judgment denying the plaintiff a divorce, but allowing her \$300 for attorney's fees and for the support of herself and her child, \$100 to be paid by the 1st of April, 1892, and \$125 on the 1st day of every third month thereafter until

otherwise ordered by the court. The custody of the child was also awarded to the plaintiff, with provision for visitations by the father. Judgment was also entered against the defendant for costs. The defendant alleges error in rendering judgment against him for alimony, attorney's fees, and costs, after having determined the main issue in his favor. His counsel argues that, having found against the plaintiff as to the facts on which a divorce was claimed, it being shown and admitted that the parties had been domiciled in Ohio, where the defendant still resides, the court was without jurisdiction to do more than dismiss the action; that the domicile of the wife follows that of the husband, except when she separates from him for some just and sufficient cause; that the wife must submit to the will of the husband as to their place of residence, unless he affords her just cause for separation. By section 640 of the Code of Civil Procedure it is provided that the plaintiff in an action for divorce must have been an actual resident of this state for one year before filing the petition. Section 651 reads: "A wife who resides in this state at the time of applying for a divorce, shall be deemed a resident of this state, though her husband resides elsewhere." Whatever the rule may be in jurisdictions where there is no such statute, the section quoted gives to a wife the right to acquire a residence in this state for the purpose of bringing a suit for divorce, independent of the will of her husband. The defendant having answered, the court was invested with full jurisdiction to determine all questions that might be properly adjudicated in an action for divorce.

On the merits of the case the finding of the court was against the plaintiff,—that she had no ground for divorce. Section 649 of the Code of Civil Procedure provides that the wife may obtain alimony from the husband for any of the causes for which a divorce may be granted. Section 646 makes provision for the allowance of alimony where the divorce is granted, and also for the disposition of the property of the parties in such cases. Section 643 reads: "When the parties appear to be in equal wrong, the court may in its discretion refuse to grant a divorce, and in any such case, or in any other case where a divorce is refused, the court may for good cause shown make such order as may be proper for the custody, maintenance, and education of the children, and for the control and equitable division and disposition of the property of the parties, or of either of them, as may be proper, equitable and just, having due regard to the time and manner of acquiring such property, whether the title thereto be in either or both of said parties." There can be no doubt that under this section the court had full jurisdiction to make all necessary and proper orders for the custody and care of the minor child, which was born, and had always lived, in Kansas. Had the court power to decree to the plaintiff \$125 every three months as permanent alimony for the support of her-

self and child, and to further adjudge against the defendant the payment of \$300 as fees for plaintiff's attorneys and costs of the suit? In *Van Brunt v. Van Brunt*, 52 Kan. 380, 34 Pac. 1117, where it appeared that the parties had been married for many years, and had accumulated a considerable amount of property, the title to nearly all of which was vested in the wife, that the parties were in equal wrong, and a divorce was refused, an order dividing the property, and awarding judgment in favor of the husband for \$1,000 out of the property held by the wife, was affirmed by this court, the decision being rested on the section of the statute last quoted. See, also, *In re Johnston*, 54 Kan. 726, 39 Pac. 725. In this case a divorce was refused because no ground existed for a divorce. If the action had been brought under section 649 for alimony, the plaintiff must have failed for the same reason that she failed to obtain a divorce. May the court, then, under the guise of dividing the property of the parties as authorized by section 643, in fact grant permanent alimony payable at stated intervals, not merely out of any property now possessed by the husband, but out of any he may hereafter acquire by his own efforts, unaided by the co-operation of his wife, and to an amount which in the course of a few years will far exceed the value of the property he now owns? It appears from the opinion delivered by the judge trying the case, and incorporated in the record, that the whole property of the defendant was worth \$1,500 to \$1,800. Three hundred dollars were awarded the plaintiff for her attorneys, and \$500 a year for the support of herself and child. In three years this allowance would have taken the whole of the defendant's property, at the highest valuation stated, and would leave him still liable to a charge of \$500 a year. It therefore cannot be said that the judgment rendered is in substance merely a division of the property owned by the parties at the time the decree was rendered. It is strictly and technically a decree for alimony, coupled in gross with a provision for the maintenance of the minor child. The distinction between an allowance of alimony and a division of property is discussed at length, and clearly recognized, in the case of *Bacon v. Bacon*, 43 Wis. 197. In 2 Am. & Eng. Enc. Law, p. 92, alimony is thus defined: "Alimony is an allowance which, by order of court, the husband, or former husband, is compelled to pay to his wife, or former wife, from whom he has been legally separated or divorced, for her support and maintenance." The foundation for its allowance is the duty of the husband to provide for the wife's support, and where a divorce or separation occurs because of his fault, the duty of providing for her maintenance continues, and the court by an allowance of alimony compels its performance. A division of the property of the parties is an essentially different thing. No

matter which party may be at fault, nor what the decision of the court on the merits of an application for a divorce, the court may for good cause make an equitable division and disposition of the property of the parties. In doing this the power of the court extends only over the property of the parties owned by them at the time the order is made. It cannot reach into the future, and bind subsequent earnings or accumulations of either party. The order in this case, being strictly in the nature of an allowance for alimony, and made in a case where the court finds that no sufficient ground for such an order exists, is erroneous.

The court also erred in requiring payment by the defendant of \$300 as fees for plaintiff's attorneys and costs of the suit. Section 644 of the Code of Civil Procedure authorizes the court, during the pendency of the suit, to make such order relative to the expenses of the suit as will insure the wife an efficient preparation of her case, and on granting a divorce in favor of the wife, or refusing one on the application of the husband, the court may require the husband to pay such reasonable expenses of the wife in the prosecution or defense of the action as may be just and proper, considering the respective parties, and the means and property of each. Neither of the contingencies named in the statute existed in this case. The wife had been refused a divorce, which she applied for. The husband had not asked for a divorce. The wife had not been compelled to employ counsel, or incur expenses in resisting any application of the husband for a judgment against her. The whole trial was had on charges made by the wife against the husband, which the court found unsubstantial and insufficient to warrant a divorce. Under these circumstances, it was error to adjudge attorney's fees and costs against the defendant as a part of the final judgment in the case. *Wagner v. Wagner*, 34 Minn. 441, 28 N. W. 450; 2 Bish. Mar. & Div. § 416; *Newman v. Newman*, 69 Ill. 167; *Wilde v. Wilde*, 2 Nev. 306. The court had power in this case to make a proper order for the support of the child of the parties. It also had power to make an order for the equitable disposition of the property of the parties, but it erred in awarding permanent alimony to the plaintiff, and also in adjudging attorney's fees and costs against the defendant. The judgment is therefore reversed, and the case remanded for such further proceedings as are consistent with the views herein expressed.

JOHNSTON, J., concurs.

MARTIN, C. J. (dissenting as to judgment for costs). Under section 591 of the Civil Code, the awarding of costs in this case was within the discretion of the trial court, and, no abuse of discretion being apparent, I think the judgment as to costs ought not to be disturbed.

ARENDS et al. v. CITY OF KANSAS CITY et al.

(Supreme Court of Kansas. Nov. 7, 1896.)

MANDAMUS—MUNICIPAL CORPORATIONS.—SPECIAL ASSESSMENTS.

1. Courts are not bound to award writs of mandamus where there is another plain and adequate remedy in the ordinary course of law.

2. An owner against whose city property a special assessment was irregularly made for the grading of a street failed to avail himself of the statutory remedy provided for such cases, and made no objection for more than two years after an objection might have been made, nor until after a large part of the assessments had been paid, when he made a demand for a reapportionment of the entire cost of the improvement, and asked for a mandamus to compel the same. *Held*, that he was not entitled to the writ.

(Syllabus by the Court.)

Error from district court, Wyandotte county; Henry L. Alden, Judge.

Petition by E. A. Arends and others against the city of Kansas City and others for mandamus. From a judgment denying the writ, petitioners bring error. Affirmed.

W. S. Carroll, for plaintiffs in error. K. F. Snyder and T. A. Pollock, for defendants in error.

JOHNSTON, J. This was an application for a writ of mandamus to compel the municipal authorities of Kansas City to reapportion the cost of grading a part of Washington avenue. A petition for the improvement was presented to the mayor and council in July, 1888. In the following month the petition was granted, and an ordinance passed, directing that the improvement be made. Estimates of the work were made, the contract let to the lowest responsible bidder, and the grading was done. The property subject to assessment was appraised by three disinterested appraisers, and a time was fixed for hearing the complaints of property owners, and due notice of the hearing was given. In September, 1889, an apportionment was made, and a special assessment was charged to the various lots abutting on the street, which was regular in every respect except that each block was made a taxing district, instead of assessing the cost of the improvement against the abutting lots on the part of the street that was improved. Although the petition for the grading was filed July 6, 1888, and notice given that the assessment must be paid on or before the 28th day of October, 1889, no complaint was made nor proceeding instituted until October 21, 1891. In compliance with the notice given to the property owners in 1889, a large number of them paid the amounts of the assessments in full, and the remaining property owners have, with few exceptions, paid annual assessments, and continued to pay them until the commencement of this proceeding. Only a part of the property owners asked for a reapportionment of the cost of the grading, and they have not availed themselves of the remedies pointed out by the statute where

special assessments are informally or illegally made. *Laws 1887, c. 101, § 1; Wahlgren v. Kansas City, 42 Kan. 248, 21 Pac. 1068.* The laches of the parties in seeking a remedy, and the complications which would necessarily arise from a reapportionment so long a time after the improvement was made and largely paid for, were sufficient reasons for the ruling of the district court in denying the writ. The court, being vested with some discretion, will not issue a writ of mandamus except where it seems to be necessary and proper to accomplish the ends of justice; and where the statute provides a plain and adequate remedy in the ordinary course of the law the writ will not be awarded. *Simpson v. Kansas City, 52 Kan. 88, 34 Pac. 406.* We think the district court ruled correctly, and its judgment will therefore be affirmed. All the justices concurring.

SHERMAN COUNTY BANK v. McDONALD et al.

(Supreme Court of Kansas. Nov. 7, 1896.)

FRAUDULENT CONVEYANCE—ACTS AND DECLARATIONS OF GRANTOR—PARTICIPATION OF GRANTEE—EVIDENCE.

1. *Held*, that the evidence supports the findings in this case.

2. On the trial of the question as to the validity of a mortgage claimed to be fraudulent as to the creditors of the mortgagor, fraudulent acts and declarations of the mortgagor made contemporaneously with, or prior to, the execution of the mortgage may be shown. The fraudulent purpose of the mortgagor being shown by competent evidence, knowledge of or participation in his fraud by the mortgagee may then be proven by any competent evidence, and it is not necessary to show that the mortgagee had notice of each particular fraudulent act or attempt of the mortgagor.

(Syllabus by the Court.)

Error from district court, Sherman county; Charles W. Smith, Judge.

Replevin by R. L. McDonald & Co. against W. B. Swisher. An interpleader was filed by the Sherman County Bank, and from a judgment for plaintiffs the interpleader brings error. Affirmed.

Solomon & Bland, for plaintiff in error. A. H. Ellis and F. T. Burnham, for defendants in error.

ALLEN, J. The questions presented to this court arise from the trial of an interplea filed by the plaintiff in error in an action brought by R. L. McDonald & Co. against W. B. Swisher, coroner of Sherman county, to recover a stock of merchandise theretofore owned by W. H. Daly. The Sherman County Bank claimed the property under a chattel mortgage executed to it by Daly. Questions with reference to the validity of the chattel mortgage under which McDonald claimed were decided in the case of *McDonald v. Swisher, 57 Kan. 205, 45 Pac. 593.* It was claimed by Swisher, the coroner, representing attaching creditors, that the mortgage to the bank was fraudulent. The court so held

on the evidence. The principal contention on the part of the plaintiff in error is that the finding that the mortgage to the bank was fraudulent is not supported by the evidence. On reading it, we find sufficient evidence to support the finding of the court.

Complaint is made of several rulings with reference to the introduction of testimony. We find no substantial error in any of them. Certain witnesses were permitted to testify to conversations had with Daly in the absence of all the representatives of the bank, and of which it does not appear that the bank, or any person connected with it, had any knowledge. It is claimed that these conversations were inadmissible, under these circumstances, but we hold otherwise. In showing the invalidity of the bank's mortgage, it was necessary—First, to prove Daly's fraudulent purpose; second, either that the bank actually participated in the fraud, or had knowledge of it, or of such circumstances as would put a reasonable man on inquiry concerning it; third, that by taking the mortgage the bank aided him in carrying out his fraudulent design. Daly's fraud could be shown by his acts and declarations made at the time of, or prior to, the execution of the mortgage. Knowledge of Daly's fraudulent purpose by the officers of the bank might then be shown by any competent evidence. There was no necessity of proving knowledge of each particular step taken by Daly in the accomplishment of his design. It was sufficient if the bank knew by any means that his purpose was to defraud his creditors, and that they, in taking the mortgage, attempted to aid him in its accomplishment. The testimony of A. H. Ellis as to the statements made by Daly after the execution of the mortgage, and which were in the nature of admissions, were improperly admitted; but the error does not seem important, and is insufficient to warrant a reversal. The fact sought to be established by this testimony was abundantly shown by other evidence in the case, and does not seem to have been disputed. The judgment is affirmed. All the justices concurring.

KINCHLOW v. MIDLAND ELEVATOR CO.

(Supreme Court of Kansas. Nov. 7, 1896.)

NEGLIGENCE—DANGEROUS PREMISES—PROVINCE OF JURY.

Where an owner of premises has reason to apprehend danger from the peculiar situation and condition of certain of their appurtenances and their openness to accident, the question whether he has exercised due care or not, as well as that of the contributory negligence of a person injured thereon, becomes one for the jury, to be determined upon all the facts and circumstances of the case.

(Syllabus by the Court.)

Error from court of common pleas, Wyandotte county; T. P. Anderson, Judge.

Action by Asa E. Kinchlow, by John Kinchlow, his father, and next friend, against the Midland Elevator Company. From a judg-

ment for defendant, plaintiff brings error. Reversed.

Dall & Bird, for plaintiff in error. Meservey, Pierce & German and Morse & Morse, for defendant in error.

MARTIN, C. J. On January 5, 1892, the plaintiff, a boy 10 years of age, was scalded and badly injured by falling into a barrel partly full of hot water, formed by the exhaust steam from the engine used as a motive power for the defendant's elevator at Kansas City, Kan. On January 18, 1892, he commenced his action to recover damages in the sum of \$15,000 on account of said injury. The defense was a general denial, and a plea of contributory negligence, which latter was put in issue by the reply of the plaintiff. The case was called for trial on June 14, 1892, and the plaintiff introduced his evidence, to which the defendant demurred, and the demurrer was sustained, and the jury discharged. The plaintiff's motion for a new trial was overruled October 15, 1892. Exceptions were duly taken to the rulings of the court, and the case is now here for review.

The evidence tended to show the following facts: The elevator company occupies a strip of ground about a quarter of a mile in length east and west and about 60 feet in width north and south. There are railroad tracks on each side of the elevator, and the engine house and the office are separate buildings, varying in distance from about 35 to 75 feet from the east end of the elevator. A boxed-in shaft, about three feet from the ground, transmits the power from the engine to the elevator, crossing the vacant space between the buildings. The exhaust-steam barrel was sunk in the ground, so that its top was level with the surface, and close to the elevator. The pipe led into the barrel just beneath the top, and the only covering of this barrel was either the original heading or something of the same shape and character, which lay loose on the top. On each corner of the elevator building a sign was nailed, about 14 feet from the ground, with the words: "Danger. Keep Away." There was no guard or railing about the barrel, and no special warning of danger in reference to it. There was more or less passing of employes and others from the elevator to the engine house and the office, and some persons crossed the ground north and south, stooping to go under the boxed-in power shaft. There was no well-defined path north and south, but there was no obstruction in that respect except the shaft and its boxing. The neighborhood of the elevator was dangerous on account of the frequent movement of cars on either side. The plaintiff had been making his home for a week or two with John McQuillan, who, for a consideration paid by him to the elevator company, had the privilege of sweeping out the grain cars after they had been unloaded, and obtaining the grain procured from the sweepings. The

work was done mostly by two or three boys employed by McQuillan, including the plaintiff, who worked for his board. The sweeping was done mostly east of the elevator on both sides, and opposite the vacant space between it and the engine house and the office. The plaintiff and the other boys were forbidden by McQuillan to go into the office and the engine house, but were not warned about the exhaust-steam barrel, and the plaintiff never noticed it until the day of his injury. He and Walter Freeman, another boy, had been sweeping cars all day, and McQuillan had gone to his house for a lantern, because it was necessary to continue work after dark. They got through with a car on the north side, and were next to work on the south side, and McQuillan told them to remain until he came back. The day was cold, and shortly after he left, a little girl about eight years old told the plaintiff that the barrel was a good place to warm his feet. He noticed a little steam coming out of the top of the barrel, and he and Walter Freeman went towards it, the little girl going away. The plaintiff stepped upon the cover, which tipped up, and he fell into the barrel with both feet. Walter Freeman helped him out, and they went to McQuillan's house. The plaintiff was so badly scalded that the skin nearly all came off both legs from the knees to the ankles, as also some of the flesh. He was afterwards taken to a hospital, where the process of skin grafting was commenced, but at the time of the trial only partial progress had been made, and he was unable to stand on his feet, and he will always be at least partially disabled.

If in the foregoing there was any evidence from which a jury would have a right to infer negligence of the defendant towards the plaintiff in maintaining the steam-exhaust barrel in that particular place and condition, then the case ought to have been submitted to the jury, unless contributory negligence of the plaintiff was also conclusively shown thereby. *Railway Co. v. Rollins*, 5 Kan. 167, 181; *Caulkins v. Mathews*, Id. 191; *Railway Co. v. Richardson*, 47 Kan. 517, 519, 28 Pac. 183. The maxim, "*Sic utere tuo, ut alienum non lædas*," has been applied in a great variety of cases, and persons and corporations have often been held liable for the use or exposure of their own property in such manner as to produce injury to the person or property of another. The exposure of dangerous implements or machinery unguarded and in such a position as to be attractive to trespassing children has frequently been the sole ground of liability for injuries to them. To this class belong the cases of *Railway Co. v. Fitzsimmons*, 22 Kan. 686; *Railway Co. v. Dunden*, 37 Kan. 1, 14 Pac. 501; and *Osage City v. Larkin*, 40 Kan. 206, 19 Pac. 658. Another class of cases, more nearly allied to the present one, is where traps or pitfalls are maintained on one's premises unguarded, and in such position that others are liable to be in-

jured thereby, as in *Penso v. McCormick*, 125 Ind. 116, 25 N. E. 156; *Bennett v. Railroad Co.*, 102 U. S. 577; *Bransom v. Labrot*, 81 Ky. 638; *Hydraulic Works Co. v. Orr*, 83 Pa. St. 332; *Schilling v. Abernethy*, 112 Pa. St. 437, 3 Atl. 792; and *Railway Co. v. McDonald*, 152 U. S. 262, 14 Sup. Ct. 619. In the case last cited a boy was injured by running into a slack pit, not apparently dangerous on its surface, but composed of live embers underneath, and the statute of Colorado required such places to be fenced; but the court, through Justice Harlan, delivering its opinion, discussed the general ground of liability in such cases without regard to any statute; and we are led to believe that the judgment in favor of the boy would have been affirmed even had there been no statutory duty imposed upon the railway company. In the case of *Hydraulic Works Co. v. Orr*, supra, the court thus lays down the rule: "While it is true, in general, that where no duty is owed no liability arises, this rule varies with circumstances, and where, therefore, an owner has reason to apprehend danger from the peculiar situation of his property and its openness to accident, the question of duty then becomes one for a jury, to be determined upon all its facts of the probability of danger and the grossness of the act of imputed negligence." In the foregoing cases the plaintiffs were either trespassers, or had no more right to be where they were than the plaintiff in this case had to be at the barrel. The plaintiff was employed by the licensee of the defendant, and he had the same right as his employer to be on the premises while engaged at his work. *Powers v. Harlow*, 53 Mich. 507, 19 N. W. 257. The defendant should have known that McQuillan employed boys to assist in sweeping the cars, for they had been so engaged for months past. In *Powers v. Harlow*, supra, it was held that: "A license to come upon one's premises, especially if in the licensor's interest, imposes upon him the duty to warn those who come of any danger in coming of which he knows or ought to know and they do not." The barrel had two elements of attractiveness in the winter time, namely, the issuing steam and the heat. And with its defective head or cover level with the surface of the ground and ready to fall upon being touched, it was in the nature of a trap or pitfall. The cases cited by counsel for defendant are not inconsistent with the foregoing. In *Car Co. v. Cooper*, 60 Ark. 545, 31 S. W. 154, it was held that, in an action by a child against the owner of land for injuries received by walking into a pool of hot water and being scalded, the jury should be directed in determining defendant's liability to consider whether the condition and situation of the pool were such that defendant, as a reasonable man, ought to have known that children of the age of plaintiff would probably be attracted to it, and would receive such injuries as plaintiff did receive. The judgment was reversed on account of misdirection to the jury. In *Schmidt v. Distilling*

Co., 90 Mo. 284, 1 S. W. 865, and 2 S. W. 417, there was no averment showing that the place where the child lost her life was attractive to children, or that, to the knowledge of the defendant, children were in the habit of resorting to it for amusement or otherwise, and on a rehearing the case was remanded for another trial so as to allow such amendments to be made. In the case under consideration averments were made fully covering these points, and it was further alleged that this barrel as maintained was a dangerous trap. In *Birge v. Gardner*, 19 Conn. 507, a recovery by the plaintiff was sustained. In *Witte v. Stifel*, 126 Mo. 295, 28 S. W. 891, a recovery by the plaintiff was reversed, but it was a case so unlike the present one that we need not further consider it. We think it ought to have been submitted as a question of fact for the jury to determine upon the evidence whether the defendant was guilty of negligence or not in placing the barrel in that position, and in maintaining it with such an insecure cover; and also whether or not, considering the age and capabilities of the plaintiff, he was guilty of contributory negligence in stepping upon the cover. The judgment will be reversed, and the cause remanded for a new trial. All the justices concurring.

ROHRBAUGH v. HAMBLIN et al.

(Supreme Court of Kansas. Nov. 7, 1896.)

BREACH OF COVENANT—LIABILITY OF HEIRS.

1. H. bound himself by a covenant of warranty in a deed for certain real estate. He died testate, leaving all his property to the defendants. Six years after final settlement and distribution of the estate and the discharge of the personal representative, there was a breach of said covenant by eviction of the plaintiff. *Held*, that relief may be afforded him by a suit in equity in the district court directly against the defendants to compel them to refund that which in good conscience they ought not to retain.

2. Although, by the common law of England, heirs are not bound by a covenant of warranty of their ancestor unless expressly named therein, and then only to the extent of the assets received by descent, yet in this state, when, after all the assets have been converted into money, and distributed to the heirs, an obligation of the ancestor matures, such heirs may be compelled to refund to the claimant so much of what they have received as shall be sufficient to satisfy the obligation.

(Syllabus by the Court.)

Error from court of appeals, Southern department, Eastern division.

The original action was commenced in the district court of Franklin county by Rohrbaugh to recover damages for a breach of the covenant of warranty contained in a deed of real estate executed by George W. Hamblin and wife December 13, 1879. George W. Hamblin died testate, leaving all his property to the defendants as his legatees. The covenant of warranty reads as follows: "And the said George W. Hamblin does hereby covenant and agree that * * * he will warrant and defend the same in the quiet and peaceable possession of the

said party of the second part, his heirs and assigns forever, against all persons lawfully claiming the same.' The death of George W. Hamblin occurred September 18, 18-2, and his estate of \$22,469.10 was fully settled in a court of competent jurisdiction on January 18, 1884, and distributed in accordance with the will. Although said Hamblin was in possession of said real estate, and delivered the same to his grantee, yet he had no title thereto, and the plaintiff was evicted therefrom in 1890, at the suit of the city of Ottawa. 42 Kan. 253, 21 Pac. 1061. It was agreed that, if the plaintiff was entitled to recover, the amount of the judgment should be \$250, with interest, which at the time of the decision amounted to \$25. The case was tried before Hon. Sperry Baker, judge pro tem., and judgment was rendered in favor of the plaintiff for \$275 and costs. This judgment was reversed by the court of appeals (3 Kan. App. 131, 42 Pac. 834), and the case comes here on discretionary certification. Reversed.

C. A. Smart, for plaintiff in error. F. A. Waddle, for defendants in error.

MARTIN, C. J. (after stating the facts as above). 1. The court of appeals in effect held that the remedy provided by sections 171 and 172 of the executors' and administrators' act (paragraphs 2957, 2958, Gen. St. 1889), relating to the refunding of legacies and distributions, is exclusive, and that no action having this purpose in view can be maintained in the district court. Referring to those sections as affording a remedy, the court says: "We apprehend that, if a proper showing had been made in this case, it would have been the duty of the court to appoint an executor or administrator de bonis non, and he, under the direction of the court, would have proceeded, after the allowance of the claim, to procure assets sufficient to pay said claim." We do not think the plaintiff was required to pursue this circuitous remedy, if, indeed, an administrator de bonis non can be legally appointed after all the property has been distributed and the personal representative discharged. Final settlement had been made six years before there was a breach of the covenant of warranty, and under such circumstances we hold that relief may be afforded in equity directly against the beneficiaries of the estate to compel them to refund that which in good conscience they ought not to retain. It is true that while an estate remains unsettled, and the probate court is still exercising jurisdiction over it, the district court should not, except in special cases, entertain an action for relief properly grantable by the probate court; but we think it follows from a long line of decisions of this court that the district court may properly entertain jurisdiction in a case of this character. The following are some of the authorities, and they refer to most of the others: Shoemaker v. Brown, 10 Kan. 383; Klemp v. Winter, 23 Kan. 699, 705; Stratton v. McCandless, 27 Kan. 296, 306; Kothman v.

Markson, 34 Kan. 542, 550, 9 Pac. 218; Gafford v. Dickinson, 37 Kan. 287, 291, 15 Pac. 175; McLean v. Webster, 45 Kan. 644, 643, 26 Pac. 10, and In re Hyde, 47 Kan. 277, 281, 27 Pac. 1001. The court of appeals relied on Fox v. Van Norman, 11 Kan. 214, but we think that case is distinguishable from this as from McLean v. Webster, supra, as stated by Chief Justice Horton in said case.

2. The defendants claim that, in any event, the judgment of reversal was proper on other grounds, one of which only we think it necessary to discuss. The covenant of warranty does not assume to bind the heirs of George W. Hamblin, and it is well settled in England that in such case they would not be liable. In order to hold them liable on such a covenant, it was necessary to show that they were named therein, and that they should have assets by descent sufficient to meet the demand. 2 Bl. Comm. 304, and Rawle, Cov. §§ 309, 310. The latter author says: "The liability (whether immediate or ultimate) of the heir by reason of his ancestor's covenants for title depends, in this country, to a great extent upon the statutory provisions adopted in the different states for making the real estate of a decedent liable for the payment of his debts. * * * In the United States it may be said that, as a general rule, lands are liable for the debts of a decedent, whether due by matter of record, by specialty, or by simple contract. In the last two cases the existence of the debt, unless it be reduced to judgment, creates no lien during the debtor's life. By his death, however, its quality is changed, and it becomes a lien upon his real estate, which descends to the heir or passes to the devisee subject to the payment of the debts of the ancestor according to the laws of the state in which it lies; and the rights of the creditor can, in most of the states, be enforced against the lands in the hands of a bona fide purchaser, within certain statutory limitations as to time." In this state realty does not become liable to the payment of the debts of the estate until the personality has been exhausted, in which case it may be applied to the fullest extent unless exempt; and, by analogy, when all the assets have been converted into money, and distribution has been made to the heirs, devisees, or legatees, and an obligation of the ancestor or testator then matures, such beneficiaries of the estate ought to be compelled to refund to the claimant so much of what they have received as shall be sufficient to satisfy it. Strictly speaking, the beneficiaries are not liable in an action at law, even when named in the covenant, for they can only be held to the extent of the assets received from the estate. Such action should be equitable in form to subject the assets received by the beneficiaries to the payment of the debt, but in this case no point was made in the district court as to the form of the action, nor as to the character and amount of the judgment, provided the plaintiff should be entitled to recover; and, the amount received by each of the defendants being greater than the plaintiffs' claim, there was no sub-

stantial error in rendering judgment in its present form, the defendants being liable to contribution as between each other. The judgment of the court of appeals must be reversed, and the judgment of the district court will be affirmed. All the justices concurring.

CITY OF KANSAS CITY v. GARNIER.

(Supreme Court of Kansas. Nov. 7, 1896.)

RECOGNIZANCE—SUFFICIENCY—MUNICIPAL CORPORATIONS—REGULATION OF PAWN BROKERS
—COMPLAINT—SUFFICIENCY.

1. A recognizance given upon appeal from a conviction in the police court in a city of the first class for the violation of a municipal regulation may be executed to the city.

2. Such recognizance is not absolutely void because it fails to definitely designate the offense for which a conviction was had, where it refers to the complaint, which was transmitted with the recognizance and sufficiently describes the offense.

3. Under the provisions of Gen. St. 1889, par. 555, a city of the first class has authority to enact ordinances for the regulation of the business of pawnbrokers, and, to that end, may require them to keep and furnish to the police department a record of property purchased or received by them as pawnbrokers, as well as a description of the persons from whom the property was purchased or received.

4. In a clause of such an ordinance distinct from the one defining the offense, there was a proviso to the effect that it is unnecessary to furnish a description of property purchased from manufacturers or wholesale dealers who have an established place of business, or which has been purchased at an open sale. *Held*, that the proviso being in a subsequent clause, and not incorporated in the definition of the offense, it was unnecessary to negative it in the complaint.

(Syllabus by the Court.)

Appeal from district court, Wyandotte county; H. L. Alden, Judge.

Prosecution by the city of Kansas City against F. A. Garnier. From a judgment for defendant, plaintiff appeals. Reversed.

K. P. Snyder and T. A. Pollock, for appellant. Junius W. Jenkins, for appellee.

JOHNSTON, J. This is an appeal from the ruling of the district court quashing a complaint which charged F. A. Garnier with the violation of a city ordinance regulating the business of pawnbrokers. The defendant was convicted in the police court, where a fine of \$25 was imposed. To obtain an appeal he gave a recognizance, and it, with the warrant and transcript of the proceedings, was transmitted to the district court. There, on motion of the defendant, the complaint was quashed and the defendant discharged. Upon this appeal the city contends that the district court had no jurisdiction, because the recognizance on appeal was defective, and an elaborate argument is made to show that it is void on its face. We think the statutory provision with reference to appeals was substantially complied with. It gave the title of the cause, and recited the rendition of the judgment; that an appeal had been taken therefrom; that the

principal and one surety acknowledged themselves indebted to the city of Kansas City in a sufficient sum, and the condition was that Garnier should personally be and appear before the district court of Wyandotte county, on the 1st day of the next term to be holden in that county, to answer the complaint made against him, and to abide the judgment of the court. It was taken by the police judge, and the surety approved by him. When it was transmitted to the district court it became a matter of record there, and appears to accord with the general practice in respect to taking appeals. It is defective in this: that it does not definitely designate the offense of which the defendant was convicted; but as it refers to the complaint, which was transmitted, and became a matter of record, with the recognizance, there is no difficulty in ascertaining the offense, and the defect is no more than an irregularity.

Another alleged defect is that the recognizance runs to the city, instead of the state. The statute does not provide that recognizances shall be given to the state, nor does it designate to whom they shall be executed; but, as the offense was a mere violation of a municipal regulation, we think it was properly executed to the city. None of the defects suggested by the city destroy the validity of the bond, or take away the jurisdiction of the court over the subject-matter. The trial court quashed the complaint upon a motion alleging that it did not charge an offense against the law of the state or an ordinance of the city, and because the ordinance upon which the complaint is based is illegal and void. The specific ground upon which the judgment quashing the complaint was based is not stated, and no appearance has been made here in behalf of the defendant. The ordinance provided that every pawnbroker should keep at his place of business a register in which he should enter in writing a minute description of every kind of property taken, purchased, or received, the amount loaned thereon, the interest charged, and when the loan falls due. He is also required to give the person leaving the property a receipt, in which the articles are to be described as in the register. It is further provided in section 3 of the ordinance that the pawnbroker shall make out and deliver to the chief of police every day, before noon, a legible and correct copy from the register of all the personal property or other valuable things received, deposited, or purchased during the preceding day, with a complete description of the persons leaving the pledges, or from whom any purchase was made. At the end of the section there is a proviso that no person shall be required to furnish a description of any property purchased from manufacturers or wholesale dealers who have an established place of business, or of any goods or property purchased at an open sale, but that such goods or property must be accompanied by a bill of sale, or other evidence of an open and legitimate purchase, which

must be shown to the mayor, or any member of the police department, when demanded. A person violating the provisions of the ordinance may be fined in a sum not exceeding \$100. In the complaint it was alleged that on September 18, 1895, defendant was engaged in business as a pawnbroker, when he received certain articles of personal property, as a pawnbroker, but failed to make out and deliver to the chief of police before noon of that day a copy of the register required to be kept by him under the provisions of section 3 of the ordinance. Provision is made by statute for regulating the calling and occupation of pawnbroker, and this appears to be sufficient authority for the ordinance that was enacted. Gen. St. 1889, par. 555. In view of the nature of the business, the character of many that are engaged in it, and the well-known fact that the pawnshop is frequently made a hiding place for the fruits of crime, the regulations prescribed by the ordinance cannot be regarded as unreasonable or oppressive. They are intended for the protection of the public, and they also tend to protect the pawnbroker himself from imposition and loss. *Launder v. City of Chicago*, 111 Ill. 291; *City of Grand Rapids v. Braudy* (Mich.) 64 N. W. 29.

One of the claims was that the complaint was insufficient because it failed to negative the proviso contained in the last part of section 3. The proviso or exception is distinct from the clause defining the offense, and simply excepts from the operation of that clause a certain class of purchases which might be made by persons engaged in the calling of pawnbrokers. The exception being in a subsequent clause, and not being incorporated in the definition of the offense, it was not necessary to negative it in the complaint. *State v. Thompson*, 2 Kan. 432; *State v. O'Brien*, 74 Mo. 549; *State v. Elam*, 21 Mo. App. 290; 1 Bish. Cr. Jur. § 639; Whart. Cr. Pl. § 238. We think there was error in the ruling of the court in quashing the complaint, and therefore its judgment will be reversed, and the cause remanded for further proceedings. All the justices concurring.

STATE v. HATCH.

(Supreme Court of Kansas. Nov. 7, 1896.)

HOMICIDE—SELF-DEFENSE—DUTY TO RETREAT.

1. In a prosecution for murder, where the homicide was admitted, and the defendant relied only upon the justification of self-defense for acquittal, it was error for the court to instruct the jury, in substance, that the right of self-defense does not arise when there is opportunity to restrain the deceased by process of law, and that if, having opportunity, the defendant failed to invoke the authority of the law by going before a magistrate with a view of having the deceased bound over to keep the peace, then he was not entitled to the plea of self-defense.

2. A person who is unlawfully attacked by another may stand his ground, and use such force as at the time reasonably appears to him to be necessary to protect himself. Where the

defendant is in the wrong, however, and commences the affray, even without an intent to kill or inflict great bodily harm, and the other person, being thus provoked, makes a deadly assault, then it is the duty of the defendant to retreat as far as the fierceness of the assault will permit him to do without danger of great personal injury to himself, before slaying his antagonist.

(Syllabus by the Court.)

Error from district court, Reno county; F. L. Martin, Judge.

The defendant was charged with murder in the first degree, by shooting and killing Thomas Mullen on December 5, 1895, at Hutchinson, in Reno county, and he was convicted of murder in the second degree, and sentenced to imprisonment in the penitentiary for the term of 20 years; and he appeals to this court because of alleged errors upon the trial. It was not denied that Hatch shot and killed Mullen at the time and place stated, and the defendant relied only upon the justification of self-defense for acquittal. The evidence tended to show the following facts, among others, namely: That Hatch was a colored hotel porter, part of whose business it was to go to the depots on the arrival of passenger trains to solicit people to go to the hotel for which he was employed; that on the afternoon of December 5th he went into a billiard hall where Mullen and Freeman, two colored men, were engaged in playing pool, and some bantering words passed between Hatch and Mullen about playing a game, when Mullen threatened to strike Hatch with the butt end of a billiard cue, but Freeman interfered; that Hatch then went outside, Mullen following him, and there they had hot words, and Mullen threatened to kill Hatch; that Freeman also became involved in the quarrel, at which Mullen took offense against him; that soon afterward Mullen obtained a shotgun, and carried it about the street, threatening to kill Hatch and Freeman; that they were advised thereof, and they requested the chief of police and a constable to disarm Mullen; that Hatch then endeavored to procure a pistol, and made some threats against Mullen; that friends of Mullen, after a time, prevailed upon him to give up his gun; that, about 6 o'clock in the evening, Hatch borrowed a pistol from his employer, on the statement that he needed it for defense against Mullen, who had threatened his life, and it was necessary for him to go to meet an incoming train; that he went to meet the train, and at the corner of Second and Main streets he called, "Hello, Tom!" (meaning, as he says, Tom Fife, not seeing Mullen, but this is a fact in dispute); that Mullen came towards him, and there were some words of attempted explanation, and Mullen ordered Hatch to take his hands out of his overcoat pockets, as if in fear that Hatch was armed; that Hatch did as requested, but Mullen approaching nearer, and the talk between them continuing, thereupon Hatch drew the pistol from his overcoat pocket and began firing at Mullen, who started across the street; that Hatch

fired four or five shots, three of them taking effect and one proving fatal, Mullen falling and expiring in the street immediately. Mullen was not armed at the time, but Hatch testified that, before he shot, Mullen was approaching towards and threatening to kill him, and that he made a motion as if reaching for a pistol. Mullen had been under the influence of intoxicating liquors during the afternoon. The defendant complains especially of the following instructions which were given by the court to the jury: "(24) The right of self-defense does not arise when there is opportunity to restrain the assailant by process of law, and if the jury in this case believe from the evidence, beyond a reasonable doubt, that the defendant had an opportunity to invoke the interposition of the law against any threatened assault by the deceased, and failed to invoke the authority of the law, he is not entitled to the plea of self-defense; and it would not be enough for the defendant to call upon the police officers and constables for protection, unless the deceased was present at the time, attempting then and there to assault him. But, if he had ample opportunity to do so, the law devolved upon him the duty of going before some magistrate and have the deceased bound over to keep the peace, or committed to jail in default of bail; and if, having such opportunity, he failed to do so, and deliberately and premeditatedly armed himself with a deadly weapon, and went forth to meet the deceased in a conflict which he expected, or provoked a conflict by inviting the deceased into a dispute or altercation with him, he is not entitled to the plea of self-defense. (25) I instruct you further, in the same connection, that, in order to establish justifiable homicide in self-defense, it must appear that the party killing had retreated as far as the fierceness of the assault would permit him to do without great personal injury to himself; and if, in this case, the defendant expected an attack to be made by the deceased, and if you believe from the evidence, beyond a reasonable doubt, that the defendant had practicable opportunity to retreat, and thus avoid killing the assailant, before he was in imminent danger of great personal injury, he is not entitled to the plea of self-defense." Questions were raised as to some other instructions, and also as to the competency of evidence. Reversed.

McKinstry & Fairchild, for appellant. F. B. Dawes, Atty. Gen., and Lucius M. Fall, for the State.

MARTIN, C. J. (after stating the facts as above). 1. The homicide being admitted, and the only defense thereto that it was justifiable, instruction 24 was of paramount importance. There was no evidence that the defendant went before any magistrate with a view of having Mullen bound over to keep the peace, although he probably had abundant opportunity of doing so during the course of the afternoon, and after the difficulty at the billiard hall. He did

apply to a constable and a police officer for protection, but this was insufficient, according to this instruction. We have been unable to find any authority introducing this element into the law of self-defense. Counsel for the state cite several cases in support of the instruction, and we have examined them all, but find in them no justification of the state's contention. Section 9 of the crimes act (Gen. St. 1889, par. 2130) is itself a definition of justifiable homicide in this state, and it contains no such element as that required by instruction 24. Instruction 29 further impressed upon the jury the duty of the defendant to go before a justice of the peace for protection, as a prerequisite to the plea of self-defense, thus repeating the error in giving instruction 24.

2. Instruction 25 was also erroneous and material. The doctrine that a party unlawfully attacked must "retreat to the wall," before he can be justified in taking the life of his assailant in self-defense, does not obtain in this state. *State v. Reed*, 53 Kan. 767, 37 Pac. 174. Where the defendant is in the wrong, and commences the affray, even with no intent to kill or inflict great bodily harm, and the other party, being thus provoked, makes a deadly assault, then it is the duty of the defendant to retreat as far as the fierceness of the assault will permit him to do without danger of great personal injury to himself, before slaying his antagonist. *State v. Rogers*, 18 Kan. 78. In the present case it was for the jury to determine from the evidence whether Hatch or Mullen was in the wrong in commencing the affray at Second and Main streets which resulted in the death of Mullen. The court should not assume that one party or the other was first or chiefly in fault, when that fact is in issue, but should instruct the jury on the theory of the defendant as well as that of the state, provided each theory finds some support in the evidence as in this case. Instruction 15, defining murder at the common law, is subject to the criticism that it omits the word "unlawfully"; but, in connection with other instructions, we think it could not have been prejudicial to the defendant, although it should be corrected on a retrial. Evidence touching the declarations of Mullen during the afternoon, while armed with the shotgun, should not have been admitted; but they were scarcely prejudicial to the defendant, and the judgment would not be reversed on these grounds alone. For the error of the court, however, in giving instructions 24, 25, and 29, the judgment will be reversed, and the case remanded for a new trial. All the justices concurring.

STATE v. MAY.

(Supreme Court of Kansas. Nov. 7, 1896.)

CRIMINAL LAW—JURISDICTION—ILLEGAL ARREST.

A district court of a county where a felony has been committed has jurisdiction to try the alleged offender, duly bound over on regular process, although he was originally arrested in

another county without warrant, and forcibly brought into the county where the crime was committed.

(Syllabus by the Court.)

Appeal from district court, Harvey county; F. L. Martin, Judge.

Robert May was indicted for larceny. From an order discharging the defendant, the state appeals. Reversed.

F. B. Dawes, Atty. Gen., and C. E. Branine, for the State. Bowman & Bucher, for appellee.

MARTIN, C. J. May was arrested without a warrant in Sumner county on December 22, 1895, on suspicion of having committed the crimes of burglary and larceny on the preceding day in Harvey county. He was forcibly taken to the latter county by a deputy sheriff, and placed in jail until the next day, when a complaint was filed before a justice of the peace of that county, charging him with the commission of said crimes, and he was then arrested upon a warrant issued in regular form, and was bound over to the district court, where an information was filed against him on February 4, 1896. Afterwards the defendant filed a special plea in abatement to the jurisdiction of the court by reason of his illegal arrest in and forcible abduction from Sumner county, and on May 11, 1896, said plea was sustained, and the defendant was discharged, and permitted to go at large, and he was given time to return to the place where he had been arrested in Sumner county. The state excepted, and reserved the question for the consideration of this court.

This ruling was erroneous. The learned trial judge was probably misled by a clause in the opinion of this court in *State v. Hall*, 40 Kan. 338, 340, 19 Pac. 918, 920. In that case it was held that "an alleged fugitive from justice, extradited from one state to another, can be prosecuted in the state to which he has been extradited only for the offense for which he was extradited, until after he has had a reasonable time and opportunity afforded him to return to the place from which he was extradited." And in the opinion of the court said: "This rule of law is applied in cases of separate jurisdictions, whether the separate jurisdictions are cities, counties, districts, states, or foreign countries." The language above quoted from the opinion in the *Hall* case as to such separate jurisdictions as cities, counties, and districts must be regarded as dictum only, but certainly erroneous. It may be that a person illegally arrested in another county has a civil remedy for the trespass and false imprisonment, but this does not divest the court into which he is brought of the right to try him upon the criminal charge preferred against him. The district court of Harvey county had jurisdiction to try the defendant, notwithstanding the irregularity or the illegality of his original arrest in Sumner county. No other sovereignty was invaded. A warrant

might have been properly served upon the defendant in any county of the state whose sovereignty is co-extensive with its external boundaries, and the jurisdiction of whose courts for the apprehension of alleged offenders upon proper process is not affected by county lines. His original arrest was irregular, but this does not affect the jurisdiction of the court into which he was afterwards brought by regular process of law. The judgment of the court below must be reversed, with direction to overrule the plea in abatement to the jurisdiction of the court. All the justices concurring.

CITY OF KANSAS CITY v. SMITH.

(Supreme Court of Kansas. Nov. 7, 1896.)

ILLEGAL SALE OF LIQUORS—COMPLAINT.

A complaint under a city ordinance charging the defendant with maintaining a place where persons are permitted to resort for the purpose of drinking intoxicating liquors as a beverage, which fails to designate the place otherwise than as being in the city, is insufficient.

(Syllabus by the Court.)

Appeal from district court, Wyandotte county; H. L. Alden, Judge.

A complaint was filed in the police court of Kansas City, the body of which reads as follows: "W. Reynolds complains of George Smith, and, being duly sworn, on oath says that the said George Smith, at and in the city of Kansas City, county of Wyandotte, and state of Kansas, and on the 27th day of October, 1895, did unlawfully keep and maintain a place where persons were permitted to resort, and to which persons there and then did resort, for the purpose of drinking intoxicating liquors as a beverage, and then and thereby did keep and maintain a tippling shop, in violation of Ordinance No. 775 of the ordinances of said city of Kansas City." The transcript of the docket of the police judge shows a trial before him, and a finding that the defendant was guilty of the acts charged in the complaint, but that such acts were insufficient in law to constitute an offense, and that he rendered judgment discharging the defendant. The city appealed from the decision of the police judge to the district court, which affirmed the decision of the police court, and the city now appeals to this court. Affirmed.

K. P. Snyder and T. A. Pollock, for appellant. John A. Hale and Henry McGrew, for appellee.

ALLEN, J. (after stating the facts as above). It is extremely doubtful whether an appeal could be taken by the city from the order of the police judge discharging the defendant after a trial. *State v. Hickerson*, 53 Kan. 133, 39 Pac. 1045, and cases there cited. But as to this we do not now decide, nor do we deem it necessary to consider the matters discussed in the brief of counsel for the city. The substance of the complaint is a charge against the

defendant of maintaining a tippling shop, which, under the statutes of this state, is a nuisance. Gen. St. 1889, par. 2533. The complaint fails to state the place where such tippling shop was kept. It is provided in section 399 of the act concerning crimes and punishments: "In prosecutions under this act, by indictment, or otherwise, it shall not be necessary to state the kind of liquor manufactured or sold, and shall not be necessary to describe the place where sold, except in prosecutions for keeping and maintaining a common nuisance, or when a lien is sought to be established against the place where such liquors were illegally sold." While this is a prosecution for the violation of a city ordinance, the substance of the offense sought to be charged is the same as that defined in said paragraph 2533; and the reasons rendering it necessary to state the place where the nuisance is maintained, in a prosecution under a city ordinance, are the same as in one under the statute. Whether at common law it would be necessary to describe the exact place where the offense is charged to have been committed, is a matter of much doubt. 1 Bish. Cr. Proc. § 373. As the substance of the offense charged is keeping a place where persons resort for the purpose of drinking intoxicating liquors as a beverage, the place at which the defendant is charged with keeping it would seem to be an essential and very important part of the description of the offense; and, there being doubt as to the rule at common law, we think that that indicated by the statute in prosecutions for violation of the state law on the same subject ought to control in prosecutions for violations of a city ordinance. We can only conjecture as to the grounds on which the court based its decision, the record being silent, and no appearance being made for the defendant. The complaint appears to us open to the objection that it fails to state where the alleged tippling shop was maintained. The judgment is therefore affirmed. All the justices concurring.

DYKES, Sheriff, et al. v. LOCKWOOD MORTG. CO.

(Supreme Court of Kansas. Nov. 7, 1896.)

TAXATION—ASSESSMENT—FAILURE TO GIVE NOTICE.

1. As the amount of taxes chargeable against personal property depends to a great extent upon the city, township, or school district in which it is assessed for taxation, it is essential that such property be entered upon the proper roll, and that a location as well as a valuation of the same shall be made.

2. Personal property not returned by the assessor was entered for taxation by the county clerk on the tax rolls, under the provisions of section 70 of the tax law, but notice to the taxpayer was not given, as section 70 requires. *Held*, that the tax is illegal, and that the collection of the same may be enjoined.

(Syllabus by the Court.)

Error from court of appeals, Southern department, Eastern division.

Action by the Lockwood Mortgage Company against B. T. Dykes, as sheriff, and others. Judgment for plaintiff, which was affirmed by the court of appeals. 43 Pac. 263. Defendants bring error. Affirmed.

Jennings & Garrigues, for plaintiffs in error. Moseley & Dixon, for defendant in error.

JOHNSTON, J. In February, 1893, Hannah L. Whiteside obtained a judgment in the district court of Stafford county for \$327, and a decree foreclosing a mortgage upon real estate. The real estate was subsequently sold pursuant to the decree, and she became the purchaser. In 1895 she conveyed the land to the Lockwood Mortgage Company, and the title still remains in that company. An attempt was made to levy a tax upon the above-mentioned judgment for the year 1893, but it was never listed or valued by any officer, nor has it ever been placed upon the personal property tax roll. In August, 1893, the board of county commissioners of Stafford county made an order which in effect was a request for the clerk of the district court to certify a list of all judgments shown by the record of his office to the county clerk, and the county clerk was directed to place the list of judgments on the tax rolls of 1893, to be taxed as other personal property of that year. In October of the same year the board made an order to the effect that whoever filed an affidavit with the county clerk that the judgment in his favor was of no present value should be exempt from having such judgment placed on the tax roll. The clerk of the district court furnished a list of judgments to the county clerk, and upon such list was that of Hannah L. Whiteside. The county clerk entered this judgment on the real-estate tax rolls of Stafford county, and there was levied upon the judgment a tax of \$7.96. In March, 1894, a personal property tax warrant was issued, with a view of collecting the taxes on such judgment, which was returned unsatisfied. The tax warrants, with indorsements thereon, were filed with the clerk of the district court in May, 1894, and by that officer entered upon the judgment docket of the district court. In December, 1894, the clerk of the district court issued a real-estate tax warrant, and placed it in the hands of the sheriff, which commanded him to make the amount of the tax out of the lands and tenements of Hannah L. Whiteside. Under this warrant the sheriff advertised the real estate which had been transferred by Hannah L. Whiteside to the mortgage company, and was proceeding to sell the same when the present action of injunction was commenced. The district court held the tax to be invalid, and enjoined the sale, and upon review the court of appeals affirmed that judgment. A more complete statement of the facts may be found in the reported decision of the court of appeals. 2 Kan. App. 217, 43 Pac. 268.

We think the tax was illegal, and that the judgment of affirmance must be sustained. The property was never assessed or valued, nor

was it ever located for taxation in any city, township, or school district. The statute provides for the listing and location of personal property, and until it is located the amount of taxes thereon cannot well be ascertained. The state and county taxes could be measured, but the city, township, or school taxes, which constitute the greater part, cannot be determined until the location is fixed. The amount of the taxes to be paid depends upon the location as well as the valuation, and it would seem to be essential that the property should be entered upon the proper tax roll, and that a valuation and location of the same should be made. Passing this defect, however, we think there was a fatal omission in failing to give notice to the owner that the property was to be entered upon the tax roll for taxation. Where property has been omitted or undervalued by the assessor, provision is made in section 70 of the tax law whereby returns of the assessor may be corrected, and the property omitted entered for taxation. By this section, before omitted property can be entered for taxation five days' notice must be given to the taxpayer that his property is to be valued and taxed. We fully concur in the views expressed by the learned judge of the court of appeals that the notice is jurisdictional in character, and must be given as the statute prescribes before the county commissioners or the county clerk can enter omitted property upon the tax rolls. *Dykes v. Mortgage Co.*, 2 Kan. App. 217, 43 Pac. 268; *Board of County Com'rs v. Lang*, 8 Kan. 284; *Griffith v. Watson*, 19 Kan. 23; *Coal Co. v. Emlen*, 44 Kan. 117, 24 Pac. 340; *Railway Co. v. Roberts*, 45 Kan. 360, 25 Pac. 854; *Water-Supply Co. v. Roberts*, 45 Kan. 363, 25 Pac. 855. These authorities settle the proposition that the tax is invalid, and that the collection of the same may be enjoined. This determination disposes of the merits of the case, and renders unnecessary the consideration of the other questions that have been discussed. The judgment of the court of appeals will be affirmed. All the justices concurring.

MENGER et al. v. CARRUTHERS et al.

(Supreme Court of Kansas. Nov. 7, 1896.)

ADVERSE POSSESSION — PAYMENT OF TAXES BY LIFE TENANT.

The defendant went into possession of a piece of land under a deed from S. S. derived title under a warranty deed from M. At the time of the execution of this deed, M. had no title, but subsequently, and before the execution of the deed to the defendant, acquired a life estate, which the defendant enjoyed for the full term of it. *Held*, that whether the legal title to the life estate passed to the defendant by virtue of the covenant of warranty, or merely inured to his benefit by way of equitable estoppel, is unimportant in this case, and that under either view the defendant could not acquire a title, as against the owners of the fee, either by adverse possession, or under a sale for taxes which accrued during the continuance of the life estate.

(Syllabus by the Court.)

Error from court of appeals, Northern department, Eastern division.

Action by Virginia R. Carruthers and others against Anna G. M. Menger and others. Judgment for plaintiffs was affirmed by the court of appeals (44 Pac. 1096), and defendants bring error. Affirmed.

Alford & Savage, for plaintiffs in error.
Riggs & Nevison, for defendants in error.

ALLEN, J. This action was commenced in the district court of Douglas county, and resulted in a judgment in favor of the defendants in error. On proceedings in error the case was reviewed by the court of appeals, and the judgment of the district court affirmed. *Menger v. Carruthers* (Kan. App.) 44 Pac. 1096. The facts in the case are more fully stated in the opinion there filed, and the questions involved are more fully discussed than is necessary here. The action involved the title to a lot in the city of Lawrence. The title of the plaintiff in error was derived by quitclaim deed from Joseph T. Sibley, dated August 29, 1866, under which possession was obtained. On July 1, 1865, Jacob Moak and wife had conveyed the lot by warranty deed to Sibley. At that time the only title Moak had was derived from a void tax deed. Afterwards, on the 12th of the same month, J. S. Emery and wife conveyed to Moak the life estate of Jerome S. Ridley, which had theretofore been condemned, forfeited, and sold under proceedings in the United States district court instituted for that purpose under the confiscation act of 1862. It is claimed on behalf of the defendants in error that this life estate, though acquired by Moak after the execution of the deed to Sibley, at once passed to him, by virtue of the covenant of warranty contained in the deed, and that at the time Sibley executed his deed to Menger he was vested with all the title that Moak had, including that conveyed by Emery to him. Counsel for plaintiffs in error now insists that the legal title did not actually pass from Moak to Sibley by virtue of the covenant of warranty, but that it remained in Moak; that, though Moak might be estopped in equity from asserting that title against Sibley or his grantees, neither Sibley, nor Menger claiming under him, was estopped from denying the validity of the title conveyed by Emery to Moak, nor bound to accept it. It is argued that Menger had a right to repudiate the confiscated title, and acquire an independent one by adverse possession, or under tax deeds. We think all the questions presented are sufficiently discussed in the opinion of the court of appeals, except a single one. The confiscation proceedings appear to us to be sufficient as against a collateral attack, and yet more clearly sufficient as against one who has held possession of the land without any attack on his title ever having been made by Ridley himself, or any one else, during his lifetime. May the defendant then either accept or reject the benefit of the confiscated

title, which, even according to his own contention, inured to his benefit by way of equitable estoppel, and build up an adverse title for the purpose of cutting off the heirs to the fee after the expiration of the life estate? It appears to us that it matters very little in this case whether the legal title actually passed to Sibley by virtue of the covenant of warranty contained in Moak's deed, or whether it inured to the benefit of Sibley and his grantees, by way of equitable estoppel. The substance would be the same under either theory. Menger was in possession of the lot. If Moak held the bare legal title to a life estate, which he could not assert against Menger, Menger was as secure in the possession of the property as though the legal title were vested in himself. Moak could not transfer the legal title to any one else who would not be as clearly estopped and barred from asserting it as Moak himself. Nor is there any force in the contention that by the conveyance of the confiscated title from Menger to Moak a title was thrust upon Sibley and his grantee without his knowledge or consent. Sibley bought the lot from Moak. The deed purported to convey a full title. It could not possibly be a fraud on Sibley for Moak to acquire a title after the execution of the deed, though he had none when it was executed. It was entirely lawful for Moak to protect himself against liability on his covenant of warranty by buying in any outstanding title, and, when so purchased and conveyed to him, it inured to the benefit of Sibley and those claiming under him. The lot was taxable. The title had passed out of the United States. Menger was in possession of it. Whether he held the legal title or not, no one had such a title that he could successfully disturb him. He enjoyed the benefit of the life estate without molestation during the full term. No one else was under the slightest obligation to pay the taxes while he enjoyed the rents and profits, and clearly he could not obtain a valid tax title based on his own failure to pay taxes justly chargeable to him alone. Nor could he build up a title in opposition to the heirs of Ridley by adverse possession. The judgment is affirmed. All the justices concurring.

STATE v. PARK.

(Supreme Court of Kansas. Nov. 7, 1896.)

PERJURY—WHAT CONSTITUTES.

The false answer of a defendant, who became a witness in his own behalf in a criminal prosecution, that he had never been convicted of a certain felony, was material, in that it affected his credibility, and perjury can be predicated thereon.

(Syllabus by the Court.)

Error from district court, Harvey county; F. L. Martin, Judge.

W. I. Park was indicted for perjury. From an order discharging the defendant, the state appeals. Reversed.

F. B. Dawes, Atty. Gen., and C. E. Brannine, for the State. W. S. Allen, for appellee.

JOHNSTON, J. This was a prosecution on a charge of perjury. In the information it was alleged that in May, 1896, W. I. Park was tried in the district court of Harvey county upon a charge of grand larceny, and at the trial he became a witness in his own behalf, and upon cross-examination he was asked by counsel for the state, for the purpose of affecting his credibility, whether or not he had been convicted of grand larceny or any other felony in the state of Missouri, and as punishment for such offense was sentenced to and confined in the penitentiary of the state of Missouri for a portion of the years 1893 and 1894, and that in answer to such inquiry he swore that he had never at any time been convicted of grand larceny or other felony in the state of Missouri, or in any other place, and that he had never at any time been confined in the penitentiary of Missouri; whereas, in truth and in fact, he had been, on the 31st day of May, 1893, duly convicted of grand larceny in the county of Vernon, state of Missouri, and on that day sentenced to the penitentiary of that state for the term of two years, and on the 1st day of June, 1893, he was lawfully placed in that penitentiary, and held and confined there under the sentence until the 24th day of November, 1894. The information contained the requisite averments in respect to the administration of the oath, the nature of the proceeding in which it was administered, and as to the materiality of the statements alleged to be false. The information was quashed, for the reason that the facts alleged therein were deemed insufficient, and the defendant was discharged. This ruling appears to have turned on the materiality of the alleged false statements, and this is the only question presented on the appeal taken by the state.

To constitute perjury, the false statements must be material to the subject under consideration, or such as would tend to influence the determination of the issues to be decided. The question whether the defendant had been previously prosecuted and punished for committing grand larceny in Missouri, although, in a certain sense, collateral to the question on trial, can hardly be treated as immaterial. In the trial wherein false statements are alleged to have been made Park voluntarily became a witness in his own behalf, and he was, therefore, subject to the same rules upon cross-examination as any other witness. Having assumed the position of a witness, it was competent for the state, upon cross-examination, to test his veracity and credibility. It is well settled in this state that a defendant may be asked questions disclosing his past life and conduct, and the state may even go to the extent of inquiring if he has ever been convicted of the same offense as that upon which he is upon trial. *State v. Pfefferle*, 36 Kan. 90, 12 Pac. 406; *State v. Probasco*, 46 Kan.

310, 26 Pac. 749; *State v. Wells*, 54 Kan. 161, 37 Pac. 1005. The statement of the witness was, therefore, not only competent, but it had an important bearing upon the credit to be given to his whole testimony; and it is generally held to be perjury to swear falsely to anything affecting the credibility of the witness himself, or the credibility of another witness in the case. In *Wood v. People*, 59 N. Y. 117, it is held that: "It is not necessary that the false statement tends directly to prove the issue in order to sustain an indictment for perjury. If circumstantially material, or if it tends to support and give credit to the witness in respect to the main fact, it is perjury." The Texas court of appeals has held that "perjury may be predicated on a false answer of a witness that he had never been convicted of a felony, as such answer affects his credibility, and is, therefore, material to the issue." *Williams v. State*, 12 S. W. 1103. See, also, *U. S. v. Landsberg*, 23 Fed. 585; *Washington v. State* (Tex. App.) 3 S. W. 229; 2 Bish. New Cr. Law, § 1032; *Clark, Cr. Law*, 389; *Tiff. Cr. Law*, 850; 3 *Greenl. Ev.* § 195. The judgment of the district court will be reversed, and the cause remanded for further proceedings. All the justices concurring.

CITY OF KANSAS CITY v. GRUBEL.
(Supreme Court of Kansas. Nov. 7, 1896.)

CITY ORDINANCE—VALIDITY.

It is no objection to the validity of a city ordinance that it prohibits acts and omissions made penal by the laws of the state, provided the legislature has expressly authorized such municipal legislation; and, while the ordinance keeps within the limits of the state law, it may be valid, notwithstanding it does not cover the whole ground occupied by the statute.

(Syllabus by the Court.)

Appeal from district court, Wyandotte county; H. L. Alden, Judge.

F. C. Grubel was charged with the violation of city ordinances. From an order quashing the complaint, the city appeals. Reversed.

K. P. Snyder and T. A. Pollock, for appellant. John A. Hale and Henry McGrew, for appellee.

MARTIN, C. J. A complaint was filed against the defendant in the police court of Kansas City, Kan., June 1, 1895, the body of which reads as follows: "J. A. Walsh complains of F. C. Grubel, and, being duly sworn, on oath says that the said F. C. Grubel on the 26th day of May, 1895, the same being the first day of the week, commonly called Sunday, did unlawfully keep open, after 10 o'clock a. m. on said day, a certain place of business, for the purpose of doing business therein, at number 532 Minnesota avenue, in city of Kansas City, Wyandotte county, Kansas, and then and there, and after 10 o'clock a. m. of said day, did expose for sale therein goods, wares, and merchandise, the same then and there not being drugs, medicines, or articles of immediate necessity, in violation of section No. 31 of Ordinance No. 793 of the ordinances of said city of Kansas City." The section referred to is as follows: "Sec. 31. Any person who shall keep open any place of business, or sell or expose for sale on the first day of the week, commonly called Sunday, after 10 o'clock a. m., any goods, wares or merchandise, other than drugs, medicines or articles of immediate necessity, shall upon conviction thereof, be fined in any sum not exceeding fifty dollars (\$50.00)." The police court sustained a motion to quash the complaint, and the city appealed to the district court, as authorized by chapter 75, *Sess. Laws* 1891. The district court also quashed the complaint, and the city appeals to this court, as it may do under said chapter 75.

The defendant does not appear in this court, and we are compelled to rely upon the record and the brief of counsel for the city in order to a proper disposition of the case. It is stated in said brief that the complaint was quashed because said section 31 of the ordinance is in conflict with the section of the crimes act relating to the desecration of the Sabbath day, which section reads as follows: "Sec. 258. Every person who shall expose to sale, any goods, wares, or merchandise, or shall keep open any ale or porter house, grocery or tipping shop, or shall sell or retail any fermented or distilled liquor, on the first day of the week, commonly called Sunday, shall on conviction be adjudged guilty of a misdemeanor, and fined not exceeding fifty dollars." It is no objection to the validity of a city ordinance that it prohibits acts or omissions made penal by the laws of the state, provided the legislature has expressly authorized such municipal legislation. This is too well settled in Kansas and elsewhere to require the citation of authorities. By subdivision 28, par. 555, *Gen. St.* 1889, the mayor and council of a city of the first class may restrain, prohibit, and suppress the "desecration of the Sabbath day." They may also regulate any and all callings, trades, professions, and occupations carried on within the city limits. Section 31 of said ordinance is in line with said section of the crimes act, and the provisions relating to the government of cities of the first class. It is not as broad as the section of the crimes act, for it does not operate before 10 o'clock in the forenoon. Until that hour, if a man keeps his store open and exposes his goods for sale, he violates only the state law; but after that time his act is an infraction, not only of the state law, but of the municipal regulation upon the subject, and he may be held amenable for it in either jurisdiction, or perhaps in both. An offender has no right to complain because the city ordinance covers only part of the day, while the state law extends over the whole period from midnight to midnight. In *Mayor, etc., v. Linck*, 12 Lea, 499, an ordinance was held valid which allowed retail vendors of fruit, and dealers in newspapers and periodicals, to keep open their stands from 4 until 8 o'clock on Sunday morning, but prohibited the sale of fermented, spirituous, and vinous liquors during any portion of

the Sabbath day. And in *Theisen v. McDavid*, 34 Fla. 440, 16 South. 321, it was decided that a municipal ordinance prohibiting the carrying on of certain business pursuits within the city limits on Sunday was not invalid because it excepted from its inhibition various pursuits that are not excepted from the operation of the state law on the same subject. It would seem, from these authorities and others that might be cited, that in such case, while a city ordinance keeps within the limits of the state law, it may be valid notwithstanding it does not cover the whole ground occupied by the statute. No valid objection to the ordinance, nor to the complaint based thereon, appearing to the court, the judgment of the district court will be reversed, and the case remanded for further proceedings. All the justices concurring.

STATE v. CLIFTON.

(Supreme Court of Kansas. Nov. 7, 1896.)

CRIMINAL LAW—MOTION TO QUASH—PRESENCE OF DEFENDANT.

The hearing of a motion to quash the information in a prosecution for a felony is a part of the trial, and the defendant must be personally present in court at such hearing.

(Syllabus by the Court.)

Appeal from district court, Geary county; O. L. Moore, Judge.

William Clifton was convicted of assault, and appeals. Reversed.

O. A. Kimball, for appellant. F. B. Dawes, Atty. Gen., and John T. Dixon, for the State.

ALLEN, J. The defendant was charged, by the county attorney of Geary county, with having assaulted one James Gage, with intent to kill him. A motion was filed by his attorney to quash the information on various grounds. This motion was argued by counsel, submitted to the court, and overruled, when the defendant was not present, but was in confinement in the county jail. Afterwards he was tried, convicted, and sentenced to imprisonment in the penitentiary for five years. A motion for a new trial was filed on the ground, among others, that the defendant was not personally present during every part of the trial, but the motion was overruled. Section 207 of the Code of Criminal Procedure provides that "no person indicted or informed against for a felony can be tried unless he be personally present during the trial." This means throughout the whole trial. *State v. Myrick*, 38 Kan. 238, 10 Pac. 330. In the Code of Civil Procedure (section 265) a trial is thus defined: "A trial is a judicial examination of the issues, whether of law or of fact, in an action." In the case of *State v. Kendall*, 56 Kan. 238, 42 Pac. 711, it was said that "a motion to quash the charge or information is an issue joined between the state and the defendant," and it was strongly intimated that the personal presence of the

defendant at the hearing of a motion to quash the information is indispensable. That this is the law appears to be well settled. *Bish. Cr. Proc.* § 269. On the hearing of a motion to quash an information the issues of law relating to the criminality of the acts of the defendant charged in the information are tried and determined by the court. If the motion is sustained, the prosecution terminates, unless the information be amended. The decision on such a motion is not merely a determination of a matter preliminary to the trial, but is a part of the trial itself, within the meaning of this section of the statute, and disposes of the issues of law arising on the information. When the trial commences so that the defendant is placed in jeopardy within the meaning of the constitution, and may not be tried again, is quite a different question. The record affirmatively shows that the defendant was not present, but was in the county jail, when this hearing was had. In this he was denied his right to be personally present, and witness all that took place at his trial. For this error the judgment must be reversed, and the cause remanded for a new trial. All the justices concurring.

CITY OF ABILENE v. WRIGHT.

(Court of Appeals of Kansas, Northern Department, C. D. Oct. 17, 1896.)

MUNICIPAL CORPORATIONS—STREET—EXISTENCE—ACTION FOR NEGLIGENCE—MEASURE OF DAMAGES—PLEADING.

1. Evidence that a street through a city of the second class has been generally traveled by the public as a thoroughfare, and has been taken charge of and kept in repair by the municipal officers, and recognized as a public street, is sufficient, prima facie, to show that such street has been duly laid out and accepted as a public highway, and that the city is liable for its negligence in failing to maintain the same in a reasonably safe condition for public travel.

2. In an action to recover damages for a physical injury, sustained by reason of a defective sidewalk in a city of the second class, the party injured may, under a general allegation of damages, recover all damages which are the natural and necessary results of the injury, such as loss of time, physical pain and suffering, and permanent disability.

3. In such action, the reasonable cost and expense of medical attendance necessarily incurred may be recovered for, even though actual payment therefor was not made prior to the commencement of the action.

4. The instructions and evidence examined, and found to disclose no reversible error prejudicial to the substantial rights of the defendant.

(Syllabus by the Court.)

Error from district court, Dickinson county; James Humphrey, Judge.

Action by George W. Wright against the city of Abilene. From a judgment for plaintiff, defendant brings error. Affirmed.

John H. Mahan and C. F. Mead, for plaintiff in error. Stambaugh & Hurd, for defendant in error.

CLARK, J. This is an action brought by one George W. Wright to recover damages from the city of Abilene, a city of the second class, for personal injuries sustained by him through the alleged negligence of the defendant. The allegations of negligence and of the items of damages sustained by the plaintiff are thus set forth in the petition: "That for more than five years last past a certain street, commonly called 'A Street,' between Cedar and Mulberry streets, in said city of Abilene, has been a public highway, open and free to all persons to pass and repass at their will at all times; that on or about the 24th day of September, A. D. 1891, said city of Abilene carelessly and negligently permitted the sidewalk on the south side of A street between Cedar and Mulberry streets, within the corporate limits of the city of Abilene, to become broken and out of repair, and in a dangerous condition, and to so remain for a long space of time, to the great danger of persons passing along said street; that said plaintiff, without his fault or negligence, in passing along said street, on the 24th day of September, A. D. 1891, unavoidably stepped into a hole in said sidewalk, and fell, and thereby the arm of said plaintiff thereby became and was lame, sick, and diseased, and still continues lame, sick, and diseased, to the damage of said plaintiff in the sum of five thousand dollars; and said plaintiff further says that on account of his injuries so received he was prevented from attending to his necessary business, to his damage in the sum of five hundred dollars, and was put to great expense in and about trying to be healed and cured of said injury, to wit, to the sum of one hundred dollars; and that said plaintiff has been injured by the negligence of said defendant in the sum of \$5,600." The answer consisted of an admission that the defendant was a city of the second class, and a general denial of all the other allegations of the petition. A trial was had, resulting in a verdict and judgment in favor of the plaintiff for \$900. The assignments of error embrace the rulings of the court upon the admission of evidence, the instructions to the jury, and overruling the motion for a new trial.

The court, over the objection of the plaintiff in error, admitted in evidence certain pages of a plat book in the office of the register of deeds covering a strip of land which in the petition is designated as "A Street." No reason was assigned for failing to introduce the original plat, and the copy thereof, as recorded, would indicate that the original plat had not been executed by the owners of the land described therein, although the certificate of the notary public attached thereto recites that the owners and proprietors of the land acknowledged that the plat was true and correct, and that it had been made by the surveyor whose certificate was attached thereto, at their request and direction. While we think the court erred in the ruling complained of, we cannot say that the error was so preju-

dicial as to compel a reversal of the judgment. The evidence outside of this plat shows clearly that this strip of land had been commonly known for many years as "A Street"; that it had been recognized as such by the city council and by the public generally; that it was used by the public as a highway, and had been in such use for many years; that the street commissioner had repaired the sidewalk where this accident occurred; that the citizens of Abilene had, in 1870, petitioned the city council to widen this street, and that at that time it was recognized by that body as a public highway. In *Town of Salida v. McKinna* (Colo. Sup.) 27 Pac. 810, it was held that evidence that a street through the main business part of a town is a public thoroughfare, generally traveled, and that the municipal officers have voluntarily assumed to keep the same in repair, is sufficient, *prima facie*, to warrant a finding that the street has been duly dedicated and accepted as a public highway. In *Mayor v. Sheffield*, 4 Wall. 189, the court, speaking through Miller, J., said: "If the authorities of a city or town have treated a place as a public street, taking charge of it, and regulating it as they do other streets, and an individual is injured in consequence of the negligent and careless manner in which this is done, the corporation cannot, when it is sued for such injury, throw the party upon an inquiry into the regularity of the proceedings by which the street was originally established." In *Houff v. Town of Fulton*, 34 Wis. 608, it was held that while, as a general proposition, a town is not liable for injuries caused by the insufficiency of any road or bridge unless the same is a lawful highway, yet, where a road has been opened, or a bridge erected, by a town or its officers, or where one already created without public authority has been adopted by them by acts clearly indicating their intention that it shall be regarded as a public highway, the town is estopped from denying that it is a lawful highway in an action for injuries caused by its insufficiency or want of repair. We think this case falls within the rules laid down in these decisions. The parol testimony of the witnesses was sufficient, *prima facie*, to warrant the finding of the jury that the street had been duly dedicated and accepted as a public highway. In fact, as this evidence was uncontradicted, the jury must necessarily have found that the defective sidewalk was upon a public street in the city of Abilene, even had the record which was erroneously admitted in evidence been excluded. But, for aught that appears before this court, the jury may have been instructed to disregard that record, and, were it necessary so to do in order to sustain the trial court in overruling the motion for a new trial, we would be justified in assuming that the court so instructed the jury. The jury were instructed that, if they found for the plaintiff, the amount of their verdict should be sufficient to compen-

sate him for the expense of being treated for the injury which he claimed to have sustained, and for any loss of time, physical suffering, and permanent injury resulting therefrom. The plaintiff in error contends that Wright could not recover for loss of time, "as the record contains no evidence whatever regarding the value of the time lost." Whether the jury, in estimating damages, made any allowances for loss of time, we cannot say, as they returned no special findings of fact. We think, under the evidence, he was clearly entitled to recover nominal damages for loss of time. It was also contended that under the petition the plaintiff was not entitled to recover for physical suffering; that "such suffering means pain, and is a separate and distinct cause for damage over and above mere disability and permanent injury, and * * * it must be declared to exist, and compensation asked therefor, in the petition." We think, however, that physical suffering is not only the natural, but the necessary, result of a fractured and bruised arm, and that, therefore, the general allegation of damages as set out in the petition was sufficient, as against a general denial, to support an award of damages based upon physical suffering endured by the plaintiff by reason of the negligence of the city; but, even if the allegations were not as specific as they should have been in order to entitle the plaintiff to recover for physical suffering, the defendant could not raise that question for the first time by an objection to the giving of certain instructions to the jury. It is further contended that, as the evidence shows that the bill for medical attendance, which amounted to \$35, had not been paid at the time of the trial, the court erred in instructing the jury that the amount of their verdict should be sufficient to compensate the plaintiff for the expenses of being treated for the injury which he claimed to have sustained. We cannot agree with counsel in this contention, nor do we think he is supported by the authorities. In *Varnham v. City of Council Bluffs*, 52 Iowa, 698, 8 N. W. 792, which was an action for the recovery of damages for personal injuries, it was shown that the plaintiff had employed a physician on account of such injuries, who had not been paid, and it was held that evidence was admissible to show the reasonable value of the services rendered by him to the plaintiff; that the law would imply a promise to pay the same; that, the plaintiff being under obligation to pay for them, she might recover therefor; that the indulgence she received from her physician would not defeat her claim against the defendant. See, also, *Klein v. Thompson*, 19 Ohio St. 569; *City of Indianapolis v. Gaston*, 58 Ind. 224; *Lundsford v. Walker* (Ala.) 8 South. 386; *Donnelly v. Hufschmidt*, 79 Cal. 74, 21 Pac. 546; 2 Sedg. Dam. § 483.

Complaint is also made that the court instructed the jury that "the gist of the charge or complaint is the negligence of the city; and to entitle the plaintiff to recover in this case it is necessary to prove—First, a defect in a sidewalk within the city limits, rendering it unsafe to travel over it; second, that the defendant city was negligent in permitting such defect to continue without repair; third, that the plaintiff, in passing over such sidewalk in the nighttime, exercised reasonable care and diligence in doing so, notwithstanding which he was thrown down by reason of such defect, and received the injuries complained of." The criticism of counsel upon this instruction is that the jury might be led to infer therefrom that proof that the defective sidewalk was within the city limits would be sufficient to authorize a recovery of damages, regardless of the fact as to whether or not such sidewalk was upon a public street or highway. We are not able to determine whether the entire charge of the court would warrant the inference claimed by counsel, as the record does not purport to contain all the instructions given. It was held in *Morgan v. Chapple*, 10 Kan. 216, that, "where the error alleged is the giving of an instruction, it must appear that such instruction is so full and complete, and so manifestly wrong, that the whole law applicable to the case could not have been correctly presented to the jury without a contradiction of that given, before a reversal will be ordered." Tested by this rule, we cannot say that the court erred in giving the instruction of which complaint is made. If this particular instruction was faulty, it may have been so qualified by some other instruction as to appear unobjectionable. For the same reason we cannot say that the court erred in refusing to give the instructions requested by the plaintiff in error. *Winston v. Burnell*, 44 Kan. 367, 24 Pac. 477; *Bard v. Elston*, 31 Kan. 274, 1 Pac. 565; *Davis v. McCarthy*, 52 Kan. 116, 34 Pac. 399; *Railroad Co. v. Brown*, 14 Kan. 469; *Ferguson v. Graves*, 12 Kan. 39; *State v. O'Laughlin*, 29 Kan. 20-24.

Plaintiff in error further contends that the verdict for \$900 was excessive, and that, therefore, the court erred in refusing to set it aside and grant a new trial. The trial was had nearly one year after the injury, and there is some evidence tending to show that even at that time the plaintiff had not fully recovered the use of his arm. From a careful examination of the evidence, we cannot say that the damages allowed are so excessive that they appear to have been given by the jury under the influence of passion or prejudice, and that, therefore, the defendant is entitled to a new trial, under section 306, Code. It follows from what has been said that the judgment must be affirmed. All the judges concurring.

BUIST v. CITIZENS' SAV. BANK OF CONCORDIA.

(Court of Appeals of Kansas, Northern Department, C. D. Oct. 17, 1896.)

BANKS—INSOLVENCY—LIABILITY OF STOCKHOLDERS—ACTION BY CREDITORS.

1. Where the return of an officer to whom an execution upon a judgment against a Kansas banking corporation has been directed shows that no property could be found whereon to levy such execution, *held*, that the judgment creditor may at once rightfully proceed, under paragraph 1192, Gen. St. 1889, to subject the property of a stockholder of such corporation to the satisfaction of such judgment, notwithstanding 60 days may not have elapsed since the date of such execution.

2. Two or more creditors of an insolvent corporation may proceed concurrently against a stockholder to enforce his statutory liability, and the pendency of proceedings by one creditor is no bar to that of another. But the court has ample authority to protect the stockholder so that he be not required to make more than one payment in discharge of his liability.

(Syllabus by the Court.)

Error from district court, Mitchell county; Cyrus Herell, Judge.

Action by the Citizens' Savings Bank of Concordia against George Buist. Judgment for plaintiff. Defendant brings error. Affirmed.

Clark A. Smith, for plaintiff in error. Caldwell & Ellis, for defendant in error.

CLARK, J. This is a proceeding to enforce the individual liability of a stockholder of the Cawker City State Bank, a corporation organized under the laws of Kansas. On October 6, 1891, the Citizens' Savings Bank of Concordia recovered a judgment in the district court of Mitchell county against the said Cawker City State Bank for \$1,274. On October 9th an execution was issued on said judgment, which was on October 20th thereafter returned by the sheriff unsatisfied, for the reason, as shown by his return, that after diligent search and inquiry he could find no goods, chattels, real estate, lands, or tenements of the defendant upon which to levy the execution. On December 2, 1891, this execution was withdrawn from the office of the clerk, and on December 9th thereafter was again filed, bearing a similar return to the one previously entered thereon. On October 7, 1891, the National Bank of Lebanon recovered a judgment in said court against the same defendant corporation for \$2,070, and on October 12th an execution was issued thereon, which was returned unsatisfied on October 15th thereafter; the return of the sheriff showing that no property, either real or personal, could be found, whereon to levy the execution. George Buist was at the date of the rendition of these judgments, and for more than a year prior thereto had been, and at the dates hereinafter mentioned still remained, the owner of 20 shares of the capital stock of the said Cawker City State Bank, each share being of the face value of \$100. On October

24, 1891, the Bank of Lebanon caused a notice in due form to be served upon Buist that an application would be made upon the 1st day of the January term, 1892, of the district court of Mitchell county for an order directing an execution against him upon its judgment, as a stockholder of the said Cawker City State Bank. Such application was thereafter made, agreeably to said notice, and a hearing was had thereon. After the plaintiff had introduced its evidence, Buist demurred thereto on the ground that "the same does not prove facts sufficient to entitle the plaintiff to any remedy against the defendant, Buist, but does show that plaintiff is not entitled to the remedy asked." This demurrer was sustained, a motion for a new trial was overruled, and a judgment entered that the plaintiff pay the costs of the proceeding. Whether or not the court erred in sustaining the demurrer, we are unable to determine, as the evidence introduced upon the hearing of that application is not before us. Proper exceptions were saved to the rulings of the court, and an extension of time was allowed in which to make and serve a case for the supreme court, which time had not elapsed when the order complained of herein was entered. On November 14, 1891, and again on December 31st thereafter, the Citizens' Savings Bank of Concordia caused to be served on Buist a written notice that on January 11, 1892, an application would be made to the court for an order directing that an execution issue against his property for the amount of its judgment against the Cawker City State Bank. A hearing was had upon the motion, which was subsequently filed. The court found the facts to be as above recited, and held that, "the plaintiff being the first judgment creditor to proceed under the statute for execution against the said stockholder after the return day of the execution, he is entitled to preference over all other creditors to the amount of his judgment," and ordered the issuance of an execution as prayed for. Buist seeks a reversal of that order.

Section 2, art. 12, Const., provides that "dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder; and such other means as shall be provided by law; but such individual liabilities shall not apply to railroad corporations, nor corporations for religious or charitable purposes." Under this provision of the constitution, the legislature enacted paragraph 1192, Gen. St. 1889, which reads as follows: "If any execution shall have been issued against the property or effects of a corporation except a railway or a religious or charitable corporation, and there cannot be found any property whereon to levy such execution, then execution may be issued against any of the stockholders to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon; but no execution shall issue against any stockholder, except upon an order

of the court in which the action, suit or other proceeding shall have been brought or instituted, made upon motion in open court, after reasonable notice in writing to the person or persons sought to be charged; and, upon such motion, such court may order execution to issue accordingly; or the plaintiff in the execution may proceed by action to charge the stockholder with the amount of his judgment." The statute under which the execution against the Cawker City State Bank was issued provides that "the sheriff or other officer to whom any writ of execution shall be directed shall return such writ to the court to which the same is returnable within sixty days from the date thereof." Gen. St. 1880, par. 4567. The plaintiff in error contends that the law contemplates that if no property is in fact found by the officer, whereon to levy execution, he must nevertheless retain the writ in his hands for service for full 60 days, and that a return by him of nulla bona prior to the expiration of that time would be no evidence that "there cannot be found any property whereon to levy such execution." If this should be held to be the correct interpretation of this statute, we do not think that the act of the officer in withdrawing the execution after having made a return thereof, and holding the writ until the return day named therein, would afford a sufficient foundation upon which to base the subsequent proceedings to subject the property of the stockholder to the payment of the judgment. After the execution had been returned by the officer to whom it was directed, it became functus officio, and no levy could thereafter have been legally made upon the property of the corporation, except by virtue of another writ duly issued. It is true that the officer is, under the statute, allowed 60 days in which to make the levy, and he cannot be compelled to return the execution prior to the execution of that time. Still, we know of no reason why he may not very properly return the writ before the expiration of the 60 days, if, after having made diligent search, he is unable to find any property upon which to levy, and his return showing that fact would be at least prima facie evidence that no property could be found subject to execution. We think we might well adopt the language employed by the supreme court of Mississippi in *Ward v. Whitfield* (Miss.) 2 South. 485, wherein it is said that, "if there was no property subject to execution while it [the writ] remained in his hands, there exists no presumption that the condition of the debtor would be changed before the return day." In construing a statute identical in terms with our own, it was held in *Renaud v. O'Brien*, 35 N. Y. 93, that a return by the sheriff before the expiration of the time within which he was required to make it was a sufficient basis for a proceeding like this; that the time allowed for the return of an execution is for the benefit of the sheriff, and to prevent action or compulsory proceedings against him before he has had a reasonable time to execute the process; that the point beyond which it would not continue is provided, but that the statute is

silent as to how soon he is to be permitted to make the return; and that if the sheriff should make an honest return that he could find no property of the defendant in his county, or if the defendant should be known to be notoriously insolvent, and the sheriff should take the hazard of an early return, no valid objection could be urged thereto. The statute of Minnesota provided that execution should be returned within 60 days. In *Manufacturing Co. v. Shatto*, 34 Fed. 380, it was held that, after the return of an execution unsatisfied, supplementary proceedings might be commenced, although 60 days had not elapsed since the date of the execution. In *Guerney v. Moore*, 32 S. W. 1132, the supreme court of Missouri was called upon to construe the sections of our statute above quoted, and held that, where an execution upon a judgment against a corporation was returned unsatisfied 19 days after it was issued, such return was not premature, and that the contingencies had arisen which warranted the bringing of an action to charge the stockholder of the corporation with the amount of the judgment. It appears from the evidence, and from the findings of fact by the court, that several months prior to the rendition of the judgments herein named the Cawker City State Bank suspended business, closed its doors, and made an assignment of all its property, both real and personal, for the benefit of its creditors, and that at the time the order herein complained of was made the assignee had possession and control of all the property of the bank. If the officer knew of this fact, he would have been justified in returning the execution nulla bona, without making further useless search for property, as he could not legally levy upon property which was at the time held under a valid deed of assignment.

It is also contended that, if it should be held that the return of the officer was sufficient upon which to base proceedings to subject the property of a stockholder to the satisfaction of a judgment against a corporation, as the Bank of Lebanon had first instituted such proceedings it thereby acquired a priority of right to recover against the plaintiff in error, and as its judgment exceeded the amount of his liability as a stockholder the court erred in ordering the issuance of an execution in favor of the defendant in error before the time allowed by law in which the Bank of Lebanon might institute proceedings in error to reverse the ruling of the court denying its motion for execution had expired, and that if that ruling should be reversed, and it should be finally determined that the Bank of Lebanon had acquired a prior lien upon the liability of the plaintiff in error as a stockholder, by reason of its greater diligence in attempting to enforce the payment of its judgment by proceeding against him under the statute, the plaintiff in error might be subjected to the payment of a sum in excess of that prescribed by the constitution and statutes of this state. A sufficient answer to this contention would be that no application was made by the plaintiff in error to have the issuance of an exe-

cution stayed until his liability to the Bank of Lebanon should be finally ascertained, either upon proceedings in error, or by failure of that bank to institute such proceedings within the time limited by law. He could also have been fully protected by an order of the court authorizing him to deposit with the clerk the amount of the judgment in favor of the defendant in error, subject to the further order of the court when the priority of right of these judgment creditor should be fully ascertained. We think, however, that when an execution upon a judgment against a Kansas banking corporation has been returned nulla bona the judgment creditor may at once proceed against any stockholder thereof, under paragraph 1192 of the General Statutes of 1889, even though 60 days may not have elapsed since the date of the execution. The court has ample authority to make any order which may be necessary to fully protect the interests, not only of the stockholder against whom such proceedings may be instituted, but of the more diligent creditor as well. Simply awarding an execution against a stockholder "to an extent equal in amount to the amount of stock by him or her owned" does not of itself relieve such stockholder from his liability to other creditors of the corporation, nor prevent them from instituting similar proceedings against him; and in such case, unless it should appear that there has been a full satisfaction of the stockholder's liability, either by actual payment or its equivalent, an order for the issuance of an execution against him may be rightfully entered. Executions might be awarded in favor of the same judgment creditor, and against any number of stockholders, for the amount of their respective liabilities; but there could, of course, be but one satisfaction of the judgment. It appears from the record that the Bank of Lebanon instituted proceedings against other stockholders in the Cawker City State Bank similar in their nature to those instituted by it against the plaintiff in error, and that those proceedings were still pending and undetermined at the date of the entry of the order herein complained of. If that plaintiff should recover from such other stockholders a sufficient amount to satisfy its judgment against the corporation, Buist could not possibly be prejudiced by the order of the court which he is here seeking to have reversed. As the plaintiff in error has failed to point out any errors of the trial court which operated to his injury, the order directing the issuance of an execution against him will be affirmed. All the judges concurring.

LOCKROW v. CLINE et al.

(Court of Appeals of Kansas, Northern Department, C. D. Oct. 17, 1896.)

BOND—REFERENCE TO MORTGAGE—EFFECT ON NEGOTIABILITY—ASSIGNMENT—NOTICE—PAYMENT TO ASSIGNOR.

1. Where a bond, which is otherwise negotiable, in specific terms makes a mortgage deed, which was given to secure its payment, a part

of that contract, *held*, that each and every condition, provision, and stipulation contained in said mortgage deed thereby became a part of said bond to the same extent that it would have been had the same been written in full upon the face of said instrument; and where said mortgage deed contains any promise or stipulation which, if inserted in the bond, would render it nonnegotiable, such will be the legal effect of that clause which makes the mortgage deed a part of the contract.

2. Where the assignee of a nonnegotiable instrument fails to give notice of such assignment to the party to whom he looks for payment, a payment made to the original payee, without notice of the assignment by the maker, will be a satisfaction of his liability.

(Syllabus by the Court.)

Error from district court, Lincoln county; W. G. Eastland, Judge.

Action by Thomas B. Cline against Abby J. Lockrow and others to cancel a mortgage. From a judgment for plaintiff, defendant Lockrow brings error. Affirmed.

E. A. McFarland and W. E. Saum, for plaintiff in error. C. B. Daughters and David Ritchie, for defendant in error.

OLARK, J. On October 1, 1886, the Western Farm Mortgage Company of Lawrence, a corporation organized and doing business under the laws of Kansas, loaned to Thomas V. Malone and wife \$1,000, and accepted as evidence of such indebtedness their real estate coupon bond for \$1,000, payable to the order of one W. J. Neill, at the Third National Bank in the city of New York, on the 1st day of October, 1891, bearing interest at the rate of 7 per cent. per annum, payable semiannually. To secure the payment of this bond, Malone and wife executed in favor of Neill a mortgage deed on 80 acres of land in Lincoln county. This bond recited that it was given for an actual loan of \$1,000, and that said loan was secured by a mortgage deed on real estate duly recorded, and also contained this clause: "To which said deed reference is hereby made, and which is made a part of this contract." Thomas B. Cline subsequently became the owner of this real estate by a conveyance thereof from one John A. Shannon, a grantee of George Green, to whom Malone and wife had conveyed the same. By the terms of the deed from Shannon to Cline the latter assumed payment of this mortgage. Cline paid several installments of interest, and finally, on October 1, 1891, he remitted by bank draft the entire amount then due on the bond and mortgage, being the principal sum and interest thereon, amounting in all to \$1,097.70. All of these payments and remittances were made by Cline to the mortgage company which made the loan originally, although the name of the company had changed to the Western Farm Mortgage Trust Company of Denver. In March, 1887, Neill transferred and assigned the bond and mortgage to one J. H. Pratt, and by successive assignments the same were transferred from Pratt to J. B. Burgess, and from Burgess to Abby J. Lockrow, the plaintiff in error here-

in, the last assignment having been made January 21, 1889. The trust company retained the \$1,097.70 remitted to it by Cline, and failed to forward the same to the then owner and holder of the bond and mortgage, Abby J. Lockrow, and on July 26, 1892, Cline commenced an action in the district court of Lincoln county against Neill, Pratt, Burgess, and Lockrow to secure a cancellation and release of this mortgage. Lockrow answered, alleging her ownership of the bond and mortgage, and that the same were unpaid, and asked for a personal judgment against Malone and wife, who were, on her motion, subsequently made parties defendant, and against the plaintiff, Cline, upon his assumption of the mortgage indebtedness as set out in the deed from Shannon to him. The trial resulted in a verdict and judgment in favor of the plaintiff as prayed for in his petition, and Abby J. Lockrow seeks a reversal of that judgment.

The jury returned the following special findings of fact: "(1) Did the mortgagee, W. J. Neill, have any interest in the note and mortgage in controversy, other than nominal? Ans. He did not. (2) Was the Western Farm Mortgage Company the real owner of the note and mortgage in controversy at the time of their execution and delivery? Ans. It was. (3) Did the Western Farm Mortgage Company quit business about November, 1887? Ans. It did. (4) Did the Western Farm Mortgage Trust Company of Lawrence, Kan., and Denver, Colo., purchase the assets of the Western Farm Mortgage Company about November, 1887? Ans. Part of them. (5) Did the plaintiff continually from 1888 pay all the interest coupons on the note in controversy to the Western Farm Mortgage Trust Company at Denver, Colo.? Ans. He did. (6) Did the plaintiff pay to the Western Farm Mortgage Trust Company the interest and principal in full after due? Ans. He did. (7) Did the plaintiff have any knowledge or notice of the interest claimed by defendant Lockrow before the payment to the Western Farm Mortgage Trust Company? Ans. He did not. (8) Did plaintiff pay the note and mortgage in controversy to the Western Farm Mortgage Trust Company in good faith, believing the company had the right to collect same? Ans. He did. (9) Did defendant Abby J. Lockrow sell the coupons detached while she was the owner to the banks where she received payment, or did she place them in the possession of the banks only for collection? Ans. For collection only. (10) Did Cline, at the time he forwarded the money to the Western Farm Mortgage Trust Company at Denver, Colo., believe and suppose that said company was the owner and holder of the note executed by Malone and wife? Ans. He did. (11) What acts, if any, did Abby J. Lockrow do or authorize to be done for her prior to October 13, 1891, in direction of the collection of the coupons upon said bond or the collection of said principal bond? Ans. She did nothing. (12) Where was the principal note and mortgage kept and held; that is,

in whose possession were they on Oct. 13, 1891? Ans. In Abby J. Lockrow's possession." The jury further specially found that Cline paid the note and mortgage to the original owner and holder thereof; that he did not examine the records at any time to ascertain where the mortgage was payable; that he did not know, at the time he sent his last payment to Denver, that Neill was not the real mortgagee; that Abby J. Lockrow was the owner and holder of the note and mortgage at the time Cline made his final payment; that she had possession of and control over the note and mortgage at all times after she bought them in 1889, and had no correspondence, either with Neill or the Western Farm Mortgage Trust Company, about the payment of interest or principal; and that she never authorized either of them to collect any interest or the principal on the note and mortgage in controversy.

The plaintiff in error contends that under these special findings of fact the payment by Cline to the trust company of \$1,097.70, on October 13, 1891, being unauthorized by her, did not, in law, amount to a satisfaction of the indebtedness, and that she was entitled to a personal judgment against the defendant in error for an amount equal to the face of the bond, and interest thereon from April 1, 1891, and a decree foreclosing her mortgage, notwithstanding the general verdict of the jury in favor of the plaintiff below. We think the proper determination of this controversy hinges upon the question as to whether or not this bond was a negotiable instrument. If it was such an instrument, then the plaintiff in error was entitled to a judgment in her favor, and a decree foreclosing her mortgage. The bond contains the stipulations usually found in real estate mortgage bonds or notes, but differs from many of them in that it refers to the mortgage deed securing the payment of the bond, and makes the same a part thereof. By doing so, each and every condition, provision, and stipulation in the mortgage deed becomes as much a part of the bond as it would were it written upon and embodied in the same instrument; and, if the mortgage deed contains any provision or stipulation which, if inserted in the bond, would render it a nonnegotiable instrument, such must be the legal effect of that clause which refers specifically to the mortgage deed making it a part of the contract. In this mortgage Malone and wife covenanted that at the delivery thereof they were the lawful owners of the premises thereby granted, and that they were seised of a good and indefeasible estate of inheritance therein, free and clear of all incumbrances, and that they would warrant and defend the same in the quiet and peaceable possession of the mortgagee, his heirs and assigns, forever, against the lawful claims of all persons whomsoever. It also contains an agreement that the makers thereof should pay all taxes and assessments levied against the premises when the same should become due, and, if not so paid, that the mortgagee or the legal holder of the mortgage might, without notice,

either declare the whole sum of money secured thereby at once due and payable, or he might elect to pay the taxes, and, in case of such payment, the amount thereof should be a lien on the premises and secured by the mortgage, and collected in the same manner as the principal debt. The makers of the mortgage also therein agreed to keep all buildings, fences, and other improvements upon the premises in as good repair and condition as the same were at the time the mortgage was executed, and abstain from the commission of strip or waste on the premises until the whole sum thereby secured should be fully paid. The mortgage further provides that, in case of default in the payment of any sum as specified in the bond, or in case of the breach of any of the agreements or conditions contained in the mortgage, the bond and accrued interest thereon, and any money which may have been advanced by the mortgagee, should, at this election, become at once due and payable, and the mortgagee should be at once entitled to the possession of the mortgaged real estate, and have and receive all the rents and profits thereof. In *Killam v. Schoeps*, 26 Kan. 310, our supreme court held that an instrument which contained a contract in respect to the title to property, and for the possession thereof, rendered the instrument something more than a simple promise to pay money; and *Brewer, J.*, said in the opinion that: "There might as well be included in one agreement a contract for the lease of real estate, or for the hiring of chattels, or the performance of labor, with an absolute promise to pay a sum certain at a certain time, and then affirm that by reason of this absolute promise the entire contract is a negotiable instrument. This is not the law. Doubtless many of the rules respecting negotiable paper are purely arbitrary, but nevertheless they are well settled, and ought to be rigorously enforced. Among those rules is that of the unity of the contract, the singleness of the promise to pay, and we think no departure should be made from the spirit or letter of those rules. We conclude, then, that whenever any stipulation concerning other matters than the payment of money is incorporated in one instrument with a promise to pay money, such double contract will not be adjudged a negotiable paper." In *Iron Works v. Paddock*, 37 Kan. 510, 15 Pac. 574, it was held that a note which contained a provision that if it was not paid at maturity the payee might take possession of and sell the property for the payment of the debt for which the note was given, contained other provisions than for the unconditional payment of money, and was nonnegotiable. Under these decisions we must hold that the bond in controversy is a nonnegotiable instrument. What, then, were the respective rights and duties of the assignee of the bond and of the purchaser of the equity of redemption? We answer, they were in all respects similar to those of the assignee of any other chose in action and the party liable for the satisfaction thereof, respectively. The assignee

should give notice of the assignment to the party to whom he looks for payment, as a payment to the original promisee of a nonnegotiable instrument without notice of the assignment would, in law, be deemed a satisfaction of the liability. In *Jones, Mortg.* § 956, it is said that: "If the mortgage be overdue at the time of the assignment, the mortgagor may be protected in making payment to the mortgagee until he has received notice of the assignment of the mortgage." In 1 *Para. Cont.* (5th Ed.) p. 227, it is said that: "The debtor may make all defenses which he might have made if the suit were for the benefit of the assignor, as well as in his name, provided these defenses rest upon honest transactions which took place between the debtor and the assignor before the assignment, or after the assignment, before the debtor had knowledge or notice of it." Mr. Neff, at the date of the execution of the mortgage, was a clerk in the office of the Western Farm Mortgage Company, and afterwards held a similar position with the trust company, but he had no interest whatever in this bond or the mortgage given to secure its payment. The trust company sent to Cline regular notices of the dates when the interest and principal would respectively mature, and therein directed that the payment should be made to it. The final payment by Cline was, as the jury specially found, forwarded to the trust company through the Western Farm Mortgage Company, the latter being the real party in interest at the date of the execution of the bond. The evidence shows that the draft by means of which this remittance was made was drawn payable to the Western Farm Mortgage Company, and was by it indorsed in blank. Cline had no notice, either actual or constructive, that this bond belonged to any one other than the mortgage company. "The assignee of a mortgage, as a practical matter, should always give notice of the assignment to the holder of the equity of redemption, so as to surely protect himself against payments which may be made in good faith to the assignor." *Jones, Mortg.* § 791. All prior payments of interest had been made to the trust company, and in due time thereafter the interest coupons were returned to Cline by that company. We think the jury were warranted in finding that Cline acted in perfect good faith in this transaction, and that, in consequence thereof, he was entitled to a verdict and judgment canceling the mortgage. It appears from the record that, although in the deed of conveyance from Shannon to Cline the latter assumed the payment of this mortgage, Shannon himself was under no liability to pay that indebtedness, as he had in no way assumed its payment; hence, under the decision in *Morris v. Mix* (recently decided by this court) 46 Pac. 58, neither the mortgagee nor his assignee could recover from Cline by virtue of his agreement with Shannon to pay the mortgage. As we discover in the record no error prejudicial to the rights of the plaintiff in error, the judgment of the trial court will be affirmed. All the judges concurring.

STATE v. VIRGINIA & T. R. CO. et al.
(No. 1,473.)

(Supreme Court of Nevada. Nov. 17, 1896.)

TAXATION—RAILROADS—VALUATION—EVIDENCE—
APPEAL—CONFLICTING EVIDENCE.

1. Under St. 1891, pp. 137, 138, providing that all property shall be assessed at its actual cash value, and that the term "cash value" means the amount at which the property would be appraised if taken in payment of a just debt from a solvent debtor, the value of a railroad for the purpose of taxation must be determined mainly by its net earnings, capitalized at the current rate of interest, taking into consideration any immediate prospect of an increase or decrease in the earning capacity of the road.

2. Evidence of the assessor who valued a railroad for taxation that he took into consideration the business the road seemed to be doing, certain mining developments which, at the time of trial, proved to be worthless, the material in the road, and its condition; that he did not examine the reports of the road, nor make any inquiry as to the amount of its business, leaving both this and prospective change in the volume of business out of consideration, as well as the decrease in the earnings of the road; and that the value of the property was as assessed by him, etc.,—is insufficient to create a substantial conflict in the evidence, where the undisputed facts show that, according to the correct method of valuation, the assessment is too high.

3. In estimating the net earnings of a railroad as a basis for ascertaining the value of the road for the purpose of taxation, the cost of replacing a bridge should be deducted as a part of the expense of that year.

4. The rule that a verdict on conflicting evidence will not be disturbed relates only to a substantial conflict.

Appeal from district court, Washoe county; A. E. Cheney, Judge.

Action by the state of Nevada against the Virginia & Truckee Railroad Company and others to recover taxes. From a judgment for plaintiff, and from an order refusing a new trial, defendants appeal. Reversed.

Action to recover taxes due for the year 1895, amounting to \$5,369.10. The defendant made the statement to the assessor required by the statute, valuing its railroad in Washoe county at \$131,800. This the assessor refused to accept, but assessed it at the sum of \$254,321. Upon complaint by the defendant to the board of equalization of Washoe county, this assessment was sustained. Upon the taxes becoming due, the defendant tendered, in full payment thereof, \$3,173.86, which was refused by the tax collector. To the action, the defendant made answer that the actual cash value of its road in Washoe county was but \$131,800. The case was tried before a jury, and a verdict rendered in favor of the state, finding the value of the property to be the same as fixed by the assessor. From the judgment entered upon this verdict, and an order refusing a new trial, the defendant appeals.

W. E. F. Deal, for appellants. F. H. Norcross, Dist. Atty., Torreyson & Summerfield, and Robt. M. Beatty, Atty. Gen., for the State.

RIGELOW, O. J. (after stating the facts). By the act of March 9, 1895 (St. 1895, p. 39), section 52 of the revenue law was amended so as to permit a defendant sued for delinquent taxes to answer "that the assessment is out of proportion to and above the actual cash value of the property assessed." Prior to that amendment this defense could not have been made. *State v. Central Pac. R. Co.*, 21 Nev. 172, 178, 26 Pac. 225, 1100. The defendant answered under this amendment, but the jury found against it; and the question presented upon the appeal is, what was the actual cash value of the defendant's road in Washoe county?

The respondent first contends that the evidence as to value is conflicting, and that, consequently, this court cannot interfere with the verdict. That is undoubtedly the general rule, but for it to have this effect there must be a substantial conflict. It is not sufficient that there is some evidence supporting the verdict, if it is so weak and inconclusive as not to raise a substantial conflict with that produced against it. *Hayne*, New Trial & App. § 288; *Watt v. Railroad Co.*, 44 Pac. 428, 28 Nev. 154. We think that is the case here. While there is some evidence in support of the verdict, it is so weak, and is so completely upset by the undisputed facts, that it does not raise a substantial conflict as to the true value of the road. Const. Nev. art. 10, provides that all property, both real and personal, shall be assessed and taxed at an equal and uniform rate, and shall receive a just valuation. By St. 1893, p. 110, § 3, it is provided: "In ascertaining, assessing and fixing the value of any railroad for taxation the assessor shall assess it the same as other property, and shall consider, treat and assess the portion thereof at its value within his county as an integral part of a complete, continuous and operated line of railroad, and not as so much land covered by the right of way merely, nor as so many miles of track consisting of iron rails, ties and couplings." By St. 1891, pp. 137, 138, it is directed that all property shall be assessed at its actual cash value, and that the "term 'full cash value' means the amount at which the property would be appraised if taken in payment of a just debt due from a solvent debtor." A railroad, then, the same as every other class of property, is to be assessed at its true cash value,—at such an amount as it would be appraised if taken in payment of a just debt due from a solvent debtor. But this does not necessarily mean that the same rules and principles are to be applied to all the different kinds in determining what their true cash value is. The true value of each class is to be determined by evidence applicable to that class. Wherever property has a well-defined market value, which is usually the case with personal property, with town and farm property, the market value is usually the best criterion of its value for purposes of taxation. It is fair,

to presume that property to be taken in payment of a just debt from a solvent debtor would be appraised at what it is reasonably worth in the market,—at what it would probably bring. So one rule is really the equivalent of the other. But there are many other kinds of property to which this test would be entirely inapplicable. It cannot be said, although sometimes bought and sold, that they have a market value. Such, for instance, is a water ditch, a salt marsh, a borax field, or a mine of any kind. A toll road is another instance. Take, for example, the famous "Geiger Grade," which must have cost many thousands of dollars, and have been, at one time, a wonderfully productive piece of property, but which now would probably not pay the wages of a toll keeper. The market cannot be appealed to to fix a value upon such property, but its value may be and must be fixed by other obvious considerations. A railroad comes within this class. Railroads are bought and sold so seldom, and the value of each road depends so entirely upon its surroundings, that in determining the amount at which such property would be appraised if taken in payment of a debt we must resort to other principles. Railroads are usually constructed and operated for profit. They are not valued, as men sometimes value a beautiful home, a horse, or a diamond, for the pleasure that comes from their ownership, but for the returns that can be obtained from them as a business investment. Neither are they usually held for speculative purposes, as much other property, particularly unimproved lands, town and city property, is so often held. The value of a railroad is generally strictly prosaic and utilitarian. To obtain any return from it, either present or prospective, a railroad must be operated. It cannot lie idle, and at the same time increase in value through the natural increase of population and business. As it must be operated, expense must be constantly incurred, and the result is that its true value as a railroad depends very largely—almost entirely—upon what its net income can be expected to be. It is reasonable to suppose that the owners of a road will operate it to their own best advantage,—that they will obtain all the income possible, and keep the expense of operation as low as possible. This should certainly be the presumption in the absence of a showing to the contrary; and it follows, where a road has been operated for a number of years, that what it has done in the past is a very good criterion of what it may be expected to do, under the same conditions, in the future. Then, after ascertaining this net return, it is necessary to take into consideration the surrounding conditions, which also cut some figure in the problem, such as the condition of the road, in order to determine whether the expense of keeping it in repair will be greater or less

than in the past, and the condition of the country tributary to the road, in order to form a judgment of whether its business is likely to increase or decrease, or remain stationary. In fact, the true cash value of the property—its value for taxation—should be determined by the same matters that would be considered by one who wished to purchase and who was simply endeavoring to ascertain what the road was worth.

In the case of *State v. Central Pac. R. Co.*, 10 Nev. 47, this whole matter was very thoroughly considered by as able a bench as it has ever been the good fortune of this state to have. From the opinion by Beatty, J., we make the following short extract: "To determine the value of a railroad, then, the very first inquiry is as to its actual cost. That, *prima facie*, is its value. But if it appears that the actual cost was in excess of the necessary cost, the necessary cost is its proper standard. If it further appears that the net income of the road does not amount to current rates of interest on its necessary cost, and is not likely to do so, or if the business of the road is likely to be destroyed or impaired, by competition or other cause, or, in short, if the utility of the road is not equal to its cost, then its value is less than its cost, and must be determined by reference to its utility alone." It is claimed, however, that what was said in that case as to the correct rule for fixing the valuation of a railroad was dictum. We do not so regard it, as the defense in that case was that the road had been fraudulently overvalued. In considering this defense, the first point to be determined was whether there had been any overvaluation at all. Upon its theory of how a road should be valued, the defendant had established that there had, and this brought the question of what was a correct theory squarely before the court. But no matter. Whether what was there said was necessary to the decision of that case or not, we regard it as a substantially correct statement of the law, and we find it supported by many other cases. Thus, in *People v. Keator*, 67 How. Prac. 278, the court held as follows: "In complying with this provision of the law, as a railroad property cannot, as a dwelling, have any fancy value, by reason of its location or the expenditure thereon of large sums of money which would conduce to the comfort of the owner, it is evident that the assessors, in fixing its value, must be very largely controlled by its ability to earn money, and the productiveness of its use for the purposes of a railroad. As an original question, it would seem to be reasonably clear that the value of a railroad property must almost entirely depend upon its capacity to earn money for its owners, and that, therefore, no creditor would receive from a solvent debtor, in payment of his debt, railroad property at a greater price than that which would be a fair one based upon its earning capacity." In *People v. Weaver*,

67 How. Prac. 479, a case involving the value of a bridge, the same court said: "In determining the value of the property of the relation in the mode which the statute directs, it is an evidently sound proposition that the true criterion of such value must be its earning capacity." In *People v. Hicks*, 40 Hun, 601, we find the following, which we adopt as a very careful statement of the law: "The estimate of value of any portion of the road cannot be intelligently made without some knowledge or information of it as a whole, and its business, earnings, and ordinary expenses. Railroads are constructed with a view mainly to revenue and profit upon investments; and hence the productive capacity and its earnings are matters for consideration in the estimate of their value, and the extent to which actual net earnings of a road should govern or aid such estimate is dependent upon circumstances. No arbitrary method can be prescribed of ascertaining value. In some cases the earnings of a road may be entitled to much more consideration than in others. The cost of the road is also usually to be taken into account, and the value depends much upon relations present, and in reasonable contemplation, because the value of property may considerably be dependent upon defined unappropriated means and facilities for increased business connections and relations, and the importance of the consequences to follow." To the same effect are *Railway Co. v. Guenther*, 19 Fed. 385; *People v. Pond*, 13 Abb. N. C. 1. See, also, *People v. Fredericks*, 48 Barb. 173; *State v. Central Pac. R. Co.*, 7 Nev. 99. Perhaps, to avoid a misunderstanding of our decision, it should be stated in this connection that the value of a portion of a road is not, necessarily, a fractional part of the whole. Owing to local considerations, it may be greater or less. But we find nothing in the evidence in this case indicating any difference, and it is only mentioned to avoid a misconception of the opinion.

Without contradiction, the evidence in this case shows the following facts: That the cost of construction of the road was \$3,780,452.96, but that it could now be replaced, exclusive of the right of way, for \$1,500,000. That for the year ending June 30, 1894, the net earnings were \$8,642.52; for the year ending June 30, 1895, \$27,449.53; and for the year ending June 30, 1896, of which the last three months were estimated upon the basis of the receipts for the preceding nine months, \$21,077.71, from which should be deducted at least \$6,808.23, the amount the defendant admitted to be due Storey and Washoe counties for taxes for the year 1895, and possibly more, depending upon the result of this and a similar action in Storey county, leaving net for that year \$14,179.50 or less. It is not claimed that these figures are incorrect, nor that the gross receipts of any year might have been increased by proper management, or the amount of expense decreased. It was also shown, without

contradiction, that the current rate of interest in Washoe county was 8 per cent. per annum. Whether a broader view should not have been taken upon this point, and the rate of interest fixed at a lower figure, we have no data upon which to form a conclusion. There was no evidence that it was too high, and for the purposes of this appeal it must consequently be accepted as correct. It was also shown, again without contradiction, that there is no prospect in the near future that the business of the road will increase. In fact, it seems quite probable that, if anything, for some time to come, the receipts must decrease. In this connection it is argued that the jury had a right to exercise their own judgment in determining whether there was a probability of future improvement; that they could take judicial notice of the condition of the country, and determine as well as an expert whether business was likely to increase; and that, having done so, their judgment cannot be revised by this court. Admitting, without deciding, that they could take such notice of surrounding conditions, then this court has the same right and the same knowledge that the jury had, and, the same as a finding upon any other point, there must be something substantial upon which to base it. If the jury can take judicial notice of a thing, it must be of something that exists, not of something that does not, and there can be no question that there is nothing now except pure speculation upon which to base such a belief. There are no improvements contemplated and in process of construction, and no new mining camps discovered and developed to such an extent, in the region of country tributary to defendant's road, as make it reasonably certain that they will add materially to the income of the road in the near future. To affect the present value of the road, such prospective improvement must be more than a possibility. It must be so near and so certain that a business man purchasing the road would take it into consideration. *People v. Weaver*, 67 How. Prac. 477. It is present and not prospective value that is in question. *People v. Roberts* (Sup.) 38 N. Y. Supp. 724. It is very probable that, in time, new mining discoveries will be made, or present ones further developed, and new enterprises opened up that will bring in an increased population, and add to the business of this road, and we certainly believe such will be the case, and when this happens it will add to its value; but this possibility does not, as a business proposition, add materially to its present value. From the foregoing data, which certainly, in the main, cover the elements to be taken into consideration in determining the value of this road, there can be no question that the portion of the road in Washoe county is not of the true cash value of \$254,321, as fixed by the verdict. It does not seem reasonable that the value of a road should be fixed in view of the net receipts for any one year, which, owing to abnormal conditions,

may be greater or less than the average; but we are not called upon to consider that point here. We should certainly not go back beyond the railroad fiscal year of 1893-94, because the evidence shows that the conditions which produced a net profit the year before of \$102,341.52 no longer exist; and if we should put the years 1893-94, 1894-95, and 1895-96 together, the average would be less than the receipts of 1894-95. So, considering that year alone, the net receipts were \$27,449.53. That sum, capitalized at 8 per cent., represents \$343,119.12 as the value of the entire road, not taking into account the rolling stock and other personal property, consisting of 51.75 miles of main track and 26.14 miles of side track, of which amounts there are 25.65 miles of main track and 3.55 miles of side track in Washoe county. Several different ways of figuring Washoe county's proportion of the entire valuation may be adopted, depending upon the view taken of the side track; but under none of them can it amount to near the sum of \$254,321, as fixed by the verdict.

In making the above estimate, and in basing it entirely upon the earning capacity of the road, we do not wish to be understood, as we have stated before, as holding that there may not be other considerations which, in some cases, would cut quite a material figure. We simply hold that the earning capacity is the main consideration, and that, as shown in the evidence in this case as reported to us, we discover no others of sufficient importance to affect the result. The only evidence tending to support the verdict is that of the assessor. He testified that in his judgment the road in Washoe county was worth what it was assessed for. It appeared, however, that he had no special knowledge of the value of a railroad, nor was he any better qualified to testify to the value of one than almost any other man in the community. He stated that, in making the assessment, he had taken into consideration the business the road seemed to be doing, certain mining developments which, at the time of the trial, had turned out to be worthless, the material in the road, and its condition; that he did not examine the reports of the road, nor did he make any inquiry to ascertain what business it was or had been doing; that he did not take into consideration any decrease in the earnings of the road, and that, if he had known they had greatly decreased, it would not have made any difference in his judgment of its value; that, in making up his judgment, he did not take into consideration what the business had been, nor what it might be in the future. In making the assessment, he seems to have looked the property over, and to have come to the general conclusion it was worth the value he placed upon it. This would be all right, so far as the assessment was concerned, if he hit it right, because the law does not require the assessor to act upon any particular kind of evidence; but, when it comes to testifying as an expert,

he must be able to give some reason for his conclusions, or they are not entitled to much weight. Certainly he was able to give none here, and we cannot consent to the claim that such evidence creates a substantial conflict with the undisputed facts shown by the defendant.

There is also a question as to whether a part of the cost of a steel bridge across the Truckee river, erected in the year 1894, should be deducted as a part of the expense of that year. As we understand the facts relating to that matter, they are as follows: The old wooden bridge had become decayed to such an extent that it was necessary to replace it with a new one. The cost of a new wooden bridge would be \$6,018; of a new steel bridge, \$7,812.79. The company concluded to put in a steel bridge, and it now claims that what it would have cost to build a wooden bridge should be deducted as a part of the annual expense of keeping up the road, and that only the difference between the cost of the two should be charged to construction account. We see no reason why this is not correct. Replacing a worn-out bridge would seem to be as much an expense of keeping a road in repair as would replacing old ties, old rails, or old culverts; and in our statement of the net earnings of the road we have accordingly deducted it. As this expense will not have to be incurred again, it is fair to suppose that the future net earnings will be increased by that fact. Judgment and order reversed, and cause remanded for a new trial.

BONNIFIELD and BELKNAP, JJ., concur.

WATT v. NEVADA CENT. R. CO. (No. 1,457.)

(Supreme Court of Nevada. Nov. 14, 1896.)

APPEAL—ASSIGNMENT OF ERROR—INSUFFICIENCY OF EVIDENCE—FINDINGS OF FACT—REVIEW.

Under St. 1893, p. 89, which provides that, when the notice of a motion for a new trial designates as the ground thereof the insufficiency of the evidence, it shall be a sufficient assignment of error to specify that the decision is not supported by, or is contrary to, the evidence; and if the evidence, taken altogether, does not support the decision, on appeal the case shall be revised, without regard to whether there are express findings upon all the issues,—where the assignment is that "each and every part of each and every finding of fact by the court is wholly unsupported by the evidence, and against the evidence," the revising tribunal is not bound by an express finding of the lower court on a certain issue, unless supported by the evidence.

On petition for rehearing. Denied.

For former opinions, see 44 Pac. 423, and 46 Pac. 52.

BONNIFIELD, J. The appellant has petitioned for a rehearing in so far as the judgment of the court below was affirmed in the sum of \$2,651.90 (46 Pac. 52), claiming that said sum is too much by \$896.25. Counsel say: The court below made its findings on the

question of costs of transportation from Watt's ranch to Austin, exclusive of the cost of baling, as follows: "The cost of transportation from Watt's ranch to Austin was not less than eight dollars per ton, and the cost of transportation from Austin to Watt's ranch was not less than eight dollars per ton, and the market value of baled hay at Austin at about the time of the burning of plaintiff's hay was \$10 to \$12 per ton." Counsel further say: "This finding has not been questioned as to its correctness, either by plaintiff or defendant. It has not been assigned as error, nor has this finding been specified by counsel for defendant as unsupported by the evidence. It has not been assailed in any way by either side, and is therefore binding, under the authorities, and upon sound reason, upon this court, for all purposes of the case. Whether it be invoked for the purpose of reversing the judgment, or relied upon in case a modification of the judgment shall be determined upon by this court, it is absolutely binding on the court and litigant, because it has not been pointed out as not supported by the evidence, nor assailed as a finding of fact in any way." We, however, find, among the errors as assigned by appellant's counsel in the statement on motion for new trial, the following alleged error: "That each and every part of each and every finding of fact by the court is wholly unsupported by the evidence, and against the evidence." We also find that the appellant's notice of motion for new trial designated, as one of the grounds, "the insufficiency of the evidence to justify the decision of the court."

Our statute (1893, p. 89) with reference to motions for new trials, among other things, provides: "When the notice designates, as the ground upon which the motion will be made, the insufficiency of the evidence to justify the verdict or other decision, it shall be sufficient assignment of error to specify that the verdict of the jury, or the decision, or judgment, or decree of the court, is not supported by the evidence, or is contrary to the evidence. In such case, where it appears that the evidence, taken altogether, does not support the verdict, or decision, or judgment, or decree of the court, a new trial shall be granted, or, upon appeal, the case shall be revised without regard to whether there are express findings upon all the issues, or whether the specifications particularly point out the finding or findings, either express or implied, that are not supported by the evidence, or are contrary thereto."

Under the above facts and the statute, this court is not bound by the finding of the lower court with reference to the cost of transportation of the hay, unless it finds that the evidence supports such finding. The force of this finding is no greater than any other finding of fact in the case, but is exactly the same. The petition for rehearing is denied.

BIGELOW, C. J., and BELKNAP, J., concur.

STATE v. ELSWOOD.

(Supreme Court of Washington. Nov. 9, 1896.)

INFORMATION—DUPLICITY—CRIMINAL LAW—SPECIAL COUNSEL—EVIDENCE.

1. An information charging that a defendant did feloniously make an assault upon a female child, and did then and there feloniously ravish, carnally know, and abuse such child, is not demurrable on the ground that it charges an assault as a distinct offense.

2. Permitting special counsel to appear in a criminal case to assist in the prosecution is not ground for reversal, unless an abuse of discretion is shown.

3. The action of a trial court in permitting leading questions to be asked of witnesses is so largely discretionary that it is not ground for reversal, except in extreme cases.

Appeal from superior court, Stevens county; Jesse Arthur, Judge.

Henry Elsword was convicted of the crime of rape, and appeals. Affirmed.

John B. Slater and S. G. Allen, for appellant. C. A. Mantz, for the State.

HOYT, C. J. Defendant was convicted of the crime of rape, and, from the judgment and sentence imposed, has prosecuted this appeal. His first attack is upon the information, of which the substantial part was in the following language: "Comes now C. A. Mantz, county and prosecuting attorney for Stevens county, state of Washington, and by this, his information, charges the defendant, Henry Elsword, of the crime of rape, committed as follows, to wit: The said Henry Elsword, in Stevens county, state of Washington, on, to wit, the 21th day of July, 1895, and before the filing of this information, in and upon one Ressie Lutjens, a female child, under the age of twelve years, to wit of the age of ten years, feloniously did make an assault, and her, the said Ressie Lutjens, then and there feloniously did ravish, carnally know, and abuse, contrary to the statute in such case made and provided." It is claimed that this indictment was bad, for the reason that it charged two distinct crimes: First, that of assault; and, second, that of rape. The ground upon which this claim is made is that the section upon which the information was founded has provided for two distinct crimes,—one for rape upon an adult, and another for one upon a child. We do not thus understand this section. We think it has provided for but one crime, that of rape; that it has provided the acts necessary to constitute the crime in the case of an adult, and also those which would constitute the crime in the case of a child. But in either case the offense therein defined is that of rape. This being so, and it being clear from the language of the information that it was the intent to charge a felonious assault, the fact that words were used which might have charged an assault independent of the charge of rape does not show an intent to charge the crime of assault, excepting as the same is included in the

crime of rape. The information fairly informed the defendant of the offense with which he was sought to be charged, and, under our statute, was sufficient.

The second error is founded upon the action of the court in allowing special counsel to appear to aid the prosecuting attorney in the trial of the cause; but, in our opinion, the action of the court in this matter was within its discretion, and, no abuse thereof being shown by the record, such discretion will not be interfered with here.

A portion of the third ground upon which reversal is sought attacks the information, as to which it is not necessary that anything further should be said.

The other ground alleged under this point is that the evidence was such that the court should have taken the case from the jury, and discharged the defendant. But, since there was testimony tending to show every fact necessary to establish the guilt of defendant, we think the action of the court in refusing to take the case from the jury was what it should have been.

The fourth assignment of error is founded upon the action of the court in admitting, and refusing to admit, evidence offered upon the trial, and raises the question as to the sufficiency of the evidence to support the verdict. The action of the court upon the trial in allowing leading questions is strongly urged as having been prejudicial error, but this is a matter so largely in the discretion of the lower court that, except in an extreme case, its action will not be interfered with, and that extreme case is not made to appear from this record. As to the admission of testimony objected to, and the refusal to admit testimony offered, it is sufficient to say that we have carefully examined the statement of facts, and fail to find in the rulings therein disclosed any ground for reversal. Upon the question of the insufficiency of the evidence to support the verdict, there was, as we have already seen, testimony tending to show every necessary fact; and this being so, and the jury having acted thereon, and rendered a verdict, and the court which tried the cause and heard the testimony given having refused to interfere with such verdict, the insufficiency of the testimony is not so apparent from the record as to warrant us in setting aside the verdict. The judgment and sentence will be affirmed.

SCOTT, ANDERS, DUNBAR, and GORDON, JJ., concur.

J. F. HART LUMBER CO. v. RUCKER.
(Supreme Court of Washington. Nov. 9, 1896.)

SCHOOL LANDS—LEASE—IMPROVEMENTS—APPRAISAL—SALE—TIDE LANDS—EVIDENCE
—PRIMA FACIE CASE.

1. In an action by an assignee of a lessee of school lands to recover from the purchaser there-

of the appraised value of the improvements upon the land purchased, evidence that the lessee, H., made certain improvements thereon, and assigned his claim therefor to plaintiff, is sufficient to establish, prima facie, plaintiff's right to recover, though such improvements were made in pursuance of an agreement between the lessee and other persons as to their ownership.

2. Where the board of county commissioners makes a lease purporting to give the right to the lessee named therein to take possession of the lands described, and thereunder possession is taken, and improvements made, a stranger to the transaction, who would otherwise be liable for the value of the improvements, cannot object to an irregularity in the making of the lease.

3. That improvements upon school lands were appraised by the board of county commissioners before a sale of the lands may be shown by the county records, and by proof of what transpired at the time of the sale.

4. That an appraisal of improvements upon school lands, made by the board of county commissioners before a sale of the land, was fraudulent, is a matter of defense, and must be proved, in an action to recover from the purchaser the appraised value of the improvements.

5. At a sale of school lands, where a lot is in form struck off to one person with the understanding that another is to become the purchaser, and the second person carries out the agreement by having his name entered as purchaser, and pays the 10 per cent. of the purchase price required to consummate the sale, he cannot avoid the contract on the ground that he was not in fact the purchaser at the sale.

6. In a sale of school lands, the appraisal having stated that certain improvements were upon a lot designated, a purchaser of such lot must be presumed to have bid with the expectation that he must pay to the owner thereof the amount of such appraisal, and he cannot take advantage of the fact that some portion of the improvements were upon tide land in front of the upland purchased by him.

Appeal from superior court, Snohomish county; John C. Denney, Judge.

Action by the J. F. Hart Lumber Company against Wyatt J. Rucker to recover the value of improvements made upon school lands under lease. From a judgment of nonsuit, plaintiff appeals. Reversed.

O. W. Seymour, Stiles & Stevens, Coleman & Hart, and Sapp & Lysons, for appellant. Bell & Austin and Crowley, Sullivan & Grosscup, for respondent.

HOYT, C. J. This action was brought to recover of the purchaser of school lands the appraised value of the improvements upon the land purchased. After the evidence on the part of the plaintiff was all in, the court, upon motion of defendant, granted a nonsuit, and the question presented on this appeal is as to whether or not the evidence made out a prima facie case against the defendant. The respondent sets out in his brief five propositions as to which it was necessary that the plaintiff should introduce evidence, and concedes that, if evidence sufficient to prima facie establish each of these five propositions was introduced by the plaintiff, the motion for a nonsuit was wrongfully granted. These five propositions are stated in said brief as follows: "First, John F. Hart made upon lot number 11, section 16, township 29 N., R. 5 E., W. M., certain large and valuable permanent improve-

ments, consisting of a sawmill, and improvements, pertaining thereto, and dyking and slashing. Second. These improvements were made by said Hart after obtaining from the state a valid lease of said lot from the authorized agents of the state. Third. These improvements were subject to appraisal, and were appraised according to law by the authorized agents of the state. Fourth. The defendant, Wyatt J. Rucker, became a purchaser of said lot. Fifth. The plaintiff, Hart Lumber Company, became, before the commencement of this action, the owner of full and complete right and title to the claim made against the defendant, Wyatt J. Rucker, for the appraised value of said improvements."

As to the first proposition, there was abundant testimony to show that certain improvements had been made upon the land in question, that the same had been made by one John F. Hart, and that his interest therein had been assigned to the plaintiff. This testimony, *prima facie* at least, established the first proposition, and this *prima facie* showing was not overcome by reason of the fact that these improvements were made by Hart in pursuance of an agreement between himself and other persons as to their ownership. Notwithstanding the existence of this agreement, the improvements having been put upon the land by Hart, and he having assigned his claim therefor to the plaintiff, was sufficient, at least *prima facie*, to establish the right of plaintiff to recover the value of the improvements.

The second proposition was clearly established, if the board of county commissioners had authority to make the lease introduced in evidence; and whether or not they had such authority could not concern the defendant. It purported to give the right to the lessee named therein to take possession of the land in question, and thereunder possession was taken, and improvements made, and a stranger to the transaction, who would otherwise be liable for the value of the improvements, could not escape such liability by reason of any irregularity in the making of the lease. That these improvements were appraised by the board of county commissioners before the sale was attempted to be shown by the introduction of copies of a portion of the records of Snohomish county, and by proof as to what transpired at the time of the sale. These were, in our opinion, sufficient to *prima facie* establish the fact of such appraisal. But, even if they were not, defendant is not in a position to question the fact that an appraisal had been made. A letter from him to the board of state land commissioners was introduced in evidence, upon which he asked such board to act officially; and in that letter there was a statement that the improvements on the lot had been appraised, just before the sale, at the sum of \$48,000. Having stated this fact as a foundation for a claim for relief by the board, he thereafter was not in a condition to deny the fact of such appraisal in any matter growing out of the alleged purchase by him of the

lot in question. It is true that in such letter he claimed that the appraisal was fraudulent, and that the actual value of the improvements did not exceed the sum of \$8,000. But, if the appraisal was actually made, proof of that fact would be sufficient to make out a *prima facie* case in favor of the plaintiff; and, if the fact that it was fraudulent would constitute a defense, the fraud would have to be proven.

As to the fourth proposition, it sufficiently appeared from the evidence that the lot in question, with others, was in form struck off to James J. Hill, but that at the time it was so struck off it was understood that defendant was to become the purchaser of the lot in question, and James J. Hill of the other lands included in the parcel sold. This understanding was carried out by the defendant's name being entered as purchaser of the lot in question, and by the payment by him of the 10 per cent. of the purchase price required to consummate the sale. Under these circumstances, he is not in a condition to claim that he was not in fact the purchaser of the lot in question, and especially is this so in view of the fact that in the letter hereinbefore referred to he, though seeking to avoid the sale, did not claim that he was not in fact the purchaser at such sale.

The fifth proposition has been substantially covered by what was said as to the first. If others than Hart were interested in the improvements, that fact did not appear of record, and a conveyance by him to the plaintiff would, at least *prima facie*, convey a good title.

There was then, in our opinion, testimony tending to establish each of the facts necessary to enable the plaintiff to recover, if, under the law, there could have been any appraisal of the improvements upon the land by the commissioners at the time it was made. From what is said in the briefs it is probable that the court construed the case of *Holm v. Prater*, 7 Wash. 207, 34 Pac. 919, to negative the right of the commissioners to make such appraisal. What was held in that case was that, an appraisal of the improvements having been once made, the fact that other improvements were placed thereon before the sale would not entitle the owner thereof to a second appraisal. But in the case at bar there was nothing tending to show that there had been any appraisal of the improvements prior to the one in controversy. It is true that there was some testimony tending to show that an appraisal of the land had been before made. But if, from that fact, an inference would flow that the improvements had also been appraised, such inference was negated by testimony showing that the commissioners understood that the appraisal of the improvements must be as of the day of the sale.

We have not overlooked the extended and able discussion as to the rights of the parties growing out of the alleged fact that much of these improvements were on tide lands in front of the lot, and not upon the lot itself; but, un-

der our view of the law, the defendant is not in a position to take advantage of that fact, if fact it was. The appraisal having stated that the improvements were upon the lot in controversy, the defendant must be presumed to have bid with the expectation that he must pay to the owner thereof the amount of such appraisal; and while we will not now decide as to the liability of the purchaser for improvements appraised as a part of the land purchased, if in fact they are upon an entirely different lot, we do hold that under the circumstances disclosed by the evidence in this case the purchaser cannot take advantage of the fact that some portion of the improvements were upon tide land in front of the upland purchased by him. As to what would be the effect upon the rights of the owner of improvements upon school land to collect their appraised value from the purchaser thereof if such improvements had been fraudulently made or appraised, we shall not now decide. It is sufficient to say that at the time plaintiff rested there was no sufficient showing that the right of plaintiff to recover had been affected by any fraud in the appraisal. The judgment will be reversed, and the cause remanded, with instructions to deny the motion for nonsuit, and proceed with the trial of the cause in accordance with this opinion.

SCOTT, ANDERS, and GORDON, JJ., concur.

HERRIMAN et al. v. MENZIES et al. (No. 15,991.)¹

(Supreme Court of California. Nov. 7, 1896.)

CONTRACT—RESTRICTION OF TRADE—MONOPOLY—PUBLIC POLICY—VALIDITY.

A contract provided for the formation of an association between several firms and individuals "to govern and control the business of master stevedores, to be carried on by its members, and to divide the profits and losses of said business so carried on." The association was to continue for five years, and was given power, through a majority vote, to fix a schedule of charges; and it was agreed that each member would do no work for lower prices. Each member was to carry on the business in its or his own name, as theretofore, for the benefit of the association, and render regular statements to the association. The agreement was to cover all business done by any of its members in the state, and provided that any member violating the contract should pay to the association a certain amount as liquidated damages. *Held*, that the contract did not create a monopoly to unduly restrict the business of stevedoring, in contravention of public policy.

In bank. Appeal from superior court, city and county of San Francisco; James M. Troutt, Judge.

Action by Albert Herriman and others against Stuart Menzies and others on a contract. From a judgment in favor of plaintiffs, defendants appeal. Affirmed.

Henry N. Clement, for appellants. T. C. Coogan, for respondents.

¹ Rehearing denied.

VAN FLEET, J. In this case the defendants appealed to this court from the judgment and from an order denying a motion for a new trial. The appeal from the judgment was heretofore dismissed, and the order denying a new trial affirmed, in department. *Herriman v. Menzies*, 44 Pac. 680. Subsequently the order dismissing the appeal from the judgment was, upon petition therefor, set aside, and a hearing of the motion ordered in bank. Since the last order, the appeal from the judgment has been submitted upon the merits, but without a waiver of said motion to dismiss.

The appeal from the judgment involves but one question,—whether the complaint states a cause of action. The objection urged is that the contract which forms the basis of the action, and under which the accounting is asked, is contrary to public policy, and void. The contract is set out in *in ec verba*. It provides for the formation of an association between several firms and individuals engaged in the business of stevedoring in the city of San Francisco under the name of the Master Stevedores' Association, "to govern and control the business of master stevedores, to be carried on by its members, and to divide the profits and losses of said business so carried on." The association is to continue five years. Certain officers, consisting of president, vice president, and secretary, whose duties are defined, and a standing committee for the auditing of accounts of the members, are provided for. The association is given power through a majority vote of its members to "fix a schedule of prices or charges for any and all work as stevedores to be done and performed by its members, and they hereby agree that they will each of them observe and abide by such schedule of prices or charges, and that none of them will do or perform any such work at or for less or lower prices, or suffer or allow any discount to be made therefrom, except as may be allowed or authorized by the association." "(9) Each of the firms and parties hereto is to carry on the business of master stevedores, according to the provisions of this agreement, in their own names as heretofore, for the benefit of this association; and each agree to do so in an efficient and economical manner, and that their disbursements shall be subject to examination and approval or disapproval as herein provided." Each member is required to keep full and correct accounts of the business done by him, including all receipts and disbursements, and render statements thereof at stated intervals to the association. The agreement covers all business done by any of the members in San Francisco and the other ports in the state, and provides that any member violating any provision of the contract shall pay to the association a certain amount as liquidated damages.

It is contended that the contract contemplates an illegal scheme and combination to

stife competition in the stevedoring business, and is in restraint of trade, and that its effect is to create a monopoly; and that in these respects it contravenes public policy, and is opposed to good morals, and so constitutes no proper basis for an action either at law or in equity. We are unable to coincide in this construction of the contract, or to perceive anything therein which renders it invalid upon the grounds stated. The objection that its effect is to create a monopoly in and unduly restrict the business of stevedoring does not find support in its terms. A monopoly exists where all or so nearly all of an article of trade or commerce within a community or district is brought within the hands of one man or set of men as to practically bring the handling or production of the commodity or thing within such single control, to the exclusion of competition or free traffic therein. Anything less than this is not monopoly. Webster defines it as "the sole power of dealing in any species of goods," and Bouvier as "the abuse of free commerce, by which one or more individuals have procured the advantage of selling all of a particular kind of merchandise." And these definitions accord with that given by later writers. *Spell Trusts*, § 133. An agreement, the purpose or effect of which is to create a monopoly, is unlawful if it relate to some staple commodity, or thing of general requirement and use or of necessity, and not something of mere luxury or convenience. Assuming that the business of stevedoring is a thing which is the proper subject of a monopoly within this definition, there is nothing in this agreement to render it obnoxious to that objection, nor anything to show that it will operate to unlawfully restrain trade. It nowhere appears therefrom that the parties to this contract, by the combination of their business interests provided for, are in the control, or anything like the control, of that business in San Francisco, to an extent to enable them to exclude competition therein, or control the price of such labor or business. There is absolutely nothing to show that they comprise more than the most insignificant part or fraction, either in number or volume of business, of those engaged in that trade in this community. We are not at liberty to indulge in inferences which would restrict the parties in their right to combine their interests. Parties are to be given the widest latitude to make contracts with reference to their private interests (*Printing Co. v. Sampson*, L. R. 19 Eq. 465), and the invalidity of such contracts is never to be inferred, but must be clearly made to appear. Appellant says that the purpose of this contract is expressly declared as that of "controlling the business of stevedoring," and that this implies an improper restriction of that business and a monopoly. But the language of the contract is, "to govern and control the business of master stevedores, to be carried on by its members." This is a

very different thing from a combination to control the entire business of stevedoring. Combinations between individuals or firms for the regulation of prices, and of competition in business, are not monopolies, and are not unlawful as in restraint of trade, so long as they are reasonable, and do not include all of a commodity or trade, or create such restrictions as to materially affect the freedom of commerce. Say the supreme court of Illinois, in *People's Gaslight & Coke Co. v. Chicago Gaslight & Coke Co.*, 20 Ill. App. 492: "The tendency of the courts is to regard contracts in partial restraint of competition with less disfavor than formerly, and the strictness of the ancient rule has been greatly modified by the modern cases. Maule, J., in *Proctor v. Sargent*, 2 Scott, N. R. 289, remarked that: 'Many persons who are well informed upon the subject entertain an opinion that the public would be better served if, by permitting restrictions of this kind, encouragement were held out to individuals to embark large capitals in trade, and that it would be expedient to allow parties to enter into any description of contract for that purpose that they might find convenient.' *Greenhood*, Pub. Pol. 680, and cases cited." And in *Skrainka v. Scharringhausen*, 8 Mo. App. 522, it is said: "The old doctrine of the common law that contracts in restraint of trade are void is no longer to be rigorously insisted upon precisely as it was insisted upon in the earlier cases in which it was announced. It has been modified by the more recent decisions, as the laws of trade have become better understood during the development of our commercial system, and the changes which have been introduced in the social system. *Presbury v. Fisher*, 18 Mo. 50; *Long v. Towl*, 42 Mo. 545. It is not that contracts in restraint of trade are any more legal or enforceable now than they were at any former period, but that the courts look differently at the question as to what is a restraint of trade."

We find nothing in the terms of the present agreement which would necessarily work an unreasonable restriction in the manner of conducting the business in question, or which would necessarily interfere with the freedom or right of others not parties to the contract to engage in and carry on such business. The parties themselves, it is true, have combined their business as severally carried on by them, and have agreed to be bound by a schedule or rate of charges to be fixed by the association; but this in itself is not an unlawful restraint of trade so long as it does not appear that the rates to be charged are unreasonable, or the restriction such as to preclude a fair competition with others engaged in the business. In *Collins v. Locke*, 4 App. Cas. 674, it is held that where the object of an agreement was to parcel out the stevedoring business of the port of Melbourne among the parties to it, and so prevent competition, at least among themselves, and reasonably keep up the price, it

was not invalid, though its effect might be to create a partial restraint upon the power of the parties to exercise their trade. In *Association v. Walsh*, 2 Daly, 1, where an agreement not materially unlike the present was entered into between master stevedores, fixing a rate of prices to be charged by the members in their business, and making a penalty for any member doing work for less, and an action was brought to enforce such penalty for a default by one of the members, it was held that such an association was not an unlawful combination, as injurious to trade or commerce, nor the restrictions unlawful, as being in restraint of trade. "An agreement between a number of persons to act concertedly in fixing prices at which they will sell a particular product in a particular city is not illegal, as being in restraint of trade, unless it appears that they have a monopoly of that product." Ray, *Contract. Lim.* p. 223, and cases there cited. See, also, *People's Gaslight & Coke Co. v. Chicago Gaslight & Coke Co.*, supra; *Skrainka v. Scharringhausen*, supra; *Ontario Salt Co. v. Merchants' Salt Co.*, 18 Grant (U. C.) 542; *Roller Co. v. Cushman*, 143 Mass. 353, 9 N. E. 629. In *Ontario Salt Co. v. Merchants' Salt Co.*, supra, speaking of an agreement of similar import between salt manufacturers to keep up the price of that commodity, it is said: "I know of no rule of law ever having existed which prohibited a certain number (not all) of the producers of a staple commodity agreeing not to sell below a certain price; and nothing more than this has been agreed to by the parties here." We find nothing necessarily inconsistent with the doctrine of these cases in the cases cited by appellants. In the case of *Factor Co. v. Adler*, 80 Cal. 117, 27 Pac. 37, the language relied upon has express reference to contracts "entered into with the object and view of controlling and necessarily suppressing the supply, and thereby enhancing the price of articles of actual necessity." In *Lumber Co. v. Hayes*, 76 Cal. 387, 393, 18 Pac. 391, 393, in the language of the court: "The very essence and mainspring of the agreement—the illegal object—'was to form a combination among all the manufacturers of lumber at or near Felton, for the sole purpose of increasing the price of lumber, limiting the amount thereof to be manufactured, and give plaintiff control of all lumber manufactured.'" In *Vulcan Powder Co. v. Hercules Powder Co.*, 96 Cal. 510, 31 Pac. 581, the contract precluded the parties absolutely from shipping to, or selling the commodity within, a large part of the territory of the United States, and restricted the output of the powder within the territory wherein the parties were at liberty to sell; and it was held that the contract was void, as in restraint of trade. The cases from other states relied upon are as clearly distinguishable from the present as are the foregoing. After a careful review of all the authorities, we are unable to say from the terms of the present contract that it, to any extent, trenches upon the rule of public policy invoked, or that

there is anything within its provisions which should preclude the parties thereto from enforcing it. This conclusion renders the motion to dismiss the appeal of no consequence. The judgment is affirmed.

We concur: GAROUTTE, J.; HARRISON, J.; McFARLAND, J.; TEMPLE, J.; HENSHAW, J.

McMAHON v. THOMAS et al. (S. F. 359.)
(Supreme Court of California. Oct. 24, 1896.)
NEW TRIAL—NOTICE OF MOTION—ATTORNEY OF RECORD—WAIVER OF DEFECTS.

1. A notice of motion for a new trial is defective unless signed by the attorney of record for the moving party.

2. M. was attorney of record for defendants on a trial wherein they recovered judgment, but on appeal L. appeared as one of the attorneys, signing his name to the notice of appeal, and making the argument. In a second trial M. appeared, and moved that J. be substituted as defendants' attorney, but no formal substitution was made. J. conducted the second trial for defendants, and, after judgment against them, notice of a motion for new trial was served on plaintiff, which was signed by L. alone. *Held*, that the notice was insufficient, because not signed by an attorney of record.

3. Plaintiff did not waive his objection to such defect by acquiescing in L.'s appearance on the appeal.

Department 1. Appeal from superior court, San Benito county; John H. Logan, Judge.

Action by one McMahon against Thomas and others. From a judgment for plaintiff, and from an order denying their motion for a new trial, defendants appeal. Affirmed.

L. W. Jefferson and William A. Beasley, for appellants. Briggs & Hudner, for respondent.

VAN FLEET, J. At the hearing in the court below of the defendants' motion for a new trial, which was made upon the minutes of the court, plaintiff objected to the hearing, and asked that the motion be denied, upon the ground that no proper notice of the motion had been given, in that the notice of motion was not signed by the attorney of record of defendants in the cause. The judge reserved his ruling on the objection, stating that he would consider and determine the same in disposing of the motion. Subsequently he made an order denying the motion for a new trial, from which order defendants have appealed; and plaintiff, having preserved his said objection in the settlement of the statement, now renews the objection in this court, and asks that the order denying a new trial be affirmed upon that ground, without inquiry into the merits. If the objection is well taken, this would seem to be the proper practice. *Gumpel v. Castagnetto*, 97 Cal. 16, 31 Pac. 898; *in re Ryer's Estate*, 110 Cal. 558, 42 Pac. 1082.

G. B. Montgomery was the attorney of record for the defendants in the court below. He alone signed the answer. The first trial resulted in a judgment for defendants. Plaintiff moved for a new trial, which was granted,

and from that order the defendants appealed to this court. 39 Pac. 783. Upon that appeal L. W. Jefferson, Esq., appeared as one of the attorneys for defendants. He signed his name with that of the attorney of record to the notice of appeal, and also to the stipulation as to the correctness of the transcript thereon, and he argued that appeal in this court. That order being affirmed, the case went back for a new trial, and when it came up in the lower court Montgomery, the attorney of record, appeared, and, as recited in the statement, "moved the court that J. J. May, Esq., be substituted as attorney of the defendants for the attorneys theretofore of said defendants, and upon said motion of said Montgomery the court remarked, 'Very well; file your written consent;' but no consent of either of the defendants, or their said attorneys, or either of them, was filed with the clerk, or entered upon the minutes, and no notice was given from attorney to client, or client to attorney, at said or any other time, of any application for such order. Thereupon said J. J. May alone tried said cause on behalf of the defendants." That trial resulted in a verdict for plaintiff, upon which the present judgment was entered. Within due time the notice of motion here in question, asking a new trial on behalf of the defendants, was served on plaintiff's attorneys. This notice was signed by L. W. Jefferson alone, as attorney for the defendants. Subsequent to the giving of said notice, on July 22, 1895, when the motion was first on the calendar of the superior court for hearing, Jefferson appeared, and had the clerk continue the same to a later date. This was in the presence of counsel for plaintiff, who signified his assent by saying, "Very well."

It is conceded that no formal substitution of attorneys has ever been had in said cause, and the questions arising are: (1) Do the facts stated, which all appear from the settled statement, show the service of any authorized notice of motion? And, (2) if not, has plaintiff waived the right of objection thereto? That no attorney, other than the attorney of record, is authorized to sign a notice of motion for a new trial has been held in a number of cases, and may now be regarded as well settled. It was so held in *Hobbs v. Duff*, 43 Cal. 491. In that case there were several defendants, Mr. G. F. Sharp being the attorney of record for the defendant Duff. The notice of intention was signed, "G. F. & W. H. Sharp, Attorneys for the Defendants." Neither member of the firm was the attorney of record for any defendant but Duff, and it was held that the notice was ineffectual as to any defendant but Duff. So in *Prescott v. Salthouse*, 53 Cal. 221, the same ruling was had. The facts of that case were not entirely dissimilar from those before us. Messrs. Baggs & Tully were the attorneys of record for the plaintiff. At the trial the court made an order "that Julius Lee be, and he is hereby, associated with Messrs. Baggs & Tully for the plaintiff." This order the clerk omitted to enter, and it was afterwards entered nunc pro tunc as of

the day it was made. Mr. Lee participated in the trial on behalf of the plaintiff, and the plaintiff's notice of intention to move for a new trial was signed by him alone. Objections to the sufficiency of the notice, having been properly reserved, were sustained by this court, it being held that an order associating an attorney is unknown to the practice as prescribed by the Code of Civil Procedure; that the Code provides only for the substitution of an attorney, and that without such substitution an attorney has no authority to sign a notice of motion for a new trial. See, also, *Whittle v. Renner*, 55 Cal. 395. It is clear, therefore, that the notice in question was of no avail, unless the objection thereto has been waived. Respondent urges that such objection has been waived by the fact that Mr. Jefferson has been recognized by the plaintiff's attorney as an attorney of record in the case. This claim is based upon the fact of Mr. Jefferson's appearing without objection as attorney for the defendants on the former appeal, above mentioned. But we do not think that the recognition by the attorneys for the plaintiff of Mr. Jefferson's right to appear in that proceeding can be in any respect construed as a waiver by them of the present objection. It has been repeatedly held that an appeal is an independent proceeding, and that an appellant has the right to select any counsel to represent him upon an appeal, regardless of who may have appeared as attorney of record in the court below. The record does not show that Mr. Jefferson has ever been dealt with by the attorneys for plaintiff other than as the attorney prosecuting said appeal. Furthermore, as appears from the facts above stated, Mr. Jefferson was not recognized by the defendants themselves as their attorney of record, since it there appears that when it was deemed desirable to have Mr. J. J. May substituted, Mr. Montgomery, the attorney of record, appeared for the purpose of making that motion.

It is further contended that the question as to the regularity of the notice of motion for a new trial is concluded by the recital found in the bill of exceptions that: "In due time, to wit, on July 11, 1895, defendants filed herein, and duly served upon plaintiff's attorneys, their notice of motion for a new trial, specifying therein the grounds upon which the motion would be made," etc. If the recitals of the statement stopped there, there might be some ground for the claim based upon it, but the judge immediately proceeds to recite the facts as to the service of notice which we have above stated, and which show that no such effect was intended by the language just quoted as is sought to be placed upon it by the defendants. We find, in fact, nothing in the record, which tends to show a waiver by the plaintiff of his right to avail himself of the objection now urged; and, it appearing that this objection has been properly taken and preserved, and that it is one which goes to the very life of the motion, we see no escape—however unsatisfactory to dispose of a case upon technicality—from giving plaintiff its benefit by affirming

the order upon that ground. Upon the appeal from the judgment no point is urged for a reversal. The judgment and order are therefore affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

PEOPLE v. PAULSELL (Cr. 175.)
(Supreme Court of California. Nov. 7, 1896.)
CRIMINAL LAW—INSTRUCTION—REASONABLE DOUBT.

The refusal of an instruction giving the well-established and approved definition of a reasonable doubt, and the giving, instead, of one stating that such doubt must be one based on "common sense," is erroneous.

Department 2. Appeal from superior court, city and county of San Francisco; Edward A. Belcher, Judge.

W. E. Paulsell was convicted of robbery, and appeals from the judgment, and from an order denying his motion for a new trial. Reversed.

The instrument referred to in the opinion was as follows: "Now, the reasonable doubt you have heard me speak of means precisely what the words import,—a fair doubt, growing out of the evidence in the case, based on reason and common sense."

T. C. Coogan and Reddy, Campbell & Metson, for appellant. Atty. Gen. Fitzgerald and C. N. Post, Dep. Atty. Gen., for the People.

McFARLAND, J. The judgment must be reversed, and a new trial ordered, on account of instructions given and refused upon the subject of reasonable doubt,—a subject upon which we had hoped there would be no further difficulty, except where instructions had been presented upon that subject by the defendant. We have frequently held that, where the well-known definition of "reasonable doubt" of Chief Justice Shaw in the Webster Case had been given to the jury, we would be loth to reverse a judgment for the refusal of the court to give other instructions upon the subject; and we have frequently warned trial courts against departing to any considerable extent from that definition. In *People v. Chun Heong*, 86 Cal. 332, 24 Pac. 1022, the court, through Beatty, C. J., said: "We cannot, however, abstain from again expressing the hope that the trial judges who have made use of this form of instruction will eventually see the propriety of returning to the approved definition, which since the time of Chief Justice Shaw has never been improved upon." In *People v. Kernaghan*, 72 Cal. 610, 14 Pac. 506, we said: "For instance, the definition—or, rather, description—of 'reasonable doubt' given by Chief Justice Shaw in the Webster Case has been adopted by this court, and by nearly all American courts, as a statement of that mental condition sufficiently accurate. Therefore, where a nisi prius court had given the language used by Chief Justice Shaw, and had confined itself to such language, we would be slow to reverse the case, although other in-

structions upon the subject not objectionable had been asked by defendant, and had been refused." In *People v. Lenon*, 79 Cal. 629, 21 Pac. 969, we said: "Most instructions of courts on the old subject of reasonable doubt turn out to be erroneous when they ambitiously step outside of well-established bounds." See, also, *People v. Lee Sare Bo*, 72 Cal. 626, 14 Pac. 310. If, in the case at bar, the court had given the instruction which has been so often approved by this court, and the point of appellant had been that other instructions were inconsistent with the said Shaw definition, then we would have been compelled to look closely into the other instructions to see if there was any such inconsistency which was material. But in the case at bar it happens that the appellant himself asked the court to give said definition of reasonable doubt which is found in the said Webster Case, in the following language: "In the words of our own supreme court, a reasonable doubt is that state of the case which, after an entire comparison and consideration of all the evidence, leaves the minds of the jury in that condition that they cannot say that they feel an abiding conviction to a moral certainty of the truth of the charge." And the court refused to give said instruction upon the ground that it was "given by the court elsewhere." Of course, it was clearly error to refuse this instruction. It ought to have been given, even if the court intended to say anything further upon the subject. We do not feel ourselves called upon to critically examine what is claimed to be the equivalent of the said refused instruction, and to determine upon a close analysis whether what the court said was, in fact, the exact equivalent of the said instruction which it refused to give. If experimental departures from the well-established language sanctioned by all courts upon the subject of reasonable doubt are to be here allowed, and each trial court is to venture upon unusual language to express the idea contained in language so often approved, we will be afloat upon a new and unknown sea, and complications will arise in every criminal case coming here which will be very difficult to unravel. In the present case it is sufficient to say that the court introduced the new and unused phrase "common sense," and told the jury that the doubt must be based upon that. Counsel for appellant argues, after giving some of the definitions of "common sense" to be found in the dictionaries, that this language is merely the equivalent of saying that a jury should convict if they are satisfied of the guilt of the defendant to such a certainty as would influence their minds in the important affairs of life, which was held to be unsound by this court in *People v. Brannon*, 47 Cal. 96, *People v. Ah Sing*, 51 Cal. 372, and *People v. Bemmerly*, 87 Cal. 121, 25 Pac. 266. It is sufficient to say, however, that the phrase "common sense" is about as uncertain as any phrase in the language. When one speaks of common sense, he generally means his own sense; and there is no warrant for the unnecessary use of such a term when there is apt language to ex-

press the idea of reasonable doubt which has been frequently approved and pointed out as the language proper to be used. For this reason, the judgment must be reversed. Section 2061, Code Civ. Proc., provides: "That a witness false in one part of his testimony is to be distrusted in others." The court, in instructing the jury of its own motion, unfortunately changed the statutory language so as to make it as follows: "A witness proved to be willfully false in one part of his testimony may be distrusted in other parts of it." While the court undoubtedly should have been careful to use on this subject the language of the statute, we are not prepared to say that the judgment should be reversed on this account. But upon another trial the court, no doubt, will be more careful to follow the statutory language.

In its charge to the jury upon the subject of circumstantial evidence, the court read quite a long extract from the opinion of another court in another case, which contained really quite an argument in favor of the conclusiveness of circumstantial evidence, and a statement that such evidence was sufficient if it warranted a belief "as strong and certain as that on which discreet men are accustomed to act in relation to their most important concerns"; and the court then told the jury that the part of said opinion just quoted was not the law in this state. This course, we think, was improper. It is usually the province of the court to tell the jury what the law is, not what it is not; and, while we are not called upon to say whether or not such a course would warrant a reversal of the judgment, we may say, at least, that it is not commendable. The court also instructed the jury upon this subject as follows: "The doctrine of circumstantial evidence, in brief, is this: that all the circumstances must tend to establish the guilt of the defendant, and be inconsistent with any other rational hypothesis." This language is somewhat ambiguous, and might be misleading. All of the circumstances taken together should establish the guilt of the defendant. They should do something more than merely tend to establish such guilt.

It is contended by the appellant that the court erred in overruling challenges to certain jurors, upon the ground of bias. We do not think, however, that this contention can be maintained, and the same questions will probably not arise upon another trial.

We see no other points necessary to be specially noticed. The judgment and order appealed from are reversed, and the cause remanded for a new trial.

I concur: HENSHAW, J.

TEMPLE, J. I concur in the judgment and in the opinion, except the reference to section 2061, Code Civ. Proc. The instruction should be given only when made proper by some evidence. It is then to tell the jury that they must distrust a particular witness. This is an interference with the province of the jury which the legislature cannot authorize.

It is prohibited by section 19, art. 6, of the constitution. See *Kauffman v. Maier*, 94 Cal. 269, 29 Pac. 481.

SAN JOAQUIN LUMBER CO. v. WELTON et al. (Sac. 104.)¹

(Supreme Court of California. Nov. 7, 1896.)
MECHANIC'S LIEN — PLEADING — SUFFICIENCY OF COMPLAINT.

In an action to enforce an alleged lien on certain buildings, an allegation that "said buildings are in an unfinished condition, that work ceased thereon on or about the 1st day of April, 1894, and has not been resumed," is sufficient, in regard to the time of the cessation of the work, in absence of a special demurrer thereto, to admit proof and a finding of the exact date of such cessation.

Commissioners' decision. Department 2. Appeal from superior court, Tulare county; Wheaton A. Gray, Judge.

Action by the San Joaquin Lumber Company against S. L. Welton, M. C. and H. J. Sadler, and others, to enforce an alleged lien. From a judgment in favor of plaintiff, defendants Sadler appeal. Affirmed.

Fred. H. Hood, for appellants. Davis & Allen, for respondent.

VAN CLIEF, C. The action is to enforce an alleged lien on certain buildings for the value of materials (\$186.74) furnished by plaintiff to be used, and which were used, in the construction of said buildings. The plaintiff had judgment by default, all the defendants having failed to appear. The defendants H. J. and M. C. Sadler have appealed from the judgment on the judgment roll.

A reversal of the judgment is asked by appellants on the ground that no cause of action is stated in the complaint. The alleged defect in the complaint is that it does not show that plaintiff's claim of lien was filed for record within the time prescribed by section 1187 of the Code of Civil Procedure, as amended March 15, 1887, which requires a furnisher of materials to file his claim of lien within 30 days after completion of the building, etc.; and that "cessation from labor for thirty days upon any unfinished contract or upon any unfinished building * * * shall be deemed equivalent to a completion thereof." It is alleged in the complaint, which was filed June 22, 1894, "that said buildings are in an unfinished condition; that work ceased thereon on or about the 1st day of April, 1894, and has not been resumed." It is also alleged that plaintiff's claim of lien was filed and recorded on May 8, 1894. If the work ceased on April 1st, or at any time before April 7th, the buildings were properly deemed completed before May 8th, when the claim of lien was filed for record, and the filing was within 30 days after such completion. It is claimed by appellant, however, that a cessation of work on April 9th would be within the meaning of the phrase "on or about the first day of April." But, even if this be conceded,

¹ For opinion on application for modification, see 46 Pac. 1067.

I think it only follows that the allegation as to time of the cessation of work was uncertain, and subject only to a special demurrer on that ground; and that, in the absence of such demurrer, the plaintiff was entitled to prove that the work ceased on the 1st day of April, 1894. It appears that evidence was introduced and considered, and that the court expressly found "that the work of constructing and erecting said dwelling house and barn ceased on the 1st day of April, 1894, and said buildings were then left in an unfinished condition, and still remain in an unfinished condition." This finding supplied the only want of certainty in the complaint, since it was alleged in the complaint and confessed by the default that after the cessation the work had not been resumed at the time this action was commenced. It follows that the only question worthy of consideration is whether or not the allegation as to the time of the cessation of the work was sufficient, in the absence of a special demurrer thereto, to admit proof and a finding of the exact date of such cessation.

The line of distinction between an uncertain or defective averment of a material fact and a total want of such averment is well defined by the authorities, especially in this state; and it has been uniformly held that, if the defect in the averment be merely that of uncertainty, it will be waived by failure to demur specially on the ground of uncertainty, and, of course, by a default. In *Bates v. Babcock*, 95 Cal. 482, 30 Pac. 606, this court said: "It is only where there is in the complaint an entire absence of averment of a fact essential to a recovery, so that no evidence of that could be received at the trial, that a judgment in favor of the plaintiff cannot be sustained; but, if the objection be merely that such fact is defectively alleged, evidence received under such averment, if sufficient, will sustain the judgment. While the complaint in the present case is not entirely free from criticism, and might have been made more certain and precise in some of its averments, yet we think that it contains a sufficient statement of facts to justify the court in receiving evidence thereof. * * *" To the same effect are the cases of *San Francisco v. Pennie*, 93 Cal. 468, 29 Pac. 66, and *Schluter v. Harvey*, 65 Cal. 158, 3 Pac. 659. In *Garner v. Marshall*, 9 Cal. 269, Mr. Justice Field said: "The general rule is that, wherever facts are not expressly stated which are so essential to a recovery that, without proof of them on the trial, a verdict could not have been rendered under the direction of the court, there the want of the express statement is cured by the verdict, provided the complaint contain terms sufficiently general to comprehend the facts in fair and reasonable intentment." Citing *Steph. Pl.* 149. In the case at bar it cannot be doubted that the averment in question, by fair and reasonable intentment, comprehends the fact found by the court, namely, that work on the buildings ceased on the 1st day of April, 1894. As to the continuous duration of the cessation of the work for more than 30 days before the

filing for record, the claim of lien, and that the claim of lien was filed within 30 days after the constructive completion of the buildings, the complaint is sufficiently certain. I think the judgment should be affirmed.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

HANLEY et al. v. HANLEY. (S. F. 446.) (Supreme Court of California. Nov. 6, 1896.) JUDGMENT—COLLATERAL ATTACK FOR FRAUD—DECREE SETTING APART HOMESTEAD TO WIDOW.

1. A judgment or decree can be collaterally attacked for fraud only when such fraud is extrinsic or collateral to the matter tried, and an independent action cannot be maintained in equity to set aside a decree allotting a homestead to the widow of a decedent, on the ground that in procuring such decree the widow misrepresented to the court the facts as to the property.

2. A proceeding to set aside a homestead to the widow of a decedent is in rem, and the decree binds all parties interested in the estate, without personal notice.

Department 2. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

Action by John Hanley and Michael Hanley against Ellen Hanley. This court sustained a demurrer to the complaint, and rendered judgment for defendant, from which plaintiffs appeal. Affirmed.

Sullivan & Sullivan, for appellants. Joseph D. Tobin and Andrew G. Maguire, for appellee.

McFARLAND, J. This is an equitable action, brought by the plaintiffs, as heirs of one Patrick Hanley, deceased, to vacate and set aside a certain decree of the superior court rendered in the administration of the estate of said Patrick Hanley, by which certain real property was set aside to the defendant, Ellen Hanley, the widow of said deceased, as a homestead. A demurrer to the complaint was sustained by the court below, and judgment was rendered for the defendant, and from such judgment plaintiffs appealed.

The complaint does not state facts sufficient to constitute a cause of action, and the demurrer was properly sustained. The main averments of the complaint are that the premises in dispute were the separate property of said Patrick Hanley, deceased; and that said respondent, Ellen Hanley, willfully, falsely, and fraudulently represented to the court and testified that the said premises were community property, and also falsely represented that a certain declaration of homestead had been filed on said premises while she and her husband were actually residing thereon. The decree of the superior court setting apart said homestead was final, unless reversed on appeal; and it cannot be attacked collaterally in an independ-

ent action upon the grounds set up in the complaint. A judgment or decree of a court of competent jurisdiction can be set aside in an independent equitable proceeding for fraud only where the fraud alleged was extrinsic or collateral to the matter which was tried and determined by such court; and such is not the character of the fraud alleged in the complaint in this action. In *U. S. v. Throckmorton*, 98 U. S. 61, the court declared that the cases in which a court of equity is authorized to interfere and set aside a former judgment on the ground of fraud are those only where the fraud was extrinsic or collateral to the matter tried. This rule has been declared and followed in a large number of cases decided by this court: *Pico v. Cohn*, 91 Cal. 129, 25 Pac. 970, and 27 Pac. 537; *Langdon v. Blackburn*, 100 Cal. 26, 41 Pac. 814; *Gruwell v. Seybolt*, 82 Cal. 10, 22 Pac. 938; *In re Moore's Estate*, 96 Cal. 523, 31 Pac. 584; *In re Griffith's Estate*, 84 Cal. 113, 114, 23 Pac. 528, and 24 Pac. 381; *Fealey v. Fealey*, 104 Cal. 355, 38 Pac. 49. In *Pico v. Cohn*, supra, this court said: "That a former judgment or decree may be set aside and annulled for some frauds there can be no question, but it must be a fraud extrinsic or collateral to the question examined and determined in the action. And we think it is settled beyond controversy that a decree will not be vacated merely because it was obtained by forged documents or perjured testimony. * * * What, then, is an extrinsic or collateral fraud, within the meaning of this rule? Among the instances given in the books are these: Keeping the unsuccessful party away from the court by a false promise of a compromise, or purposely keeping him in ignorance of the suit; or where an attorney fraudulently pretends to help a party, and connives at his defeat, or, being regularly employed, corruptly sells out his client's interest." That was a case appealing very strongly to equitable considerations, for there it clearly appeared that perjury had been committed in a case where the judgment was rendered which was sought to be set aside. Nevertheless, the rule of the conclusiveness of the former judgment was applied. A number of the cases above cited were almost exactly like the one here at bar; that is, they were cases in which it was sought to set aside a decree setting apart a homestead. This was particularly the case in *Gruwell v. Seybolt* and *Fealey v. Fealey*. The latter case can hardly be distinguished in any way from the case at bar. The same principle was announced in the very late case of *Lynch v. Rooney* (Cal.) 44 Pac. 565. There is nothing in the contention of appellants that they had no notice of the proceeding to set aside the homestead. The proceeding was in rem, and all parties interested were bound by it without personal notice. See *Kearney v. Kearney*, 72 Cal. 591, 15 Pac. 769, and cases there cited. The appellants rely somewhat upon the case of *Wickersham v. Comerford*, 96 Cal. 433, 31 Pac. 353, but that case was commented upon and distinguished

v. 461. nc.9—47

from cases coming within the general rule above cited by the opinion of the court in *Fealey v. Fealey*, supra, in which it was held that the concealment perpetrated in *Wickersham v. Comerford* constituted a fraud which was extrinsic and collateral. The case at bar comes clearly and fully within the rule declared in the cases above cited. The judgment appealed from is affirmed.

We concur: HENSHAW, J.; TEMPLE, J.

SCATENA et al. v. CALIFORNIA CANNERIES CO. (S. F. 337.)¹

(Supreme Court of California. Nov. 7, 1896.)

MOTION—ORDER THEREON—APPEAL.

A party cannot complain of an order made in response to his own motion.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by L. Scatena and others against the California Canneries Company for goods sold and delivered. From a judgment in favor of plaintiffs, and from an order denying its motion for a new trial, defendant appeals. Affirmed.

Reinstein & Elsnor, for appellant. Estee & Miller and J. H. Miller, for respondents.

SEARLS, C. Action to recover a balance of \$866.47 on account of goods, wares, and merchandise sold and delivered to defendant (a corporation) by the plaintiffs as co-partners under the firm name and style of L. Scatena & Co. Defendant answered, denying many of the allegations of the complaint. It also set up a counterclaim, under which it demanded damages against the plaintiffs, as co-partners aforesaid, in the sum of \$1,500, on account of a breach of a contract entered into by and between plaintiffs and defendant for the delivery of 150 tons of fruit at \$20 per ton. Plaintiffs demurred to the cause of action contained in the counterclaim, which demurrer was undisposed of until the cause was on trial, when, as appears by the record, the demurrer was, on motion of counsel for defendant, sustained. Thereafter counsel for the defendant offered testimony in support of its counterclaim, which was rejected by the court. Plaintiffs had judgment, from which, and from an order denying its motion for a new trial, defendant appeals. The order of the court sustaining the demurrer to its counterclaim, and the ruling of the court in excluding evidence in support thereof, are the only errors of any importance assigned. The action of counsel for defendant in moving the court to sustain a demurrer to its answer of counterclaim is so extraordinary that we should doubt the correctness of the record but for the fact which also appears, viz. that defendant had brought suit against plaintiffs for a breach of the same contract set out in

¹ Rehearing denied.

the counterclaim, which action was set down for trial on the same day with this cause, and was doubtless heard and determined. Be that as it may, the demurrer having been sustained by request of appellant, it cannot now complain on account thereof.

2. The demurrer having been sustained to the counterclaim, there was no issue to which the proffered evidence in support thereof could apply, and hence no error in its rejection. The evidence was ample to support the findings. The judgment and order appealed from should be affirmed.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

BERGTHOLDT v. PORTER BROS. CO.

(Sac. 184.)¹

(Supreme Court of California. Nov. 6, 1896.)

AGENCY—EVIDENCE—CURING ERROR.

1. As evidence that M. was the agent of a corporation, letters to him from S., its vice president and general manager, directing him to placard the buildings in which he was doing business with the corporation's name, photographs showing that they were marked as directed, letter heads and stationery showing that the business was conducted with M. as agent, and shipping receipts and bills of lading all showing the same thing, and seen by S., are admissible.

2. Evidence that M. employed plaintiff for and on account of defendant is admissible to show that plaintiff in good faith believed himself to be defendant's servant, though not to prove agency of M.

3. Error, if any, in refusing to allow defendant to ask certain questions, is cured by the court's offering to open the case, and permit such questions.

Commissioners' decision. Department 2. Appeal from superior court, Placer county; J. E. Prewett, Judge.

Action by Bergtholdt against the Porter Brothers Company, a corporation. Judgment for plaintiff, and defendant appeals. Affirmed.

L. T. Hatfield, for appellant. D. E. Alexander and Alexander, Miller & Gardner, for respondent.

SEARLS, C. Action to recover for services rendered by plaintiff to the defendant, viz. a balance of \$689.12, and, as assignee of F. H. Howell, to recover \$536.93 for services rendered to defendant by said Howell. Plaintiff had judgment for \$1,226.05 and costs of suit. Defendant appeals from the judgment, and supports its appeal by a bill of exceptions.

The Porter Brothers Company, the defendant, was and is a corporation organized and existing under and by virtue of the laws of the state of Illinois. Since 1892, and prior

to that date, it has been engaged in shipping fruit from sundry points in California to Chicago, New York, Omaha, Minneapolis, and perhaps some other points east, where it sells and disposes thereof. Its head office in California seems to have been at Sacramento, and Nate R. Salisbury was its vice president and general manager for California. Newcastle, Penryn, and Loomis are stations upon the Central Pacific Railroad, situate in the fruit region of Placer county, Cal. A. Moger located at Newcastle in 1890, or early in the year 1891, and engaged in shipping fresh or green fruit, as it is termed, from that point east, consigning it mostly to the Porter Brothers Company, Chicago, for sale. This fruit was either purchased from the growers, or received on consignment for shipment and sale. In connection with the business, Moger dealt in and furnished to fruit growers packing material, consisting of lumber or shooks for boxes, paper, etc., which last business yielded a profit. On the 2d of May, 1891, the plaintiff entered the employ of Moger as a bookkeeper at Newcastle, at a monthly salary of \$75, and continued to work as such bookkeeper at the same place until May 15, 1895. On June (or January) 1, 1892, plaintiff was informed by Moger that the defendant corporation had purchased the property and business at Newcastle, and that henceforth his employment would be under defendant at \$75 per month until May, 1892, and thereafter at \$100 per month. Moger also, early in 1892, secured warehouses for the receipt and shipment of fruit at Penryn and Loomis. Thus far there is no substantial conflict in the testimony. But here a sharp conflict occurs in the testimony as to whether defendant assumed and conducted the business in Placer county from about January, 1892, up to 1895, on its own account, with Moger as its managing agent, or whether Moger was simply a soliciting agent for defendant, with no authority to hire, on behalf of defendant, the necessary assistants for the transaction of the business. F. H. Howell, who assigned his claim to plaintiff, was employed as a shipping clerk in April, 1892, by Moger, who professed to act as the agent of defendant, similarly with plaintiff, and need not be specially mentioned hereafter, as the evidence applies equally to both Howell and plaintiff. The court below found that both plaintiff and Howell were employed by defendant, and that their services were necessary to the conduct of the business. These findings are attacked by appellant as being unsupported by the evidence. Their propriety depends upon the authority of Moger, as the agent, actual or ostensible, of defendant, to employ them on its behalf, for the reason that there is no pretense that they were employed on behalf of defendant, except through the agency of Moger.

We might content ourselves in support of the findings by the trite statement that there is a substantial conflict in the evidence, and hence that the findings will not be disturbed.

¹ Rehearing denied.

We will, however, refer to some of the evidence in support of the deductions of fact reached by the trial court, viz.: (1) Prior to January 1, 1892, the warehouse at Newcastle was owned by the Newcastle Fruit Association, and Salsbury, the vice president of the defendant, had, on behalf of defendant, loaned \$3,000 to the owners, secured by a mortgage on the property. Defendant had negotiated for the purchase of the building, but thought the price too high and did not purchase. A. Moger purchased the building in 1892 (in October or November), and gave a mortgage thereon to Salsbury (for defendant) of \$3,700, in payment of which he conveyed the property to Salsbury (for defendant) in November, 1894. The land upon which the building stood was the property of the railroad company, and most, if not all, the time since January, 1892, defendant has been the lessee thereof. (2) On the 29th day of February, 1892, Nate R. Salsbury wrote A. Moger, from San Francisco, a letter in which, after speaking of having a switch or side track put in at the warehouse, he continued as follows: "If you secure the packing house at Loomis, I would suggest that you have a large sign painted on the roof, 'Porter Brothers Company, Chicago, New York, Minneapolis, Omaha. A. Moger, Agent.' Also have a sign painted for your house at Penryn, and get your sign painted on the Newcastle house as soon as possible." In March these signs were painted on the buildings. That at Newcastle, as is shown by a photograph in evidence, is as follows: On the roof, in large letters, "Porter Brothers Company;" and on the front, "Porter Bro's Company, Chicago, New York, Omaha, Minneapolis." The packing house at Penryn was similarly branded. Salsbury was at Newcastle several times in 1892, and saw these signs. (3) On or about January, 1892, the blank stationery used in the business, such as letter heads, receipts, bills of lading, etc., were changed. The letter heads were printed as follows: "Porter Brothers Company. A. Moger, Agent. Shipper Choice Mountain Fruit. Porter Brothers Company, Chicago, New York, Omaha, Boston, Philadelphia, New Orleans, Montreal." That defendant was aware of this mode of advertising is evidenced by the introduction in evidence of letters thus headed received by it from Moger, and by proof that Salsbury visited Newcastle, examined the stationery thus or similarly headed, and made no objections thereto. (4) The fruit was shipped by defendant as consignor to defendant as consignee at various points east, where defendant had branches or places of business. The following is a sample of shipping receipts: "Received by Southern Pacific Company, from Porter Brothers Company, one car of green fruit, to Porter Brothers Company, Chicago." These receipts were at once sent to the Sacramento office, which was in charge of Salsbury, vice president and manager, as aforesaid. (5) May 3, 1893, the Newcastle News,

a newspaper published at Newcastle, contained an article on the extended business of the Porter Brothers Company, with cuts purporting to be pictures of Washington Porter and Fred Porter, etc., in which article the following paragraph occurs: "Porter Brothers Company are represented in Placer county by Captain A. Moger, assisted by Wallace Dewe at Penryn, and J. E. French at Loomis. The company will also be represented at Auburn." Extra copies of this paper were ordered, and the publisher thought he sent one to the company at Sacramento, but it was only a recollection and he was not sure. (6) A. Moger shipped some fruit to local points, say Reno, Truckee, Oregon, etc. This was shipped in his own name. (7) In 1894, Moger failed to disburse to fruit growers and others moneys forwarded him by defendant, and from about June, 1894, a change was made in the method of shipment, and checks were sent directly to shippers for balances due them for fruit. In 1895, defendant settled the delinquencies of Moger by paying in full for fruit shipped through to it, and 50 cents on the dollar for fruit purchased by Moger and shipped elsewhere. Other circumstances are in proof, but it is believed the foregoing are sufficient to warrant the court in its findings.

Errors of law: Nearly all the testimony on the part of plaintiff was objected to by counsel for defendant, and some 40 errors are assigned upon the rulings of the court admitting or rejecting testimony. Counsel for appellant has argued the questions thus raised in a general and discursive way, without much reference to them individually. This method of argument, coupled with the character of the bill of exceptions, which is practically a statement of the evidence as taken by the reporter, intermingled with remarks of counsel and observations of the court, has made the task of ferreting out the questions involved a most difficult one. We find most of the exceptions without merit. Others are ingenious, and, assuming the premises of appellant to be correct, are formidable, but upon a review of the record are found to be untenable. For the sake of greater brevity, we shall merely state the general legal propositions applicable to the case, and refer incidentally to some of the exceptions as coming within the several principles enunciated.

1. Agency and the extent of the power of an agent are questions of fact (*Farnum v. Insurance Co.*, 83 Cal. 246, 23 Pac. 869), and may be established by parol, except in those cases where a written authorization is expressly required by positive law. *Carey v. Petroleum Co.*, 33 Cal. 694. It may be established by circumstantial evidence. *Whart. Ag. §§ 44, 121, 126; Burnett v. Fisher*, 57 Cal. 152; *Lumber Co. v. Krug*, 89 Cal. 243, 26 Pac. 902, and cases there cited.

2. Where circumstantial evidence is resorted to for the purpose of establishing an agency, all the facts and circumstances showing the relation of the parties, and throwing light up-

on the character of such relation, are admissible in evidence. *Ellis v. Crawford*, 39 Cal. 526, 528.

3. If A. sells goods to B., supposing him to be a principal, but afterwards discovers him to be an agent of C. in the transaction, he may resort to C. for payment. *Lumber Co. v. Krug*, 89 Cal. 244, 26 Pac. 902, and cases there cited; *Ferguson v. McBean*, 91 Cal. 63, 27 Pac. 518.

4. The mere declarations of a party are not proof that he is agent for another. *People v. Dye*, 75 Cal. 108, 16 Pac. 537; *Hubback v. Ross*, 96 Cal. 426, 31 Pac. 353. But, notwithstanding the foregoing rule, it is proper to show that a party dealt with a third party as an assumed agent of another, not for the purpose of proving the agency or its extent, but to show that such third party understood he was dealing with the other as an agent, and not as a principal. *Swinerton v. Development Co.* (decided April 13, 1896) 44 Pac. 719.

Under the foregoing propositions, the letters from Salisbury to Moger directing him to placard the buildings with the name of the corporation defendant, and relating to various matters touching the business, the photographs showing that the buildings were marked as directed, the letter heads and other stationery showing that the business was conducted by defendant, with Moger as agent, the shipping receipts and bills of lading showing the same thing, and many other circumstances, were admissible as tending to show that the business at Newcastle, Penryn, and Loomis was conducted by defendant, through Moger as its general agent, aided by subordinates at Penryn and Loomis. The evidence that Moger employed plaintiff for and on account of the defendant was properly admitted. The court repeatedly stated during the trial that the declarations of Moger were not admissible to prove his agency or authority, and they were never in evidence for such purpose. The court did, however, admit evidence tending to show that from a given time the employment of plaintiff by Moger was for the defendant, as tending to show that plaintiff in good faith believed himself to be a servant of defendant. This was proper. The declaration of Moger to the effect that he was putting the signs on the building by instructions of defendant's vice president was of no moment, as his written authority and instructions so to do by defendant were in evidence.

The error of the court, if any, in refusing to permit counsel for defendant, on cross-examination of plaintiff, to prove when he received certain letters of defendant, which he produced and offered in evidence, was cured by the action of the court, after the trial closed, in offering to open the case, and permitting defendant to put the proffered questions, which was refused by defendant, unless the case should be opened generally for the reception of testimony.

The other errors complained of do not call for comment. Upon the whole case as made,

we see no sufficient cause for reversal, and recommend that the judgment be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

PEOPLE ex rel. DREW v. RODGERS.

(Sac. 88.)¹

(Supreme Court of California. Nov. 6, 1896.)

CHIEF OF POLICE—VACANCY IN OFFICE—ACTION FOR USURPATION—DISMISSAL—JUDGMENT—RES JUDICATA.

1. Under St. 1871-72, providing (page 243) that one elected chief of police shall hold "for the term of two years and until his successor is elected and qualified," and (page 246) that in case of a vacancy it shall be filled by appointment till the next city election, when a chief shall be elected for the unexpired term, the mere formal election and qualification of one ineligible to the office does not end the term of the incumbent and create a vacancy, so as to permit an appointment and election for an unexpired term.

2. An adjudication, in a proceeding under Code Civ. Proc. § 1111, to contest defendant's right to an office, that he was ineligible because not a citizen of the United States, is conclusive in an action against him for usurpation of the office, though the parties and causes of action are not identical.

3. An action for usurpation should not be dismissed, though the office is abolished before the trial, as judgment against defendant may subject him to a fine, and is a foundation for recovery by the rightful claimant of damages occasioned by the usurpation. Code Civ. Proc. §§ 806, 807, 809.

4. A judgment in an action for usurpation of office that relator be restored to office, and defendant be ousted, though not appropriate in form, because the office had been abolished before trial, cannot be corrected on appeal from an order denying a motion for new trial only.

Commissioners' decision. Department 2. Appeal from superior court, Sacramento county; A. P. Catlin, Judge.

Action by the people, on the relation of Warren F. Drew, against John B. Rodgers. Judgment for relator. From an order denying a new trial, defendant appeals. Affirmed.

Atty. Gen. Hart, O. T. Jones, and Johnson, Johnson & Johnson, for appellant. Robt. T. & Wm. H. Devlin, for respondent.

BRITT, C. Action for the usurpation of an office. It was commenced by the attorney general as early as April 29, 1893, and brought to trial February 7, 1894. By its judgment the court declared that the relator, Drew, is entitled to the office of chief of police in the city of Sacramento, and has been so entitled since the 1st day of April, 1890; that defendant Rodgers usurps and intrudes into such office, and has wrongfully held the same and exercised its functions since April 1, 1893; that the relator be admitted and restored to such office; and that defendant be ousted and excluded therefrom. Drew was

elected to said office at the city election held in March, 1890, for the term commencing April 1st following, under a statute providing that he should hold "for the term of two years and until his successor is elected and qualified." St. 1871-72, p. 243. The same act (page 246) provided that in case of a vacancy in the office the board of trustees of the city might fill the same by appointment until the next city election, at which time a chief of police should be elected for the unexpired term. At the city election in March, 1892, Rodgers received a majority of the votes cast for said office, and the proper canvassing board declared him elected thereto for the term next ensuing; but on June 17, 1892, in a proceeding to contest his right, instituted in the superior court under section 1111, Code Civ. Proc., he was adjudged to be ineligible to the office, by reason of alienage, and his election was annulled. He appealed, and the judgment was affirmed by this court in December, 1893. *Drew v. Rodgers*, 34 Pac. 1081. However, in April, 1892, he forcibly dispossessed the relator of said office, and thenceforward performed its duties; but the relator was at all times ready and willing to perform them, and claimed to be the lawful incumbent. The difficulty of Rodgers' alienage having been removed by his naturalization, the board of trustees of the city on June 27, 1892, in form appointed him chief of police to hold until the next city election (this on the assumption that a vacancy existed in the office); and at the next election, in March, 1893 (not the regular time for electing to the office in question) he was again the person receiving the highest number of votes for said office, and was declared elected accordingly. In January, 1894, the new charter of the city of Sacramento went into operation. By its provisions the office of chief of police was created, but made appointive instead of elective, and it is conceded that the office of that name previously existing was abolished. St. 1893, pp. 538, 611.

Appellant contends that by his formal election and qualification in March, 1892, a successor to the relator in said office was elected and qualified, within the meaning of the statute permitting the latter to hold over until the occurrence of that event, and after the expiration of his prescribed term of two years, and that thus such contingent right of the relator to a prolongation of his term was cut off. We differ with appellant. Ineligibility for an office means incapacity to be elected or otherwise chosen thereto. Rodgers was affected with such incapacity in March, 1892, and the votes cast for him were "ineffectual for the purpose of an election." *Saunders v. Haynes*, 13 Cal. 154; *Dryden v. Swinburne*, 20 W. Va. 137, and cases cited. There being thus a failure to elect a successor to the relator, the contingency arose upon which he had the right to an extension of his original term. It is claimed that the

whole matter is disposed of in appellant's favor by the decision in *People v. Ward*, 107 Cal. 236, 40 Pac. 538; but in that case—in which the writer was of counsel—the successor had been duly elected and had properly qualified, and the question presented differed widely from that involved here. It results that the alleged appointment of defendant to the office on June 27, 1892, was void, because there was then no vacancy. *People v. Tilton*, 37 Cal. 614; *People v. Edwards*, 93 Cal. 153, 28 Pac. 831. And for the same reason the election of Rodgers for the unexpired term in March, 1893, was void; the statute requiring an election for this office in the even-numbered years, and permitting it at other times only in case of a vacancy. St. 1871-72, pp. 243, 246.

The court rightly refused the offer of evidence at the trial that while defendant was yet a minor his mother was married to a citizen; the object being to show that he was really eligible for the office in March, 1892, although the precise matter had been put in issue in the previous case of *Drew v. Rodgers*, and decided against him. 34 Pac. 1081. The judgment roll in that action was in evidence at the trial of this. True, the parties and the causes of action are not identical; and *Drew*, the contestant in that case, was a different person from the relator here. But that was a proceeding prosecuted for the purpose of trying the very question whether Rodgers' election was not void because of his ineligibility. Code Civ. Proc. § 1111. It was a matter of public concern (*Lord v. Dunster*, 79 Cal. 477, 21 Pac. 865), involving the political and legal relations of the contestee, and we see no reason to doubt that the nullity of his election there determined was conclusive upon him in the present action (Code Civ. Proc. § 1908, subd. 1).

It is further argued that the court should have dismissed the proceeding, or have granted a nonsuit, because by the new charter of the city the office in controversy had been abolished before the case came on for trial. Under the statute governing the subject, the removal of the usurper is not the sole object which is or may be accomplished by the proceeding. Judgment may be rendered upon the right of the defendant, and also upon the right of the party, if any, alleged to be entitled to the office. If against the defendant, he must pay the costs, and, at the court's discretion, a fine. It is also the foundation of a recovery by the rightful claimant of damages occasioned by the usurpation. Code Civ. Proc. §§ 805, 807, 809. When, as in this instance, the action has been brought during the usurpation, and such consequences may flow from the judgment, it ought not to be held that the action must abate merely because efflux of time, or other circumstance which does not toll the legal wrong of the intrusion, has put a period to the disputed term. And to this effect is the decided preponderance of authority. *People v. Hartwell*, 12 Mich. 508; *State v. Pierce*, 35 Wis. 93; *Hunter v. Chandler*, 45 Mo. 452; *People v. Loomis*, 8

Wend. 396; Com. v. Jackson, 45 Pa. St. 59. Some cases cited by appellant—to which may be added *Hurd v. Beck* (Kan. Sup.) 45 Pac. 92—are distinguishable. They proceed on the assumption that after the expiration of the usurped term no substantial right was involved.

The judgment is not, in form, appropriate to the state of the case at the time of trial, the office having been abolished; but it cannot be corrected on this appeal, which is from an order denying a motion for a new trial only. There is no error in the record available to defendant, and the order appealed from should be affirmed.

We concur: BELOHER, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is affirmed.

RANKIN v. NEWMAN et al. (No. 15,857.)¹
(Supreme Court of California. Nov. 5, 1896.)

SALE—THE CONTRACT—CONSTRUCTION—VALIDITY
—PERFORMANCE BY EXECUTOR—
APPEAL—REVIEW.

1. A partnership contract provided for an annual inventory and appraisal; that in case of death of one of the partners the "inventory provided for herein" should be taken as soon as possible, to determine the deceased partner's interest; that the survivors should give their 12 equal monthly installment notes in payment of deceased's interest so determined; provided, however, that the surviving partners shall have the option to continue the said co-partnership; the estate of the deceased partner taking the place of the decedent on such terms and conditions as may be agreed upon; the surviving partners and their successors to have the right to continue the business under the name of the old firm. *Held*, that such contract contemplated a sale on the death of one of the partners of his interest to the survivors.

2. On the death of one of the partners, his executor had the right to consummate the transfer of deceased's interest in the business to his surviving partners for the consideration specified in the contract, without the authority or consent of the probate court. Beatty, C. J., and Henshaw and Temple, JJ., dissenting.

3. The mode and manner of fixing the amount of the purchase price is not so indefinite as to invalidate it; but such mode is found in the language of the contract itself, and is the inventory and appraisal provided for therein. Beatty, C. J., and Henshaw and Temple, JJ., dissenting.

4. Such contract was not void as placing it within the power of the surviving partners to fix their own purchase price.

5. Under such contract the good will of the business passed to the surviving partners, and in no sense formed an asset of the estate to be inventoried and appraised. Beatty, C. J., and Henshaw and Temple, JJ., dissenting.

In bank. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Bill by Ira P. Rankin, administrator with the will annexed of the estate of John Levinson, deceased, against William J. Newman and others, as surviving partners of the co-partnership of which deceased was a member, for an accounting. Pending the suit, H. W. Philbrook was appointed such adminis-

trator, and substituted as plaintiff in the record. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

H. W. Philbrook, for appellant. Reinstein & Eisner and E. R. Taylor, for respondents.

GAROUTTE, J. William J. Newman, Benjamin Newman, and the deceased, John Levinson, were partners in the merchandise business, and held interests therein in proportion to the amount of capital invested by each. The last articles of co-partnership between these parties were entered into January 24, 1889; and, among other things, they provided in detail the manner in which an inventory and appraisal of the partnership business should be taken annually, which inventory and appraisal should form the basis in estimating the net profit going to each partner. The articles further provided as follows: "In the event of the death of one of the co-partners the inventory provided for herein shall be taken as expeditiously as possible, and without unnecessary delay. The surviving partners, if requested so to do, shall admit to the place of business of the firm at least one person selected, designated, and empowered by the heirs or legal representatives of the deceased partner to represent the interest of his estate in the co-partnership. Such person so representing the interests of the estate of the deceased partner shall have accorded to him access to all the books, papers, and accounts of the firm, and may, at his election, remain and continue at the place of business thereof until all matters relating to the interests of the deceased partner shall have been fairly and satisfactorily arranged and settled and adjusted, and the total amount due to the estate of the deceased partner shall have been ascertained and determined. The total amount ascertained and determined to be due the estate of the deceased partner on account of his interest in the co-partnership shall be paid to the heirs or legal representatives of the deceased partner in twelve successive and equal monthly installments, commencing within one month from the time the amount due has been ascertained and determined; for the amount of which installments the surviving partners shall execute and deliver to such heirs or legal representatives their promissory notes, payable as aforesaid, without interest, and satisfactorily secured by indorsement or otherwise; provided, however, that the surviving partners shall have the option to continue the said co-partnership; the estate of the deceased partner taking the place of the decedent on such terms and conditions as may be agreed upon between the surviving partners and the legal representatives of the deceased partner, but it shall not be obligatory upon the surviving partners so to do. The surviving partners and their successors shall also have the right and privilege of continuing the business under the said designation and name of Newman & Levinson."

Levinson died February 25, 1890, and forth-

¹ Rehearing denied.

with the Newmans made an inventory and appraisal of the partnership business, as provided by the articles of partnership, by which inventory and appraisal it was determined that the net amount of Levinson's interest in the assets of the firm was the sum of \$20,790.88. For this amount defendants prepared, and procured to be properly indorsed, their notes, 12 in number, for the sum of \$1,732.57½ each, bearing date February 26, 1890, payable at successive monthly intervals following that date, and within one month after Levinson's death tendered them to Raveley, the executor of the will of said deceased, who had then received letters testamentary from the superior court. In July, 1890, the Newmans filed a petition in the court, alleging that they were ready and willing to purchase the interest of the deceased in the partnership upon the terms stated in the articles, and had requested the executor to allow them to do so; that he had refused; and praying an order directing him to convey that interest to them. The court sustained a demurrer to such petition, on the ground that it had no jurisdiction to grant the order prayed for. Thereafter, on September 6, 1890, Raveley, the executor, being of the opinion that he had the power to accept the terms proposed by the Newmans, received the said notes, and on that day executed to them two certain papers, the first of which acknowledged the delivery of the notes "in pursuance of the provisions of the articles of partnership * * * for the interest of the estate of said Levinson in said partnership." The other paper set out the transaction more in detail, and stated that the amount of such notes was the amount of Levinson's interest in the assets of the firm, as determined by the said inventory and appraisal, and that the notes were received by the executor "in full payment and satisfaction of the amount due the estate of John Levinson, deceased, for the interest of said deceased and of his said estate in the co-partnership firm as the same has been ascertained, as above stated." Levinson's residuary legatees were his mother and two sisters, all of full age. They, in writing, notified the Newmans on March 5, 1890, that they did not desire to employ any person to assist in taking the inventory of the assets of the late firm, then in progress, and the estate of the deceased had no representative in that undertaking, though the executor was often about the place of business, and both he and the legatees knew what was being done. No account of the good will of the firm was taken in the inventory made by the defendants, nor was it in the inventory and appraisal of the estate returned to the court by the executor. In the inventory and appraisal returned by the executor the value of the interest of Levinson in the partnership assets was stated at the same sum as that fixed by the appraisal of the defendants, to wit, \$20,790.88, and was adopted by the appraisers on the strength of that appraisal. The omis-

sion to value the good will as part of the estate by the executor was resented by the legatees, and on this ground they petitioned the court to remove Raveley from his office of executor. He thereupon resigned; his accounts were settled; successive administrators with the will annexed carried on the administration, until finally H. W. Philbrook was appointed, and he has been substituted as plaintiff of record herein. This action is essentially one in equity, sounding largely in fraud, and asking for an accounting of the partnership affairs. The case has been before us in the past upon an appeal from the judgment (107 Cal. 602, 40 Pac. 1024, and 41 Pac. 304), where may be found an outline of the purposes of the action and the general framework of the pleadings.

Fraud is charged in the body of plaintiff's bill, and upon that ground relief in a great measure is sought. But in the opinion of the trial judge, Hon. W. T. Wallace, which opinion is set forth in the record, it is stated that there is no evidence whatever to support such a charge. And, after a careful examination of the evidence, we find nothing therein even tending to show the practice of any fraud upon the heirs and legatees of the dead partner. It follows that all question of fraud is out of the case, and the only important question remaining is: Had the executor, under the articles of co-partnership, the right to consummate the transfer of the deceased partner's interest in the business to the surviving partners for the consideration specified in said articles? Although this interrogatory presents a clear-cut proposition of law, still it is well to say that, if this transfer of the partnership interest should be set aside, as is here sought by appellant, and all parties be placed in statu quo, as of the day the transaction was had, no substantial results favorable to appellant's interests would ensue. It would be a valueless victory, for, as said by the trial judge, upon an accounting the sum realized by the legatees would fall far short of the amount actually paid by the surviving partners to them. In appellant's brief the law is conceded to be: "Where the co-partners in the partnership contract—articles of partnership—do actually contract that on the death of a partner the partnership property and business belongs to the survivor or survivors, fixing the price at which it is to be taken by the survivor or survivors, such contract is binding according to its terms." Upon such concession we are brought face to face with the articles of co-partnership for the purpose of weighing and testing them by the formula furnished by appellant; and at the threshold of the investigation we are met by the objection that, at the date when those articles were entered into, the deceased partner, Levinson, was incapable, by reason of mental incapacity, of entering into any contract whatever. The mental incapacity of Levinson at the time was not even suggested in plaintiff's bill, and his mental status does not appear to be an ele-

ment of the case that attracted serious attention at the trial. But some evidence came before the court upon the question without objection, which, even in the absence of direct issues raised by the pleadings, should be considered as bearing upon the question. *Crowley v. Railroad Co.*, 60 Cal. 626. There are various good reasons why this evidence should not be held sufficient to invalidate the articles of co-partnership, and as an all-sufficient reason we suggest that the implied finding of the court was against any such contention. Appellant's principal witness to the point testified that, if Levinson had read the articles of co-partnership, he would have understood them, and there is no evidence in the record that he did not read them. As a salient circumstance bearing upon Levinson's mental capacity at that particular time, it may be noticed that some few days thereafter he executed his last will and testament, the will under which this administrator is now acting in prosecuting this litigation. It further appears that, upon his return from Europe after the execution of these articles, for several months, and up to the time of his death, he gave his personal attention to the business of the firm, as he had always done in the past. We are satisfied there is nothing in the point.

We have quoted in detail that portion of the partnership contract which declares what shall be done with the business in case of the death of one of the partners. In this respect the provision of the contract is not well drawn. It is not clear, but, upon the contrary, somewhat vague and indefinite. At the same time, when carefully read and considered, but one conclusion can be arrived at; and that is that, upon the death of one of the partners, the surviving members of the firm had at least the privilege and option of buying the interest of the deceased partner in the business upon certain terms. It is claimed upon the part of the Newmans that under the contract they were bound to do so. But to support the validity of the contract in this regard they are not compelled to go to such length; for, if they had an option by the articles of co-partnership to purchase upon stated terms, then they had the undoubted right to exercise that option, and take the interest of the deceased partner, if they were so disposed. *Appeal of Harbster*, 125 Pa. St. 8, 17 Atl. 204. In that case it is said: "It requires no argument to show that the interest of the deceased partner ended when the firm gave notice that they would take it in accord with the terms of the agreement." And in the case at bar, if the Newmans simply held an option to purchase the interest, there can be no question but that they exercised that option in favor of purchasing. If it should be held that the co-partnership articles did not give the surviving partners a right to purchase, then the presence of all that portion of the contract providing for the mode and manner of payment by the Newmans for the deceased partner's interest

would be inexplicable. It is provided in great detail that they should give their equal monthly installment notes, running over a period of 12 months, in payment of the interest of the deceased partner. Such provision beyond question contemplated a sale; and that a sale to the surviving partners in case of the death of one of the firm was in the minds of all parties when the contract was made, does not admit of doubt. There can be no other reasonable construction of the contract.

It is insisted that the language here used provides no fixed and definite amount of money to be paid by the surviving partner for the interest of the deceased partner and it is claimed that for such reason there is no contract, at least no contract sufficiently clear and explicit to be capable of enforcement. There is no case cited by appellant that goes to the length here insisted upon. But, upon the contrary, that is certain which may be made certain, and many of the cases bearing upon this question rest upon this principle. Numberless cases might be cited where courts have recognized the right of the partners to stipulate in the co-partnership articles that the purchase price for the interest of a deceased partner shall be fixed by an inventory and appraisement to be taken after the death of such partner. In the very nature of things, a fair purchase price of an interest in the firm at an indefinite future time would be incapable of ascertainment. To fix the amount in advance would be simply a speculative gamble upon the part of all parties concerned, and hardly justifiable either in morals or law.

It is further contended that there is no mode whatever provided in the articles by which to ascertain the value of the interest of the deceased partner; and it may well be conceded that the provisions of the contract in this regard are not what they should be. In this particular the instrument is unhappily drawn, and well serves the purpose of being an invitation for litigation. As we have already seen, the articles provide for an annual inventory and appraisement, in order that the actual financial status of the concern may be determined. This inventory and appraisement was provided for in order that the annual profit or loss of each partner might be known. A succeeding subdivision of the contract, which we have heretofore quoted in full, then in part declares: "In the event of the death of one of the co-partners, the inventory provided for herein shall be taken as expeditiously as possible, and without unnecessary delay. The surviving partners, if requested so to do, shall admit to the place of business of the firm at least one person selected * * * by the heirs or legal representatives of the deceased partner, to represent the interest of his estate in the co-partnership, * * * and may at his election remain and continue at the place of business thereof until all matters relating to

the interest of the deceased partner and his estate shall have been fairly and satisfactorily arranged and settled and adjusted, and the total amount due to the estate of the deceased partner shall have been so determined. The total amount ascertained and determined to be due the estate of the deceased partner on account of his interest in the co-partnership shall be paid to the heirs or legal representatives of the deceased partner in twelve successive and equal monthly installments." If the language of the contract had included the words "and appraisement" after the word "inventory," there would have been no question of indefiniteness, and no possible technical objection as to the matter of construction. But the absence of those two words should not nullify the contract. It would be carrying the doctrine of technicality too far, if we should so hold. The true intent of the parties is plainly apparent from the language used. And that intent was that an inventory and appraisement, as provided for in the articles, should furnish the basis for fixing the purchase price of the deceased partner's interest. Such is the fair construction of the language, taking it altogether, and, indeed, the only construction which can be given it. To say that the parties to the contract, while providing for a sale, and also providing for the manner and time for payment, never intended to provide as to the amount which should be paid, or to fix any mode by which the amount could be determined, would be going to lengths entirely unauthorized by the instrument itself. We hold that the mode and manner of fixing the amount of the purchase price is found within the language of the instrument itself, and that mode and manner is the inventory and appraisement provided for in a previous portion of the contract.

Conceding that the inventory and appraisement mentioned in the articles of co-partnership were intended by the partners to be used as the basis for fixing the value of a deceased partner's interest, then appellant contends that the contract was void as placing it in the power of the surviving partners to fix their own purchase price. There is no force in this contention. The contract contemplates the presence of a representative of the deceased partner during all these times, and incidentally it may be suggested that the executor was present during the time, more or less, and that both he and the legatees had full knowledge of what was being done, and ample opportunity to be present at all times and upon all occasions, to assist either personally or by agent. Again, as to the store and office fixtures, the value is fixed at a certain and definite amount. As to the stock of merchandise on hand, it is to be appraised at its actual value, but not to exceed its original cost. All solvent debts are to be taken at their face value. We see nothing so indefinite in these facts as to nullify the contract. The actual value of a piece of merchandise can be determined, and likewise it can be determined

what is and what is not a solvent account. They are matters capable of ascertainment, and every partnership in the country is constantly engaged in determining them. There is certainly nothing so indefinite and uncertain as to the valuation to be fixed upon these assets as to in any way render the contract nugatory. In *Appeal of Harbster*, cited by appellant, the purchase price was fixed at the previous annual appraisement, with the proportion of profit or loss for the present year added or deducted, as the case might be. It certainly in that case was no easier to fix the amount of the profit or loss than it was in this case to fix the actual value of the stock, or determine what debt was a solvent account. Indeed, both of those factors of the business were necessary elements to be determined before the profit or loss could be fixed. In another of appellant's cases—*Blake v. Barnes* (Sup.) 12 N. Y. Supp. 72—the purchase price by the surviving partners upon the death of a member of the firm was to be determined by an inventory and appraisement to be made as follows: "(b) Accounts overdue at a fair estimate, to be determined, if necessary, by arbitration. (c) Rejected machinery, or any other property or merchandise for which the firm was not willing to allow the valuation inventoried or heretofore provided for, at the price offered by the highest bidder. (d) For the stereo and electrotype plates, engravings, * * * a sum equal to the gross profits of the firm for the last two complete business years preceding the time of settlement." It was not suggested that such a character of valuation avoided the contract, although the case was bitterly contested on other grounds. The case of *Simmons v. Leonard*, 3 Hare, 581, goes away beyond the cases just cited. It was there provided that the surviving partners should take the interest of the deceased partner at a valuation shown by the last annual accounting, the articles having provided for annual accounts. A partner died, and no annual accounts had been taken. The representative of the deceased partner, as in this case, contended that there could be no sale, as the purchase price was not fixed. The vice chancellor said: "The rule which justice and common sense would apply in such a case is, I think, too clear for serious argument. The proviso for sale in one event (that of the term running out), and the proviso for paying off a deceased partner's share (dying during the term) by installments, is conclusive evidence of an intention and agreement that the death of a partner during the term should not work a dissolution of the whole partnership, but that the survivors should have a right to carry it on with the accommodation of paying off the executors of a deceased partner by installments." And, in conclusion, he held the contract for a sale good, and that the purchase price should be determined by an accounting.

In *Dinham v. Bradford*, 5 Ch. App. 519, it is held, in effect, that the articles of co-partnership might provide that the purchase price of a deceased partner's interest in the business

should be fixed by three disinterested parties. In *Quinnivan v. English*, 44 Mo. 46, the value of the interest of a deceased partner was to be fixed by an appraisal made after his death, and, in case of a dispute as to the valuation of the stock, the matter was to be submitted to three arbitrators. The court held such an agreement valid and binding. Indeed, it may be suggested that the authorities are practically unanimous that any question of indefiniteness or uncertainty as to the amount of the purchase price, or the manner or mode in which such price is to be arrived at, in no way affects the right of the surviving partners under the partnership contract to buy. And it is held in many cases that such conditions only result in casting the burden upon the trial court to take an accounting and fix the price. We conclude that the contract is valid and binding in all respects; that the amount of the purchase price for the deceased partner's interest in the business was fixed by the articles with such sufficient certainty as to deny the court the right to hold a general accounting. And, in the absence of a showing of fraud, to some extent at least, in the making of the inventory and appraisal which formed the basic element in fixing the purchase price, the transaction should be upheld.

While this litigation, judging by the size of the transcript and briefs before us, has now assumed somewhat mammoth proportions, there was a time in its early history when but a single matter was involved. And that matter arose upon the contention of the administrator that the good will of the business was not included in the inventory and appraisal of the property of the deceased returned by the executor to the probate court. Owing to the views we entertain as to the validity of the contract, this contention may be disposed of in a few words. The contract of partnership provided: "The surviving partners and their successors shall also have the right and privilege of continuing the said business under the said designation and name of Newman & Levinson." We have no doubt that the good will of the business passed to the surviving partners under this provision of the contract, and in no sense formed an asset of the estate. Much could be said upon this question showing the instability of appellant's claims in this regard, but we deem it unnecessary. The order appealed from is affirmed.

We concur: McFARLAND, J.; VAN FLEET, J.

BEATTY, O. J., and HENSHAW and TEMPLE, JJ. We concur in the judgment. We do not think we can say, over the implied finding of the trial court, that the execution of the partnership articles was procured by fraud, or by the use of undue influence. The question is argued on the assumption that the Newmans were contracting with the expectation that they would be the survivors. We do not think we can assume that.

Such a consideration was proper to be urged upon the trial court under the charge of fraud, and evidence could have been addressed to that point. It does not appear that any such question was tried. It does appear that Levinson was then ill, but we do not find that the illness was deemed mortal. He lived more than one year thereafter, and during a portion of that time was able to attend to business. But the advantages of the agreement are not all on one side. In case of a dissolution by death it would have been the privilege of the surviving partners, in case there was no provision made for such an event, to have stopped the business, and to have gone into liquidation. In such case the goods would have been sold at a sacrifice, and the estate would have realized nothing for the good will.

As to the construction and effect of the twelfth article of the partnership agreement between the defendants and their deceased partner, our views do not coincide with those expressed in the preceding opinion. The meaning of that article is, of course, the main question in the case, and for two years after the death of Levinson it was the only question; the attack upon the validity of the agreement based upon the alleged mental incapacity of Levinson, and the charge of undue influence by his surviving partners, being an evident afterthought. So much stress, however, has been laid upon this matter in the argument, and it forms so large and so essential a part of the charge of fraud, to the elaboration of which the voluminous brief of appellants is mainly devoted, that it cannot be ignored. The fact that the validity of the partnership agreement is affirmed by the implied finding of the superior court, and that there is substantial evidence to support such finding, is sufficient, as shown in the preceding opinion, to put an end to the question so far as it is material to the decision of this appeal, but with respect to the matters so vehemently and intemperately argued upon the part of appellant, and especially with reference to the torrent of vituperation poured out upon Mr. Justice Harrison, it is important to note that never upon any occasion during the time that he was acting as attorney for Executor Raveley was there the slightest hint or suggestion to the effect that the partnership articles were in any respect invalid, or that Levinson, at the time he signed them, was mentally incapacitated, or subjected to the slightest degree of undue influence. On the contrary, the whole dispute from the beginning, and for two years after the death of Levinson, was as to the construction of the agreement, and in particular whether, according to its terms, the estate of Levinson was entitled to separate and additional compensation for his interest in the good will of the business of the firm. The mother and sisters of Levinson—all adults—and Mr. Philbrook, their attorney, assumed as a fact unquestioned that the contract was entirely valid, and

that the rights of all parties were dependent upon its proper construction. Under these circumstances it would have been strange, indeed, if the attorneys for the executor had not taken the same view. Naturally and inevitably they confined their attention to the meaning of the contract, and to the steps necessary to be taken in carrying it out according to the intention of the parties. They (the firm of Jarboe & Harrison) had been employed by the executor within a few days after the death of Levinson, and Mr. Philbrook shortly afterwards was employed by the mother and sisters of the decedent to look especially after their interests. From the very first there was an open difference of opinion between these attorneys as to the meaning of the partnership agreement with respect to the right of Levinson's estate to be paid an additional compensation for his interest in the good will of the business, over and above the appraised value of his interest in the stock of goods, fixtures, accounts, and other tangible assets of the firm. Jarboe & Harrison took the position, which they always maintained openly and unequivocally, that, according to the proper construction of the agreement, the surviving partners took the whole interest of the deceased partner, including the right to continue the business under the name of Newman & Levinson, upon payment of the appraised value of his share of the assets, to be ascertained by an inventory and appraisal according to the annual custom of the house, and that no separate allowance for good will was contemplated or provided for. Mr. Philbrook took the opposite view, which he likewise consistently maintained. There was no other difference between the parties or their legal advisers, and, when the inventory and appraisal were made, their fairness and correctness, so far as they went, were not disputed, the only objection on the part of Mr. Philbrook and his clients being that it made no allowance for the value of the good will. No charge of fraud, or undervaluation of assets, or overstatement of liabilities in the appraisal, was then or ever during Judge Harrison's connection with the case made or suggested. The dispute was wholly upon a question of law,—i. e. the construction of a contract,—and as to this there was, as above stated, no equivocation or concealment whatever.

Mr. Philbrook, however, seems to think that Jarboe and Harrison were guilty of a species of disloyalty to his clients, because, notwithstanding their opinion to the contrary, they did not sustain him in his position, and advise their client accordingly. But this contention is utterly unreasonable. They were attorneys for the executor, who was trustee not only of the legatees, but also of the creditors of his testator, and it was their imperative duty to advise him to proceed according to the true construction of the agreement as they interpreted it, and especially to see that he wasted no portion of the es-

tate in fruitless litigation. In view of the difference of opinion between them and the attorney for the legatees, it was natural that they should take time to consider, before deciding a question so delicate and so important, and equally natural that they should wish to submit the decision of the matter to the probate court. But when that court, in the proceedings instituted by the Newmans to compel the executor to transfer to them the interest of the deceased partner, declined to give a construction to the agreement upon the ground that it had no jurisdiction to decide upon the matter, the responsibility was thrown upon the attorneys for the executor to decide whether he should accept or reject the tender which the Newmans had made of the appraised value of Levinson's interest. Being obliged to take the responsibility of deciding, they naturally decided according to their own construction of the contract, and not according to Mr. Philbrook's. Differing, as we do, from the views which they entertained, we should never have thought of imputing a bad motive for their decision, if for no other yet for the simple reason that, if wrong, it could harm no one but themselves and their client. A large part of Mr. Philbrook's tirade is based upon the assumption that Jarboe and Harrison did not really entertain the opinion which they expressed, and that they only advised the executor to the course that he took because they were acting in collusion with, and in the interest of, the Newmans. The absurdity of this position is manifest from the fact that any settlement between the executor and the Newmans, not made in accordance with the true construction of the contract, could only involve the parties to such settlement in loss and difficulty, and could not possibly foreclose or prejudice the rights of the residuary legatees.

By accepting the money and notes tendered by the Newmans in full payment for the interest of his testator in the firm, the executor placed himself in the position of unequivocally refusing to proceed against the surviving partners on account of the value of the good will, and thereby gave to the residuary legatees the right to ask, as they ultimately did, for his discharge, upon the ground that he was neglecting the duties of his trust. As to the executor, this was the sole effect of erroneous advice on this point. As to the Newmans, the effect of a settlement unauthorized by the probate court, and unwarranted by the terms of the partnership agreement, would simply be to expose them to an action for an accounting,—this very action,—in which the most rigorous and burdensome rules for computing the interest of Levinson in the assets of the firm and profits of the business would be enforceable against them at the option of the administrator with the will annexed. To suppose, as the argument does, that the attorneys for the executor were deliberately giving him advice which they knew to be bad, in order to serve the interest of the New-

mans at the expense of the legatees, when the only effect of the course advised would be to expose the executor to censure and punishment, and the Newmans to certain loss, is rather too heavy a draft on human credulity. But it is not alone the acceptance of the tender made by the surviving partners, and the advice upon which the executor acted, that furnish grounds for Mr. Philbrook's suspicions. It is the secrecy of the transaction, and the fact that the receipts or acknowledgments given by the executor were in the handwriting of, and were witnessed by, a gentleman who, at the date of the settlement, had been nominated by a leading political party of the state for a seat on this bench, that excites his deepest indignation. He can see in these circumstances nothing but a deliberate attempt to defraud his clients and to corrupt this court.

As to the secrecy of the transaction, the simple truth is that Mr. Philbrook and his clients were not called in to witness the payment of the money or the delivery of the receipts, and there was no reason why they should be present. It was not necessary that they should be there to protest in order not to be bound by the settlement. Their rights were not being concluded, or in any wise prejudiced. The fact that the notes and money were in the hands of the executor was nothing to them. The time for presentation of claims of creditors had not elapsed, the time for filing a first annual account had not arrived. No part of the money in the hands of the executor could then, or for months thereafter, be applied in payment of claims or legacies; in short, neither the executor nor the Newmans could gain the slightest advantage, nor the legatees suffer the slightest loss, by concealment of the fact that the settlement had been made. And accordingly we find that, upon the very first occasion calling for a disclosure of the fact and the terms of the settlement, such disclosure was fully and unreservedly made in the most direct and certain terms. The settlement was made in September, and in November following, in response to a demand for an amended inventory of Levinson's estate, which should include the item of good will of the business, the surviving partners served upon Mr. Philbrook their written answer, which contained, among other things, the following passage: "And deny that said William J. Newman, or said Benjamin Newman, has not fully accounted to said executor of said estate for any and all moneys, interests, and claims due to said estate from said William J. Newman or said Benjamin Newman, or either of them, and aver, on the contrary, that they have fully accounted for any and all claims, payments, and sums due said estate in the manner set forth in said memorandum in writing, and in this behalf said William J. Newman and said Benjamin Newman aver that after the appointment of said S. W. Raveley as the executor of the last will and testament of said John Levinson, deceased, said executor requested them—said William J. Newman and

Benjamin Newman—to account to him for the interest of said decedent in said co-partnership, and said William J. Newman and said Benjamin Newman did thereupon account to him and exhibit to him, said executor, all the books and assets of every kind belonging to said co-partnership, and it appeared therefrom that the entire interest of said decedent in the assets of said co-partnership amounted to the sum of \$20,790.80; and thereupon said William J. Newman and said Benjamin Newman elected and decided, under and in accordance with the provisions of said memorandum in writing, to purchase and pay for the interest of said decedent in said co-partnership, and thereupon executed to said S. W. Raveley, as executor aforesaid, twelve certain promissory notes, bearing date the 26th day of February, 1890, payable at monthly intervals thereafter, each for the sum of \$1,732.57 $\frac{1}{2}$ (said promissory notes aggregating the sum of \$20,790.80), in full payment and discharge of the interest of said decedent in said co-partnership business, as the same had been ascertained and determined by the inventory and appraisal thereof, made in accordance with the provisions of said memorandum in writing." Mr. Philbrook knows the meaning of a plain statement in plain English, and therefore it is not to be doubted that from and after the 19th day of November, 1890, he and his clients knew that executor Raveley had accepted from the surviving partners their notes for \$20,790.80, in full payment for his testator's interest in the co-partnership. He knew then and ever afterwards that Raveley, acting under the advice of his attorneys, would refuse to prosecute an action against the Newmans for a further accounting, and that the legatees, if they desired to have such an action instituted, must procure the removal of the executor, and the appointment of an administrator with the will annexed, who would be guided by his advice. This is the course which was taken just one year after Mr. Philbrook was advised of the settlement, and, since he allowed a whole year to elapse after receiving the information before taking the only action that the settlement called for, he can hardly complain that the fact was not disclosed two months sooner than it was. As to the fact that Mr. Harrison, after his nomination for justice of the supreme court, continued to advise Executor Raveley in a matter in which he had been employed long before his nomination, and the further fact that he drew up and witnessed the papers which passed upon the settlement, it seems scarcely credible that a normal mind could regard them as evidence of fraud, or as an attempt to corruptly influence the decision of this court. But it is out of these simple circumstances that Mr. Philbrook has constructed his elaborate theory of fraud and corruption. The truth is there is not only no foundation for the argument upon this point, but the fact which it seeks to establish is totally irrelevant. The motives which may have prompted Raveley's attorneys in giving their advice, the advice itself, and the action taken in consequence of it have not in the

slightest degree affected the rights of Levinson's mother and sisters. If the advice was correct, as held in the preceding opinion, there never was any ground of complaint. If it was incorrect, the settlement did not bind the estate, and the Newmans remained accountable for the true value of Levinson's interest at the time of his death, or at the option of his representatives for the profits of the business which they continued to carry on.

If these views are correct,—and we have no doubt that they are,—the whole question of fraud and corruption so gratuitously imported into the case may be dismissed from further consideration, and attention confined to the questions upon which the decision of the appeal necessarily depends.

The agreement between the Newmans and Levinson, which by the preceding opinion is held to be a contract of sale, properly bears the construction put upon it. It was within the terms of the agreement and the contemplation of the parties that in some way a purchase by the survivors should be made. If the contract were in other respects free from objection, the case would be the not unusual one where the partners provide for the purchase by the survivors of the interest of a deceased member of the firm. Upon the exercise by the survivors of their right, the sale would be complete, and the surviving partners would become debtors to the estate of the deceased partner, with the duty of accounting with his representative for the value of the deceased partner's interest. Cases are not rare where contracts of this nature have been entered into and enforced. But, when upheld, it is because they are certain and specific in their terms, and unobjectionable upon any equitable consideration. The plan adopted by these partners for arriving at the value of their annual profits by deducting from their assets the amount of their liabilities was feasible and satisfactory while all the partners were living, but upon the death of Levinson; not the profits merely, but the whole of his interest, was in some manner to be determined and withdrawn from the assets of the firm. While all of the partners were alive, it did not matter how the assets were valued, or the liabilities estimated, for what they did not take out as profits they retained in the assets of the firm. But, when one died, it became highly important that his share, then to be wholly withdrawn, should be fairly and fully valued. The apportionment of profits involved no transfer of title to the remaining capital; but such a transfer was necessarily involved in the transaction contemplated upon the death of a partner. Frequently, says Lindley (Partn. p. 429), in order to prevent the ruin consequent on the sale when a partnership happens to be dissolved by the death of a partner, it is provided that the share of the deceased may be taken by the survivors at the value shown by the last settlement agreed to by him, with the addition of any

subsequent profit. But here a new valuation was to be made, and, either no method is provided in the contract for arriving at that valuation, or, if a method be found, it can only be the method actually adopted,—the valuation being made by the surviving partners themselves. But, in the first instance, if no mode is prescribed, there is the absence of an essential element of a contract of sale which equity cannot supply,—the price, or the manner of determining the price. If the second, and the mode adopted, be the one contemplated by the contract, then, if the contract be valid, it must result in holding that the surviving partners, trustees of the deceased partner's share, may not only purchase that share, but may fix the value which they will pay for it. But, if we understand respondents, they do not contend, nor could they successfully, for the latter proposition, but they claim that by their agreement with the executor such value was legally ascertained; and herein it is claimed that the executor, in effecting that settlement, was merely carrying into effect the contract of his testator, as expressed in the articles. But something more was necessary. The testator's contract did not determine the amount of the consideration to be rendered by the survivor for his interest, and the exercise of a further act of discretion, judgment, and assent was necessary to ascertain the amount. *Morrison v. Rossignol*, 5 Cal. 65; *Breckinridge v. Crocker*, 78 Cal. 529, 21 Pac. 179; *Vickers v. Vickers*, L. R. 4 Eq. 529. It is said that these were cases where specific performance was sought, while in this instance the contract has been executed. This is true, but we are now dealing with the question of power in the executor, and these cases illustrate the proposition that in making the adjustment with defendants the executor necessarily supplied the missing terms of his testator's contract by the exercise of his own will and discretion.

Had the executor that authority? Defendants claim it for him by virtue of his general powers, and independently of the articles. At the common law such power was unquestionably his, but at common law the executor or administrator held the title of the personal property of the decedent, while with us title to personalty as well as to realty vests in the heirs, subject only to the right of the executor to take possession of it for specific purposes. At common law, then, the representative could sell personal property without restraint, so long as his acts were not fraudulent, but here his power to sell is dependent upon the assent of the superior court. Code Civ. Proc. §§ 1517, 1561; *Wickersham v. Johnston*, 104 Cal. 407, 88 Pac. 89; 2 *Woerner, Adm'n*, § 331. The provisions of the articles for the transfer of Levinson's interest were incomplete, in that no price was fixed, and that no disinterested person was named who should fix the price. The executor, by assenting to the valuation put by the Newmans on the

partnership interest, assumed to supply the omission of the contract, and to fix a sum at which they might take the interest. It is not claimed that the executor derived authority to make the sale from the will of deceased. As the articles fall short of conferring that power, he could necessarily derive it only from the court in the manner prescribed by statute. But under the statute it could be sold only "in the same manner as other personal property," namely, by authority and consent of the superior court. Had the contract of partnership determined the price, or prescribed some legal mode of ascertaining the price, the cases cited in the preceding opinion would be directly in point. Then the executor would have needed only to abide by the terms of the contract. *Janin v. Browne*, 59 Cal. 37. The wisdom or policy of the contract would have been none of his concern. But, under the facts, the necessity for the supervisory power of the court to order a sale, and for the caution of the statute that before confirming the sale of the partnership interest the court or judge must carefully inquire into the condition of the partnership affairs, and must examine the surviving partner (Code Civ. Proc. § 1524), was as manifest as if there had been no contract.

But it is further said that the inventory and appraisal were made in the manner usual during Levinson's life, and that this established a custom by which the articles are to be interpreted. But a customary mode of valuing assets, with a view of determining and withdrawing profits, is radically different from the requisites of a fair and reasonable estimate of all assets with a view to segregating the share of a deceased partner for purchase by the others. We think the conclusion inevitable that the executor exceeded his authority in the settlement with defendants; that he did not, as is admitted, follow the statutory mode in making the settlement, and that there was no power for him to do so under the articles.

Leaving aside for the moment the question whether or not the good will was included in the settlement, we think the evidence overwhelmingly establishes, as the trial court held, that the sum found by the Newmans under the inventory and appraisal to be the value of Levinson's interest, and by the Newmans paid into the estate of Levinson, and received by the executor thereof, was not only a just amount, but, indeed, a very liberal amount. The evidence seems to be without conflict, and at least is strongly in favor of the respondents, that the appraised value put by the Newmans upon the interest of their deceased partner was greater than its actual worth. It was paid over and received, with knowledge then or soon afterwards acquired of the claim of the Newmans that by the payment they took to themselves the deceased's interest and title in the assets of the co-partnership, and acquired the right to continue to conduct the business under the firm name.

Thereafter the heirs, who were all of age, and who were represented throughout all court proceedings by their attorney, petitioned for, and, despite the protests of the executor, obtained, a decree of partial distribution, distributing to them as of the property of the estate a portion of the moneys thus obtained from the Newmans. At the time when this decree was sought and obtained the source from which the moneys came, and the circumstances under which it had been paid over to the estate, and the claims of the Newmans in regard thereto, were well known to them. Their opposing claim during all of this time seems to have been solely the one that the good will had not passed to the Newmans, and was still personal property, and a part of the assets of Levinson's estate. Having, under these circumstances demanded and received the moneys so paid by the Newmans, the price having been fair, and the transaction without fraud, we are of opinion that they are estopped from questioning the settlement while retaining the benefits of it, and from denying that there passed to the Newmans whatever would have passed under the terms of the contract had it been free from the defect above discussed. What, then, would have passed, and what are appellants estopped from denying did pass? Unquestionably there passed to the Newmans Levinson's interest in the assets, as shown by the inventory and appraisal upon which the settlement was based. But the articles provide further that the survivors shall have the right to continue the business under the firm name of Newman & Levinson. This clause may be construed either as dependent or independent of the covenant to purchase. If construed as dependent, then the contract was that, upon purchasing under the inventory and appraisal, the survivors would acquire the right to continue the business under the firm name. In this view appellants would also be estopped from denying that there passed to defendants the right to conduct the business under the firm name. If, however, this clause is to be construed as independent, it is of itself valid and operative, and conferred this right upon defendants regardless of other considerations. In either case it must follow that the right to conduct the business under the firm name passed to the defendants.

There thus comes under consideration the question which originally, and for a long time, was the sole point of difference between the parties,—the question of the disposition of the good will; for it appears that, while the heirs from a very early date insisted that the good will still remained a part of the property of the estate, and should be inventoried and appraised as such, they made no objection to the valuation put upon the deceased partner's interest, nor to the sale of that interest, saving that therein the good will had not been valued. There was no concealment nor secrecy nor fraud in this. The heirs were informed that the good will was not included, the con-

tention of the executor and of the Newmans under the advice of counsel being that the good will, under the circumstances, did not become a part of the assets of the estate, but vested in the surviving partners. While some of the earlier cases lean to the doctrine that, upon the death of one partner, the good will goes to the survivors, the great weight of later decision is to the contrary. Thus, it is said by Bates (2 Bates, Partn. § 658): "It was once thought that upon the death of a partner his interest in the good will ceased, and it survived to the surviving partner as his own property. This was doubted in *Crawshaw v. Collins*, 15 Ves. 218, and it is not now nor anywhere regarded as the law in trade partnerships, and, though inseparable from the business, is an appreciable part of the assets in which the estate of a deceased partner can participate." Lindley says: "In the event of dissolution by death, it has been said that the good will survives, and there is a clear decision to that effect; but this is not in accordance with modern authorities. They are wholly opposed to the notion that the value of the good will as such belongs to the survivor." 2 Lindl. Partn. § 443. And our Code declares (Civ. Code, § 993): The good will of a business is property transferable like any other. It is not necessary to enter upon a discussion of the character of this intangible property known as "good will." The Code solves many doubts by defining it to be the "expectation of continued public patronage." Civ. Code, § 992. Now, the Newmans had purchased the interest of the estate in the assets as shown by the inventory, and had likewise acquired, as has been discussed, the right to continue the business under the firm name. We are unable to perceive any difference between the acquirement of a right to conduct this business under a firm name and the acquirement of the good will of the business. In other words, every possible "expectation of continued public patronage" to the business was gone when the right to conduct it under the firm name was parted with. If there were left anything of value, however shadowy and unreal, it might be ground for saying that the good will yet remained to the estate, but the interest in the assets, together with the interest in the right to conduct the business under the firm name, having passed to the Newmans, nothing in the nature of good will was left.

But there is another and equally convincing view which may be taken of these matters. Counsel have cited some cases in which it is said that it is the duty of the survivors to sell the property, and the business as a going business, and also to continue the business until this can be done. It may be that when a firm name is not composed of the name of the partners, but is a trade name only, different equities may arise, but we are sure in this case the Newmans could not have been required, in the interest of Levinson's estate, to sell the right to continue the business in the

firm name nor to sell the good will. There is not only the good will which belongs to the firm, but in a successful business each partner may have gained a business standing and a reputation which is of value to him. One who sells the good will of a business warrants by that very act that he will not endeavor to draw off any of the customers. Civ. Code, § 1776. If the surviving partners can be required to do this, they are practically prohibited from pursuing the same business at that place, and that may be their only means of gaining a livelihood. When a partnership is dissolved by death, the survivors are absolved from all obligations except to close out the partnership affairs and to account to the estate. They do not owe a duty to the estate of the deceased to abstain from business even in the same line as that in which the partnership was engaged. We are forced to believe in this case that the articles of co-partnership failed to provide effectively for a transfer of the interest of Levinson's estate in the co-partnership to the surviving partners. The executor and his counsel were of the opinion that it did so provide, and acted accordingly. Though we are convinced that they were mistaken, we do not doubt that the estate of Levinson realized much more from the property than would have been possible if the firm had gone into liquidation, as they must have done in the absence of the agreement. We think, therefore, that the agreement which the parties supposed they had made was to the material advantage of all concerned, and, had they provided for a valid method of determining the value of the interest of Levinson, it would have been just as well as legal. For the lack of such method, however, the transfer to the Newmans was unauthorized and void. The legatees, however, of Levinson's estate, were all of age, and the estate was solvent. Knowing all of the essential facts, they demanded and received the proceeds of the sale over the protests of the executor and of the Newmans. These protests amounted to the claim that, unless the transfer to the Newmans was valid, the money should be returned to them. If the transfer was regarded as invalid, plainly that should have been done. The court could not distribute the money except upon the theory that it properly belonged to the estate. The Levinsons solicited and obtained such an adjudication, and they received the money so distributed. No rights were or could have been reserved by the protest, styled a "stipulation," which was filed by the Levinsons. The money was not voluntarily paid after the protest was made, but the payment was forced by the legatees. The protest does show, however, that the legatees knew, or at least suspected, that the executor and the surviving partners claimed that the money in the hands of the executor was all that was coming to the estate from the partnership. It is stated, after admitting that the money was received by the executor "on account of the interest of said estate in the partnership assets,"

as follows: "But it is not admitted by said petitioners, or any of them, that no further sum remains due, or is to become due, from said surviving partners, or either of them, or assigns, to said estate, or to said petitioners, or any of them." There would have been no purpose in guarding against the implication if it had not been believed that the claim was that this was all. That the legatees well knew the claim made by the surviving partners abundantly appears from the other evidence. This was a ratification of the sale on the part of the legatees which can be avoided only for fraud discovered afterwards, and then only upon a rescission and a restoration of all that they have received, or a showing of some excuse for not doing so. The action is to compel the surviving partners to account for the interest of Levinson in the co-partnership. But the moneys which were distributed upon the application of the legatees were paid for the entire interest of Levinson in the co-partnership. To compel an accounting is to set aside or ignore that transaction. The money was not paid on account, and the legatees must have known that no such sum was due from the surviving partners to the estate, except upon the theory that they had purchased the interest of Levinson. The acceptance of the sum by the executor materially affected the condition of the surviving partners. But for that the concern would most likely have gone into liquidation, and large liabilities for goods would not have been incurred. They did not understand that they were assuming these liabilities and the risks of trade for the benefit of the estate of Levinson, but for themselves.

STATE v. HAYES.

(Supreme Court of Utah. Oct. 12, 1896.)

HOMICIDE—CIRCUMSTANTIAL EVIDENCE—SUFFICIENCY—RES GESTA—OTHER CRIMES.

1. The fact that the testimony in a criminal case is largely of a circumstantial character does not necessarily weaken its strength, if the circumstances are closely clustered together in one unbroken chain of criminating facts, all pointing with unerring certainty to the accused as the author of the alleged crime. Circumstantial evidence may be quite as conclusive as direct evidence, but it is incumbent upon the prosecution, not only to show by a preponderance of the evidence that the alleged facts and circumstances completing the chain are true, but they must also be such facts and circumstances as are incompatible, upon any reasonable hypothesis, with the innocence of the accused, and incapable of explanation upon any reasonable hypothesis other than that of the defendant's guilt. The chain of circumstances must be complete and unbroken, and should be established beyond a reasonable doubt.

2. When characterizing the act of the defendant in killing the deceased, it was proper for the jury to view it in the light of all the circumstances to which it was subject at the time. It was proper for the jury to consider the condition of the weather; the ice upon the lake in February, and its absence in April; the size of the bullet, and the direction from which it was shot; whether the bodies were placed under the ice, and how they came to be found upon the

shore of the lake; the defendant's efforts to prevent search in the places where the bodies were found, and his condition of mind and manner when viewing the bodies; what he said and did indicating a malicious intent, or the absence of it.

3. It was not error in the counsel for the prosecution, in his opening statement to the jury, to inform them that he expected to show the killing of two other young men besides the one with whose murder the prisoner was charged, and that all three met their death at the same time, at the hands of the defendant. While the general rule is that one crime cannot be offered to prove a similar offense committed against another person at another time, yet where the circumstances tend to show the killing of three persons in a similar manner, and at the same time, and their disappearance at the same time, as one continuing transaction, and the state was reasonably bound to account for the whereabouts of the two persons, companions of the deceased (whose death was not charged to defendant), then in such a case the killing of the one, and the manner and killing of each, bore upon the killing of the others, and tended to explain the motive, acts, and intent of the slayer of the deceased. Such evidence is competent, especially when accompanied by instructions from the court that the jury should not consider it except and so far as it tended to connect the defendant with the crime charged.

4. Where there is evidence sufficient to establish the defendant's guilt, it is for the jury to pass upon its weight, and determine whether or not the defendant is guilty beyond a reasonable doubt.

(Syllabus by the Court.)

Appeal from district court, Fourth district; W. M. McCarty, Judge.

Harry Hayes was convicted of murder, and appeals. Affirmed.

J. W. N. Whitecotton, Chas. De Moisey, and H. C. Edwards, for appellant. A. C. Bishop, Atty. Gen., and B. X. Smith (E. A. Wedgwood, of counsel), for the State.

MINER, J. The indictment in this case charges the defendant with the crime of murder in the first degree, in shooting and killing one Albert Enstrom, alias Albert Hayes, in Utah county, February 16, 1895. The verdict of murder in the first degree, as charged, was rendered April 1, 1896, and the defendant was sentenced to be hanged by the neck until dead. From the judgment of conviction, and the order denying defendant's motion for a new trial, this appeal is taken.

The first contention made by the appellant is that there is no evidence in the case tending to prove that the deceased was killed in Utah county, nor that the defendant killed the deceased in Utah county, and that there was no evidence to justify the verdict. We discover from the record that about the 16th day of February, 1895, the defendant or his wife owned a ranch at Pelican Point, on the west shore of Utah Lake, in Utah county, upon which was erected a small dwelling, where the deceased, Albert Hayes, Andrew Johnson, and Alfred Nelson, three young men, resided, and took care of the ranch and the stock for the defendant, who was stepfather to Albert Hayes, and who resided at Eureka, Utah, about 20 miles distant. These young men had been missed

from the dwelling after the 17th of February, 1895. Search was made, and about the 15th day of April, 1895, the dead body of Albert Hayes was found in the shoal and sand of Utah Lake, partly covered, about one mile from the Hayes ranch, with two bullet holes in his breast, which caused his death. The bullets were shot from the front. His clothes were on. A few days later the dead bodies of Andrew Johnson and Alfred Neilson were found in the lake, about two miles south from where the body of Hayes was found. Each body had on the clothing worn in life. Johnson had a gunshot wound in the breast, shot from right to left, and Neilson had a gunshot wound through from the back of the head, and out over the right eye. These several wounds caused the death of the three young men, and were mortal wounds, caused by bullets from a gun. The Hayes ranch and house were shown to be in Utah county, Utah, and the country south of the Hayes ranch was for three or four miles in Utah county. A map was introduced showing the lay of the country and locality of the Hayes ranch and corral. The house was 10 or 15 rods from the road, and about 300 yards from the lake. The deceased and his companions were at the house on the ranch on Saturday, February 16, 1895, during the daytime, and were last seen there at 5 o'clock in the afternoon. Parties passing the house on the 18th and 23d of February found no one there, and the doors were locked. The cattle and hogs were found loose and unattended, and the bedding in the house had been changed. On March 9th, the house was entered, and bloodmarks were found on the floor in several places. The defendant was shown to have made repeated threats against the deceased and his dead companions, and was shown to have made repeated contradictory statements concerning the affair.

Defendant claimed that he had not been to the ranch in February or March, nor between December, 1894, and April, 1895. It was shown that he had said he was going to the ranch on the 15th of February to shoot ducks, and invited a friend to go with him, and that he had started off alone with a cart that day, and returned on the 17th of February, and stated that he had just returned from below. It also appears from the testimony of two witnesses that defendant was seen by them at the ranch on the 17th day of February, fixing a cart. Several witnesses saw him at the ranch between the 10th and 20th of February. On the 16th or 17th of February, Hayes' wife endeavored to borrow a horse to go to the ranch, stating that defendant was there, and that she desired to go there. It was shown that defendant started false stories concerning the deceased having left the ranch, and taking away his property, and also that he had received a letter that the boys had gone to Arizona, which was untrue. When the defendant received letters that the boys were gone, and that the stock was starving, he was asked why he did not go down and look after the stock, to

which he replied "that he would never go to the ranch again, for it had been a great deal of trouble to them, and he would never go there again." On his return from the ranch, on the 17th of February, he looked pale, acted peculiar; his eyes were bloodshot; he acted crazy-like and nervous; his conduct was extraordinary and unusual. While wringing a friend's hands, he turned him around, and said, "Shake hands with an old criminal." The testimony tended to establish the theory that the boys were shot at about the same time, and placed under the ice. A witness testified that he heard a conversation between his brother and Hayes shortly after the homicide, and before the bodies were found, as follows: "My brother said to Hayes that he thought Albert was killed first, and then put through the ice,—an air hole in the ice,—and then, the other boys coming back, they being away, that they were then killed to cover up the first crime. Mr. Hayes said: 'There was no ice on the lake when I was down there in February, or rather when I was there in March.' And my brother says: 'Why, Hayes, there was no ice on the lake in March.' And he says: 'Oh, yes; there was ice on the lake in March.' And my brother says: 'I was at Provo as a witness at that time, and there was no ice on the lake then at that period.' And Mr. Hayes replied: 'There are no air holes in the ice when it is frozen solidly, as it would be in the winter.' My brother spoke up, and said: 'This murder will come out.' And Hayes said: 'It will never be found out, not in a thousand years.'" The defendant was shown to be opposed to taking any steps to find the bodies or the murderer. He failed to identify the body or clothing of his stepson, although the clothing had been previously worn by himself, while others identified both readily. A wagon or cart track was noticed from the house to the lake on the 18th of February. In February the lake was frozen over, and was thawed out in April. When the bodies were being searched for, the defendant attempted to attract the attention of the searchers away from the locality where the bodies were found, and to discourage the search. The harness that the defendant accused the deceased of taking was found in a manure heap on the premises. In April, Mrs. Hayes informed a witness, in presence of her husband, that her husband had killed her boy, and Hayes made no reply except to inquire of witness what was the best to do, and he was advised to notify the officers. Hayes replied that he wanted to keep it still. He did not want to make any noise or excitement, nor inform the officers, but wanted to get a search warrant, and find the things he had before stated were carried away by the boys, or were lost. Mrs. Hayes also stated, in defendant's presence, that he had talked her out of notifying the officers, because he wanted to find his lost property first. Hayes said the ranch belonged to the deceased, and he would not go near it again. He called the other boys

"damned scrubs," and said "they were no good anyway." He had threatened to kill the deceased before the occurrence in question, when in a state of anger.

The testimony is replete with other strong criminating circumstances connecting the defendant with the murder of the three boys at about the same time. There was sufficient evidence to go to the jury to establish the defendant's guilt. That being so, it was for the jury to pass upon it, and say whether or not the defendant was guilty beyond a reasonable doubt. The testimony was largely of a circumstantial character, but that does not weaken its strength and potency where the circumstances are so closely clustered together in one unbroken chain of criminating facts, all pointing with unerring certainty to the defendant as the author of the alleged crime. Circumstantial evidence may be quite as conclusive as direct evidence, but it is incumbent upon the prosecution, not only to show by a preponderance of evidence that the alleged facts or circumstances completing the chain are true, but they must also be such facts and circumstances as are incompatible, upon any reasonable hypothesis, with the innocence of the accused, and incapable of explanation upon any reasonable hypothesis other than that of the defendant's guilt. The chain of circumstances must be complete and unbroken, and should be established beyond a reasonable doubt. *People v. Scott*, 10 Utah, 217, 37 Pac. 335.

In his opening statement to the jury, counsel for the prosecution stated to the jury what the people expected to prove on the trial of the case; and that the circumstances of the whole transaction would show that the killing of the deceased and of Johnson and Nellson occurred at one time, and as one transaction; and that all three of the boys met their death at the hands of the defendant, at about the same time; and that it would be impossible to separate the proof of the killing of Albert Hayes from the killing of the other two young men; and that the prosecution would show the killing of the three as part of one transaction. To this statement defendant's counsel objected, and objected to any other evidence being admitted, except as to the killing of Hayes. The objection was overruled, and an exception taken. Thereupon testimony showing the whole transaction was admitted as a part of the *res gestæ*. The court, in its instructions to the jury on this subject, said: "There has been some evidence introduced by the prosecution in this case of the killing of Andrew Johnson and Alfred Nellson. You are instructed that you must not consider the testimony on this point, except only so far as it may connect the defendant with the crime charged in the indictment; and, if you find that such testimony fails in any way to connect the defendant with the crime charged in the indictment, it is your duty to wholly and absolutely disregard such testimony, and to dismiss the same from your minds, and not consider it in this case. The defendant

is only on trial for the crime charged in the indictment, and unless you believe from the evidence, beyond a reasonable doubt, that he is guilty of the identical crime charged in the indictment, it is your duty to acquit him." We are of the opinion that the testimony was properly admitted, and the rights of the defendant were carefully guarded by the court in its charge to the jury. The general rule is that one crime cannot be offered to prove a similar offense committed against another person at another time. But the circumstances shown in this case tend to show that the killing of the three boys, and their disappearance at the same time, were one continuing transaction. The state was reasonably bound to account for the absence or disappearance of Johnson and Nellson, the companions of the deceased. The killing of one bore upon the killing of the others, and tended to explain the motive, acts, and intent of the slayer of Hayes.

In characterizing the act of defendant in killing Hayes, it was proper for the jury to view it in the light of all the circumstances to which it was subject at the time. It was proper for the jury to consider the condition of the weather; the ice upon the lake in February, and its absence in April; the size of the bullet, and the direction from which it was shot; whether the bodies were placed under the ice, and how they came to be found on the shore of the lake; the defendant's efforts to prevent the search in the place where the bodies were found, and his condition of mind and manner when viewing the bodies; what he said and did indicating a malicious intent, or the absence of it. Along with the principal facts, the jury should be given the attending and surrounding circumstances constituting the *res gestæ*. "The affairs of men consist of a complication of circumstances so intimately interwoven as to be hardly separable from each other. Each owes its birth to some preceding circumstance, and, in its turn, becomes the prolific parent of the other; and each, during its existence, has its inseparable attribute, and its kindred facts materially affecting its character, and essential to be known, in order to a right understanding of its nature." The surrounding circumstances, constituting parts of the *res gestæ*, may always be shown to the jury along with the principal facts. *People v. Coughlin*, 44 Pac. 94, 13 Utah, 58; 1 Greenl. Ev. 108.

The size and character of the bullet that killed Johnson, and the wound made by it, were proper to be admitted in evidence in connection with the wounds made upon the deceased by a similar bullet, apparently shot from the same gun.

Upon a careful examination of the record, we are unable to find any error. The order and judgment of the court below appealed from are affirmed.

ZANE, C. J., and BARTCH, J., concur.

BUNNELL v. CARTER.

(Supreme Court of Utah. Oct. 15, 1896.)

MORTGAGES—TRANSFER OF PROPERTY—SUBROGATION—DISCHARGE OF MORTGAGOR.

Plaintiff sold certain property to defendant, who gave therefor his promissory notes, secured by a mortgage on the same. The defendant then sold the property to D., subject to the mortgage, and D. sold it to C., under like conditions. Neither D. nor C. assumed or agreed to pay the mortgage, but the interest on the notes were paid by them. The time of payment of the notes was extended by the plaintiff, the mortgagee, without the knowledge or consent of the defendant, the mortgagor. The property was at all times, up to the maturity of the notes, worth the full amount of the mortgage, but declined greatly in value thereafter, and was worth less at the end of the time to which payment had been deferred than the mortgage. When the property was sold on a foreclosure, and the sheriff's sale showed a deficiency, plaintiff claimed a deficiency judgment against defendant, which was denied by the court. *Held* that, by the right of subrogation, the mortgagor, after conveyance, and after maturity of the mortgage, might pay the debt, and secure his safety upon the land, and that when the mortgagee and the grantee extended the time of payment, without the knowledge and consent of the mortgagor, they took away the latter's right of subrogation, and imposed upon him a new risk, not anticipated, and never consented to. The mortgagor stood to the end, as he was in the beginning, the sole principal debtor, but, on account of the depreciation of the value of the mortgaged security, liable only to the extent of the land, which depreciated during the time of the extension of the notes. The extension of time took away his right of subrogation, and discharged him to the extent of the value of the land. Being once discharged, he could not again be made liable. From the time of the extension, the risk of future depreciation fell upon the creditor, and he assumed the risk of obtaining his money out of the land; and defendant was released from liability for the deficiency reported due on the mortgage.

(Syllabus by the Court.)

Appeal from district court, Salt Lake county; Le Grand Young, Judge.

Action by Theodore Bunnell against Thomas Carter to foreclose a mortgage. From a judgment denying him a deficiency judgment, plaintiff appeals. Affirmed.

Frank Pierce, for appellant. Williams, Van Cott & Sutherland, for respondent.

MINER, J. In February, 1890, appellant was the owner of property in Salt Lake City, and sold it to respondent, Thomas Carter, and took from him, as part payment, two promissory notes made by Carter, of \$1,500 each, payable on or before February 5, 1891, and February 5, 1892, respectively, with annual interest. These notes were secured by a mortgage on the property, which was duly recorded. This action was brought to foreclose the mortgage, and for a deficiency judgment against Carter, the respondent. On April 2, 1890, Carter conveyed the premises to John E. Dooley, by general warranty deed, subject to the incumbrance of the \$3,000 mortgage. On October 3, 1893, Dooley conveyed the premises to A. G. Campbell, by general warranty deed, subject to the same

mortgage. Neither Dooley nor Campbell assumed or agreed to pay the mortgage. Carter, the respondent, paid no interest on the notes after conveyance to Dooley, nor was he at any time called upon or requested to pay any interest on either note. The interest was paid by Dooley or Campbell. On October 12, 1891, payment of the notes, by agreement between the plaintiff and the owner of the property, was extended to October 12, 1892, and afterwards likewise extended until February 5, 1894. These extensions were without the knowledge or consent of the respondent, Carter, the maker of the notes. The property covered by the mortgage was worth the full amount of the mortgage debt at all times between October 11, 1891, and the maturity of the last note, February 6, 1892; but since said time said property has depreciated in value, and is not now worth the mortgage debt. Upon a foreclosure and sale of the property, the sheriff returned a deficiency of \$1,357.30. The court denied the appellant's motion for a deficiency judgment against Carter, the maker of the notes, for this sum, and rendered its decree accordingly. From this decree and judgment, this appeal is taken.

While it is true that a purchaser who assumes the mortgage becomes as to the mortgagee the principal debtor, and the mortgagor a surety, yet, under such circumstances, the mortgagee, unless he assented to such an arrangement, may treat both as principal debtors, and may have a personal decree against both. So, the purchaser, having assumed the payment of an existing mortgage, he thereby becomes the principal debtor, and the mortgagor a surety of the debt merely, and an extension of the time of payment of the mortgage, by an agreement between the holder of it and the purchaser, without the consent of the mortgagor, discharges the mortgagor from liability upon it. 1 Jones, Mort. §§ 741, 742; Calvo v. Davies, 73 N. Y. 211. But the facts in this case are different from those stated. The question here presented is whether the mortgagor is discharged from liability on account of the depreciation of the mortgage security below the debt during the period covered by the extension of payment after maturity, where the payment of the debt was extended by the mortgagee and grantee of the mortgagor, without the consent of the mortgagor, and when liability was not assumed by the grantee. In this case, at the maturity of the second note, the premises were ample to discharge the debt, but the notes were extended for two and three years by the mortgagee and grantee, and during this period of extension the property depreciated, and was not worth the mortgage debt at the expiration of the time to which it was extended. While no strict and technical relation of principal and surety arose between Carter, the mortgagee, and his grantee, Dooley or Campbell, from the conveyance of the land subject to the mort-

gage, still an equity did arise, which could not be taken from the mortgagor without his consent, and which bears a close resemblance to the equitable right of a surety the terms of whose contract have been modified. Dooley or Campbell, as grantees of Carter, could not properly be denominated "principal debtors," because they owed no debt; and yet the land which they owned was the primary fund for the payment of the mortgage, and the mortgaged property stands liable to the extent of its value, for the payment of the mortgage. So, as grantee with respect to the land, and to the extent of its value only, they stand in the relation of principal debtors, and to this extent only the mortgagor has the equities of a surety. This result follows from the right of subrogation which inheres to the original conveyance from Carter to Dooley, made subject to the mortgage which Carter executed. As against Dooley, Carter had the right to require that the land should be first exhausted in payment of his mortgage. The amount of the mortgage was deducted from the purchase price, the tacit understanding, at least, being that the land should pay the debt as far as it would go. Through this right of subrogation, the mortgagor, after conveyance, and after maturity of the mortgage, may pay the debt, and secure his safety upon the land. This was a right that Carter had which could not be invaded with impunity. But it was invaded when the mortgagee and the grantee extended the time of payment without the knowledge or consent of Carter. They, for the time at least, took away Carter's right of subrogation, and imposed upon him a new risk, not anticipated and never consented to. The value of the land at the maturity of the notes was more than sufficient to pay the mortgage. By the extension, increased accumulations of interest were to be expected. The mortgagee had no right to modify or destroy Carter's original right of subrogation. In making the extension, he acted at his peril. The grantees, Dooley and Campbell, stood in quasi relation of principal debtors, only in respect to the value of the land as the primary fund, and to the extent of its value. That value being less than the mortgage debt, they owed no debt or obligation whatever beyond it; but the mortgagor stood to the end, as he was in the beginning, the sole principal debtor, but, on account of the depreciation in the value of the mortgaged security, liable only to the extent of the value of the land, which is shown to have depreciated during the time of the extension of the notes, and to be less in value than the face of the mortgage. The measure of his injury was his right of subrogation, and that was necessarily measured by the value of the land. The extension of time took away his right of subrogation, and discharged him to the extent of the value of the land. Being once discharged, he could not again be made liable. From the time of the extension of

payment by the mortgagee, the risk of future depreciation fell upon the creditor, who, by the extension, practically took the land as his sole security to the extent of its then value, and assumed the risk of obtaining that value out of it in the future.

In *Murray v. Marshall*, 94 N. Y. 611, the court say: "For conceding the general rule to be that the surety is discharged utterly by a valid extension of the time of the payment, and that the mortgagor stands in the position, and has the rights of a surety, it must be steadily remembered that he can only be discharged so far as he is surety; that he holds that position only up to the value of the land, and beyond that is still principal debtor, without any remaining equities." The mortgagor has a right to complain in this case only to the extent of the depreciation of the value of the mortgage security, which decreased during the period of time covered by the extension of the time of payment, and which deprived him of his right of subrogation, and so impaired his equitable rights as mortgagor as to discharge him from liability to the extent of the value of the land, which is shown to be less than the face of the mortgage, and to the extent of any deficiency judgment. *Murray v. Marshall*, 94 N. Y. 611; *Clark v. Mackin*, 95 N. Y. 346; *Jones, Mortg.* §§ 740-742; *Metz v. Todd*, 36 Mich. 473.

We are of the opinion that by the plaintiff's treating with the grantee in the manner stated, and extending the time of payment beyond maturity, to a period when the land depreciated in value below the face of the mortgage, and dealing with the land, which constituted the primary fund for the payment of the mortgage in a manner to deprive the mortgagor of his right to resort to it for indemnity, the defendant, Carter, was released from liability for the deficiency reported due upon the mortgage. We find no reversible error in the record. The order and judgment appealed from are affirmed, with costs.

ZANE, C. J., and BARTON, J., concur.

HOLDEN v. HARDY, Sheriff.

(Supreme Court of Utah. Oct. 29, 1896.)

MASTER AND SERVANT—EIGHT-HOUR LAW—CONSTITUTIONALITY.

1. Plaintiff, in violation of a state law, employed one H. to labor in a mine more than eight hours per day. Upon fine and imprisonment, plaintiff petitioned the supreme court for a writ of habeas corpus, contending that the law limiting the time of labor in mines to eight hours a day was unconstitutional. Section 1, p. 219, Laws 1896, declares that "the period of employment of working men in all underground mines shall be eight hours per day, except in cases of emergency, where life or property is in imminent danger." The constitution having declared that "the legislature shall pass laws providing for the health and safety of employees in factories, smelters and mines," the court will not hold the act without such constitutional authority if there is any reasonable doubt that it

is not calculated to promote the health and safety of such employes.

2. The court will not hold that an act is not within the police power of the state unless it is so clearly without as to remove every reasonable doubt that it is.

3. If the power of the legislature to pass the law is conceded, it cannot be said in this case there is any deprivation of liberty without due process of law.

4. While the powers of the national government consist of those delegated, those of the state government embrace such as are not forbidden.

5. The first clause of the fourteenth amendment to the constitution of the United States makes all persons described in it citizens of the United States, and of the state where they reside,—citizens of two distinct governments.

6. The second clause of the same section prohibits the state from denying to any person therein his privileges and immunities as a citizen of the United States. His privileges and immunities as a citizen of the state are left to the protection of the state.

7. The third clause of the section forbids the deprivation of life, liberty, or property, except by virtue of valid laws. If the state law in this case was valid, the process was valid.

8. The last provision of the section prohibits the denial by the state, to any person within its jurisdiction, the equal protection of the law. And a law may be limited to the dangers peculiar to a particular industry, without denying to any person the equal protection of the law.

9. The property or business of mines operated and controlled by private corporations is not affected with a public interest or use, though a statute may assume or declare them to be so affected. *Bartch and Miner, JJ., dissenting.*

(Syllabus by the Court.)

Habeas corpus, on the application of Albert F. Holden, against Harvey Hardy, sheriff. Writ discharged, and petitioner remanded.

Marshall & Royle, Dickson, Ellis & Ellis, and Bennett, Harkness, Howat & Bradley, for petitioner. A. C. Bishop, Atty. Gen., C. S. Varian, O. W. Powers, Chas. J. Pence, and J. H. Murphy, for the State.

ZANE, C. J. The plaintiff was found guilty of a misdemeanor by a justice of the peace, who assessed a fine against him of \$50, and, upon a refusal to pay, committed him. To obtain his liberty, he has presented this petition for a writ of habeas corpus.

The offense charged consisted of employing one William Hooley in underground mining more than eight hours per day, in violation of a law entitled "An act regulating the hours of employment in underground mines, and in smelting and ore reduction works," as follows:

"Section 1. The period of employment of working men in all underground mines or workings shall be eight (8) hours per day, except in cases of emergency where life or property is in imminent danger.

"Sec. 2. The period of employment of workmen in smelters and all other institutions for the reduction or refining of ores or metals shall be eight (8) hours per day, except in cases of emergency where life or property is in imminent danger.

"Sec. 3. Any person, body corporate, agent, manager or employer, who shall violate any

of the provisions of section 1 and 2 of this act, shall be deemed guilty of a misdemeanor."

This statute limits the hours of employment of laboring men in underground mines and smelters, or other works for the reduction of ores or refining of metals, to eight hours per day.

The question for our consideration and decision is, had the legislature the power to enact this law?

Article 16 of the constitution of this state is as follows (Laws Utah 1896, p. 219):

"Section 1. The rights of labor shall have just protection through the laws calculated to promote the industrial welfare of the state.

"Sec. 2. The legislature shall provide, by law, for a board of labor, conciliation and arbitration which shall fairly represent the interests of both capital and labor. The board shall perform duties, and receive compensation as prescribed by law.

"Sec. 3. The legislature shall prohibit: (1) The employment of women, or of children under the age of fourteen years, in underground mines. (2) The contracting of convict labor. (3) The labor of convicts outside prison grounds, except on public works under the direct control of the state. (4) The political and commercial control of employes.

"Sec. 4. The exchange of blacklists by railroad companies, or other corporations, associations or persons is prohibited.

"Sec. 5. The right of action to recover damages for injuries resulting in death shall never be abrogated, and the amount recoverable shall not be subject to any statutory limitation.

"Sec. 6. Eight hours shall constitute a day's work on all works or undertakings carried on or aided by the state, county or municipal governments; and the legislature shall pass laws to provide for the health and safety of employes in factories, smelters and mines.

"Sec. 7. The legislature, by appropriate legislation, shall provide for the enforcement of the provisions of this article."

The first section of the act makes it the duty of the legislature to protect the rights of laboring men by the enactment of just laws calculated to promote the industrial welfare of the people,—such laws as will be just to all classes. The command is to the lawmaking department of the state, and the only express limitations upon the power are that such laws shall be just, and calculated to promote the welfare of the industrial classes. The legislature must decide whether the law is just and adapted to the purpose named; and unless the law is so palpably unjust, or so clearly not calculated to promote the purposes mentioned in the constitution, as to remove every reasonable doubt that it is unjust, or that it is not calculated to promote the purpose expressed in the constitution, the court should not hold it without the scope of the authority mentioned in that instrument. The first clause of section 6 declares

that "eight hours shall constitute a day's work on all works or undertakings carried on or aided by the state, county or municipal government." We presume the object of this provision was to protect the laboring man from the injurious consequences of prolonged physical effort, and to give him the remainder of the 24 hours for his own personal affairs, and for the cultivation of his mental and moral powers, the acquisition of useful knowledge, and for rest and sleep. The second clause of the section commands the legislature to pass laws "for the health and safety of employes in factories, smelters and mines." This provision must be regarded as an expression of the will of the people of the state with respect to the subjects and objects of legislation named in it; and they possessed all the power to enact laws with respect to such subjects that the people of the United States had not conferred in the national constitution exclusively on that government. Any law adapted to the preservation of the health or safety of employes in factories, smelters, or mines is within the scope of this provision. The law must be connected with some of the objects named, and calculated to effect that purpose. If it is not so connected and adapted, the court has the right to hold that it is not within the scope of the provision. But, if there is a reasonable doubt as to the connection and adaptation, the advisability must be held by the court to have been within the lawmaking power. The court must be able to see clearly that the law was not so connected before holding it void for that reason. If the power to pass the law is conceded, the court cannot set it aside because it may deem its enactment unnecessary or injudicious, or because the court may think that experience has proven it so, or because the court may think itself more sagacious than the legislature, and can therefore see more clearly that the law will retard rather than promote progress and prosperity, and will be a detriment to the common good when actually applied to human affairs amid the conditions of the future.

This brings us to the question: Is the first section of the statute limiting the period of employment of laboring men in underground mines to eight hours per day, except in cases of emergency, where life or property is in imminent danger, calculated to protect the health of such laboring men? The effort necessary to successful mining, if performed upon the surface of the earth, in pure air, and in the sunlight, prolonged beyond eight hours, might not be injurious, nor affect the health of able-bodied men. When so extended beneath the surface, in atmosphere laden with gas, and sometimes with smoke, away from the sunlight, it might injuriously affect the health of such persons. It is necessary to use artificial means to supply pure air to men laboring in any considerable distance from the surface. That being so, it is reasonable to assume that the air introduced, when mixed with the impure air beneath the surface, is not as healthful as the free air upon the surface. The fact must be conceded that the breathing of pure

air is wholesome, and the breathing of impure air is unwholesome. We cannot say that this law, limiting the period of labor in underground mines to eight hours each day, is not calculated to promote health; that it is not adapted to the protection of the health of the class of men who work in underground mines.

While the provision of the constitution under consideration makes it the duty of the legislature to enact laws to protect the health and to secure the safety of men working in underground mines, and in factories and smelters, it does not prohibit the legislature from enacting other laws affecting such classes, to promote the general welfare. While the constitution of the United States is a delegation of powers to that government, with some express limitations upon the powers conferred, it also contains limitations upon the powers of the states. The government which it created is regarded as one of enumerated and delegated powers. On the other hand, while the state constitution contains some mandatory provisions, with others, distinguishing the departments of the government, and specifying the duties of various officers thereof, it contains many limitations upon the state, and is regarded in a general sense as a limitation upon the state government. The authority of the general government is ascertained from the powers delegated, while those of the state government are ascertained from those not prohibited. The powers of the first are described by those delegated, and the powers of the latter consist of those not prohibited. This leaves the state legislature in the possession of all the lawmaking power not prohibited to it by the constitution of the United States, or the laws made in pursuance of it, or by the state constitution. The enactment of some laws is made mandatory. The enactment of others is left to the discretion of the legislature, as the public welfare may demand. Among the mandatory provisions of the constitution of this state is the one under consideration.

It is claimed that the enactment of the statute in question was forbidden by section 7 of article 1 of the constitution of the state, which is that "no person shall be deprived of life, liberty or property without due process of law." The petitioner insists that his trial was not, and that his imprisonment is not, according to "the law of the land," because the statute fixing the period of labor of a laboring man in underground mines was, as he claims, forbidden by the constitution, and therefore void. If the legislature had power to pass the law, there was no valid objection to his trial, fine, and imprisonment. If the law was valid, the usual and ordinary process was adopted. If it was not valid, the defendant was deprived of his liberty without due process of law. It is also insisted that the provisions of the state law were forbidden by section 1 of amendment 14 of the constitution of the United States, as follows: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside. No state

shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law." This section declares: (1) That all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. They are made citizens of two distinct governments. (2) It declares that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." The enactment of state laws depriving or abridging the privileges or immunities of citizens of the state is left to the state legislature so far as this provision goes. It secures to citizens of the United States, in any state, privileges and immunities of the citizens of that state. Expounding the provision now under consideration, the supreme court of the United States said: "The constitutional provision there alluded to did not create those rights which it called 'privileges' and 'immunities' of citizens of the state. It threw around them in that clause no security for the citizen of the state: in which they were claimed and exercised; nor did it profess to control the power of the state government over the rights of its own citizens. Its sole purpose was to declare to the several states that 'whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify or impose restrictions on their exercise, the same, neither more or less, shall be the measure of the rights of citizens of other states within your jurisdiction.'" *Slaughterhouse Cases*, 16 Wall 76. As the plaintiff is a citizen of this state, the second clause of the first section last above quoted has no bearing upon his case, as his privileges and immunities must be ascertained from the constitution of the state and its laws. The third clause of the section declares that no state shall "deprive any person of life, liberty or property without due process of law." This, in effect, is the same as section 7 of article 1, of the state constitution, and means process authorized by the law of the land. And, as we have seen, if the state law which the plaintiff was charged with violating was valid,—if the legislature had power to pass it,—there was no substantial objection to the process. It was suitable and proper to the nature of the case, and sanctioned by the established usages of the courts.

The last clause of section 1 of amendment 14 of the federal constitution declares that no state shall "deny to any person within its jurisdiction the equal protection of the laws." The slaves in the various states in which slavery existed having been liberated during the late war, congress deemed it necessary to make them citizens of the United States, and forbade the states the denial to them the equal protection of the law. At that time the laws

of all the states in terms gave equal protection to all white persons. This amendment, however, is general, and forbids the denial to any class of persons the equal protection of the laws, by any state; and we have no doubt that class legislation is forbidden. But some pursuits are attended with peculiar hazards and perils, the injurious consequences from which may be largely prevented by precautionary means, and laws may be passed calculated to protect the classes of people engaged in such pursuits. It is not necessary to extend the protection to persons engaged in other pursuits not attended with similar dangers. To them the law would be inappropriate and idle. So, if underground mining is attended with dangers peculiar to it, laws adapted to the protection of such miners from such danger should be confined to that class of mining, and should not include other employments not subject to them. And if men engaged in underground mining are liable to be injured in their health, or otherwise, by too many hours' labor each day, a law to protect them should be aimed at that peculiar wrong. In this way, laws are enacted to protect people from perils from the operation of railroads, by requiring bells to be rung and whistles sounded at road crossings, and the slackening of the speed of the trains in cities. So, the sale of liquor is regulated to lessen the evils of the liquor traffic, and other classes of business are regulated by appropriate laws. In this way, laws are designed and adapted to the peculiarities attending each class of business. By such laws, different classes of people are protected by various acts and provisions. In this way, various classes of business are regulated, and the people protected, by appropriate laws, from dangers and evils that beset them; safety is secured, health preserved, and the happiness and welfare of humanity promoted. All persons engaged in business that may be attended with peculiar injury to health or otherwise, if not regulated and controlled, should be subject to the same law; otherwise, the law should be adapted to the special circumstances. The purpose of such laws is not advantage to any person or any class of persons, or disadvantage to any other person or class of persons. Necessary and just protection is the sole object.

An ordinance of the city and county of San Francisco prohibited the washing and ironing of clothes in public laundries and washhouses within certain prescribed limits of the city and county from 10 o'clock at night until 6 o'clock on the morning of the following day; and one Soon Hing was fined and imprisoned for a violation of it, and he petitioned for a writ of habeas corpus, on the ground that the ordinance was void, because it discriminated between the class of laborers engaged in the laundry business and those engaged in other kinds of business; that it discriminated between laborers beyond the designated limits and those within them; that it deprived the petitioner of the right to labor, and, as a neces-

any consequence, of the right to acquire property; and that the board had no power to pass it. The writ was denied by the lower court, and the judgment was brought before the supreme court of the United States, and affirmed by that court. Among other things, that court said, in its opinion: "The specific regulations for one kind of business, which may be necessary for the protection of the public, can never be the just ground of complaint because like restrictions are not imposed upon other business of a different kind. The discriminations which are open to objection are those where persons engaged in the same business are subject to different restrictions, or are held entitled to different privileges under the same conditions. It is only then that the discriminations can be said to impair that equal right which all can claim in the enforcement of the laws." *Soon Hing v. Crowley*, 113 U. S. 703, 5 Sup. Ct. 730; *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. 357.

Our attention has been directed to the rule by which the court should be governed in deciding upon the constitutionality of the law in question, and reference is made to the case of *Dartmouth College v. Woodward*, 4 Wheat. 629, wherein Chief Justice Marshall, in delivering the opinion of the court, said "that in no doubtful case would it [the court] pronounce a legislative act to be contrary to the constitution." In the *Sinking Fund Cases* the same court said: "Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this statutory rule." 99 U. S. 700; *Powell v. Pennsylvania*, 127 U. S. 678, 8 Sup. Ct. 992, 1257. In this last case the constitutionality of a statute of Pennsylvania, prohibiting the manufacture or sale, or offering for sale, or having in possession with intent to sell, oleomargarine butter, was questioned. No evidence was offered on the trial in the court even to prove that the oleomargarine was impure or unwholesome. On the contrary, there was an offer to prove that it was a wholesome and nutritious article of food, in all respects as wholesome as butter, produced from pure unadulterated milk, or cream from unadulterated milk. The court held that whether the manufacture of oleomargarine of the kind described in the statute involved such danger to the public health as to require, for the protection of the people, the entire suppression of the business, rather than its regulation in such manner as to permit its manufacture and sale to go on, were questions of fact and of public policy, which belonged to the legislative department to determine, and that the court could not interfere without usurping powers committed to the legislative department. The case of *People v. Warden of City Prison* held the enactment of a law prohibiting any person from exercising the calling of a master plumber without passing an examination, before a board of examiners, a valid exercise of

the police power. In its opinion, the court further held that, if legislation is calculated to protect the public health and promote the public comfort and safety, the exercise of the legislative discretion is not the only subject of judicial review, but those measures must have some relation to those ends. (N. Y. App.) 39 N. E. 686.

We have examined a number of authorities to which reference has been made, and those which we deem most pertinent to the case in hand we will further examine in this opinion. Judge Cooley says: "Whether a statute is constitutional or not is always a question of power; that is, a question whether the legislature, in the particular case, in respect to the subject-matter of the act, the manner in which its object is to be accomplished, and the mode of enacting it, has kept within the constitutional limits, and observed the constitutional conditions. In any case in which this question is answered in the affirmative, the courts are not at liberty to inquire into the proper exercise of the power. We must assume that legislative discretion has been properly exercised." Cooley, *Const. Lim.* (8th Ed.) p. 220. The same author says, at pages 200 and 201, "that, except where the constitution has imposed limits upon the legislative power, it must be considered as practically absolute, whether it operate according to natural justice or not in any particular case." Undoubtedly, sovereignty resides in the people, and their will is expressed in constitutions and laws,—in constitutions in the mode prescribed, and in statutes through the legislature; and, if the law is in harmony with the federal and state constitutions, it must stand until the lawmaking power changes it. It is the duty of the court to interpret, construe, expound, and apply the law, whether it be expressed in constitutions or in statutes, or whether it be the common law. But courts have not been intrusted with the lawmaking power. That power is in the hands of another department of government. The supreme court of Massachusetts, in the case of *Com. v. Hamilton Manufg. Co.*, held that a law declaring that a woman should not be employed at labor by any person, firm, or corporation in any manufacturing establishment more than 10 hours in any one day, except in certain cases, and in no cases more than 60 hours a week, was constitutional and valid. In deciding the point, the court said: "It does not forbid any person, firm, or corporation from employing as many persons or as much labor as such person, firm, or corporation may desire; nor does it forbid any person to work as many hours a day or week as he chooses. It merely provides that, in an employment which the legislature has evidently deemed to some extent dangerous to health, no woman shall be engaged in labor more than ten hours a day or sixty hours a week. There can be no doubt that such legislation can be maintained, either as a health or police regulation, if it were necessary to resort to either of these sources for power. This principle has been so frequently recognized in this commonwealth

that reference to the decisions is unnecessary." 120 Mass. 383. In the case of *Ritchie v. People*, 155 Ill. 98, 40 N. E. 454, the following provision of a statute of that state was held unconstitutional and void: "No female shall be employed in any factory or workshop more than eight hours in any one day, or forty-eight hours in any one week." Act June 17, 1893, § 5. In deciding upon the law, the court said that the police power of the state enables it to promote the health, comfort, safety, and welfare of society, and that it was very broad and far-reaching, but that it was not without its limitations; that "legislative acts passed in pursuance of it must not be in conflict with the constitution, and must have some relation to the ends sought to be accomplished,—that is to say, to the comfort, welfare, or safety of society." And, further on, the court also said: "But the police power of the state can only be permitted to limit or abridge such a fundamental right, as the right to make contracts, when the exercise of such power is necessary to promote the health, comfort, welfare, and safety of society or the public." Just preceding the statement of this proposition, reference is made to an inference, and to a natural law: "There is no reasonable ground—at least, none which has been made manifest to us in the argument of counsel—for fixing upon eight hours in one day as the limit within which woman can work without injury to her physique, and beyond which, if she work, injury will necessarily follow." The court assumed a very wide discretion in passing upon the reasonableness and appropriateness of the law, which it pronounced absolutely void. In *Frorer v. People*, 141 Ill. 171, 31 N. E. 395, the court held a statute unconstitutional which made it unlawful for any natural or legal person, while in the business of mining or manufacturing, to engage or be interested in keeping or controlling any truck store, shop, or scheme for the furnishing of supplies, tools, clothing, provisions, or groceries to employes. The court said in its opinion that, "in all that relates to mining and manufacturing wherein they differ from other branches of industry, we recognize the supremacy of the general assembly to determine whether any, and, if any, what, statutes shall be enacted for their welfare, and that of operatives therein, and necessarily affecting them alone. But keeping stores and groceries or supplies of tools, clothing, and food, by whatever name, to sell to laborers in mines and manufactories, is entirely independent of mining and manufacturing." And said, further, that it did not regulate the duties of employer and employe in respect to mining; that it imposed disabilities as to contracting as to tools, clothing, and food, matters as to which all laborers in every other branch of industry are permitted to contract without any restriction. The principal objection to the law was that it was unequal. The court said that it was impossible, under the police power, that what is lawful if done by A., if done by B. can be a misdemeanor, the cir-

cumstances and conditions being the same. A law of the state of New York to improve the public health by prohibiting the manufacture of cigars and the preparation of tobacco in tenement houses in certain cases was held unconstitutional by the court of appeals. While the act professed to be a health law, the court was of the opinion that it was not. The court said: "It is plain that this is not a health law, and that it has no relation to the public health,"—and for that reason held it of no effect. In *re Jacobs*, 98 N. Y. 98.

We do not agree with defendant's counsel that the business of mining is affected with a public interest, and the legislature had the power to pass the law for that reason. Mines are used by private persons or corporations, who have the exclusive use and control of them, as a farmer may own his farm, and have the exclusive use and control of it. The fact that the business may benefit the public does not give the public any interest in the mine or its business, or affect it with a public interest. It is not like the railroad business. Such property and business are owned by a private corporation, but the use of the road is in the public. Travelers and shippers have a common right to use the road for such purposes, by paying fares or freights. The same may be said of similar other classes of business affected with a public use and interest. On this point the court said, in the last-cited case: "Although the legislature may declare it to be public, that does not necessarily determine its character. It must, in fact, be public; and, if it be not, no legislative fiat can make it so." In *re Townsend*, 39 N. Y. 171; In *re Deansville Cemetery Ass'n*, 66 N. Y. 569; In *re Eureka Basin Warehouse & Manuf'g Co.*, 96 N. Y. 42; *Rockwell v. Nearring*, 35 N. Y. 302. But while the business of mining may not be affected with a public interest, the legislature may enact laws adapted to the promotion of the health and safety of men working in underground mines. Whatever difference of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does exist to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public good. The legislature cannot, by any contract, divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim, "*Solus populi suprema lex*;" and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself. *Beer Co. v. Massachusetts*, 97 U. S. 25.

The section of the statute whose constitutionality is involved in this case includes all employes and employers engaged in working

underground mines. None are omitted who may be subject to the peculiar conditions that attend such mining. The provision of the state constitution quoted makes it the duty of the legislature to "pass laws to provide for the health and safety of employes in factories, smelters and mines." And we are not authorized to hold that the law in question is not calculated and adapted in any degree to promote the health and safety of persons working in mines and smelters. Were we to do so, and declare it void, we would usurp the powers intrusted by the constitution to the lawmaking power. The discharge of the petitioner is denied, and he is remanded to the custody of the sheriff named, until discharged according to law.

BARTCH and MINER, JJ. In concurring in this opinion we do not wish to be understood as concurring in that part of it wherein it is stated: "We do not agree with defendant's counsel that the business of mining is affected with a public interest, and the legislature had the power to pass the law for that reason;" "that the business of mining is not affected with a public interest;" or that the public have no interest in mining, etc. To this part of the opinion we withhold our assent. The question is too important to be passed upon without full argument and careful investigation.

WEST POINT IRRIGATION CO. v. MORONI & MT. PLEASANT IRRIGATING DITCH CO. et al. (CLAWSON et al., Interveners).

(Supreme Court of Utah. Oct. 29, 1896.)

WATER RIGHTS—INTERVENTION—SUFFICIENCY OF COMPLAINT.

This was a suit in intervention to determine certain rights to the water conducted from the Sanpitch river, through interveners' ditch, onto lands which came into the "rightful possession" of said interveners. To the complaint in intervention, defendants filed a demurrer, alleging that it was not shown by the complaint whether said lands claimed to be owned by interveners are owned or possessed in common or severally by intervener or those he represents, nor who the parties are that claim the waters, nor their individual interest therein. *Held*, that where a complaint avers that the intervener and those he represents own an undivided interest in the said ditch in common, and that they came into the rightful possession of the lands watered by said ditch, and known as the "Ephraim North Meadows," and where it appears from the complaint that the intervener and those whom he represents have a common or general interest in the question involved in the action, and either gain or lose by the direct operation and effect of the judgment, and that the number of persons who would be joined as interveners is so large that it would be impracticable to bring them before the court, the complaint, although not containing the unerring certainty that is desirable, will be sufficient to give the interveners a standing in the court, under sections 3184 and 3190, Comp. Laws Utah 1888.

(Syllabus by the Court.)

Appeal from district court, Seventh district; Jacob Johnson, Judge.

Petition by the West Point Irrigation Company against the Moroni & Mt. Pleasant Irrigating Ditch Company and others, in which Rasmus Clawson and others intervened. From a judgment sustaining a demurrer to their complaint, and dismissing it, with costs, interveners appeal. Reversed.

L. R. Rhodes, for appellants. W. K. Reid, Thurman & Wedgwood, and C. S. Varian, for respondents.

MINER, J. Plaintiff filed its complaint against the defendants for the purpose of determining its rights to a certain stream of water known as the "Sanpitch River," in Sanpete county. Defendants answered, claiming interests in the water of the stream, etc. The intervener Rasmus Clawson and others filed their petition for leave to intervene, and, by leave of the court, filed an amended complaint in intervention. The defendants filed a demurrer to the complaint in intervention, alleging that the same does not state facts sufficient to constitute a cause of action, nor any ground for a rightful intervention; that it is ambiguous, uncertain; and that it is not shown whether said lands claimed to be owned by interveners are owned or possessed in common or severally by intervener or those he represents, nor who the parties are that claim the water, nor their individual interest therein, and because of defect of parties. The demurrers were sustained. Interveners elected to stand upon the complaint, and thereupon said complaint in intervention was dismissed, with costs. Interveners appeal from this order and judgment.

Section 3190, Comp. Laws Utah 1888, provide that " * * * any person may, before trial, intervene in an action or proceeding who has an interest in the matter in litigation, in the success of either of the parties, or an interest against both. * * * " Under this section, it was competent for the interveners to file their complaint in intervention. Usually, the interest which entitled a person to intervene in a suit between other parties must be in a matter in litigation, and of such a direct and immediate character that the intervener will either gain or lose by the direct legal operation and effect of the judgment. Pom. Rem. & Rem. Rights, §§ 429, 430. Section 3184, Comp. Laws Utah 1888, provides that "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all." Under this provision of the statute, there must be a question of common or general interest to many persons involved in the action, and the question to be determined should be one of common or general interest to all of them, or such persons should be so numerous that it would be impracticable to bring them all before the court; and, in order that the intervener may be entitled to maintain his action, the facts showing that these requirements of the statute have been complied with must be alleged

by the intervener as the ground and reason for adopting this peculiar form of action permitted by the statute. "The complaint or petition must show either that many persons have a common or general interest in the questions involved in the action, or else that the number of persons who would be joined as plaintiffs or defendants, if the ordinary rule was applied, is so very great that it is impracticable to make them all actual parties. Unless the pleading contains these averments, the action must be regarded as though brought by the single plaintiff or against the single defendant named. It should be carefully observed that this provision does not create any new rights of action, nor enlarge any of those now existing. The suit cannot be sustained by one of the representatives of the many others who really sue in his name, unless it could have been maintained if all these many others had been regularly joined as co-plaintiffs, or unless it could have been maintained by each of them suing separately and for himself. The statutory provision is simply a matter of convenience, a rule of form, a means of enabling many persons to have their rights determined without their actual appearance in court as litigant parties." Pom. Rem. & Rem. Rights, §§ 389-392; McKenzie v. Lamoureux, 11 Barb. 516; Ballou v. Inhabitants, 4 Gray, 324; Cadigan v. Brown, 120 Mass. 493; Murray v. Hay, 1 Barb. Ch. 59.

It appears from the complaint "that interveners and company, with about one hundred other persons, own in common a certain ditch, known as the 'Ephraim Meadows Ditch,' which said ditch is taken from the Sanpitch river, in Sanpete county, on the east side of said river, and at a point about 6½ miles below the town of Moroni; that all the matters and things set forth in this petition are of a common and general interest to each and all of said parties, said parties owning undivided interests in said ditch; also, that it is impracticable to bring all of said parties before the court, by reason of their great number; that intervener, at the request of all parties, owners of an interest in said ditch, here intervenes in his own behalf and in behalf of all others of common and general interest; that said ditch is used for the purpose of irrigating 1,200 acres of land, known as the 'Ephraim North Meadows'; that said lands are and have been used for raising hay, and require and have required water to be applied to them in order that they may become productive; that the only source from which water can be obtained is from the stream known as the 'Sanpitch River,' said lands lying adjacent to said stream; that in the year 1855, and long before the plaintiff herein or its grantors, or either of the defendants or their grantors, had made an appropriation of water for any purpose whatever from said Sanpitch river, or had begun to cultivate any lands, this intervener and those whom he represents, either in person or by their grantors and predecessors, came into the rightful possession of the lands in the

aggregate, known as the 'Ephraim North Meadows,' and thereupon, and during the year 1855, and each year thereafter, appropriated from said Sanpitch river, by means of dams and ditches, water sufficient to irrigate said lands each year thereafter, except when prevented by the wrongful acts of the prior parties to this suit, as hereinafter stated; * * * that commencing with the year 1855, and continuing for each year thereafter, except the years hereinafter mentioned, intervener and those whom he represents, either personally or by their grantors, have diverted or appropriated from said river, in manner as aforesaid, sufficient water to irrigate said lands, known as the 'Ephraim North Meadows'; and such water has been appropriated and taken from said river in manner as aforesaid, commencing on or about the 1st day of May each year, and continuing until the 10th day of July of each year," etc. It sufficiently appears from the complaint that all the matters and things set forth in the complaint are of a general or common interest to the said intervener and the 100 persons he represents, and to each and all of said parties; and that said parties own an undivided interest in the said ditch in common; and that they came into the rightful possession of the said lands in the aggregate known as the 'Ephraim North Meadows,' consisting of about 1,200 acres of land, and appropriated the water from said stream to irrigate said land, etc. The petition shows with reasonable clearness, although not with that unerring certainty that is desirable, that said intervener and those he represents have a common or general interest in the question involved in the action, and that the number of persons who would be joined as interveners is so large that it would be impracticable to bring them all before the court. The petition seems to cover both provisions of the statute. We are of the opinion that the court erred in sustaining the several demurrers, and in dismissing the complaint in intervention. The judgment, order, and decree of the court below is set aside, with costs, and the cause is remanded for further proceedings.

ZANE, O. J., and BARTCH, J., concur.

ESLINGER v. PRATT.

(Supreme Court of Utah. Oct. 13, 1896.)

SALT LAKE CITY — CHIEF OF POLICE — POWER TO SUSPEND OFFICERS — RIGHT OF APPEAL.

1. The plaintiff and respondent was sergeant in the police force of Salt Lake City, and was dismissed by the defendant, as chief of police, for a violation of the rules promulgated by said chief and for insubordination. A report of said dismissal was duly made to the board of police and fire commissioners, who affirmed the action of the chief by a refusal to reinstate the plaintiff. The defendant had promulgated rules for the regulation of his department, under authority conferred upon him by section 10 of the Session Laws of 1896 (page 223). The board did not adopt rules which the said section 10 conferred the power upon them to adopt, but were

equally divided as to what, if any, rules should be adopted. *Held* that, in the absence of any rules, promulgated by the board, to limit the authority of the chief of police to make rules, the latter was authorized to make and enforce the regulations which the law empowered him to make; that in the following clauses of section 10: "It shall be their [the chief of police and chief engineer] duty to make and enforce rules and regulations to secure discipline in their respective departments. They shall have power, under such rules as the board may establish, to suspend without pay, fine not to exceed ten dollars, or dismiss any subordinate,"—the word "under" means "subject to"; and that the intention of the legislature was to grant the power to the chiefs to suspend, etc., but to give the board the authority to limit or qualify the power, and, since the board had failed to exercise this power under the authority of the law, the regulations of the chiefs must prevail, and the duty of seeing that the employees faithfully discharged their duties, as he was required to do under section 8 of the same law (page 222), justified him, subject to the approval of the board by a failure to reinstate, in the dismissal of the plaintiff. This construction is reinforced by the use of the word "may," a word here used undoubtedly in a primary or permissive sense.

2. The right of appeal is guaranteed under section 3634, Comp. Laws 1888.

(Syllabus by the Court.)

Appeal from district court, Salt Lake county; John A. Street, Judge.

Petition by J. N. Eslinger against Arthur Pratt, chief of police of the city of Salt Lake, and others, for mandamus to compel his reinstatement as police sergeant. From a judgment issuing the writ, and awarding plaintiff costs, defendant Pratt appeals. Reversed.

Williams, Van Cott & Sutherland, for appellant. Brown, Henderson & King, for respondent.

MINER, J. The respondent filed an affidavit in the court below to obtain an alternative writ of mandate. It appears from the affidavit that on May 9, 1896, the respondent was a policeman and sergeant of police of Salt Lake City; that the board of police and fire commissioners of Salt Lake City was duly appointed and organized under the act of the legislature approved March 30, 1896; that said board have not formulated, adopted, or promulgated any rules or regulations, as provided by section 10 of said act, under which the chief of police could lawfully act, and that no such rules are in force; that Arthur Pratt was on the 9th day of May, 1896, and for a long time prior thereto had been, chief of police; that, while respondent was acting as policeman, on said 9th day of May, 1896, the said Arthur Pratt, chief of police, without filing any charges against the respondent, assumed to dismiss the respondent from said office of policeman and sergeant of police, and refused to permit him to exercise his duties as such, although he has repeatedly applied to be reinstated to his position; that respondent has made application to the board, at its regular session, to be restored, and the board has refused to grant his request; that said chief of police did not at the time, nor

since his dismissal, file any charges against respondent; that said dismissal, and the refusal of the chief of police and said board to restore him, were unlawful,—and prays for an alternative writ of mandate requiring said chief of police and board to restore him to his office. The board of police and fire commissioners of Salt Lake City answered, admitting the facts stated as true, but alleged: That the chief of police, at the next regular meeting of said board after respondent's dismissal, reported in writing to the board his reasons for such dismissal as follows: "For willfully violating the inclosed written orders, for using disrespectful language to the chief of police, and gross insubordination." (The written orders and rules are set out as hereinafter stated in the answer of the chief of police.) That the board have been and are equally divided in members and opinion upon the construction and interpretation of said law, and for that reason have failed and neglected to formulate and promulgate rules and regulations, under section 10 of said law, to govern punishments thereunder by the chief of police. Appellant, Arthur Pratt, as chief of police, filed his demurrer to the affidavit and writ, alleging that they do not state facts sufficient to constitute a cause of action or to afford any relief. Arthur Pratt, chief of police, together with Frank W. Jennings and Louis Cohn, two of said board, answered: Denying that any rules should be adopted by said board before said chief of police can lawfully act in dismissing, fining, or suspending. That said plaintiff at said time was dismissed by said chief for gross insubordination, for disrespect to said chief, and for violating the rules of said department. That at the next regular meeting of said board the chief of police reported to the board his reasons for such dismissal in language following: "Salt Lake City, May 9, 1896. To the Hon. Police and Fire Commissioners—Gentlemen: I have this day dismissed from the police department Sergeant J. N. Eslinger. He was dismissed for the following reasons: For willfully violating the inclosed written orders, for using disrespectful language to the chief of police, and gross insubordination. Arthur Pratt, Chief of Police." "Salt Lake City, May 6, 1896. Special Orders for May 8th and 9th, 1896. First relief will report for duty at 6 o'clock p. m., and remain until further ordered. Second relief will report for duty at 10 o'clock a. m., and remain until further ordered. Third relief will report for duty at 6 o'clock p. m., and remain until further ordered. Arthur Pratt, Chief of Police." That said communication was filed, and said plaintiff appealed to the board for reinstatement, but said board, before the commencement of this action, refused to reinstate said plaintiff for the reasons aforesaid, and refused to disturb the action of the said chief. That on and prior to May 9, 1896, there were made by said chief, and in force in said police department, rules providing that any act of insubordination, or any disrespect to a superior officer, or violation of any

of the rules of the said department would be punished by dismissal. That on May 9, 1896, plaintiff was guilty of acts of insubordination in willfully refusing to remain for duty with said third relief until further ordered, and guilty of disrespect to said chief in imputing to him improper and dishonorable conduct, and guilty of neglect of duty in abandoning said third relief, and leaving his men and quitting said department without permission, and the plaintiff was dismissed for said acts. That said board have not adopted any rules regulating or limiting the power of the chief to suspend, fine, or dismiss, and the board is equally divided as to what, if any, rules should be adopted. The court below found that the dismissal of the plaintiff by the chief of police was unlawful, and ordered that the writ of mandate issue as prayed for, and that the plaintiff have judgment against the defendant for costs. From this order and judgment the defendant Arthur Pratt, chief of police, appeals.

The principal question involved in this appeal is whether the appellant, Arthur Pratt, as chief of police, had power to dismiss the respondent, when the board of fire and police commissioners had not adopted any rules of their own, and whether such dismissal was lawful under the rules adopted by the chief of police. Section 10, c. 73, p. 222, Sess. Laws 1896, provides that "the chief of police shall be the executive officer of the police department; the chief engineer shall be the executive officer of the fire department; and it shall be the duty of each to see that the laws, orders, rules, and regulations, concerning his department are carried into effect. * * * It shall be their duty to make and enforce rules and regulations to secure discipline in their departments respectively. They shall have power, under such rules as the board may establish, to suspend without pay, fine not to exceed \$10.00, or dismiss any subordinate officer, member or employé of their respective departments, but they shall forthwith report in writing the reasons for such action to the board hereby created, by whom said fine may be remitted, or by whom said subordinate officer, member or employé may be reinstated by a vote of three members, and the action of said chief of either department in suspending, fining or dismissing any subordinate officer, member or employé unless reversed or modified by said board, and any action of the board thereon shall be final and conclusive, and shall not be reviewed or called in question before any court." It will be noticed that the statute provides that it is the duty of the chief to make and enforce rules and regulations to secure discipline in his department. It appears from the answer that, in accordance with and in obedience to the statute, the chief of police made rules, which were in force in the police department May 9, 1896, providing that any act of insubordination, or any disrespect to a superior officer, or neglect of

duty, or violation of any rules of duty of the department, would be punishable with dismissal. It also appears from the answer that the plaintiff, on the 9th day of May, 1896, was guilty of insubordination, disrespect, dishonorable conduct, and neglect of duty in violating the rules, for which he was dismissed, and the reasons for such dismissal were reported in writing to the board; that plaintiff appealed to the board for reinstatement, and such board, before the commencement of this action, refused to reinstate the plaintiff, for the reasons given, and refused to disturb the action of the chief. The statute gave the chief power, and made it his duty, to make and enforce rules and regulations to secure discipline in his department. The chief made such rules without objection from the board, and the plaintiff violated such rules. The statute provides that it is the "duty" of the chief to see that the laws, orders, rules, and regulations concerning his department are carried into effect. The only method and manner of enforcing laws and rules by the chief, pointed out by the statute, is by dismissal, suspension, or fine. It is difficult to see how discipline and good government in the departments could be enforced, and the statute carried into effect, without the infliction of the punishment provided by the rule. The board, having adopted no rules of its own, refused to reinstate the plaintiff on his application, and refused to disturb the action of the chief, thereby affirming the order of removal, and the rule under which the removal was made, as well as the act of removal, and the power of the chief to remove. The board never made any rule defining or limiting the powers of the chief, except by their acts in affirming what was done by refusing to reverse or modify the order and reinstate the plaintiff. By the provisions of the statute it was made the "duty" of the chief to make rules and regulations for the express purpose of securing discipline in his department, and, when made, it was equally his duty, under the statute, to enforce such rules, in order that discipline should be maintained, and the department made efficient, for the purpose for which it was organized. The fact that the board had not adopted rules of its own, and was unable to do so, rendered it still more necessary and proper that the chief should make rules, and enforce them, in order to preserve the necessary and proper discipline in the department, and police protection to the city. Under the rules made it was competent for the chief to remove the plaintiff for the violation of them and his neglect of official duty, as reported to the board, and it was competent for the board to reinstate the officer and reverse the order of dismissal, or to affirm it. The board refused to reverse or modify the order of removal for the reasons given, or to reinstate the plaintiff, and refused to disturb

the action of the chief. So far as the board could do, they affirmed by their official acts all that was done by the chief, and recognized his authority to do what was done, and thereby recognized and affirmed the rules adopted by the chief as rules of the department.

But it is contended by the respondent that, in the absence of rules actually adopted by the board, the appellant had no power to dismiss; in other words, that the power to suspend, fine, or dismiss comes from the rules the board may adopt, and not from the statutes, nor from the rules adopted by the chief. The particular provision in the statute following that just referred to reads as follows: "The chiefs shall have power, under such rules as the board may establish, to suspend without pay, fine not to exceed ten dollars, or dismiss any subordinate officer, member or employé of their respective departments." What construction should the words "under such rules as the board may establish" have? The word "under" means "subject to." 27 Am. & Eng. Enc. Law, p. 423. With this interpretation the clause would read, "They [the chiefs] shall have power, subject to such rules as the board may establish, to suspend," etc. This reading presumes that "under" is used in the sense of "subject to," and, if correct, shows the legislature to have intended to grant the power to the chiefs to suspend, etc., but to give the board the power to limit or qualify the power; so that the legislature, in using the words of the statute, has granted a present power to the chiefs to suspend, fine, and dismiss, but has given such power subject to the rules that may be established by the board. The word "may," as used in this section, is doubtless used in a primary or permissive sense. *Suth. St. Const.* p. 592, § 462; *Thompson v. Carroll*, 22 How. 434; *Miner v. Bank*, 1 Pet. 64; 2 Comp. Laws, § 2996. It is only reasonable, when the legislature has granted the power, to say that the power exists, subject to be qualified or limited by the board, and then such construction would harmonize the entire section. When the legislature used the language, "It shall be their duty to make and enforce rules," etc., "They shall have power under," etc., it must have intended to make it the duty of the chiefs to make and enforce rules, and have power to suspend, fine, or dismiss; but, as the chief might abuse the power, the authority was reserved to the board to make other rules, so as to control, disarm, modify, or qualify any abuse of power that might be exercised or assumed, either by rule or act of the chief.

Judgment was rendered against the appellant, and for costs in the court below. Under section 3634, Comp. Laws 1888, he is entitled to appeal. *Hayne, New Trials & App.* § 23. The judgment and decree of the court below is set aside and reversed, with costs, and the writ of mandate prayed for is denied.

MCDONALD et al. v. GREAT NORTHERN RY. CO.

(Supreme Court of Idaho. Nov. 10, 1896.)

ANIMALS KILLED ON TRACK.

Where plaintiffs, without the knowledge or consent of defendant, entered upon its right of way, for the purpose of cutting and hauling ties and timber from the adjoining lands, and, while so engaged, turned their horses loose upon such right of way, for the purpose of grazing and water, leaving a man to watch and care for said horses, and keep them from straying upon the railroad track of defendant (said right of way being about 200 feet in width), and, such attendant having abandoned the care of said horses, they strayed upon the track of defendant, and were killed by a passing train, without fault or want of ordinary care by the employes of defendant, *held*, that plaintiffs were guilty of contributory negligence, and were not entitled to recover from defendant for the loss of such animals.

(Syllabus by the Court.)

Appeal from district court, Kootenai county; Alex Mayhew, Judge.

Action by Mary Ann McDonald and Malcolm McDonald against the Great Northern Railway Company. Judgment for plaintiffs. Defendant appeals. Reversed.

Jay H. Adams and R. E. McFarland, for appellant. Charles L. Heltman, for respondents.

HUSTON, J. The record in this case develops but little conflict in the evidence. The facts are substantially as follows: The plaintiff, by her agents and employes, was engaged in cutting ties and other timber upon the land adjoining the right of way of defendant, which, at the point where the accident which is the basis of this action occurred, was through land heavily timbered upon both sides of the right of way. The land was cleared upon both sides of the track the width of the right of way, and, where the timber had been cleared off, there was a growth of grass and willows. A small stream crossed the track, which stream was bridged. The plaintiff, by her agents and employes, was, as before stated, engaged in the cutting and hauling of ties and other timber from the lands adjoining the right of way of defendant, and, in the pursuance of this business, had erected a cabin, or "shack," as it is termed in the evidence, for their accommodation and convenience, upon the right of way of defendant, and near the track of its railway. It does not appear that such occupancy was by or with the knowledge or consent of defendant. It was taken by plaintiff on account of the convenience of feed and water for stock, to wit, the horses plaintiff was using in the business in which she was engaged; the grass and water upon the right of way of defendant being the only available grass and water in the immediate vicinity. It was customary, as appears from the evidence, to keep the horses tied up when not in use, or, when they were turned loose, a man was detailed to watch and look after them, and keep them from the railroad track. On the 23d day of June, 1895, said

horses were by an employé of plaintiff turned loose upon the right of way of defendant, for the purpose of grazing and watering; and one Anderson, an employé of plaintiff, was deputed to watch and look after them, and keep them from the railroad track. While so engaged, he was called to dinner or supper, at the cabin or shack; and, as he states, believing that no train was due at that point at that time, he left the horses, and repaired to the cabin for his meal, and, while he was thus absent, the horses strayed upon the railroad track, and were struck by a passing freight train.

There are 29 errors assigned by appellant in its brief. We shall only consider such of them as we deem essential to the decision of the case.

The first error assigned is irregularity of the jury, in that they reached their verdict by a resort to the determination of chance. While the facts disclosed by the record do not bring this case strictly within the letter of the decision in the case of *Flood v. McClure* (Idaho) 32 Pac. 254, we think it is clearly within the spirit of that decision. Courts should at all times discountenance and disapprove the resorting to any such insidious means of reaching a verdict. It is demoralizing in its tendencies, and is calculated to bring the administration of justice into disrepute.

The second assignment of error is covered by the first.

As to the third and fourth assignments of error, which are in reference to the ruling of the court upon the admission of testimony, we think they are not well taken. These questions were in reference to the value of the horses, and, we think, were proper.

As to the fifth assignment of error, as the question appears in appellant's brief, we see no error; but an examination of the record discloses the answer to the question, which, we think, was improper to be admitted as evidence, in that it is entirely the statement of what other parties told the witness in regard to the running of trains upon the railroad, but we think this should have been reached by a motion to strike out the answer.

The sixth assignment is to the overruling by the court of appellant's objection to a question propounded to a witness on behalf of plaintiff, which called for a statement made by parties, strangers to the record. This ruling, we think, was erroneous.

We see no error in the seventh assignment, nor in the eighth and ninth assignments.

We have carefully examined the instructions the giving and refusal of which are alleged to be erroneous; and while we think the district court fell into the altogether too prevalent error with trial courts, of giving any instruction which correctly states a principle of law, without regard to whether it is warranted by the evidence or not, still we believe, as a whole, the instructions given correctly stated the law of the case. The vice of the whole business is found in the fact, palpably apparent from the record, that the jury, in arriving at their verdict, gave but little heed either to the in-

structions of the court or to the evidence. On the contrary, they seem to have been governed and controlled by a sentiment too frequently evidenced by the verdicts of trial juries in this country, to wit, that corporations, especially railroad corporations, have no rights which juries are bound to respect. Think as we may of the policy of the law which invests corporations with vast and multitudinous rights, powers, and privileges, so long as they exist by virtue of law they are entitled to the protection of the law; and their rights under the law are not to be measured by the sentiment or prejudice which may, for the time being, be dominant in the community. While all corporations are, and, of right, should be, held to a strict accountability in the exercise and enjoyment of their corporate rights under the law, their right to full protection therein from the law must not be overlooked or abrogated.

The record in this case shows as palpable a case of contributory negligence on the part of the plaintiff as can be readily imagined. The plaintiff, without leave from defendant, went upon its right of way, erected her cabin there, and engaged in the occupation of cutting and hauling ties and other timber from the adjoining lands. She was a trespasser. That she recognized the risks and perils incident to her unauthorized and illegal act is shown by the fact that when the horses were not tied up, but were allowed to go loose, for the purpose of grazing and water, which could only be had on defendant's right of way, a man was always set to watch them, and keep them from straying upon the railroad track; and it was to the neglect and carelessness of this man, and not to any want of ordinary care on the part of the defendant, that the accident is attributable.

We have examined the cases cited by respondent. They are not in point. This is not a case where the animals were rightfully upon the public domain, and casually strayed upon the railroad track. The doctrine that cattle are free commoners cuts no figure in this case. The plaintiff voluntarily took the animals upon the right of way of defendant, and knowingly submitted them to all the chances and perils incident to her act. We think the evidence clearly shows the exercise of all the care that the circumstances required or made obligatory upon defendant. This class of cases is extremely numerous, and, while the decisions therein are somewhat variant, we have been able to find none which would support us in affirming the judgment in this case, as shown by the record. "A man who willingly abandons his property to destruction, or purposely exposes it to known danger, has no right, either in law or morals, to invoke the assistance of courts of justice to secure pay for it." *Welty v. Railroad Co.*, 105 Ind. 55, 4 N. E. 410, cited in *Railroad Co. v. Woodward* (Ind. Sup.) 13 N. E. 260. In the last case cited, the court say: "To habitually turn animals loose upon a railroad track, or right of way is, however, something more than con-

tributory negligence. Such conduct evinces a disposition to abandon the animals to the hazard of certain and inevitable destruction, sooner or later."

The right of way of defendant ran through dense timber. The only clearing was along the railroad track, to the limits of the right of way, about 200 feet in width. The plaintiff took her horses upon the right of way, and there left them. It was not a case of straying from the public domain or the premises of plaintiff. It was courting the destruction of the animals. We think the district court would have been justified in granting the motion of defendant for a nonsuit. The judgment of the district court is reversed, with costs.

MORGAN, C. J., and SULLIVAN, J., concur.

LUSE v. UNION PAC. RY. CO.

(Supreme Court of Kansas. Nov. 7, 1896.)

CARRIERS—NEGLIGENCE IN STARTING TRAIN—APPEAL—DECISION—PRACTICE.

1. It is the duty of a railroad company to afford a sufficient time to passengers to alight in safety by the exercise of reasonable care and diligence on their part, and it is negligence on the part of such company to start a train when those operating it know, or by due diligence might know, that a passenger is in the act of alighting.

2. The question discussed whether judgment should be ordered on the verdict, or the cause remanded for a new trial, and held that the latter is the proper course. Martin, C. J., dissenting.

(Syllabus by the Court.)

Error from district court, Brown county; J. F. Thompson, Judge.

Action by Victoria V. Luse against the Union Pacific Railway Company. From a judgment for defendant, plaintiff brings error. Reversed.

On April 27, 1891, the plaintiff commenced her action against the defendant to recover damages for personal injuries alleged to have been sustained by her on December 6, 1890, at Leona, Kan., in alighting from defendant's train; the principal allegation of negligence being that the train was started before she had time, under the circumstances, to get off. On a trial at November term, 1891, a verdict was returned in favor of the plaintiff for \$3,250, and at the same time the jury answered certain particular questions of fact, those in any way bearing upon the question of negligence of either party being as follows, to wit: Questions submitted by plaintiff: "(2) On or about the 6th day of December, 1890, was the plaintiff a passenger in defendant's railway train from St. Joseph, Mo., to Leona, Kan.? A. Yes. (3) Did she pay fare for such passage? A. Yes. (4) Did said train stop at the platform at Leona for the purpose of enabling the passengers to alight therefrom? A. Yes. (5) As soon as said train stopped at said station, did the plaintiff arise and attempt to leave the car? A. Yes. (6) Was her passage obstructed by the entry and

departure of passengers? A. Yes. (7) Did she leave said car as soon as she reasonably could? A. Yes. (8) If her passage from said car had not been obstructed, would she probably have reached the depot platform before said train was started? A. Yes." "(10) As she was coming down the steps from the car to the platform, was said train started? A. She was on the lower step of the car when starting. (11) In consequence of the starting of said train, was the plaintiff thrown onto the platform, or did she fall onto the platform, and was she injured in consequence thereof? A. She was thrown and injured. (12) Did the plaintiff use reasonable and ordinary care, under the circumstances, in leaving said car and reaching the station platform? A. Yes. (13) Was the plaintiff guilty of ordinary negligence in leaving said car or reaching said platform at said station? A. No. (14) Was the defendant guilty of ordinary negligence in starting said train before the plaintiff had time to alight therefrom? A. Yes. (15) Did the plaintiff know or discover said train had started when she stepped from the steps of the car platform? A. She did not. (16) When the plaintiff fell on said station platform, how did she strike,—on her back or on her side? A. On her side. (17) When she left said car and fell on said station platform, did she have her child in her arms? A. Yes. (18) Was she hurt by her fall, and has she ever since suffered pain in her back in consequence thereof? A. Yes." Questions submitted by defendant: "(1) Did not the train stop at the station the usual length of time to permit passengers to get off and on the train, and to unload the baggage and express matter? A. Yes. (2) Did not the niece of plaintiff alight from the train without difficulty? A. Yes. (3) Was not the plaintiff prevented from getting off the train promptly by a man by the name of Walters, who stood in front of her, talking to some person, while the train was stopping at Leona? A. Yes. (4) About how far had the train moved at the time the plaintiff stepped from it? A. Just starting. (5) At the time the plaintiff stepped from the train, did she not have her six weeks old baby in her arms, and did she not step off towards the rear of the car, and fall on her side? A. She had her six weeks old baby in her arms; did not step towards the rear of the car, and was thrown on her side." "(7) About how fast was the train moving at the time plaintiff stepped from it? A. Just starting. (8) Did plaintiff walk down the steps of the car, with her baby in her arms, after the train was in motion, and step off the train, and towards the back of it, while the train was still in motion, and fall upon her side on the platform? A. She did not." On the same day the defendant filed a motion for judgment in its favor upon the special findings of the jury, notwithstanding their general verdict, and also a motion for a new trial. The following is a copy of the journal entry disposing of said motions, and also of a motion filed by the

plaintiff for judgment in her favor, to wit: "And now, on this 4th day of December, 1891, came on the motion of the defendant, the Union Pacific Railway Company, for judgment on the special findings of the jury, as on file of November 14, 1891, which, upon argument of counsel and consideration by the court, is sustained, the plaintiff duly excepting. And also came on the motion of the defendant, the Union Pacific Railway Company, to set aside the verdict, and for a new trial, and the court is of the opinion that the general verdict in this cause is not sustained by sufficient evidence, and is contrary to the evidence; but inasmuch as the motion for judgment on the special findings has been sustained, and for that reason only, said motion for a new trial is overruled, to which ruling of the court the defendant then and there duly excepted. And thereupon, on the same day, the plaintiff filed her motion to set aside said judgment, as on file December 4, 1891, which coming on to be heard, and being argued by said counsel, is by the court overruled, the plaintiff duly excepting." Judgment was thereupon rendered in favor of the defendant, and against the plaintiff for costs.

C. D. Walker and A. F. Martin, for plaintiff in error. A. L. Williams, N. H. Loomis, and R. W. Blair, for defendant in error.

MARTIN, C. J. (after stating the facts). 1. The court erred in sustaining the motion of the defendant for judgment in its favor upon the findings of the jury, notwithstanding their general verdict. The findings show that the defendant was guilty of ordinary negligence in starting its train before the plaintiff had time to alight therefrom, and that she exercised due care in attempting to leave it, and in stepping therefrom, just as it was starting, and before she had knowledge that it was in motion. The care of her babe, and the entry and departure of other passengers, retarded her egress, but the jury must have found that she was not at fault for the delays occasioned thereby. It is the duty of a railroad company to afford a sufficient time to passengers to alight in safety by the exercise of reasonable care and diligence on their part. *Railroad Co. v. Hendricks' Adm'r*, 26 Ind. 228; *Railroad Co. v. Parmalee*, 51 Ind. 42; *Railroad Co. v. Kilgore*, 32 Pa. St. 292; *Keller v. Railroad Co.*, 27 Minn. 178, 181, 6 N. W. 486, 487; *Railroad Co. v. Kendrick*, 40 Miss. 374; *Straus v. Railroad Co.*, 75 Mo. 185. The mere fact that the train stopped the usual length of time is not sufficient to show negligence of the plaintiff, nor due diligence of the defendant; for the circumstances may have required a longer stop on that day than usual, and it was a question for the jury to determine whether the stop was reasonably sufficient or not. The rule is well stated by Chief Justice Gilfillan in the case above cited from 27 Minn. and 6 N. W., as follows: "When the cars stop at a passenger's place of destination, it is his duty to leave the car without unnecessary

delay, and the company's to give him a reasonable opportunity to do so with safety. The exact length of time to be given must depend very largely upon circumstances. * * * It certainly would not be permissible for them to be so reckless of the lives and limbs of passengers as to start the trains when they know, or with reasonable care might know, that passengers are in the act of alighting." The defendant lays much stress upon question 3 submitted by it, and answered by the jury, as to the conduct of Walters. The evidence shows that Walters was a passenger whose destination was also Leona; and although this fact does not appear in the findings, yet the answer to said question 3 is not inconsistent with the answer to question 6 submitted by the plaintiff, and Walters was perhaps only one of several who obstructed the plaintiff's way and contributed to her detention. The defendant cites several cases where railroad companies have been exonerated from liability to passengers for injuries occasioned directly by the independent act or omission of a third person, but these are manifestly inapplicable.

2. The only other question in the case is whether judgment should be entered in favor of the plaintiff, or the case remanded for a new trial. The writer is of the opinion that the proceedings of the court upon the motion for a new trial were erroneous, and should be disregarded, and that judgment should be entered for the plaintiff upon the general verdict, the same being in accord with the answers of the jury to the particular questions of fact. We all agree that a defendant may file a motion for a favorable judgment on the findings and a motion for a new trial at the same time; but, as both cannot be granted, the writer is of the opinion that the allowance of either ought to operate as a withdrawal of the other,—at least, the court should not rule upon the latter. To sustain the defendant's motion terminating the case in his favor, and then entertain another motion of the defendant to set aside the judgment just obtained, and for a new trial, and allow the defendant the benefit of an exception on overruling it, is certainly a lowering of the dignity of a court that ought not to be encouraged. A party should not be permitted to rely in one breath upon findings of fact as true, and, obtaining a favorable ending of the case on that assumption, in the next challenge them as false, and be allowed an exception when the court adheres to the former ruling in favor of the defendant by refusing to set it aside on such motion for a new trial. With the view entertained by the trial court, the defendant should have been given an election to take a new trial, or stand upon the favorable judgment on the findings of fact. A court ought not to allow a party the benefit of two inconsistent and contradictory positions in the same lawsuit. *Plow Co. v. Rodgers*, 53 Kan. 743, 37 Pac. 111; *National Bank v. First Nat. Bank*, 57 Kan. 115, 45 Pac. 79. It may be maintained that a particular moment of time was noon or midnight, but, when a party as-

serts that it was both, the court ought neither to listen to him, nor grant him the benefit of each assumption as against the other.

The writer does not understand that his associates consider it proper practice for the court to rule upon a defendant's motion for a new trial after it has already rendered judgment in his favor upon the findings of fact notwithstanding the general verdict; but they say the journal entry shows that the general verdict did not receive the approval of the trial court, and for this reason no judgment ought to be rendered thereon, and that this principle is well established in this state. *Richolson v. Freeman*, 56 Kan. 463, 43 Pac. 772, and cases cited. In all these cases, however, the motions for a new trial required and demanded the consideration of the trial court, and the reasons for judicial action therein being stated in the record, and exceptions being properly taken and preserved, it became incumbent on this court to consider them. If in any of these cases no motion for a new trial had been filed, or if the overruling of such motion had not been excepted to, then all alleged errors of law occurring at the trial for which a new trial might be granted would have been waived. *City of Atchison v. Byrnes*, 22 Kan. 65. The condemnation of the verdict by the trial judge, although appearing in the journal entry, would be disregarded by this court, for it would constitute no legitimate part of the record. In the present case the writer believes that the action of the court in passing upon the motion for a new trial, and in allowing an exception to the ruling, was improper and unwarranted, and therefore the reasons for the action of the court should be disregarded. But the majority of the court being of opinion that the reasons for the action of the trial court, as stated in the journal entry, should not be ignored, the judgment of the district court will be reversed, and the cause remanded for a new trial.

ALLEN, J. In this case the defendant contended that the verdict was not supported by the evidence, and also that, under the law, it was entitled to judgment against the plaintiff on the answers of the jury to the special questions submitted. These contentions are not necessarily inconsistent. Both may be sound. To present both questions to the trial court, the defendants filed two motions,—one, to set aside the verdict and grant a new trial; the other, for a judgment in its favor on the special findings. If the case terminated in the district court, there would be no necessity for considering both motions, if one should be sustained. In this case the court held that, on the facts found, the law was with the defendant, and rendered judgment accordingly. It is true that, so far as that court was then concerned, there was no occasion to pass on the motion for a new trial; for the defendant had obtained all that it could gain by a new trial, without the trouble and expense attending one. But this court now holds against the defendant on the law, and it now becomes of vital importance

whether the findings are right or wrong. Whether the trial court would have been warranted in requiring the defendant to elect on which motion it would rely, or in refusing to consider the motion for a new trial at all, after granting the defendant's motion for a new trial, it is not necessary now to decide. The trial court saw fit to overrule the motion for a new trial, and to state his reason for doing so, and in that connection has incorporated in the record a statement "that the general verdict in this cause is not sustained by sufficient evidence, and is contrary to the evidence." There is no instance that I am aware of in which it has been held that a reviewing court would direct a judgment to be entered on a verdict which the trial court has solemnly asserted is contrary to the evidence. This court, from the earliest days, has steadily adhered to the rule that, "if the verdict does not meet with the approval of the trial court, it should be set aside, and a new trial granted." *Richolson v. Freeman*, 56 Kan. 463, 43 Pac. 772. While the jury are the triors of the facts, the judge who presides at the trial also hears the evidence and sees the witnesses. He has the power, and it has often been declared to be his duty, to set the verdict aside, if it is not in accord with the evidence. *Railroad Co. v. Ryan*, 49 Kan. 1, 80 Pac. 108, and cases cited. To direct a judgment on the verdict in this case would be to require the rendition of a judgment against the defendant on a basis which the trial court has said is untruthful. Whether the trial court ought or ought not to have incorporated the statement in the journal entry, under the circumstances, does not seem to me a matter of first importance. We are notified by the record that in his judgment the matters found by the jury are not facts, but falsehoods. With such a notification, whether formal or informal, the court certainly ought to hesitate long before ordering a judgment on such a foundation. It is only "when it does not appear, by exception or otherwise, that such findings are against the evidence in the case," that this court is required to direct a judgment to be entered on the facts found. Code, § 559. I am authorized to say that Mr. Justice JOHNSTON concurs in these views.

STATE v. ASBELL.

(Supreme Court of Kansas. Nov. 7, 1896.)

HOMICIDE — CIRCUMSTANTIAL EVIDENCE — SUFFICIENCY — EXPERT EVIDENCE — EXPERIMENTS — DECLARATIONS — TRIAL — CONTINUANCE — OBJECTIONS TO EVIDENCE — INSTRUCTIONS.

1. The defendant was charged with the murder of his wife, whose body was found in the cellar, with a bullet hole through her head and a pistol near her hand. The state mainly relied on circumstantial evidence, as no witness saw the wound inflicted. His relations with her had been unpleasant, and there is testimony that he held illicit relations with a daughter of the deceased by a former husband, and wanted to be rid of his wife, so that he might marry and live with the daughter. The wife had discov-

ered the relations between her husband and daughter, and was contemplating a prosecution. She was much troubled about the conduct of her family, and the theory of the defense was that she took her own life. The trial resulted in a conviction, and upon an examination of the testimony it is held to be sufficient to sustain the verdict.

2. The hair around the bullet hole was not singed, nor were there any powder marks on the flesh, and it is claimed that, if she had fired the pistol, it was necessarily close to her head, and the hair would have been singed, and the flesh powder-marked. A witness experienced in the use of firearms, who had conducted experiments by shooting at human hair and a paper target with the pistol with which the deceased was killed and with cartridges similar to those found therein at distances ranging from six inches to ten feet, was permitted to testify as to the effects resulting from the shooting upon the hair, and also as to powder marks. *Held*, that the testimony was admissible.

3. A medical expert, qualified by study and experience, who examined the body of the deceased shortly after the wound was received, may give his opinion as to whether it was produced by a near shot or one fired from a distance.

4. An erroneous remark in an instruction, inadvertently made by the court, which evidently did not mislead the jury, is not a ground of reversal.

5. If the defendant appears or is in custody at the term at which an indictment or information is found, the case is triable at that term, unless continued for cause, although he may have been arrested and his preliminary examination had after the commencement of that term.

6. An application for a continuance of a cause rests largely in the discretion of the trial court, and, unless there has been an abuse of discretion, the refusal of a continuance will not ordinarily be ground for a reversal.

7. As the manner of the death of the deceased cannot be established by direct evidence, and as some of the circumstances of the case were not inconsistent with suicide, the declarations of the deceased shortly before her death, evincing an intention to commit suicide, were admissible; but, unless the question asked indicated that such evidence was desired, or the court was informed what was intended to be drawn out by the inquiry, the overruling of the same is not error.

8. A conversation between the defendant and another which is in the nature of a self-serving declaration, was properly excluded from the jury.

9. Where evidence is admitted over the objection of a party, but the grounds of the objection are not stated, no error is committed in overruling it.

(Syllabus by the Court.)

Appeal from district court, Labette county; A. H. Skidmore, Judge.

Marion Asbell was convicted of murder, and appeals. Affirmed.

W. B. Glasse, J. D. McCue, and J. H. Crichton, for appellant. C. H. Kimball, F. B. Dawes, Atty. Gen., and A. B. Switzer, for the State.

JOHNSTON, J. Marion Asbell was convicted upon a charge of the murder of his wife at their home in Labette county on January 29, 1896, and from the judgment of conviction he appeals. They were married nearly two years before the death of Mrs. Asbell, and during that time had resided upon a farm, which was situated about four miles from Chetopa. Each of them had been previously married, and by

the first marriage the wife had two children living at the time of her death, named Maggie Whitehouse, about 17 years old, and Carson Whitehouse, whose age was about 15 years. By her marriage with the defendant she had one child, which was nearly 11 months old at the time of her death. Maggie made her home with the defendant after his marriage with the deceased, but the testimony tends to show that Carson's presence was not agreeable to the defendant, and that prior to the marriage it was agreed that he should not live in their home. He lived in a number of places, and it appears that his conduct was such as to give his mother much concern and worry. Testimony was offered tending to show that previous to the defendant's marriage to the deceased he had sexual intercourse with Maggie, and that illicit relations between them continued until the death of his wife; that, as a result of these relations, she became pregnant, and the defendant took her to a doctor, where an abortion was produced; that within a few months after their marriage the wife suspected improper relations between her husband and Maggie, and at one time, and for this reason, some steps were taken towards obtaining a divorce, but the effort was abandoned. There is testimony to the effect that the conduct of her husband and daughter caused her great anxiety, and some also that she was contemplating the commencement of legal proceedings against them as soon as sufficient proof of their wrongdoing could be obtained. She was also worried by her son, who had been living with the father of the defendant, where he was charged with pilfering money, and, on returning home the day previous to the death of his mother, had a difficulty with the defendant, and was ordered to leave the premises, and not to return again. On the morning of January 29, 1896, Mrs. Asbell arose early, and assisted Maggie in preparing breakfast, but she declined to eat any, and while the defendant and Maggie were eating she was bowed down, holding her head in her hands, and was apparently in a troubled and despondent state of mind. On that morning she asked the defendant for a horse and buggy with which to go to Oswego, the county seat, and also to one of her brothers, who lived about six miles distant; but both of her requests were refused. He gave the horse and buggy to Maggie, with which to go upon an errand, and, taking another horse, he rode out to his work upon the farm. Maggie returned home about 10 o'clock, and found that her mother was missing, and that the baby had been placed at the window, hemmed in with a trunk and sewing machine in such a way that it could scarcely move. It had evidently been in this position for some time, as it had cried until it was hoarse and exhausted. Not finding her mother, Maggie called the defendant from the field, and, without making any search about the premises, he went to the homes of two of the neighbors, and made inquiries as to the whereabouts of his wife. Dinner was prepared and eaten, after which a

neighbor called, and suggested that a search be made in the cellar of the house, which was accordingly done. There the body was found, lying on its back, the right arm partially extended, and a revolver was found, lying a few inches from the right hand, with a pool of blood under the head and neck. It was discovered that she had been shot through the head, the bullet entering back of the right ear and passing downward and slightly towards the front, fracturing the skull on the left side of the head, where it was found about three-fourths of an inch lower and one-half an inch in front of a point opposite the point of entrance. At the coroner's inquest Maggie denied that illicit relations had existed between her and the defendant, but she subsequently testified that such relations had existed, and that the defendant had suggested that when he got rid of his wife he would marry Maggie, move to another location, where they would live together as man and wife. The theory of the state is that he desired to be rid of his wife in order to live with Maggie; and, further, that the wife had long suspected the improper relations between her husband and daughter, and which continued until the previous night, and was about to institute a prosecution against them; that, after Maggie had been sent from home, he returned to the house, killed his wife, placed her body in the position in which it was found, and then returned to the field to await the discovery. The theory of the defense is that, becoming despondent over the conduct of her children and husband, she had taken her own life.

At the opening of the trial the defendant insisted that the cause was not triable at the February term of court. The term began on February 4, 1896,—seven days after Mrs. Asbell was killed, and three days after the defendant was arrested upon the charge of killing her. The preliminary examination was held on the 13th and 14th days of February, the information was filed on February 15th, and the trial was begun on February 24th. It is contended that the case was not triable until a term of court beginning after the preliminary examination was concluded. This contention is based on section 57 of the Criminal Code, which provides that, "when the prisoner is admitted to bail or committed by the magistrate, he shall also bind by recognizance such witnesses against the prisoner as he shall deem material to appear and testify at the next term of the court having cognizance of the offense and in which the prisoner shall be held to answer." The words "next term" ordinarily mean the "next subsequent term," and, if there was no other provision on the subject, there would be much force in the defendant's contention. We are not to determine the question, however, upon inferences drawn from provisions with reference to other subjects, because the legislature has specifically declared when a criminal cause is triable, as follows: "All indictments and informations shall be tried at the first term at

which the defendant appears, unless the same be continued for cause. If the defendant appear or is in custody at the term at which the indictment or information is found, such indictment or information shall be tried at that term, unless continued for cause." Cr. Code, § 157. The language is plain and direct, leaving no doubt that the cause was properly triable at the February term. The defendant was in custody at the February term, when the information was filed; and under the statute the court was required to try the cause, unless cause for continuance was shown. The two sections seem to be somewhat inconsistent, but the express provision of 157 must prevail over a mere inference drawn from 57. The word "next" means "nearest," and the words "next term," as used in section 57, when construed in connection with section 157, may be taken to mean the "nearest term" at which the cause is triable.

An application for a continuance was made based mainly on averments that the killing of Mrs. Asbell, and the charge that it had been done by her husband, had aroused great indignation in the community towards him, and that there was such excitement and passion as to prevent a fair trial. The time for preparation was quite brief, and it would seem as if the application might properly have been granted. It was not stated that there was testimony which the defendant was unable to procure at that term, nor did the affiant express a belief that the defendant could not then have a fair trial. No application for a change of venue on account of public prejudice was made, and there appears to have been no trouble in securing jurors who had not formed or expressed an opinion upon the merits of the case. We cannot say that the court abused its discretion in refusing a continuance.

Many objections are made to rulings admitting and excluding testimony, but some of them are not of sufficient consequence to require special comment. There is complaint that the statements and suspicions of the neighbors as to illicit relations between the defendant and Maggie Whitehouse were admitted in evidence. Some questions tending in that direction were asked, but the testimony elicited was not important or prejudicial. Direct testimony was given as to the illicit relations, and none of the questions raised upon the testimony concerning these relations are deemed to be material.

The objection to the testimony of Maggie that her mother was ordinarily willing to do what defendant requested her to do is without force. It was competent and material to show the relations which existed between them, and the only objection made to this testimony is that it was immaterial. It was also competent to show the condition of things in the house at the time the body was found, and the surrounding circumstances; and hence the testimony that partly-burnt cloth was found in the cook stove was received. It could

not have been very material, but certainly its admission is no good cause for complaint.

A witness of the defendant, who had talked with the deceased some time before she was killed, was asked what she had said about her children's conduct, and the effect it had upon her; but an objection to the inquiry was sustained. It is contended that the theory of the defense was that the deceased came to her death by her own hand, and it was competent for them not only to show a purpose to take her own life, but that the conduct of her children was such as to lead her to suicide. As the manner of death could not be established by direct testimony, and as some of the circumstances of the case were not inconsistent with suicide, the declarations of the deceased shortly before her death, evincing an intention to commit suicide, were admissible. The question asked, however, did not indicate that such evidence was desired, nor does it appear that the court was informed what was intended to be drawn out by the inquiry. A narrative of what the deceased said about her children's habits would ordinarily be inadmissible, and probably the objection to the question was sustained because its purpose was not disclosed. This is the more apparent from the fact that the court did permit a full investigation as to the conduct and statements of the deceased showing her state of mind, or an intention to take her own life.

No error was committed in excluding a conversation between the defendant and his father in regard to trouble which the father had with Carson Whitehouse. This testimony, and the reasons proposed to be given by the defendant for excluding the boy from his home, were in the nature of self-serving declarations, and were not admissible under any rule of evidence.

Several months prior to the death of Mrs. Asbell there was some talk between her and the defendant in regard to obtaining a divorce. The defendant took his wife to the county seat, and there they consulted a lawyer about divorce proceedings. After stating these facts, the defendant was asked what conclusion he and his wife reached concerning divorce after the consultation was had, and if they did not leave Oswego on that day agreeing that no steps for a divorce should be taken. The objection to these questions was properly sustained, as a witness must state the facts so far as they are competent and material, and is not permitted to give his own conclusions.

Some questions of an objectionable character were asked, but no objections were made to them, and hence no error can be predicated thereon; nor is a general objection to testimony available. A picture which had been in the possession of the defendant was introduced in evidence over an objection, but the grounds of the objection were not stated, and it was, therefore, properly overruled. *Humphrey v. Collins*, 23 Kan. 549; *Stout v. Baker*, 32 Kan. 113, 4 Pac. 141; *Smith v. Morrill*, 39 Kan. 665, 18 Pac. 915.

A witness named Rambo gave testimony as

to experiments made by him with the pistol with which Mrs. Asbell was killed, and with cartridges similar to those which were found therein after her death. The first shot was at a bunch of hair placed six inches from the muzzle of the revolver, and the result was that it was torn from its fastenings, and scattered, so that the effect upon the hair could not be told. The next was at a piece of paper 30 inches away, and it was found that it was badly powder-burned, some of the powder going clear through the paper. The next was at a distance of four feet, when the paper was considerably powder-burned, a portion of the powder going through the paper. One fired at a distance of six feet showed powder marks upon the paper; and there were slight powder marks on a paper that was eight feet away. A shot fired ten feet away left no impression on the paper. The last experiment was firing at a bunch of hair thirty inches away, and there the hair was considerably singed and burned. After the testimony was received, the court, for some reason, excluded it from the consideration of the jury. It is contended that the testimony was improper, and the withdrawal of the same did not cure the error. We think the testimony was competent for the purpose of determining the effect of a pistol shot fired at human hair, and to show how much the powder marks from that particular pistol would scatter. It appears that it would have been very difficult for Mrs. Asbell to have held the pistol in such a position as to make the wound that was found in her head. If it was possible at all, the pistol must have been close to her head, and must necessarily have left powder marks, and singed and burned her hair. No powder marks were found upon her head, nor could it be ascertained that the hair was singed or burned. The experiment, having been made under similar conditions and circumstances, threw light upon the effect of a pistol shot fired at human hair from a given distance, and also enabled the jury to ascertain how much the powder marks would scatter in a given distance. It was not fired for the purpose of showing that the wound itself was a near wound, but there was an abundance of other testimony introduced for that purpose. In *State v. Jones*, 41 Kan. 309, 21 Pac. 265, it became important to ascertain the distance that the defendant was away at the time he fired a musket and killed the deceased. Persons who had experimented to ascertain how far guns and muskets would carry shot compactly were held to be competent to testify to the experiments made, and to give their opinions, based on such experiments, as to how much shot would scatter in a given distance. See, also, *Sullivan v. Com.*, 93 Pa. St. 284; *Boyd v. State*, 14 Lea, 161; 1 *Witthaus & B. Med. Jur.* 609; *Railway Co. v. Moffatt*, 56 Kan. 637, 44 Pac. 607. The witness in this case had had experience with firearms, and his testimony, giving his opinion, and the results of the experiments, aided the jury in determining one of the important issues in the case. Under the authorities, we think the de-

defendant has no cause to complain of the admission of this testimony.

Medical experts who examined the wound soon after it was made testified as to the appearance and character of the wound, and also as to whether the pistol which made it was fired close to her head or from a distance. They described the appearance and indications of near wounds without objection, and their testimony made it clear that the characteristics of such wounds are well known to those who have made a study of gunshot wounds, and whose observation and experience qualifies them to express an opinion. Some of these characteristics are the discoloration of the skin, the powder marks in and around the wound, the burning of the flesh or hair, the form and size of the wounds, and the condition of the tissues along the course of the bullet. It was not denied that the expert testimony was competent to show the characteristics of near wounds, and we see no good reason why qualified witnesses may not give their opinion whether a particular wound was produced by a near shot or one fired from a distance. These symptoms and characteristics do not lie within the range of common experience or common knowledge, and inexperienced persons are not as liable to reach a correct conclusion as persons who have been instructed by study and experience. The characteristics of the wound, such as the color and condition of the skin around it, the coagulation of the blood mixed with powder, the depth of the wound, and the disturbance of the tissue throughout, cannot easily be communicated to the jury, and some of the indications which would mean much to the expert could not well be described to an inexperienced person. It is well settled that medical experts may give an opinion as to the means by which a wound was inflicted. *Rog. Exp. Test.* § 53, and cases cited; 1 *Greenl. Ev.* § 440; *Hammond v. Woodman*, 66 *Am. Dec.* 235, and note. The question upon which the opinions were given was not a matter directly in issue before the jury, but these opinions were given upon an incidental matter, in order to enable the jury to determine the main issue in the case. We think the law relating to expert testimony was not violated by the admission of these opinions.

Some exceptions were taken to the rulings of the court in charging the jury, but only one of the instructions given is criticised. In charging the jury that the opinions of the experts were not to be taken as conclusive, but were to be considered in connection with the other evidence, the judge remarked: "You have further observed that some of the witnesses have given testimony in this case as to whether or not the deceased, Maria A. Asbell, came to her death by her own hand," etc. In this respect the court went astray. It is evident, however, that the remark was inadvertently made, and that the court was not endeavoring to construe the expert testimony. None of the experts had given such testimony, and

from all the remaining part of the charge it is clear that it was not the purpose of the court to assume the existence of that or any other disputed fact. Under the circumstances, we do not think that the jury could have been misled by the inadvertent remark, and, unless the jury were misled, it furnishes no ground for a reversal.

Complaint is made of the refusal of the court to give certain instructions upon circumstantial evidence that were requested. In these the court was asked to instruct the jury in substance that before they could convict the defendant upon the evidence they must be satisfied that the state had proven every essential circumstance beyond a reasonable doubt. We think the charge given was not defective in this respect. Besides giving a general definition of circumstantial evidence, the jury were told that, if they entertained a reasonable doubt upon any one or more of the facts and elements necessary to constitute the offense, they must give the defendant the benefit of such doubt, and acquit him. In addition to that, they were instructed "that, to authorize a conviction of the defendant on circumstantial evidence, each of the circumstances should not only be consistent with the defendant's guilt, but they must be inconsistent with any other rational conclusion or reasonable hypothesis, and such as to leave no reasonable doubt in your minds, or the mind of either of you, of the guilt of the defendant." The doctrine of the remaining instructions requested, so far as they were proper, was fairly included within the charge that was given, and we think no error was committed in the refusal.

It is earnestly insisted that the verdict is not sustained by the evidence. After a careful reading and consideration of the same, we are united in the opinion that the testimony sustains the finding that the defendant committed the offense charged. The relations which existed between the defendant and Maggie, as well as between him and the deceased, furnishes a motive for the commission of the offense. The testimony makes it very improbable that it was a case of suicide, and there is much in it which tends to connect the defendant with the killing. His conduct before the death of his wife and his conduct immediately after the body of the deceased was found tends to support the finding of the jury. The judgment of the district court will be affirmed. All the justices concurring.

SHANKS et ux. v. SIMON et al.

(Supreme Court of Kansas. Nov. 7, 1896.)

ATTACHMENT—PROPERTY SUBJECT—EQUITABLE INTEREST—FRAUDULENT CONVEYANCES—BONA FIDE PURCHASER—PARTIAL.

1. An equitable interest in land is subject to attachment.

2. S. made a parol contract with D. for the exchange of a portion of a stock of merchandise for a farm. D. executed a deed for the land,

leaving the name of the grantee blank, and placed it in the hands of a third party, to be delivered when the goods should be delivered to him at the place of his residence. The goods were shipped by S. from Clarence, Mo., consigned to Lane, Kan. Thereafter, and before they arrived, attachments were levied by creditors of S. on the land. Afterwards the goods were received by D. in due time, and the deed was thereupon delivered to S., who inserted his wife's name in it, and delivered it to her. *Held*, that S. had an equitable interest in the land, which was subject to attachment at the time it was levied on, and that neither he nor his wife can now dispute such title for the purpose of avoiding the attachments.

3. The testimony considered, and *held* sufficient to uphold a finding of the court that the name of his wife was inserted in the deed by S. for the purpose of defrauding his creditors, and that she had notice of his fraudulent purpose, and was not a bona fide purchaser.

4. In an action brought by judgment creditors to subject land alleged to be the property of the judgment debtor, the title to which rests in the name of his wife, to the payment of their judgments, a creditor who has obtained an attachment lien not yet reduced to judgment is a proper party to the proceeding, and the court may make such order as may be necessary to protect his rights.

(Syllabus by the Court.)

Error from district court, Franklin county; A. W. Benson, Judge.

Action by L. Simon & Co. against R. N. Shanks, Annie E. Shanks, and others. From a judgment against them, defendants Shanks bring error. Affirmed.

This was an action brought by L. Simon & Co. to subject certain lands in Franklin county to the payment of a judgment rendered in their favor against R. N. Shanks. The action was tried by the court, and the following special findings of fact were made:

"(1) On and for several years prior to May 1, 1891, the defendant R. N. Shanks was a retail merchant in business at Clarence, Missouri. On or about that date, the plaintiffs, who are wholesale merchants at Chicago, sold and delivered to said R. N. Shanks a bill of goods amounting to \$770.25, which he placed in his store at Clarence, as a part of his stock in trade. Said goods were sold on credit, and were never paid for, and October 28, 1891, the plaintiffs duly recovered a judgment therefor in this court against R. N. Shanks for \$777 and \$— costs, and an order to sell the property attached in said action as hereinafter specified. Said judgment has never been satisfied, nor any part thereof.

"(2) On August 29, 1891, the plaintiffs then commenced said action above referred to, and caused an order of attachment to issue therein against the property of said R. N. Shanks, and the attachment was on the same day duly levied upon the southeast quarter of section 22, township 18, range 21, in this county, taken as the property of said R. N. Shanks. The said R. N. Shanks, and said Annie E. Shanks, who is his wife, are, and at all said times were, residents of Clarence, in the state of Missouri.

"(3) At various other times about said 1st of May, the defendant R. N. Shanks also be-

came indebted to the wholesale dealers, defendants herein, who also brought suits in this court, and caused attachments to be levied on the same property. Said attachments were levied, and afterwards judgments duly recovered in the court against R. N. Shanks in favor of the parties for the amounts and at the dates following:

	Attachment.	Judgment.	Amount.
M. D. Wells & Co.	Aug. 31, '91	Nov. 4, '91	\$ 87.70
Kelley-Good allow.	Sep. 3, '91	Nov. 4, '91	\$329.27
H. B. Glover & Co.	Oct. 1, '91	Jan. 28, '91	\$460.20
Henry W. King & Co.	Sep. 23, '91	No judgment.	

"Said R. N. Shanks also became indebted before and after said time to various other wholesale dealers in divers sums for goods purchased.

"(4) On August 24, 1891, and for some time before, S. W. Devore was the owner of said real estate. About that time he entered into a verbal agreement with said R. N. Shanks to exchange it for \$4,500 worth of goods to be invoiced out of said store. Mr. Shanks directed Devore to make out a deed accordingly. Devore made said deed, leaving it blank as to grantee, because he had understood in the negotiation that Shanks would convey the land to one Clark, and thought it would be convenient to leave the blank so that the name of Clark could be inserted as grantee. This deed was made out in this county, while Shanks was at home in Missouri, and was placed in the hands of one Walter, to whom Devore had arranged to sell the goods, and who was to go to Clarence, and assist in invoicing them, and to represent Devore therein. And Devore authorized him (Walter) to insert any name as grantee as Shanks should direct. This authority was verbal only. The deed in this condition was signed, acknowledged, and dated August 24, 1891, in this county.

"(5) Mr. Walter, accordingly, on August 25, 1891, proceeded to Missouri to receive said goods. On producing said deed, Shanks at first objected to the blank, but, being informed that any name would be inserted that he might direct, proceeded to set apart and invoice the goods. Mr. Walter deposited said deed, still blank as to grantee, in a bank at Clarence, with directions that it be delivered to said Clark (who assisted in said invoice, representing said Shanks therein) when said goods should arrive at Lane, Kansas, where they were consigned to said Walter by said Shanks, on notice by letter from Walter that they had so arrived. This agreement was satisfactory to Shanks, and Walter said to both Shanks and Clark together, 'Fill in any name you choose.' Shanks said, 'I will put in my own name.'

"(6) The goods arrived at Lane on 1st day of September, and Walter notified the bank accordingly by letter to deliver the deed to Clark, which it did, and Clark delivered it to Shanks on September 4, 1891. On the same day Shanks inserted the name of Annie Shanks as grantee, and handed it to her at her home in Clarence, Mo. Thompson then wrote a letter of trans-

mittal to the register of deeds of this county, and handed the deed and letter to R. N. Shanks, who inclosed and directed it to the said register of deeds for record, who received and recorded it September 9, 1891.

"(7) The goods were shipped to Lane on the morning of August 28, 1891. Afterwards, on that day, a member of the plaintiff firm called on R. N. Shanks for payment of said account, at Clarence, who told him of said trade, and stated the deed was made to himself and had been sent on for record, and that he expected to be able to borrow money on the land, and pay the plaintiff and other creditors.

"(8) About the time these goods were shipped, other creditors were pressing for payment, and Mr. Shanks executed several chattel mortgages on the remainder of the stock, involving about \$2,500, to secure them, leaving the plaintiff and the creditors who have since taken judgments, as stated in the third finding, unsecured. When this exchange was made, Shanks was insolvent. He owned a homestead worth \$1,500, but no property subject to execution, except a business house and lots in Clarence, incumbered to its full value, the remainder of the stock so mortgaged, and his interest in the real estate attached. He has no property now within the reach of creditors except the said attached real estate, and owes several thousand dollars.

"(9) The deposition of Annie E. Shanks was taken by the plaintiff in the action at Clarence on the 21st of March, 1892, in which she testified that she paid her husband for said land the sum of \$3,100, being the amount of certain promissory notes made to her by her husband at various dates from 1882 to 1889, which she surrendered to him September 4, 1891, for said deed; that said notes were given for money she had loaned him; that said money, to use her words, 'had been given to her by Mr. Shanks, father and mother, sale of strawberries and various other things'; that she got \$81 'from her father's estate for ties'; that the amount received from her mother was \$458.27 in this way, viz. that her mother at her death left to her and her two sisters the home place, and that she (Mrs. Shanks) sold her interest therein to her father, taking his note for \$350 therefor, which she gave to her husband, and that there was then due upon it the sum of \$458.27; and that she also recovered \$48 more from her mother's estate. On April 12, 1892, the plaintiff again took Mrs. Shanks' deposition at Clarence, at which time she testified that she received no money on the \$350 note. She refused to state the amount received for strawberries, or upon what land they were grown; also refused to state whether there were any credits on any of the notes (of which she had given a schedule with date and amount in first deposition); also refused to state whether she received anything from her father's estate except an interest in his land, and whether his estate was settled. These refusals were made when the questions were asked, and seem to be based mainly upon the fact that she had already given testimony touching such matters in

the first deposition. On the first deposition, however, it appears that such questions were not asked. Mrs. Shanks did not appear at the trial, but her attorney produced in evidence the several notes which she had testified that she had surrendered for the deed, on which no credit appears. Both Mr. and Mrs. Shanks are, and were at all the times referred to, residents of Missouri, in which state all the transactions herein referred to took place between them.

"(10) The remnant of Mr. Shanks' stock at Clarence was sold under one of the mortgages given thereon, and bought by Annie Shanks for \$850, and she has ever since conducted said business in her own name. The \$850 was raised by her upon a mortgage upon her one-third interest in a farm of 360 acres left to her and her two sisters by her father at his death, worth \$12.50 per acre, and incumbered for \$2,000.

"(11) Soon after the 4th of September, R. N. Shanks rented the Kansas land, for and in the name of Annie Shanks, to a tenant who has since remained in possession. It is a cultivated farm, worth from \$3,000 to \$3,500, and about equal in value to the goods received therefor.

"(12) The insertion of the name of Annie Shanks in said deed, and its delivery to her, was done by R. N. Shanks with intent to defraud, hinder, and delay his creditors, and Annie Shanks had knowledge of such facts as make her chargeable with notice of such fraudulent intent, and she is not a bona fide purchaser of the land."

Judgment was entered on these findings directing a sale of the land, and the application of the proceeds to the payment of the claims of the attaching creditors, who were made parties to the action. Shanks and wife allege error in the judgment, and ask a reversal thereof.

W. J. Patterson, for plaintiffs in error. John W. Deford, C. A. Smart, and W. S. Jenks, for defendants in error.

AILEN, J. (after stating the facts). The first and most important question presented by counsel for plaintiffs in error arises from the fact that the attachments in favor of Simon & Co. and M. D. Wells & Co. were levied before the final delivery of the deed to Shanks, which occurred on the 4th of September, 1891. The attachment of the plaintiffs was levied on August 29, 1891, and that of M. D. Wells & Co. two days later. The goods exchanged for the land by Shanks were shipped to Lane on the morning of August 28th, and arrived there on the 1st of September. It is urged that an attachment binds only the interest which the debtor owns at the time an attachment is levied; that it does not bind an after-acquired title; and that neither R. N. Shanks, nor Annie E. Shanks, whose name was written in the deed as grantee, obtained any title to the land until the delivery of the deed. The general rule of law is that a deed takes effect only from delivery, and that an attachment does not bind a title subsequently acquired. It must be con-

ceded that the legal title to the land did not actually pass to Annie E. Shanks until the delivery of the deed on September 4th. But to sustain the attachment it is not indispensable that the defendant should have been vested with the legal title at the time of the levy. It is sufficient if he had an equitable title. Code Civ. Proc. § 222; *Bullene v. Hiatt*, 12 Kan. 98; *Aldrich v. Bolce*, 56 Kan. 170, 42 Pac. 695. The contract between Shanks and Devore for the exchange of the goods for the land was made on the 24th of August, and the deed was then executed, signed, and acknowledged. On the next day it was deposited in the bank at Clarence, to be delivered when the goods should arrive at Lane. The goods were shipped on the 28th, and received at Lane on the 1st of September. If we were to treat this merely as a parol contract, although not enforceable if either party should choose to repudiate it, it was not absolutely void. *Becker v. Mason*, 30 Kan. 697, 2 Pac. 850; *Dupuy v. Insurance Co.*, 63 Fed. 680. It was voidable only at the election of one of the parties to it. Neither party elected to avoid it. On the contrary, both parties elected to affirm and execute it. It was, in fact, carried out exactly in accordance with its original terms, with the single exception that the name of Mrs. Shanks was inserted in the deed as grantee. In this case there was the added circumstance that the deed was actually executed by Devore, and deposited in the bank at Clarence, to be delivered when he should receive the goods at Lane. The deed bore date August 24th. It was delivered September 4th. If it were important to determine the question as to the date when the legal title passed from Devore to Mrs. Shanks, it is possible that the doctrine of relation might properly be invoked in favor of the attaching creditors, but in this case it is unimportant when the legal title vested, if Shanks, at the time the first attachment was levied, had such an equitable interest in the land as might be seized for his debts. The parol contract had been duly made, and the deed duly executed, and he was entitled to the delivery of it as soon as the goods should be delivered to Devore at Lane. 1 Devl. Deeds, § 327. The goods were delivered, and the deed was delivered. Under all these circumstances it is clear to us that when Shanks commenced the actual performance of the contract by shipping the goods he obtained an equitable interest in the land, which neither he nor his wife may now deny for the purpose of defeating the attaching creditors. There is no force in the objection to the order directing the application of the proceeds of the land to the payment of the judgment in favor of King & Co. The levy of the attachment in their suit was sufficient to give them a standing in the case, and to authorize the court to protect their interests. There is ample evidence to uphold the findings that the name of Annie E. Shanks was inserted in the deed for the purpose of defrauding the creditors of R. N.

Shanks, that she was chargeable with knowledge of the fraudulent purpose of her husband, and that she was not a bona fide purchaser of the land. Her refusal to answer pertinent questions concerning the transactions between herself and husband, on which she based her claim as a purchaser, places her in a very bad light. The questions were entirely proper, and there was no fair semblance of an excuse for her refusing to answer. The court was justified in inferring that, if she had made truthful answers, they would have disclosed the want of foundation for her claim. We are entirely satisfied of the correctness of the judgment of the trial court, and it is affirmed. All the justices concurring.

STATE v. McCORMICK.

(Supreme Court of Kansas. Nov. 7, 1896.)

FALSE PRETENSES—WORTHLESS CHECK—EVIDENCE—PRETENSES OF OTHERS IN DEFENDANT'S PRESENCE—JURY—MISCONDUCT—OATH OF OFFICER.

1. The defendant was charged with obtaining property by false representations and pretenses that he had money in a certain bank, and that a check thereon which he gave was good, and would be paid on presentation, whereas it was never paid, and when in fact he never had any money there, nor any account with the bank. *Held*, that it is not necessary to a conviction to allege or prove that the defendant was insolvent.

2. The certificate of the protest of the check is competent evidence of due presentment, and of demand and refusal to pay.

3. The cashier of a bank, under whose supervision books were kept and the business conducted, is competent to testify that a person has no account with the bank, nor any money deposited there subject to check, although his knowledge is principally gained from the books of the bank; and a book containing a list of the depositors, and identified by the cashier, may be received for the same purpose, although no other proof was offered that it was correct.

4. If the defendant was assisted by another in fraudulently obtaining the property, and such other made false representations to the owner in the presence and hearing of the defendant, without objection or explanation by him, and which were in effect an affirmation of the representations made by the defendant, he will be held responsible for the false representations, to the same extent as if he himself had made them.

5. On the hearing of the motion for a new trial, the defendant offered to show that after the case was submitted, and the jury were deliberating upon their verdict, one of the jurors stated as a fact that the defendant had been convicted upon a former trial, and another that the defendant had defrauded a witness, who had testified in behalf of the state, out of some cattle while in Colorado, but the court excluded the evidence. *Held*, that these statements were of an important and prejudicial character, and, if made, might have improperly influenced the verdict, and that the exclusion of the testimony was material error.

6. The officer who took charge of the jury when they retired to deliberate upon their verdict was not sworn as required by section 237 of the Criminal Code. *Held*, that the administration of the oath is an important step in the prosecution, and, being specifically required, should not be disregarded.

(Syllabus by the Court.)

Appeal from district court, Jackson county; L. A. Myers, Judge.

Oliver McCormick, alias I. T. Jones, was convicted of obtaining property under false pretenses, and appeals. Reversed.

Stebbins & Evans and Hayden & Hayden, for appellant. F. B. Dawes, Atty. Gen., and A. E. Crane, for the State.

JOHNSTON, J. The defendant was prosecuted upon a charge of obtaining from James Fritz a bay gelding by fraud and false pretenses. On March 9, 1895, two men appeared at the home of Fritz, and entered into negotiations with him for the purchase of a gelding. One of the men was J. C. Goggerty, a liveryman, who had resided a short distance away from Fritz for some time, and with whom Fritz had been acquainted. The other man represented himself to be I. T. Jones, of Kansas City, and to be engaged in the business of buying horses. He was a stranger to Fritz, and had never been seen in that community before. After some preliminary negotiations, Jones purchased the gelding at the price of \$50. Jones then wrote out a check on the Interstate National Bank of Kansas City, and offered it to Fritz in payment for the gelding. Fritz made some objection to the taking of the check, when Jones remarked that the check was good; and Goggerty, with whom Fritz was acquainted, and had confidence in, also stated that the check was good, and that he had also sold a horse to Jones, and taken a check in payment therefor. Relying upon these representations, Fritz accepted the check and delivered the horse, which was taken away by Jones. On November 17, 1895, Oliver McCormick was arrested as the person who represented himself to be I. T. Jones in the purchase of the gelding, and charged with the crime of obtaining it by false pretenses. At a trial had at the March term, 1896, the defendant was convicted, and the penalty adjudged was imprisonment at hard labor for a term of four years. He appeals, and contends that the giving of the check, and the representation that he had money on deposit in the bank, if false and fraudulent, is not an offense, within the meaning of section 94 of the crimes act (Gen. St. 1889, par. 2228). It is argued in his behalf that the drawee could in no event maintain an action on the check, but is presumed to have taken it on the responsibility of the drawer, and therefore the fact that the check was without value did not affect the legal rights of Fritz; and, further, that if Fritz has a good cause of action against a solvent party he has not been defrauded. The information charges that Goggerty combined and conspired with the defendant in making false representations, and in perpetrating the fraud; but it was not alleged or shown that either of them was insolvent, or unable to respond in a civil action for damages resulting from their fraudulent action. An essential element of the offense is that the person who parts with his property is in fact defrauded, to his injury. In addition to the false pretenses, there must be an intent to defraud. The pretenses must be used for

the purpose of perpetrating the fraud, and a fraud must be actually accomplished by means of the false pretenses. The false representation that the defendant had money in the bank with which to pay the check operated as an injury and a fraud upon Fritz. It was in the nature of a cash transaction, and the check was taken as the equivalent of money. It therefore necessarily resulted in an injury to Fritz, regardless of how solvent defendant or Goggerty may have been. Fritz did not sell his gelding upon a promise to pay, nor was it his purpose to extend a credit to the defendant. The check was not taken as a promissory note, or as a security for future payment. The defendant pretended to set apart \$50 as money out of a special fund, and, upon the faith that the money was there as represented, Fritz accepted the check and parted with his property. It was not done upon the faith that the parties dealing with him were solvent, and might be compelled by civil action to pay the amount of money named in the check. In this respect it is substantially similar to the case of *State v. Decker*, 36 Kan. 717, 14 Pac. 283. There it was an attempt to obtain property by means of a false and fraudulent draft that was indorsed by one Brady, and there was no evidence tending to show that Brady was insolvent. It was claimed that if Brady was solvent the parties could not have been defrauded. It was held that the claim, although plausible, was not sound,—the draft was not what it was represented to be, was not drawn upon an actual bank, nor for money belonging to the drawer, or subject to the payment of his draft,—and that it was a fraud upon the owners to attempt to procure their property without delivering to them just such a draft as it was represented to be; that they wanted a draft which was the equivalent of money, and were not seeking to purchase a lawsuit against Brady, however good he may have been financially. It was decided that it was a fraud upon the parties to give them something different from what it appeared to be, different from what it was represented to be, and not as valuable as it was represented to be. So, here, Fritz was not trading his horse for a mere chose in action, nor for the right to bring a lawsuit against defendant or Goggerty, but, rather, was selling it for the money supposed to be set apart by, and subject to, the check. It is clear that he was defrauded, to his injury. If he had sold the gelding upon credit, and taken notes or other collateral to secure the payment of the debt, a different question would arise. If some of them were bad, or not as good as represented, the question would still remain whether the good were not sufficient to secure the payment of the debt,—in other words, whether he had suffered any injury by reason of the false pretenses. Unless the person parting with the property is defrauded, or unless it has been obtained to the injury of some one, it does not amount to a crime. This was the view taken in *State v. Clark*, 46 Kan. 65, 26 Pac. 481, and *State*

v. Palmer, 50 Kan. 818, 32 Pac. 29,—cases that are greatly relied upon by the defendant. In this case, however, no credit was extended, and a fraud and an injury were suffered by Fritz, and as to these features of this prosecution the cases last cited do not apply.

The contention that there was no competent evidence to show that the check was bad cannot be sustained. A certificate of protest was introduced, which was evidence of due presentment, demand, and refusal to pay. Gen. St. 1889, par. 494. In addition to that, it was shown by the state that the check has never been paid; and, further, there was testimony given by the cashier of the bank that Jones had no money there subject to his check, and in fact had no account with the bank. This information was based principally upon the examination which he made of the books. Being the manager of the bank, and the books being kept under his supervision, he was competent to state the facts to which he testified. A book purporting to be a list of the depositors of the bank was introduced in evidence, and neither the name of Jones nor McCormick appeared in the list. There was an objection to the admission of the book, upon the ground that it had not been proved to be correct. It was identified by the cashier, under whose supervision it was kept, and we think it was admissible for the purpose of showing that Jones was not upon the list of depositors.

It is next contended that the false representations alleged to have been made by the defendant were not relied upon by Fritz, and that he did not part with his gelding on the strength of them. In his testimony, Fritz stated that he relied on the statements made by the defendant and Goggerty, but principally on those made by Goggerty, and upon further interrogation he stated that he relied principally, if not altogether, upon the statements of Goggerty. Goggerty was present, assisting the defendant in purchasing the gelding; and the representations made by Goggerty in the presence and hearing of the defendant, and which were in effect an affirmation of the representations made by the defendant, without objection or explanation on the part of the defendant, bind him to the same extent as if he had himself made them. According to the testimony, Goggerty was in effect the mouthpiece of the defendant; and the representations made by him with the approbation and concurrence of the defendant, under the circumstances stated, if relied upon by Fritz, make the defendant responsible, the same as if the representations had been made by the defendant.

Several of the instructions are criticised, and complaint is made of the refusal of some that were requested. We think the charge of the court fairly presented the case to the jury, and that none of the objections made to the rulings of the court in charging the jury warrant a reversal.

A motion for a new trial was made, and

one of the grounds was misconduct of the jury. On the hearing of the motion the defendant offered to show that, after the jury had retired and were deliberating upon their verdict, one of the jurors stated that the defendant had been convicted upon a former trial, and also that during their deliberations a juror stated as a fact that the defendant had defrauded one Kelfer, who had testified in behalf of the state, out of some cattle, while in the state of Colorado. We think the court below erred in excluding this evidence. While the testimony of jurors cannot be received to show matters which essentially inhere in their verdict, they may testify to facts which transpired within their own personal observation, and which transpired in such a manner that others, as well as themselves, would be cognizant of them, and could testify to them. *Gottlieb v. Jasper*, 27 Kan. 770; *Railroad Co. v. Bayes*, 42 Kan. 609, 22 Pac. 741. The testimony offered was of an important and prejudicial character, and may have improperly influenced the verdict. There is nothing in the record to show that the statements, if made, did not prejudice the rights of the defendant, and in such cases the burden of proving that the defendant did not suffer prejudice by such improper influence rests upon the prosecution. *State v. Lantz*, 23 Kan. 728; *State v. Woods*, 49 Kan. 237, 30 Pac. 520.

The bailiff who took charge of the jury when the cause was finally submitted was not sworn as the statute requires, and this is urged as a ground for a new trial. It appears that when the bailiff was originally appointed by the sheriff the ordinary oath of office was administered to him, and also before the commencement of the trial he was sworn as follows: "You do solemnly swear that you will support the constitution of the United States and the constitution of the state of Kansas, and faithfully discharge the duties of bailiff of this court, and not let the jury in this case depart or separate without the order of the court; so help you God." No oath was administered to the bailiff after the cause was submitted, and before the jury retired for deliberation. The oath that was administered fails to meet the requirements of the statute (Gen. St. 1889, § 5305). The oath taken before the trial omitted the requirement to keep the jury together in a private and convenient place, without food, except such as the court should order, and also that he should not permit any person to speak or communicate with them, nor to do so himself. These provisions were made to protect the jury from improper influences, and were deemed so necessary to the proper administration of the law that they were incorporated into the statute. The oath is important in its nature, and, being specifically required, cannot be disregarded. For the reasons mentioned the judgment will be reversed, and the cause remanded for a new trial. All the justices concurring.

SMITH v. CITY & SUBURBAN RY. CO.
(Supreme Court of Oregon. Nov. 9, 1896.)
STREET RAILROADS — INJURIES TO PERSONS ON TRACK — CONTRIBUTORY NEGLIGENCE — INSTRUCTIONS.

1. In an action against a street railway, it appeared that plaintiff got off a car going west, walked behind it, and was struck by a car going east. The motorman testified that she stepped from behind the west-bound car into the middle of the track on which his car was going. Numerous witnesses who saw the accident testified as to the circumstances. *Held* that, notwithstanding evidence that she looked for an approaching car before attempting to cross the track, the question as to whether she did in fact do so was for the jury.

2. If plaintiff failed to look to see if a car was approaching before she attempted to cross the track, and by reason of such failure stepped on the track, and was struck by an approaching car, which she could have seen by looking, she was guilty of contributory negligence.

3. A charge to the effect that if the accident "was caused by the carelessness or negligence of plaintiff," or if she did not "use proper care and caution to ascertain whether a car was approaching" before attempting to cross the track, she could not recover, was insufficient.

On petition for rehearing. Denied. For prior report, see 46 Pac. 136.

BEAN, J. Notwithstanding any evidence which may have been given by the plaintiff or other witnesses tending to show that she looked for an approaching car before attempting to cross the track, the question as to whether she did in fact do so was for the jury, under all the circumstances of the case, and the court was not justified in refusing to give the instruction in question on the ground that there was no evidence upon which to base it. The case of *Railway Co. v. Gentry*, 163 U. S. 353, 16 Sup. Ct. 1104, is not at all in point. In that case the deceased, an employé of the defendant, was killed in crossing the track of its railroad at night, while going to his work. No one witnessed the accident, and the court held that in the entire absence of evidence as to the deceased having, or not having, looked for the approach of the car before crossing the track, the trial court was justified in refusing an instruction to the effect that if, by looking and listening, he could have known of the approach of the engine and car in time to have kept off the track and prevented the accident, and failed to do so, the jury must find for the defendant, for the reason that in such case the law presumed that he did look and listen. In this case, however, there were numerous witnesses who saw the accident and testified to the circumstances under which it occurred, and hence there was no room for indulging in the presumption referred to. Nor do we think the instruction in question was given in substance by the court in its general charge to the effect that if the accident "was caused by the carelessness or negligence of the plaintiff," or if she did not "use proper care and caution to ascertain whether a car was approaching," before attempting to cross the track, she cannot recover. The instruction, as given, contained nothing

more than the featureless generality that plaintiff must exercise ordinary care and caution, leaving the jury to determine what would satisfy that requirement, while the instruction asked and refused defines precisely what would be want of ordinary care under the circumstances of this case, and, if given, would have furnished the jury with a criterion by which to determine whether plaintiff exercised such care or not.

It is suggested that some of the expressions in the opinion in reference to the facts will, on a retrial, be greatly prejudicial to the plaintiff, and particular reference is made to the statement therein that the accident occurred at a place where the view of the track was unobstructed for a space of three or four blocks, except where the car from which the plaintiff had just alighted would obstruct the vision. This is in accordance with the facts, as we understand the record before us, but, if we are mistaken in that respect, no harm can come from it on another trial, which must be had on the evidence to be then presented, and not as given on the first trial. Counsel seems also to think that the court intended to criticize the plaintiff for not waiting until the car from which she had alighted moved on, before attempting to cross the track, but in this he is mistaken. We only intended to state the facts from the record as we understood them, and to hold that if, under the circumstances of the case as thereby disclosed, the plaintiff attempted to cross the track without looking to see whether a car was approaching, she was guilty of such contributory negligence as would bar a recovery. The petition for a rehearing is denied.

OSMUN v. WINTERS.¹

(Supreme Court of Oregon. Nov. 9, 1896.)
BREACH OF MARRIAGE PROMISE—EVIDENCE—ADMISSIBILITY—MISCONDUCT OF JUROR — WAIVER—APPEAL.

1. Where a motion for leave to file an amended answer is called up the day before the time set for a second trial of the case, and the proposed amendment tenders a new issue, it is within the discretion of the court whether or not to allow the motion.

2. In an action for breach of marriage promise, where the answer contains allegations against the character and chastity of plaintiff, and the case has been once tried, it is within the discretion of the court to grant or refuse defendant's motion for leave to strike out such allegations on the second trial.

3. On a trial for breach of marriage promise, where no proof of defendant's allegations against the character of plaintiff has been offered, it is not error to charge that, where defendant fails to prove such allegations, "it is a worse case than if there had been a simple denial of the contract of marriage, and the action had proceeded on the simple allegations and denials."

4. On a trial for breach of marriage promise, an unproved charge of plaintiff's unchastity may be considered in connection with all the rest of the evidence in aggravation of damages, as tending to show that defendant was actuated by malice.

5. In proof of an executory promise of marriage, plaintiff introduced a copy of a resolution

¹ Rehearing pending.

of a fraternity of which the parties were active members, purporting to extend to them the congratulations of the lodge upon the supposed marriage, adopted on information which proved to be false. *Held*, that it was admissible to show that a closer intimacy than the ordinary relations of friendship obtained between the parties, within the knowledge of their co-members.

6. On a trial for breach of marriage promise, an article published over defendant's signature, attacking plaintiff's character, and an insulting letter addressed by defendant to plaintiff, both written after the commencement of the action, are admissible to prove the animus of defendant in refusing to perform the marriage contract, and may be considered in aggravation of damages.

7. On a trial for breach of marriage promise, where it is sought to prove a conspiracy to blackmail defendant, the admissions and statements of one of the alleged conspirators, while not in the presence of plaintiff, touching the supposed conspiracy, are inadmissible.

8. On a trial for breach of marriage promise, evidence that, after the commencement of the action, one other than plaintiff or her attorneys came to defendant, and offered to settle the case for a certain sum, and represented that plaintiff would accede to the terms indicated, is inadmissible to prove an alleged conspiracy to blackmail defendant, where it is not shown that such person was authorized to compromise with defendant.

8. Where the cross-examination of a party goes to matters outside his examination in chief, but which are pertinent to his adversary's cause, and might have been introduced by him in the first instance, such examination becomes subject to the rules that would govern a direct examination on his own account, and it is discretionary with the court whether the testimony shall be introduced then and in that manner.

10. Where it is agreed by the parties that if plaintiff be allowed to introduce a deposition, signed by the deponent, but for some cause irregular, defendant may introduce a letter purporting to have been written by the deponent, as to the letter the agreement is simply a waiver of the observance of the rules touching proof which would identify and qualify it as proper to go to the jury, but is not an admission that it is a genuine letter of the deponent.

11. It was proper to submit the question touching the genuineness of the letter to the jury, upon their comparison of the handwriting with the signature to the deposition.

12. After verdict a party cannot complain of the misconduct of jurors of which he was cognizant during the trial.

13. The question of excessive damages cannot be raised on appeal unless specified as a ground of error in the notice of appeal.

Appeal from circuit court, Multnomah county; E. D. Shattuck, Judge.

Action by May Osmun against H. D. Winters for a breach of promise of marriage. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

For former report, see 35 Pac. 250.

E. B. Watson, for appellant. A. F. Sears, Jr., and A. F. Flegel, for respondent

WOLVERTON, J. Error is predicated of the action of the court below in overruling defendant's motion, based upon his affidavit, for leave to file an amended answer, and also in overruling a subsequent motion to strike out certain portions of the original answer. The points of divergence between the original and the proposed amended answer arise in the further and separate defenses interposed. The

answer sought to be filed contains a separate defense in substance the same as the original, except that the allegations of plaintiff's lascivious cohabitation with one Deville Dodge and one W. E. Duffer are eliminated, and a further separate defense alleging the prior marriage of the plaintiff with one Fred Osmun, and a want of knowledge or information sufficient to form a belief as to whether said marriage had been legally dissolved. The cause had been once tried, and the motion was called up the day before the time set for a second hearing; and the amendment having tendered a new issue, which would require additional evidence to support or overcome, we think it was within the sound discretion of the court below whether or not to allow the motion. Courts are usually liberal in granting leave to amend in furtherance of justice; but, unless it is apparent that justice would be subserved by the amendment, it is not an abuse of discretion to refuse its allowance. The motion to strike out goes simply to the allegations touching plaintiff's conduct with Dodge and Duffer. It appears by the affidavit filed with the first motion that defendant had failed on the former trial to prove these allegations to his satisfaction, and the purpose of the motion to strike out was to get rid, so far as possible, of their damaging effect, as false imputations against the character and chastity of plaintiff. The court below, having heard the testimony at the former trial, in connection with the affidavit and the conduct of the defendant, was able to judge whether said allegations were made in the first instance in good or bad faith; and upon reasons drawn from these observations, we presume, the court's action was based. We cannot say that there has been an abuse of discretion in disallowing this motion, and error in this respect is not well assigned.

In this connection the court instructed the jury that "the defendant in a case of this kind may allege the bad character and bad conduct of the plaintiff, but he does so always at his peril. What I mean by that is that he may assert it and prove it. He may claim that plaintiff had a bad character and bad reputation, and he may prove it, if he can; but, if he fails to prove it, it may be taken as a repetition of the charge of unchastity, and may be considered by the jury in connection with all the rest of the testimony in aggravation of damages. In other words, it is a worse case than if there had been a simple denial of the contract of marriage, and the action had proceeded on the simple allegations and denials." It is claimed that, besides laying down an erroneous rule of law touching the ascertainment of damages in the action, this instruction was especially injurious to the defendant, in view of being held to his former answer. The ruling upon the motion to amend by striking out was but a step in the trial, and, if the court was right in the disallowance of the motion, it was right in instructing the jury

touching the effect of the unproved allegations which the motion sought to eliminate. Defendant offered proof of the truth of one of such allegations, but as touching her alleged conduct with Dodge there was no attempt at proof, nor did he claim anything for it in the argument before the jury. This was the condition of the case when it became the duty of the court to instruct the jury, and it was not error to instruct with reference to such condition. Aside from this, the answer contains other allegations imputing immoral conduct to the plaintiff with other men besides Dodge and Duffer, and of her bad character in general. It was therefore pertinent to so instruct the jury generally touching the effect and lack of proof of such allegations as matter of defense.

Was the instruction proper as it respects the aggravation of damages? An instruction of almost identical import was approved by this court in *Kelley v. Highfield*, 15 Or. 290, 14 Pac. 744. The ground upon which a false charge of unchastity, assigned as a reason for breaking off the marriage engagement, may be considered in aggravation of damages, is that it shows the animus attending the severing of such relations. No damages should be allowed for the defamatory words, but they should be considered as tending to show that the defendant was actuated by malice, that he broke off the engagement wantonly and insolently, and with a bad and wicked heart, and in a manner well calculated to wound the feelings, injure the reputation, and destroy the future prospects of the affianced. So, if the charge is repeated, by spreading it upon the records in the cause after action begun, without justifying it by proof at the trial, it is a proper element for consideration in aggravation of damages, upon like principle as a repetition of slanderous words in the pleadings in an action for slander, unless sustained, may be considered as proof of the malice which prompted the defendant to give currency to the slander in the first instance. The action for breach of promise of marriage, while founded upon contract, is, in its nature, an action for tort or a wrong done the plaintiff; and, if it becomes manifest that the defendant has been actuated by motives of an evil intent to wantonly and ruthlessly humiliate and injure the plaintiff, a case is made for the assessment of punitive or vindictive damages, which may operate as a punishment in the interest of society as well as for the doing of a willful personal injury to a fellow mortal. *Johnson v. Jenkins*, 24 N. Y. 252; *Thorn v. Knapp*, 42 N. Y. 474; *Davis v. Slagle*, 27 Mo. 600. The court, as we think, very properly told the jury that such an unproven charge of unchastity might be considered in connection with all the rest of the testimony in aggravation of damages.

It is further contended that the instruction is faulty in characterizing such a case as being worse for the defendant than if there had been a simple denial of the contract of marriage.

The court simply told the jury what was the fact under the law. The breach, attended with an unfounded charge of unchastity, or an unsuccessful attempt to justify such a charge, is certainly a worse case than if there had been a simple refusal to carry out the marriage contract, unattended with such an imputation, because in itself it affords the very grounds for the aggravation of damages. There is no intimation as to what the damages should be. The two kinds of cases are simply put in comparison as a method of explaining to the jury when and under what circumstances they should, and the conditions under which they should not, visit the defendant with aggravated damages. The jury could not have understood that they should increase the damages at any rate. That was a matter left for them to determine under the testimony. The objection is not well taken.

During the progress of the trial, plaintiff introduced and had read to the jury, over the objections of defendant, certain resolutions which were adopted by Fairview Lodge, No. 500, I. O. G. T., June 26, 1892, of which lodge plaintiff and defendant were members, purporting to extend to them the congratulations of the lodge upon their supposed marriage, a copy of which was directed to be forwarded to them. The ruling of the court in this regard is assigned as error. The reasons assigned for the objection are that the resolutions do not appear to have been prompted by any conduct observed between the parties, but upon information which proved to have been false, and that it was incompetent for the purpose of proving an executory promise of marriage. The evident object of this testimony was to show that a closer intimacy than the ordinary relations of friendship, such as usually exist between members of fraternal societies, obtained between the parties. It is altogether improbable that, unless such intimacy had been previously observed, the lodge would have been so ready to adopt the resolutions, without definite knowledge of the supposed fact upon which they were based. The acts of the parties probably gave coloring to the reported marriage, as it is apparent from the resolutions that they were attentive and active members of the order. So that they have some tendency, remote and inferential though it may be, to show an existing relationship consistent with their engagement, and how their demeanor towards one another was regarded among their friends and associates. In this view, they corroborate in some small measure the proof offered by the plaintiff of the existence of the engagement between them at that time.

After the commencement of the action, the defendant made a statement to which he subscribed, and had it published in the *Portland Chronicle*, in reply to an article which had previously appeared in the *Sunday Mercury*. In the course of this statement he makes use of language as follows: "They [the Mercury people] prepared to espouse the cause of the notorious woman [the plaintiff], who knows

their characters, and who informed me herself that one of the proprietors of the Mercury was guilty of a much more flagrant offense than she charges me with." "As to the published statements concerning my relations with Mrs. Osmun, they are based on her charges, and are nearly all false. In the first place, she is not the miss, but a divorced woman of a man in Chicago, who secured a divorce on the grounds of her having been false to him, and thereby contracted and communicated to him a bad disease." "When I first became acquainted with her [the plaintiff], it was through her uncle and aunt coming into my building, and opening a bakery. For some time I supposed she was a respectable woman, and in time I saw by her conversation, her conduct with other men, and by what men told me, that she was not a virtuous woman. In fact, she told me that she was not virtuous; and I have the sworn statement of one man, given voluntarily, that the first time he ever met her was on the street; that he winked at her, and she gave him the sign to follow, and he spent the night with her at an hotel." This published statement went to the jury, over the objections of defendant. We think it was properly admitted, as tending to show the animus of defendant in refusing to perform the marriage contract, upon like grounds as unproved allegations of unchastity in the pleadings may be considered in aggravation of damages.

For like reasons, the insulting letter addressed by defendant to plaintiff, after the commencement of the action, was properly admitted. We are aware that there are good authorities against the admission of the statement and this letter in evidence. The reasons upon which they proceed are that they involve matters or transactions occurring subsequent to the commencement of the action, which should not be permitted to contribute to an increase of damages above such as were contemplated by the plaintiff when the action was begun (*Leavitt v. Cutler*, 37 Wis. 46; *Greenleaf v. McColey*, 14 N. H. 303), and because they require the consideration of an independent tort (2 Sedg. *Meas. Dam.* § 640, note 1). But if we are right in our position that an unfounded charge of unchastity, incorporated in the answer, is cause for aggravation of damages, then, logically, these authorities are wrong. 3 *Suth. Dam.* § 321, note 3. *Strahan, J.*, in *Kelley v. Highfield*, supra, says: "There can be no doubt, if the defendant's desertion of the plaintiff was without cause, or his conduct at the time towards her, or afterwards, was harsh, cruel, or malicious, or if at any time, even upon the trial, he makes a wrongful attempt to blacken her name or reputation, the jury have a right to consider it, and may, if they think proper, add something to the amount of damages on account of such new or additional wrong." So, in this case, if the contractual relations were wantonly broken off by the defendant, and he afterwards willfully and maliciously persisted in casting imputations against the plaintiff's character through the public press, and by in-

fliting to her indecent and insulting letters, whether done before or after the commencement of the action, such acts may be considered as a reflex of the defendant's wicked incentive for severing such relations, and taken into account by the jury in awarding damages.

There was some evidence introduced by defendant tending to show that, prior to the alleged breach, a conspiracy had been entered into between the plaintiff and one M. J. Santry to blackmail and extort money from the defendant by means of this litigation. Whether or not there was a prima facie case of conspiracy, sufficient to go to the jury, we are not called upon to decide. It is sufficient to say that all the evidence offered to establish such alleged conspiracy was submitted to them, except certain admissions and acts of Santry, the rejection of which is assigned as error. Dr. C. E. Hill, while a witness for defendant, after testifying to having overheard some parties, in the presence of the plaintiff and Santry, narrate some "rather smutty" stories, was asked a further question, which being objected to, the defendant's counsel stated: "We propose to prove by this witness that Santry, about this time and after this time, claimed to be interested in this litigation, and to have a part in it, and claimed that they were to divide whatever they should get out of Winters." Later on, counsel, addressing the witness, said: "You may state whether or not, on or about that time, you heard Santry state what the agreement between him and Mrs. Osmun was with regard to dividing the money they should get out of Mr. Winters." This is enough to elucidate the nature of the testimony sought to be elicited. It relates simply to admissions and statements of Santry, while not in the presence of plaintiff, touching the supposed conspiracy that had been entered into between the parties to extort money from Winters. As respects such testimony, the rule seems to be as laid down in *Metcalfe v. Conner*, 12 Am. Dec. 340, as follows: "Any declarations by one of the party at the time of committing the unlawful act are, no doubt, not only evidence against himself, but, as being a part of the *res gestæ*, and tending to determine the quality of the act, are also evidence against the rest of the party, who are equally as responsible as if they had themselves done the act. But what one of the party may have been heard to say at any other time as to the share which others had in the transaction, or as to the object of the conspiracy, cannot be admitted as evidence to affect them, for it has been solemnly decided that a confession is evidence only against the person himself who makes the confession, and not against others." This rule is explicitly sanctioned and upheld in *Sheppard v. Yocum*, 10 Or. 417, and authorities there cited. See, also, *Miller v. Barber*, 66 N. Y. 553, 567. And it amply supports the action of the court below.

Winters was asked, while a witness in his own behalf, whether or not Santry came to him after the action was commenced, claiming to have the authority, and proposed to

settle the case for a certain amount, and represented that plaintiff would accede to the terms indicated; and it is claimed that the refusal to permit him to answer was also error. But the evidence which the question indicates might be elicited does not appear to be such as would establish acts in the execution of the alleged conspiracy; and, besides, the action had been commenced, and was then in the hands of her attorneys, and it is not shown that Santry was authorized to compromise with the defendant.

It is claimed that in the cross-examination of the defendant, while a witness in his own behalf, plaintiff's counsel was permitted to examine him touching things entirely outside of and beyond the matters inquired of on his examination in chief; that is to say, plaintiff was allowed to interrogate the witness in respect to shorthand notes of his testimony given at a former trial, which was not germane to the direct examination at the present trial. The inquiry, however, went to matters which were pertinent to plaintiff's cause, and might have been introduced by her in the first instance. If she exceeded the proper bounds of cross-examination, the testimony became as much her own as if introduced by her. Such examination became subject to the same rules as a direct examination upon her own account. Hill's Ann. Laws, § 837. It was discretionary with the lower court whether the testimony should be introduced then and in that manner. Long v. Lander, 10 Or. 178. It was perhaps irregularly gotten to the jury, but we cannot see that the course which the court allowed to be pursued substantially affected any of defendant's rights. Possibly, it may have been proper for impeachment. This, however, we do not decide, as it does not appear to have been introduced for that purpose.

During the trial, the defendant offered in evidence a letter in pencil addressed to defendant's attorneys at Chicago, and purporting to have been written by the plaintiff's former husband, of which the following is a copy: "Chicago, January 29th, 1893. Ferguson & Goodnough—Dear Sirs: I think I can do better on the other side of the fence. I got a letter the other day to that effect. Yours, Fred. A. Osmun." It was introduced for the avowed purpose of explaining the averment in the answer "that at various times in the year 1891, at Chicago, Illinois, and at Pontiac, Michigan, the plaintiff was guilty of lewd and lascivious cohabitation with Deville Dodge," and his failure to offer any evidence in support of said averment. Counsel for plaintiff had objected to the introduction of this letter, but at this time they agreed with counsel for defendant that it might be read to the jury upon condition that a certain deposition of the said Fred. A. Osmun, which had been taken in behalf of defendant, but which, on account of some irregularity, was subject to objections, should also go in evidence; so both the letter and the deposition went to the jury. At the argument, one of plaintiff's counsel sought to impeach the genuineness of the letter, by a comparison, in the

presence of the jury, of the handwriting and the signature with the signature contained on each page of the deposition, to which procedure the defendant objected, but was overruled by the court; and the question as to the authenticity and genuineness of said letter and signature was submitted to the jury. Defendant contends that, as the plaintiff agreed to allow the letter to be read to the jury, she was estopped to question its genuineness, and that the court erred in permitting her to do so, and that it further erred in submitting the question to the jury upon a simple comparison of the handwriting. The controversy, judging from the record, appears to us about like this: Defendant was seeking to introduce the letter for a purpose which would go to his advantage. The deposition of Osmun had been taken, and might have been introduced by either party, providing the certification and transmission were regular, but they were not, as it appeared. This deposition was supposed to be favorable to plaintiff, but the letter does not appear to have been made a part of it. So that the agreement was but a mutual concession that defendant might introduce the letter, and the plaintiff the deposition, as the evidence of the respective parties. As to the letter, it was simply a waiver of the observance of the rules touching proof which would identify and qualify it as proper to go to the jury, but not an admission that it was the genuine letter of Osmun. This is the view the court below took of the situation, and we believe it to be correct. Nor did the court err in submitting the question whether or not the letter was genuine to the jury. Evidence respecting handwriting may be given by comparison, made by a witness skilled in such matters, or by the jury, with writings admitted or treated as genuine by the party against whom the evidence is offered. Hill's Ann. Laws, § 765. No question was raised as respects the signature to the deposition. It was admitted to be Osmun's genuine signature, and it was proper to submit the question touching the genuineness of the letter to the jury, upon their comparison of the handwriting with the signature to the deposition.

After verdict and before judgment, the defendant moved for a new trial, based principally upon the ground of the misconduct of two of the jurors during the trial. The motion was supported by affidavits, and opposed by counter affidavits. It appears that the misconduct complained of occurred October 25th, and was observed at the time by one of defendant's counsel, but the verdict was not rendered until October 29th. The court below overruled the motion, and refused a new trial, and its action in this regard is assigned as error. The respondent contends—First, that an order refusing a new trial is not reviewable on appeal; and, second, it was not error to disallow the motion. Waiving the first question, the matter may be disposed of on the second. Assuming that the misconduct of the jurors was sufficient to disqualify them from further participating in the trial, we think the objection came too

late. The acts complained of were committed some four days prior to the rendition of the verdict, and while the cause was yet in the hands of the jury. The defendant was cognizant of such acts all the while, and should have brought them to the knowledge of the court at once, and had the jury discharged or recast. By taking his chances before jurors, whom he declares to have been disqualified, when he could have had a hearing before verdict, he has waived the objection. Shippen, J., in *Berry v. De Witt*, 27 Fed. 724, says: "Such misconduct of a juror during the trial, if known to the party at the time of its occurrence, and not made the subject of a motion to the court, is waived. A party cannot know, during the trial, a fatal objection arising from the misconduct of a juror upon the trial, and keep silence, and take advantage of it in the event of an adverse verdict. He is not permitted to 'speculate upon the chances of a verdict.'" This doctrine is supported by numerous cases, and appears to be well settled. See *State v. Tuller*, 34 Conn. 280; *Consolidated Ice-Mach. Co. v. Trenton Hygeian Ice Co.*, 57 Fed. 901; *Cogswell v. State*, 49 Ga. 108; *Martin v. Tidwell*, 36 Ga. 345; *Stampofski v. Steffens*, 79 Ill. 306; *Hussey v. Allen*, 59 Me. 269; *Rowe v. Canney*, 139 Mass. 41, 29 N. E. 219; *Koester v. City of Ottumwa*, 34 Iowa, 41; *Gurney v. Railway Co.*, 41 Minn. 223, 43 N. W. 2; *Hill v. Greenwood*, 160 Mass. 256, 35 N. E. 668.

The question made touching excessive damages, not being specified as a ground of error in the notice of appeal, cannot be examined here, even if it was otherwise competent for this court to consider it.

There are other exceptions to instructions given by the court, and to others asked and refused. The former opinion rendered in this case (25 Or. 260, 35 Pac. 250) is decisive of two of them, to wit, the effect of seduction as an element in the aggravation of damages, and the question touching the alleged seduction by means of force and violence. This latter was a question for the jury, and was properly submitted to their consideration. The others we have carefully examined, and find that the court below is not in error regarding them. Affirmed.

STATE ex rel. GERMAN SAVINGS & LOAN SOC. v. SEARS.

(Supreme Court of Oregon. Nov. 9, 1896.)

CONSTITUTIONAL LAW—IMPAIRMENT OF CONTRACT—MORTGAGE FORECLOSURE.

Act Feb. 23, 1895 (Laws 1895, p. 59), extending the time for redemption from execution sales of real estate on mortgage foreclosure from 4 to 12 months, is unconstitutional, as applied to a sale under a mortgage executed prior to its passage. *Barnitz v. Beverly*, 16 Sup. Ct. 1042, 163 U. S. 118, followed. 43 Pac. 482, reversed.

On petition for rehearing. Granted.

For prior report, see 43 Pac. 482.

PER CURIAM. On the 27th of January, 1896, an opinion, reported in 43 Pac. 482, was

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filed in this case, holding that the act of the legislature approved February 23, 1895 (Laws 1895, p. 59), extending the time for redemption from execution sales of real estate from 4 to 12 months, applied to foreclosure sales under mortgages executed prior to its passage, and did not impair the obligation of the mortgage contract. Since that time, however, the supreme court of the United States, in *Barnitz v. Beverly*, 163 U. S. 118, 16 Sup. Ct. 1042, on writ of error from the state of Kansas, has held that a state statute which extends the period of redemption beyond the time allowed at the date of the execution of the mortgage cannot constitutionally apply to a sale under a mortgage executed prior to its passage. Within the doctrine of that case, and the principle therein announced, our decision is erroneous; and, as the question is one of federal cognizance, we are, of course, bound to follow the decision of the highest federal court. The judgment heretofore rendered by this court must therefore be annulled and set aside, and the judgment of the court below reversed and the cause remanded, with directions to issue the peremptory writ of mandamus as prayed for.

DAVIS v. HANNON et al.

(Supreme Court of Oregon. Nov. 9, 1896.)

PLEADING—ALLOWING AMENDMENT DURING TRIAL—SUBSTANTIALLY CHANGING DEFENSE.

In an action against an officer to recover the value of property sold on execution against another than plaintiff, where the answer denied plaintiff's ownership, defendant was permitted, during the trial, and after plaintiff had proved a sale and transfer of the property to him from the execution defendant, to amend his answer by alleging that such transfer was fraudulent as to creditors of the seller. *Held*, that the allowance of such amendment was within the discretion of the court, under Hill's Ann. Laws, § 101, authorizing the allowance of amendments, in furtherance of justice, where they do not substantially change the cause of action or defense.

Appeal from circuit court, Baker county; Robert Eakin, Judge.

Action by C. C. Davis against John P. Hannon and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Wm. R. King, for appellant

MOORE, C. J. This is an action to recover the value of personal property seized and sold upon execution. The plaintiff alleges that the defendant Hannon is the duly elected, qualified, and acting constable of Huntington precinct in Baker county, and that the defendants Degel and Elfer are sureties on his official undertaking; that a judgment having been duly rendered in the justice's court of said precinct in favor of one W. J. Woods, and against R. D. Gorby and W. M. Gorby, partners as Gorby Bros., an execution was issued thereon, in pursuance of which Hannon, as constable, levied upon and sold the property in question, which was of the value of \$500;

that, at the time of such levy, plaintiff was the owner, and entitled to and in the possession, of said property, and that by reason of such seizure and sale he had been damaged in the sum of \$500, for which he demanded judgment. The answer denied only the allegations of ownership, possession, and value of the property; but at the trial, after the plaintiff had testified that he was the owner and in the possession of the property at the time it was seized, and had introduced in evidence a bill of sale executed by said R. D. Gorby, evidencing the transfer of the title to him, the court, upon motion, over plaintiff's objection, granted the defendants leave to amend their answer by adding thereto an allegation that the pretended sale was without consideration, and fraudulent as to the creditors of Gorby, and made with intent to hinder, delay, and defraud Woods, the plaintiff in said writ. The reply having put in issue these allegations of new matter, a trial was had, resulting in a verdict and judgment in favor of the defendants, from which the plaintiff appeals.

The only question presented for consideration is whether the court, at that stage of the case, possessed the power to allow the amendment complained of; for, if it had, the allowance of the motion was a matter within its discretion, which will not be reviewed on appeal unless it affirmatively appears that there was a plain abuse of such discretion, to the manifest injury of some substantial right of the appellant. *Henderson v. Morris*, 5 Or. 24; *Baldock v. Atwood*, 21 Or. 73, 26 Pac. 1058; *Garrison v. Goodale*, 23 Or. 307, 31 Pac. 709; *Foster v. Henderson* (Or.) 45 Pac. 899. Section 101, Hill's Ann. Laws Or., as far as it applies to the question at issue, authorizes the trial court, in furtherance of justice, and upon such terms as may be proper, at any time before the cause is submitted, to allow any pleading to be amended, when such amendment does not substantially change the cause of action or defense, by conforming the pleading to the facts proved. The plaintiff would have to prove, under the issue made by the original answer, that he was the owner and entitled to the property in question, while the defendant might give in evidence any facts that tended to disprove such ownership and right of possession. The amended answer, however, conceded that the plaintiff was the owner, as against all persons except the creditors of Gorby, and as to them the defendants assumed the burden of proving that the plaintiff's title was fraudulent. Fraud having been alleged in the amended pleading, different evidence from that required under the original answer was necessary to establish it; and, while this may be the test of a new issue, the question arises, did the amendment substantially change the defense? The original answer denied the plaintiff's title altogether, and, if the proof had sustained the defendants' theory, it would have defeated the action. The amended answer conceded that plaintiff had the evidence of title, but alleged that it was

fraudulent as to the plaintiff in the execution under which the property was seized and sold, and, the proof having sustained this issue, plaintiff's title necessarily failed. In each instance plaintiff's title was attacked, and, while different evidence was demanded to sustain the allegation of fraud, we do not consider that the amendment wrought a substantial change in the defense. In *Baldock v. Atwood*, supra, the plaintiff, after the evidence was all taken, by leave of court filed a second amended complaint, containing a number of allegations not found in either the original or first amended complaint; and it was contended that the amendment was in effect the substitution of an original complaint, setting up a new and entirely different cause of suit. But *Strahan*, C. J., in deciding the case, says: "The amendment does not change the controversy. The suit still is in relation to the water alleged to have been appropriated by the plaintiff, and his right to have it flow to and upon his land. This is the real gist of the suit. Any amendment of the pleadings which would further support this right might be permitted by the court, in furtherance of justice. So, also, any amendment of the answer which tended to defeat the cause of suit set up by the plaintiff might be allowed the defendant on the like terms." The purpose of the amendment having been to conform the pleading to the facts proved, and such amendment not having substantially changed the defense, the power of the court, under the statute, to allow it, is unquestioned. If the defendants, relying upon their belief that the title to the property in question was in Gorby, denied the allegation of plaintiff's ownership, and went to trial on that issue, during which they should ascertain that plaintiff had the evidence of title thereto, to have refused them leave to amend their answer on discovering that fact would seem like a denial of justice. The plaintiff did not ask for a continuance in consequence of the amendment, and from this it must be inferred that he thought he was prepared to meet the new issue. The court having the authority, and there being no abuse of discretion in allowing the amendment, it follows that the judgment is affirmed, and it is so ordered.

JORY v. PALACE DRY-GOODS & SHOE CO.

(Supreme Court of Oregon. Nov. 9, 1896.)

TAXATION—ASSESSMENT—TAX DEED—SUFFICIENCY OF DESCRIPTION—ACTION TO RECOVER LAND SOLD FOR TAXES—TENDER OF SUM PAID BY PURCHASER—WHEN NECESSARY.

1. Hill's Ann. Laws, § 2770, subds. 1-4, require the assessors, in assessing land, to set down in separate columns (1) the names of all taxable persons; (2) a description of the tract taxed, specifying, under separate heads, township, range, and section, or, if divided into lots and blocks, the number thereof; (3) the number of acres, etc., unless the land be divided into blocks and lots; and (4) the cash value of each parcel. Section 2773 provides that if the land

assessed be less or more than a subdivision according to the United States survey, unless divided into lots and blocks, it shall be described by the boundaries thereof, or so as to make the description certain. *Held* that, where the land is so situated that it cannot be correctly described by legal subdivision or by lots or blocks, it must be described by metes and bounds, or so as to make the description certain.

2. A description of land in an assessment roll and a sheriff's tax deed as a "fraction of lot No. 2" in a certain block does not sufficiently describe an undivided one-half of a part only of such lot, or 22 feet and 7 inches by 165 feet thereof.

3. Hill's Ann. Laws, § 2823, provides that in a suit to recover land sold for taxes, except where the taxes have been paid or the land redeemed, defendant, as against the holder of the tax title must, with his answer, pay into court the taxes for which the lands were sold, and any taxes the purchaser may have paid on the land, with interest, for the benefit of the holder of the tax deed in case said tax title fails. *Held*, that, where the description in the assessment roll and in the tax deed is so vague as not to describe any land, and is therefore insufficient for the purpose of assessment, and the deed is void for the same reason, in an action by the holder of such deed to recover the land defendant need not make such tender.

Appeal from circuit court, Marion county; George H. Burnett, Judge.

Action by William Jory against the Palace Dry-Goods & Shoe Company to recover possession of the undivided one-half of a certain portion of a lot in the city of Salem, Or. From a judgment on the pleadings dismissing the action, plaintiff appeals. *Affirmed*.

This is an action to recover possession of the undivided one-half of 22 feet and 7 inches by 165 feet of lot No. 2, block 49, in the city of Salem, Marion county, Or., more particularly described as "beginning at a point 45 feet and 2 inches south of the southeast corner of the building now known as the First National Bank Building, and running south, parallel with Commercial street, 22 feet and 7 inches; thence west, parallel with the south wall of said bank building, 165 feet, to the alley; thence north, parallel with the alley, 22 feet and 7 inches; thence, on a straight line, east to the place of beginning." The complaint is in the usual form. The defendant, after putting in issue the ownership and right of possession, as a further defense alleges ownership in one R. Livingstone, and that defendant is a tenant under him; that plaintiff's pretended title is based upon a certain tax deed, a copy of which is made a part of the answer. The property attempted to be conveyed thereby is described as "Salem fraction of lot No. 2 in block No. 49; Salem lots Nos. 4, 5, 6, and 7, block No. 49, together with all and singular the tenements," etc. The deed purports to be based upon a sale for delinquent taxes levied upon the property therein described for the year 1890, in the name of W. N. Ladue, from whom R. Livingstone derives his title. It is further alleged that Ladue fully paid and discharged all taxes levied upon the premises described in the complaint for the year 1890, long prior to the pretended tax sale. It is admitted by the

reply that the answer sets out a correct copy of the tax deed, and that plaintiff claims title by virtue thereof; but the allegation that Ladue paid the taxes for 1890 prior to the sale is denied. The reply further states affirmatively that, before the commencement of this action, Ladue deeded the premises in controversy to Livingstone, but that the latter had full knowledge and notice of plaintiff's title at the time, and "that plaintiff paid on the 27th day of June, 1891, the sum of \$133 to the sheriff of Marion county, Oregon, as the consideration for such deed, the same being the amount of taxes delinquent against the lands in question herein, but the defendant or the said Ladue or said Livingstone has not paid the same, nor any part thereof, nor offered to do so." A motion was interposed by defendant for judgment on the pleadings, dismissing the action, and for costs, which being sustained, plaintiff appeals, and assigns the action of the court in this regard as error.

J. A. Carson, for appellant. G. G. Bingham, for respondent.

WOLVERTON, J. (after stating the facts). If, from the state of the pleadings, it appears that plaintiff is not entitled to any relief against the defendant, it must be admitted that the motion was properly allowed. Plaintiff's title to the premises in controversy depends entirely upon the tax deed, a copy of which is appended to and made a part of the answer. But, in case of failure of title from that source, he claims the right to recover from defendant the amount of the taxes standing delinquent against the premises, at the date of such sale, and which constitutes the consideration for the deed. The amount is alleged to be \$133.11. It is conceded by the parties that the description of the premises in the notice of sale and deed is correctly copied from the assessment roll for Marion county for the year 1890. The assessor is required, in the preparation of the assessment roll touching landed property, to set down, in separate columns, according to the best information he can obtain: "(1) The names of all the taxable persons in his county; (2) a description of each tract or parcel of land to be taxed, specifying under separate heads the township, range, and section in which the land lies, or, if divided into lots and blocks, then the number of the lot and block; (3) the number of acres and parts of an acre, as near as the same can be ascertained, unless the land be divided into blocks and lots; (4) the full cash value of each parcel of land taxed." "If the land assessed be less or other than a subdivision according to the United States survey, unless the same be divided into lots and blocks, so that it can be definitely described, it shall be described by giving the boundaries thereof, or in such other manner as to make the description certain." Hill's Ann. Laws Or. § 2770, subds. 1-4; *Id.* § 2773. By section 2823 the sheriff is required to exe-

cute to the purchaser "a deed of conveyance reciting or stating a description of the property sold, as described in the assessment roll." All these provisions may be said to be mandatory, and the officers are bound strictly to their observance. It is clear that all land, unless divided into lots and blocks, shall be so designated, either by legal subdivisions or by metes and bounds, as to make the "description certain."

But it is contended that, if the land is divided into lots and blocks, then it is sufficient to give the number of the lot and block, whether the property assessed consists of an entire lot or less. If divided into lots and blocks, the acreage may be omitted (subdivision 3, § 2770, *supra*); but, unless it is so divided "that it can be definitely described, it shall be described by giving the boundaries thereof" (section 2773, *supra*). We think the right interpretation of this latter section is that if land is so situated that it cannot be correctly described by legal subdivisions, or by lots and blocks, then it must be described by metes and bounds, or in such other manner as to make the description certain. The land is described in the assessment roll and the deed as "Salem fraction of lot No. 2 in block No. 49." The property sought to be recovered is an undivided one-half of a part only of said lot, or 22 feet and 7 inches by 165 feet thereof. Does the deed contain such a description as will operate to convey the interest sought to be recovered? The word "fraction" imports "a fragment; a separate portion; a disconnected part." *Cent. Dict. Black*, in his *Law Dictionary*, defines it as "a fragment or broken part; a portion of a thing, less than the whole." The word is used to designate a fragmentary part of a whole, disconnected and distinct within itself, rather than an undivided interest; a several, not a joint, interest. So that, looking to the deed, and finding the premises described as "fraction of lot No. 2," there would be no suggestion that an undivided interest in such lot was intended to be conveyed. But the plaintiff seeks not only to recover an undivided interest, but an undivided interest in a fractional part of the lot, and looks to the deed in support of his title. It cannot be said that the less is included in the greater, as the word "fraction" is an indefinite term, and the idea of an undivided interest is not imparted by its use. The term used is "fraction of lot No. 2," not "fractional lot No. 2." The latter would imply a lot of less dimensions than a full lot, but the former is indicative of a part less than the whole. It has been held that the grant of a specific quantity of land, parcel of a larger tract, which fails to locate the quantity so conveyed by a sufficient description, makes the grantee a tenant in common with the grantor. *Schenck v. Eroy*, 24 Cal. 110; *Lawrence v. Ballou*, 37 Cal. 518. A deed, however, which purports to describe a specific tract, giving the number of acres, and calling

it a parcel of a larger tract, the calls of which fail to describe the tract intended to be conveyed or other tract, does not operate even to convey an undivided interest. *Grogan v. Vache*, 45 Cal. 610. The deed under consideration does not purport to convey a definite quantity out of a larger tract, neither does it describe any particular parcel of lot No. 2; so that it could not be construed as conveying any interest in such lot, either undivided or several. As it regards ordinary conveyances, the description of the premises sought to be conveyed must be sufficiently definite and certain as to enable the land to be identified; otherwise, they are void for uncertainty. With the deed before us, it is impossible to ascertain what was meant to be conveyed. There is an inexplicable uncertainty in the description, amounting to a patent ambiguity, and, measured by the rules which govern in ordinary transfers of title, the deed conveys nothing. 2 *Devl. Deeds*, § 1010; *Williams v. Railway Co.*, 50 Wis. 71, 5 N. W. 482.

It is claimed that greater strictness is required in the description of land to be conveyed by a tax deed than is the case with voluntary deeds. Whether this is so or not, it is clear that it must be so described, and with such accuracy, that it can be ascertained and identified with ordinary and reasonable certainty. 2 *Devl. Deeds*, § 1405. Such is not the case here, and the deed cannot be upheld as a transfer of title. The description is so vague and indefinite that it fails to point out any parcel of land, and it is absolutely impossible, by any rules of construction known to the law, to apply it to the land which plaintiff seeks to recover, nor are the defects such as may be cleared up by parol evidence. See *Johnson v. Lumber Co.*, 52 Wis. 465, 9 N. W. 464; *Larrabee v. Hodgkins*, 58 Me. 413; *Ronkendorff v. Taylor's Lessee*, 4 Pet. 349; *Smith v. Blackiston* (Iowa) 47 N. W. 1075; *Brickey v. English*, 129 Ill. 646, 22 N. E. 854; *Wilkins v. Tourtellott*, 28 Kan. 825; *Griffin v. Creppin*, 60 Me. 270; *Roberts v. Deeds*, 57 Iowa, 320, 10 N. W. 740; *Brinson v. Lassiter*, 81 Ga. 40, 6 S. E. 468; *People v. Flint*, 39 Cal. 670; *Black. Tax Titles*, § 405.

There being a failure of title, the question remains, should the plaintiff recover the amount of taxes paid as the consideration of the deed? It is provided by section 2823, *Hill's Ann. Laws Or.*, that "in any action, suit, or proceeding for the recovery of lands sold for taxes, except in cases where the taxes have been paid, or the land redeemed as provided by law, the defendant or party claiming to be the owner, as against the holder of the tax title, must, with his answer, tender and pay into court the amount of the taxes for the payment of which the lands were sold, together with interest thereon at twenty per centum per annum from the date of the sale to the date of the said tax deed, together with the sheriff's fees for making said certificate and sheriff's deed, and also any taxes the purchaser may have paid on said

lands, with interest thereon from the date of payment to the date of filing said answer, for the benefit of the holder of said tax deed, his heirs or assigns, in case said tax title should fall in said action, suit, or proceeding." The proceeding here provided for, or, rather, the remedy established in favor of the purchaser at a tax sale, is supported upon the principle that the purchaser, through the instrumentality of the deed, though irregular and ineffectual to convey title through failure of the proper officers to comply with the statutory regulations touching the assessment of property and collection of taxes, acquires a lien upon the property to the extent of the taxes, for the payment of which the land was sold. The sale of real property under the provisions of the assessment laws conveys to the purchaser, subject to redemption, all the estate or interest of the owner. Hill's Ann. Laws Or. § 2821. The owner may redeem within two years from the day of sale, by repaying the purchase money, with certain interest and costs. Section 2820. But, if he does not redeem within that time, the sheriff may execute to the purchaser a deed, and thereafter, if the proceedings have been regular, and the deed properly executed, the delinquent is without remedy to recover back the property so sold for taxes; but, should the tax title fail, the effect of section 2823 is to permit a redemption, notwithstanding the deed, but, in order to do this, he is required to repay the amount of taxes for which the land was sold. In such case the deed of the sheriff conveys to the purchaser the interest of the county in the property, and, where the title proves defective, a lien is created in favor of the purchaser by indirection; and this, by reason of the fact that the delinquent is without remedy, except upon the conditions imposed by the statute. There appears to be no direct provision in the statute making taxes a lien upon real property, and it is doubtful whether any such lien exists in this state. But we think the effect of the provisions herein cited is to create a lien in favor of a purchaser from the day of his purchase; that is to say, the county, through the sheriff, transfers to the purchaser its interest in the premises, and, if redemption is had, the purchaser is as much entitled to the amount of the taxes paid, with interest and costs, as the county was entitled to the tax in the first instance. This does no injustice to the taxpayer, for, so long as there is a legitimate tax standing against him, he ought not to be permitted to avoid a tax deed which is without potency to carry the title, on account of irregularities in the proceedings, without first reimbursing the purchaser. So that, if he would relieve himself of the incubus of an insufficient tax deed, through the interposition of the courts, he must tender the taxes, unless they have been paid or the land redeemed.

But the rule has its limitations, and it is not in every instance where the tax title fails that the landowner is required to tender the taxes paid by the purchaser before he is entitled to recover as against the tax deed. If the tax

itself were vicious, or such that the legislature could not lawfully impose upon the person or property, the tender could not be required, as it would result in a lawless exaction, which the state would be without power to compel, either directly or indirectly. Cooley, Tax'n, 551, 552; Hart v. Henderson, 17 Mich. 218; Sinclair v. Learned, 51 Mich. 335, 18 N. W. 672; Powers v. Larabee (N. D.) 49 N. W. 724; Black, Tax Titles, § 438; West v. Cameron, 39 Kan. 738, 18 Pac. 894. And it seems that where the description is so vague and indefinite as not to be the means of describing any lands, and therefore insufficient for the purposes of assessment, and the deed is without efficacy for the same reason, the county acquires no interest in the land by virtue of the assessment, and hence cannot create or transfer a lien to the purchaser for the taxes for which the land is sold by a deed which is ineffectual in itself to identify such land. The doctrine of caveat emptor applies to such a purchaser, and he acquires nothing, because the county conveys nothing by its deed. The very corpus involved in the transaction is not identified for any purpose. So, it cannot be said that the county, through the instrumentality of the assessment, sale, and deed, has transferred to or created a lien for the taxes paid in favor of the purchaser. The case contemplated by the statute is analogous to the equitable transfer of a mortgage security to the purchaser at a void judicial sale, under an invalid foreclosure proceeding, or the subrogation of the purchaser to the rights of the lienholder. But, if the lien is void in the first instance,—that is to say, if the property is so imperfectly described as to give no lien,—the void judicial sale is without potency for the equitable transfer of a lien to the purchaser, because none ever existed, and the proceeding cannot create one. In support of these views, see Roberts v. Deeds, supra; Early v. Whittingham, 43 Iowa, 162, and Powers v. Larabee (N. D.) 49 N. W. 724.

In the present case the land was not sufficiently identified for the purposes of assessment, and the county acquired no lien, even if the statute gives one upon the property for taxes levied upon it or otherwise (Black, Tax Titles, §§ 112, 184; City of Jefferson v. Whipple, 71 Mo. 519); and the deed was powerless to transfer such supposed lien to the plaintiff, much less to create one in his favor for the taxes paid as the purchase price of the premises. Now, it is apparent from what has been said that defendant was not required to tender the amount of the alleged taxes for the payment of which the land was attempted to be sold, before he could be permitted to contest the title of plaintiff under his tax deed; hence the issue attempted to be raised by the reply in that regard becomes immaterial. So does the issue raised by a denial of the allegation in the answer to the effect that Ladue paid the taxes for the year 1890 prior to the day of sale. The question, then, recurs as to whether the deed will support the title which plaintiff alleges that he possesses. We have seen that it will not;

hence the motion for judgment on the pleadings was properly allowed.

Other questions are raised by the record, touching irregularities in the tax proceedings, sale, and deed, which it is claimed renders the tax title void; but, under the view we have taken, they all become immaterial, and for this reason we have refrained from discussing them. Affirmed.

**BRIDAL VEIL LUMBERING CO. v.
JOHNSON.**

(Supreme Court of Oregon. Nov. 9, 1896.)

EMINENT DOMAIN—PUBLIC USE.

A lumbering company, organized also for the construction of a railroad, which has constructed and has in operation a few miles of road for the use and benefit of the general public in carrying freight and passengers, may exercise the power of eminent domain for condemning right of way, though the road is built through a sparsely-settled country, without any towns or other railroad at its termini, and though the road has not been equipped with coaches, and no fare has been charged passengers.

Appeal from circuit court, Multnomah county; H. Hurley, Judge.

Condemnation proceedings by the Bridal Veil Lumbering Company against D. S. Johnson. There was a judgment for plaintiff, and defendant appeals. Affirmed.

This is an action to condemn a right of way for a railroad. The defense is that plaintiff was organized for the operation of a sawmill for the manufacture of lumber, and the proposed railroad is intended for its own private use and benefit in connection therewith, and not for the ordinary purposes of a railroad for the transportation of freight and passengers, and that therefore the use for which the land is required by the plaintiff corporation is not public, so as to justify the exercise in its behalf of the power of eminent domain. The cause was tried without the intervention of a jury, and on July 31, 1892, the court filed its findings of fact and conclusions of law, from which it appears that plaintiff was incorporated in 1880; that by its original and supplementary articles of incorporation one of its purposes is that of constructing and operating a railroad for the transportation of freight and passengers from Bridal Veil, Or., by way of the mill of the Bridal Veil Falls Lumbering Company to the center of section 1, township 2 S., of range 7 E. of the Willamette meridian, near the base of Mt. Hood, in the state of Oregon, both of its terminal points being in Multnomah county; that it was not organized for the sole purpose of operating a sawmill, or for supplying the mill with saw logs, or for constructing and maintaining a logging road thereto; that a portion of the railroad has already been constructed, and so operated and maintained that "the general public have had the use and benefit thereof,

for the transportation of freight and passengers, whenever freight was offered or passengers desired to ride"; and that, "so far as completed, it provides means of transportation useful and beneficial to the people living in the section of country in which it is built," and "gives to them and persons having business in that vicinity improved facilities for the transportation of freight not possessed before." From these findings the court concluded, as a matter of law, that the plaintiff was entitled to exercise the power of eminent domain. A short time after they were filed the defendant moved for additional findings of fact, and presented a series of proposed findings, some of which the court adopted. From these it appears that the northern terminus of that portion of plaintiff's road, as located and constructed, is at the sawmill referred to, about two miles from, and at an elevation of 1,300 feet above, the town of Bridal Veil; that no line or route of the proposed road has ever been surveyed, located, or constructed from Bridal Veil to the sawmill; that, as surveyed and constructed, it extends a distance of $5\frac{1}{2}$ miles, to lands owned by plaintiff; that the southeastern terminus of the route, as described in the articles of incorporation, is near the base of Mt. Hood, upon land owned by the government of the United States, and that there is not, at or near thereto, any town, city, or settlement, or other railroad; that the country along such route is rough, mountainous, covered with timber, and sparsely settled, and, except the town of Bridal Veil, there is at no place on the line or in its vicinity any town, city, or thickly-settled neighborhood; that the plaintiff has connected with its railroad no freight or passenger depots, no passenger coaches, and no freight cars, except that it has a number of trucks, on one of which there is a platform, covered in time of rain; and that plaintiff has never carried over its road any passengers for hire, but has always permitted any person who wished to ride on its trucks to do so without charge. Among the findings proposed by the defendant, but rejected by the court, is one to the effect that the principal purpose for which that portion of the road already constructed was built, and for which it is and has been used, is that of transporting saw logs from the lands of plaintiff to its mill. A judgment having been entered upon the findings in favor of plaintiff, the defendant appeals.

E. B. Watson, for appellant. L. L. McArthur, for respondent.

BEAN, J. (after stating the facts). There being no bill of exceptions in the record, the only question for our determination is whether the findings of fact support the judgment. The right of eminent domain is a right of sovereignty, and can be exercised only by legislative authority, and for a public use or benefit.

When, therefore, a particular corporation claims the right to take private property without the consent of the owner, it must show, not only a legislative warrant, but, if its right is challenged on that ground, it must be able to establish the fact that the enterprise in which it is engaged is one by which a public use or benefit is to be subserved or promoted, so that such taking can be said to be for a public, and not a private, use. The necessity or expediency of taking private property for public use, the instrumentalities through which it may be done, and the mode of procedure, are legislative, and not judicial, questions. But, whether the proposed use thereof is in fact public, so as to justify its taking without the consent of the owner, has always been a question for the courts to determine; and in doing so they are not confined to the description of the objects and purposes of the corporation as set forth in its articles of incorporation, but may resort to evidence allunde showing the actual business proposed to be conducted by it. *Lewis, Em. Dom. § 158; In re Niagara Falls & W. R. Co., 108 N. Y. 375, 15 N. E. 429; Railroad Co. v. Wiltse, 116 Ill. 449, 6 N. E. 49.* Now, in this case, from the findings of fact, it clearly appears that plaintiff is a corporation organized for the construction of a railroad for the transportation of freight and passengers, and therefore sections 3239, 3240, Hill's Ann. Laws, invests it with authority to exercise the power of eminent domain, if the use it intends to make of the property sought to be taken is in fact public. Bearing upon this question, the findings are that it has already constructed 5½ miles of road, and is now and has been operating the same, for the use and benefit of the general public, in carrying freight and passengers; and there is nothing in the record anywhere to indicate that the road has ever been used, or is intended to be used, for any other or different purpose, or that it was built or intended for a logging road, or has ever been used for that purpose, or, in fact, that it is in any way connected with or a part of the mill enterprise, or, indeed, except by inference, that it belongs to the mill company. We are therefore unable to say that the court was in error in holding that the railroad of plaintiff is public, so as to justify the exercise in its behalf of the power of eminent domain. The fact that it has not been fully completed between the termini indicated in its articles of incorporation, or that there is at present no town, city, or settlement, or other railroad, at its proposed southeastern terminus, or that its proposed route is through a rough, mountainous, and sparsely-settled country, or that the plaintiff has not yet fully equipped the road, or supplied itself with complete and perfect terminal facilities, or that it has not charged the passengers upon its railroad any fare, does not affect its right to exercise the power of eminent domain. The question of public use is not determined, as a matter of law, by any of these things, but by the fact that the proposed road is intended as a highway, for the use of the public, in the transportation of freight and pas-

sengers. And it can make no difference that its use may be limited by circumstances to a small part of the community. Its character is determined by the right of the public to use it, and not by the extent to which that right is exercised. *De Camp v. Railroad Co., 47 N. J. Law. 43; Phillips v. Watson, 63 Iowa, 28, 18 N. W. 659; Ross v. Davis, 97 Ind. 79.* If every one having occasion to use the road as a passenger, or for the transportation of freight, may do so, and of right may require the plaintiff to serve him in that respect, it is a public way, although the number actually exercising the right is very small. The findings of the court show that the enterprise in which plaintiff is engaged, and for which it requires the land in question, is of this character, and therefore we have no alternative but to affirm the judgment. In doing so, however, we do not desire to be understood as holding that a railroad constructed by a mill company for the evident purpose of transporting logs to its mill can become a public highway, so as to justify the exercise of the power of eminent domain in its behalf, because of any declaration in its articles of incorporation to that effect, or on account of any right of the public to use it for the transportation of freight and passengers. No such question is presented by this record. The findings of the court, by which we are bound, negative such an inference, and this decision is based upon the facts as found by the court below. The judgment must, therefore, be affirmed.

STATE ex rel. McCAIN v. METSCHAN,
State Treasurer.¹

(Supreme Court of Oregon. Nov. 9, 1896.)

PLEADING — DEMURRER — PARTIES — ACTION BY
STATE — CONSTITUTIONAL LAW — LOCATION
OF PUBLIC INSTITUTIONS.

1. Under Hill's Ann. Laws, § 68, providing that a demurrer shall be disregarded unless it distinctly specifies the grounds of objection, a demurrer for want of necessary parties must point out in some definite way those who should have been made parties, but were not, and a demurrer on the general ground that "there is a defect of parties plaintiff and defendant" is insufficient.

2. Where the determination of an action to enjoin the payment of a state warrant depends entirely on questions of law, the action will not be dismissed on appeal because it does not appear from the record whether or not the holder of the warrant is a party, the question not being presented by the pleadings.

3. An action may be maintained in the name of the state, on relation of a district attorney, to enjoin the payment of money from the state treasury on a warrant issued in pursuance of an act of the legislature which is claimed to be in violation of the state constitution.

4. The act of the legislature (Laws 1893, p. 136) authorizing the establishment and maintenance by the state of a branch insane asylum at some point in eastern Oregon is in violation of Const. art. 14, § 3, providing that "all public institutions of the state, hereafter provided for by the legislative assembly, shall be located at the seat of government."

5. An injury to the state by the payment of

¹ Rehearing pending.

money from its treasury under the provisions of said act will be conclusively presumed, and such payment enjoined.

Appeal from circuit court, Marion county; H. H. Hewitt, Judge.

Action by the state, on relation of James McCain, as district attorney for the Third judicial district, against Phil. Metschan, state treasurer. Judgment for plaintiff, and defendant appeals. Affirmed.

J. C. Moreland, for appellant. Henry D. Rayner, W. W. Thayer, H. J. Bigger, and S. L. Hayden, Dist. Atty., for respondent.

BEAN, J. This is a suit, commenced by the district attorney of the Third judicial district, in the name of and on behalf of the state, to enjoin the defendant, as state treasurer, from paying a \$25,000 state warrant, issued on account of the purchase of certain land in Union county for the site of an insane asylum, under an act of the legislature of 1893 (Laws 1893, p. 136), on the ground that the act in question is void, because in contravention of the provision of the constitution locating such institution at the seat of government. A demurrer to the information, for the reason that it does not state facts sufficient to constitute a cause of suit, and "that there is a defect of parties plaintiff and defendant," was overruled; and, defendant declining to plead further, a decree was entered as prayed for in the information, and hence this appeal.

In support of the demurrer it is contended that there is a defect of parties defendant, because the owner of the warrant, the payment of which is sought to be enjoined, is not a party to the suit. If this is true, and the objection had been properly taken, it would have been fatal. The rule undoubtedly is that the owner of a state or county warrant is a necessary party to a suit to enjoin its payment, and in some instances the courts, deeming him an indispensable party, refuse to proceed to a final determination of such a suit until he is brought in, although the parties to the record make no objection on that account, or even consent to proceed without him. *City of Anthony v. State*, 49 Kan. 246, 30 Pac. 488; *Bule v. Cunningham* (Tex. Civ. App.) 29 S. W. 801; *King v. Commissioners' Court* (Tex. Civ. App.) 30 S. W. 257; *State v. Anderson*, 5 Kan. 90; *Graham v. City of Minneapolis*, 40 Minn. 436, 42 N. W. 291; *Channel Co. v. Bruly*, 45 Tex. 6; *Board v. Railway Co.*, 46 Tex. 316. But in this case, while it is not apparent, from the face of the information, to whom the warrant was issued, or by whom it was owned at the time the suit was brought, the undertaking and order for a preliminary injunction and the decree appealed from all state that it was issued to the present defendant; so that the court would hardly be justified in holding that it affirmatively appears there is a defect of parties. But, however this may be, the demurrer itself is insufficient, both in form and substance, to raise the question. The statute provides that objections apparent upon the face of the complaint,

other than such as go to the jurisdiction of the court and that it does not state facts sufficient to constitute a cause of action or suit, are waived, unless taken by demurrer (Hill's Ann. Laws, § 71), and that a demurrer shall be disregarded unless it distinctly specifies the grounds of objection (Id. § 68). At common law a demurrer for want of necessary parties defendant was required to point out, either by name, or in some other definite way, from the facts stated in the bill, those who should have been, and who were not, made parties to the suit, so as to enable the plaintiff to obviate the objection by bringing them in (*Story, Eq. Pl. § 543; Dias v. Bouchaud*, 10 Paige, 445); and this rule has not been abrogated by the provisions of the Code (1 Rum. Prac. § 383; 1 Van Santv. Pl. 75; *Durham v. Bischof*, 47 Ind. 211; *Dewey v. State*, 91 Ind. 173; *Baker v. Hawkins*, 29 Wis. 576; *Kent v. Snyder*, 30 Cal. 666; *Irvine v. Wood*, 7 Colo. 477, 4 Pac. 783). Now, the language of the demurrer in this case is "that there is a defect of parties plaintiff and defendant," and this, as we have seen, is insufficient; so that the question is not raised by the demurrer, nor can the case be classed with those in which the courts have refused to proceed to the determination of a suit to enjoin the payment of a state or county warrant without the owner or holder thereof being a party to the suit. As already suggested, the record indicates that the warrant in question was issued to the defendant, and, if so, there is no defect of parties. *Dorothy v. Pierce*, 27 Or. 373, 41 Pac. 668. But, whether it was or not, the questions involved do not depend upon controverted facts for their solution, but are questions of law, which have been ably and exhaustively argued, and can be determined on this appeal without affecting the interests of the warrant holder, should he prove to be other than the defendant, except so far as the doctrine of stare decisis may apply to any future proceeding which may be instituted by him to enforce its payment. The demurrer for want of proper parties was, therefore, properly overruled; and if, by reason of the facts, the warrant holder should have been made a party to the suit, either on his own account or as a protection to the defendant, it should have been made apparent by answer, and, if necessary, the court could have stayed the proceedings until he could be brought in.

It is next contended that the information does not state facts sufficient to authorize a court of equity to interfere by injunction to restrain the payment of the warrant in question, for the reason that it does not appear that the state would be pecuniarily injured or damaged by the construction of an insane asylum in eastern Oregon, instead of at the seat of government. The question as to when and by whom a suit can be maintained to prevent the construction of public buildings at a place other than the seat of government has been before this court several times, and it has been held that a private individual cannot do so without showing some special in-

jury to himself (*Sherman v. Bellows*, 24 Or. 553, 34 Pac. 549), and that the same rule applies when a suit is instituted in the name of the state upon his relation (*State v. Pennoyer*, 26 Or. 205, 37 Pac. 906, and 41 Pac. 1104; *State v. Lord*, 28 Or. 498, 43 Pac. 471). But these cases are not in point in the present controversy. The one first referred to was a suit instituted by a private citizen in his individual capacity, without showing any special injury to himself; and the other was a proceeding against the board of commissioners of public buildings by a private citizen, who undertook to use the name of the state without authority, and was decided on the ground that it was not brought by nor against the proper parties. But this is a suit by the state in its sovereign capacity as the guardian of the rights of the people, instituted by its executive law officer, and can, in our opinion, be maintained without showing any special injury to the state. It is enough that the public funds are about to be applied in a manner prohibited by the constitution. At common law the attorney general of England could, by information in the name of the crown, call upon the courts of justice to prevent the misapplication of funds or property raised or held for public use, and, in the absence of statutory regulations, the district attorney in this state is vested with like powers. *State v. Douglas Co. R. Co.*, 10 Or. 198; *Dollar Sav. Bank v. U. S.*, 19 Wall. 239. Indeed, the right of the state, through its proper officer, to maintain such a proceeding, would seem to be one of the necessary incidents of sovereignty. Without it the rights of the citizen cannot be protected or enforced in cases where he is unable to act for himself. In a suit by an individual he is required to show some special injury to himself; and when, as in this case, the wrong complained of is public in its character, affecting no one citizen more than another, it is impossible for him to do so, and for that reason he is without remedy, although he may be injured in common with the other members of the community. In such cases the state has a right, by virtue of its high prerogative power, to call upon the courts, through its proper law officer, to protect the rights of its people. And to support a proceeding for that purpose it is sufficient that the grievance complained of is a threatened invasion of the right of the people to determine what disposition shall be made of the public funds exacted from them by the extraordinary power of taxation. Now, every use of such funds in violation of the provisions of the constitution or organic law must necessarily be of this character. The legislature is but an instrumentality appointed by the state to exercise a part of its sovereign powers. In that capacity it holds the public funds in trust for the people. Except as limited by the constitution, its action within its legitimate sphere is the action of the people; but, when it undertakes to apply such funds in a manner or at a place prohib-

ited by the organic law, it is not only exercising a power expressly withheld, but violating its trust, and a court of equity will interfere at the suit of the sovereign power to prevent or restrain such an application without being required to show any other injury. It is enough that the threatened disposition is in violation of the will of the people, as expressed in the supreme law of the land. There are some dicta in paragraph 7 of the opinion in the case of *State v. Lord*, 28 Or. 498, 43 Pac. 471, in which the writer thereof did not concur, apparently in conflict with this doctrine; but it was not necessary to a decision of the case, and, after more mature reflection, we are now all agreed that it was erroneous. It is based upon the false premises (1) that the location and construction of an asylum at some place other than the seat of government is not a misapplication of the public funds, unless it appears that the burden of taxation will be increased by so doing; and (2) that the location of such an institution is a legislative question. Manifestly, neither of these positions is sound. The expenditure of public money at a place prohibited by the constitution is a misapplication thereof, for the simple and very satisfactory reason that it is against the declared will of the people; and the location of a public institution, within the meaning of that term as used in the constitution, is not in any sense a legislative question, but has been determined by the people themselves. A sufficient injury, therefore, to enable the state in its sovereign capacity to call upon a court of equity for relief is shown whenever it is made to appear that public funds are about to be applied to a use, for a purpose, or at a place prohibited by the constitution. We conclude, therefore, that the court has jurisdiction, and the only remaining question is whether the act of the legislature authorizing the construction of an insane asylum in eastern Oregon is in violation of the provisions of the constitution.

By section 1, art. 14, of that instrument, it is provided that the legislature shall not have the power to establish a seat of government, but that such question shall be submitted to and determined by the people at the polls. And section 3 of the same article declares that, when the seat of government is so established, it shall "not be removed for the term of twenty years from the time of such establishment, nor in any other manner than as provided in the first section of this article: provided, that all the public institutions of the state, hereafter provided for by the legislative assembly, shall be located at the seat of government." Although the language of the section quoted is somewhat involved, the evident intention of the framers of the constitution, and of the people when they adopted it, was to declare that all the public institutions of the state thereafter provided for by the legislature should be located at the seat of government. It amounts to, and is, in effect, a constitutional location of such institutions,

and the only power vested in the legislature is to determine the necessity for and the amount of money to be used in their construction and maintenance. Any attempt by that body to expend the public revenue for the erection or maintenance of such an institution elsewhere is a mere nullity, and of no more force or validity than a legislative attempt to change the seat of government. All such institutions must be located at the place designated in the constitution, although it may now seem desirable to do otherwise, until the consent of the people is obtained in the form of a constitutional amendment. In their sovereign capacity the people have so provided, and no other power can alter or change their decree. That an insane asylum is a public institution of the state, within the meaning of the constitution, is too clear for argument. In view of the practical construction of that instrument by the legislative and executive departments for almost, if not quite, a quarter of a century, as evidenced by the erection of educational institutions away from the seat of government, it no doubt should now be construed so as to include only such institutions as are strictly governmental in their character. But an asylum for the insane comes clearly within this construction. When, therefore, the legislature assumed to authorize the expenditure of the public funds for the erection of such an institution in eastern Oregon, it attempted to exercise a power expressly withheld by the people, and an injury to the state will be conclusively presumed from a threatened application of the public funds to such a purpose. It follows that the decree of the court below must be affirmed, and it is so ordered.

COX v. ALEXANDER et al.¹

(Supreme Court of Oregon. Nov. 9, 1896.)

ALTERATION OF INSTRUMENTS—ACTION ON NOTE—JUDGMENT FOR ATTORNEY'S FEES—WHEN PROPER—APPEAL—ABSTRACT—WHO MAY APPEAL.

1. Where a negotiable note has a blank in it, preceded by the word "at," the payee or any bona fide holder may insert in the blank the name of a place, so as to make it payable at such place, without the authority of the maker.

2. In an action on a note providing for reasonable attorney's fees, in which defendant raises an issue as to the reasonableness of the amount claimed, and the jury fail to include in the verdict any allowance of attorney's fees, it will be presumed that they refused to allow any sum as such, and the court cannot render judgment for such fees.

3. In an action on a note signed by a firm composed of two persons and by one of the partners, against the individual partners, where the court properly renders a judgment against each and all of them, under Hill's Ann. Laws, §§ 60, 245, one of such defendants may appeal from the judgment against him, under section 536, which provides that any party to a suit, against whom a final judgment has been rendered, other than a judgment by confession or default, may appeal therefrom.

4. In an action on a note, defendant pleaded a "further and separate defense," and the only question involving the pleadings was as to such

part of the answer, to which there was no reply. A motion by defendant for judgment on the pleadings was denied, and such ruling was sought to be reviewed on appeal. *Held*, that the abstract, which stated the general nature of the pleadings, and contained a copy of the separate defense, complied with Sup. Ct. Rule 4 (37 Pac. vi.), which makes it incumbent on appellant to serve a printed copy of so much of the transcript as may be necessary to a full understanding of the questions presented.

Appeal from circuit court, Multnomah county; E. D. Shattuck, Judge.

Action by Norris R. Cox against Robert Alexander and others on a promissory note. From a judgment in favor of plaintiff, defendant Alexander appeals. Reversed.

This is an action by Norris R. Cox against Robert Alexander, John Robertson, and G. W. Wallace to recover on a promissory note alleged to have been executed by the defendants to one Thomas O'Day, and by the latter assigned to plaintiff. The answer, after denying the material allegations of the complaint, which is in the usual form, alleges: That Robertson and Wallace entered into negotiations with G. Kutschan, S. Walker, and D. Ogilvie for the purchase of 10,500 shares of mining stock, agreeing to pay therefor \$3,150, to be evidenced by the defendants' promissory note, provided Alexander would ratify and confirm such purchase, and also agreed to give a writing in the form of a promissory note, with the understanding that it should not be considered as the note of the defendants until it was ratified, confirmed, and executed by Alexander. That, in pursuance of such agreement, Robertson and Wallace delivered to the persons with whom such agreement was made the following written instrument: "\$3,150. Portland, Or., April 18, 1893. Ninety days after date, without grace, we, or either of us, jointly and severally promise to pay to the order of — three thousand one hundred and fifty dollars, for value received, with interest after date at the rate of eight per cent. per annum until paid, principal and interest payable in U. S. gold coin at —; and in case suit or action is instituted to collect this note, or any portion thereof, we or I promise to pay such additional sum as the court may adjudge reasonable as attorney's fees in said suit or action. [Signed] Robertson & Alexander. John Robertson. G. W. Wallace." That Alexander refused to ratify or confirm the purchase, or to execute or deliver said note, and the persons with whom said contract was made failed to deliver the stock, and the said negotiations were terminated. That subsequently, without authority or consideration therefor, the persons to whom said writing had been delivered caused it to be perfected in the form of a promissory note, and indorsed to plaintiff for collection, who brought this action thereon. "And, for a further and separate defense to plaintiff's complaint, defendants allege that there never was any value or consideration passed from Thomas

¹ Rehearing pending.

O'Day, or any one, to these defendants for said note, and the same came into the hands of said O'Day wholly without consideration, and the plaintiff, at the time the same was indorsed and transferred to him, had notice and knowledge that the same was wholly without consideration." The reply having put in issue the allegations of new matter contained in the answer, except the separate defense above quoted, a trial was had, resulting in a verdict for the amount due on the note only; and upon the issue of attorney's fee the court found that \$250 was a reasonable sum therefor, and gave judgment on the verdict, and also for such attorney's fee, from which the defendant Alexander appeals.

J. M. Bower, for appellant. Thos. O'Day and L. H. Tarpley, for respondent.

MOORE, C. J. (after stating the facts). The plaintiff's counsel moves to dismiss the appeal, contending that the note upon which the action is founded, having been signed by the firm of Robertson & Alexander, was a joint obligation, upon which the court rendered a joint judgment, and, this being so, there is such a unity of interest between the members of said firm as to bar an appeal by Alexander alone. It appears from the complaint that the defendants John Robertson and Robert Alexander are co-partners doing business under the firm name of Robertson & Alexander, and that the note in question is a joint and several obligation; and, all the defendants having appeared in the action, the court, observing the provisions of the statute, very properly rendered judgment against each and all of them. Hill's Ann. Laws, §§ 60, 245. Section 536 provides that any party to an action or suit, against whom a final judgment or decree has been rendered, other than a judgment or decree given by confession or for want of an answer, may appeal therefrom; and Mr. Black, in his work on Judgments (volume 1, § 237), in speaking of the validity of judgments rendered against partners, some of whom had not been served with process, says, "In those states, however, where the 'joint debtors acts' are in force, if not all the partners are served with process, still a judgment may be rendered against the firm, to be enforced against the partnership property and the individual property of the partners served." In *Simpson v. Prather*, 5 Or. 86, it is held that a judgment against one party only, jointly and severally bound with others, was strictly in accordance with the terms fixed by such party in the written instrument which was the foundation of the action. To the same effect, see, also, *Sears v. McGrew*, 10 Or. 48; *Hamm v. Basche*, 22 Or. 513, 30 Pac. 501. In *Estis v. Trabue*, 128 U. S. 225, 9 Sup. Ct. 59, Mr. Justice Blatchford, in commenting upon a writ of error taken out in the name of a firm as plaintiffs in error, without indicating in such writ the individuals composing the firm, says, "It is well settled that this court cannot take jurisdiction of a writ of

error which describes the parties by the name of a firm, or which designates some of the parties by the expression of '& Co.,' or the expression 'and others,' or any other way than by their individual names." The individual name of the appellant having been stated in the pleadings, and the judgment being several, the record discloses that the appeal was perfected by one having a substantial interest in the controversy, which will be affected by the judgment on appeal; and, having filed a transcript of the cause, this court has jurisdiction thereof.

As another ground for the dismissal of the appeal, plaintiff's counsel maintains that the printed abstract does not comply with the rules of this court, in that it does not affirmatively show on its face that the trial court committed any error. Rule 4 (37 Pac. vi.) makes it incumbent upon the appellant to serve upon the attorney for each respondent a printed copy of so much of the transcript as may be necessary to a full understanding of the question presented for decision. The abstract so served states the general nature and substance of the pleadings, and contains a copy of the further and separate defense to the complaint; but, because copies of the entire pleadings are not embraced therein, it is insisted that the appellant has not complied with said rule. The plaintiff having failed to reply to the further and separate defense, the defendants moved for a judgment on the pleadings, which being denied, the action of the court in such ruling is sought to be reviewed. The only question involving the pleadings is as to that part of the answer to which there was no reply, a copy of which is set out in the abstract, and from this it is apparent that the appellant has furnished so much of the record in that respect as is necessary to a full understanding of the pleadings. The motion to dismiss the appeal must therefore be overruled.

2. The jury having failed to include in their verdict any allowance for the attorney's fees provided for by the terms of the note, counsel for the appellant contends that the court had no authority to make a finding upon the issue thereon, and erred in rendering a judgment for such fees. It is settled in this state that where the parties have provided, in a promissory note, for the payment of a reasonable amount as attorney's fees, such promise may be enforced in an action on the obligation. *Kimball v. Mohr*, 15 Or. 427, 15 Pac. 669; *Bradtfeldt v. Cooke*, 27 Or. 194, 40 Pac. 1. An issue having been joined upon the question of the reasonableness of the attorney's fee demanded, the parties were entitled to a trial of that issue; but, the jury having returned a verdict for the amount due on the note only, it must be presumed that they refused to allow any sum as attorney's fees. Hill's Ann. Laws, § 776, subd. 18. It may be conceded that the judge was better qualified than the jury to pass upon this particular issue, and this might be said, with a good deal of truth, in other cases. But it must be re-

membered that the right of trial by jury is dear to the American people, and, having been guarantied by the organic law of the state (Const. Or. art. 1, § 17), the court was without power to render a special verdict on any of the issues submitted to the jury. *Fiore v. Ladd* (Or.) 46 Pac. 144. In consequence of the error of the court in this respect, the judgment must be reversed; but, as there is another question, which goes to the cause of action, a consideration of it is deemed important. The promissory note in question, having been offered in evidence, revealed the fact that the blanks alleged to have been left therein at the time it was signed were filled by inserting the name of "Thomas O'Day" in the first, and "office of Thomas O'Day" in the second. The court, instructing the jury upon the right of the holder of a promissory note to fill such blanks, said: "In this case the promissory note sued upon, on its face, appears to be a binding instrument. Something has been said, however, about the instrument having been made with blanks in it. When it was signed the name 'O'Day' was blank, and the place of payment was blank. Such a transaction makes no difference in the validity of the instrument, if it is delivered for a consideration. The party receiving it may put his name into the blank; he may put the name of some person to whom he transfers it; and it is then a valid instrument, and may be enforced against the parties, if there is no objection. The same may be said in reference to the place of payment, providing the blanks are filled up by some person having an interest in the instrument." The defendants excepted to that portion of the instruction which relates to the right of the holder of a promissory note, after the delivery thereof, to insert in a blank reserved for that purpose a place of payment; and their counsel contends that the insertion of the words, "the office of Thomas O'Day, Portland," was a material alteration of the instrument. It is a principle of universal application that any material alteration made in a promissory note after its execution or indorsement, by one claiming under it, without the consent of the maker and indorser, discharges the previous parties to the instrument. *Woodworth v. Bank*, 19 Johns. 391; *Nazro v. Fuller*, 24 Wend. 374; *Ruby v. Talbott* (N. M.) 21 Pac. 72. But, where a promissory note is issued with a blank for the payee's name, a bona fide holder thereof may, within a reasonable time, fill the blank by inserting his name therein, and thus give certainty to one of the essential requisites of such instruments. *Thompson v. Rathbun*, 18 Or. 202, 22 Pac. 837. The authority of the holder of a promissory note to supply the omissions therein, and insert his name as payee thereof, rests upon the doctrine of agency. The maker of a note, by omitting to name the payee therein, impliedly invites a bona fide holder thereof to supply the omission and give certainty to the

contract; and this implied power renders a bona fide holder the agent of the maker, and confers upon such agent authority to supply any omissions in the instrument that are not inconsistent with the terms of the contract. In *Angle v. Insurance Co.*, 92 U. S. 330, Mr. Justice Clifford, in commenting upon this subject, says: "Persons dealing with an agent are entitled to the same protection as if dealing with the principal, to the extent that the agent acts within the scope of his authority. Pursuant to that rule, it is settled law that where a party to a negotiable instrument intrusts it to another for use as such, with blanks not filled up, such instrument, so delivered, carries on its face an implied authority to complete the same by filling up the blanks; but the authority implied from the existence of the blanks would not authorize the person intrusted with the instrument to vary or alter the material terms of the instrument by erasing what is written or printed as a part of the same, nor to pervert the scope and meaning of the same by filling the blanks with stipulations repugnant to what was plainly and clearly expressed in the instrument before it was so delivered." In *Kitchen v. Place*, 41 Barb. 465, it is held that the holder of a promissory note had implied authority to insert the words "Importers' and Traders' Bank" in a blank which was left in the note between the word "at" and the words "value received," all of which were in the printed part of the note. *Leonard, J.*, in deciding the cause, says: "The word 'at' implied that the blank space which succeeded it might be filled before the note should be delivered, with a designated place of payment. Had that word been erased, the same would have been complete without filling the blank. With this isolated word, the note was imperfect in its purport until the space was filled or the word erased." In *Redlich v. Doll*, 54 N. Y. 234, the holder of a promissory note inserted between the words "at" and "value received" the words "The Bull's Head Bank of New York," and negotiated it. In an action brought by the indorsee against the maker, it was claimed that this was such a material and unauthorized alteration of the instrument as to defeat the right of recovery; but it was held that the word "at," preceding a blank in the note, carried upon its face an implied authority for any bona fide holder thereof to insert a place of payment. To the same effect, see, also, *McGrath v. Clark*, 56 N. Y. 34; *Fullerton v. Sturges*, 4 Ohio St. 529; *Emmons v. Meeker*, 55 Ind. 321. It will be observed from an examination of the note in question that the word "at" therein preceded a blank in the instrument, and, this being so, any bona fide holder thereof had implied authority to insert a place of payment, and hence there was no error in the instruction complained of. But in consequence of the error hereinbefore referred to the judgment is reversed, and a new trial ordered.

STATE v. POMEROY.

(Supreme Court of Oregon. Nov. 9, 1896.)

CRIMINAL LAW—APPEAL—DISCRETION OF TRIAL COURT—CHANGE OF VENUE—LOCAL PREJUDICE—RECEIVING STOLEN GOODS—EVIDENCE—DEFENSES—INSTRUCTIONS.

1. Under Hill's Ann. Laws, § 1222, authorizing the court to order the place of trial to be changed when it appears by affidavit that a fair and impartial trial cannot be had, the granting of such order rests in the sound discretion of the court.

2. Affidavits were filed, in behalf of one charged with receiving stolen goods, showing that defendant's sons had previously been convicted of petit larceny, that there had subsequently been a great number of similar crimes committed in the county, that many people publicly asserted that these thefts were committed by some member of defendant's family, that the feeling became so strong that people talked of lynching defendant, and that people generally had formed and expressed the opinion that defendant was guilty of the crime charged. Counter affidavits were filed showing that there were large sections of the county where defendant was scarcely known, and the incidents of the crime but little talked of, and that many people in the county had never heard of the crime. *Held*, that there was no obvious abuse of discretion in refusing a change of venue, it not appearing that any difficulty was had in obtaining an unbiased jury.

3. In a prosecution for receiving and concealing stolen goods, there was evidence that defendant's son and one H. stole the property, and were traced to defendant's house with a team; that, when the officers arrived, defendant was on a ladder leading to an open gable of the barn; that he came down, denied all knowledge as to who drove the strange rig there, and then got a gun, and ordered the officer and his companions from the premises; that, just then, two men ran from behind the barn, one of whom was H.; that after a while defendant went to the barn and was heard working in the straw near where the stolen goods were immediately afterwards found by the officer. *Held*, that the question of defendant's concealment of the goods and his knowledge that they were stolen was for the jury.

4. On a prosecution for receiving and concealing stolen goods, the fact that defendant secreted and harbored the thieves, so as to aid them to escape arrest, thereby rendering himself amenable as an accessory to the larceny, is no defense, if he also received and concealed the property, knowing it to be stolen.

5. The instruction that the jury have no right to reject the testimony of the wife and daughter of the accused simply because it came from a source in which there would be strong motives to give the "most favorable coloring possible" to the facts on behalf of the accused, is prejudicial error, as an expression of opinion on the motives of the witnesses.

Appeal from circuit court, Washington county; T. A. McBride, Judge.

Calvin Pomeroy was convicted of receiving and concealing stolen goods, and appeals. Reversed.

Thos. H. Tongue, for appellant. C. M. Idleman, Atty. Gen., and W. N. Barrett, Dist. Atty., for the State.

WOLVERTON, J. The defendant was indicted and convicted in Washington county on a charge of buying, receiving, concealing, and attempting to conceal stolen property. The errors assigned are: First, the denial of

the motion for a change of venue; second, the refusal of the court to instruct the jury that there had not been sufficient evidence produced to sustain a conviction, and to direct them to return a verdict of not guilty; and, third, the giving and refusing to give certain other instructions. Of these in their order.

The motion for a change of venue is based upon the affidavits of the defendant and his counsel, which show, in substance, that, at different times prior to the commission of the alleged offense charged in the indictment, three sons of the defendant had been convicted of petit larceny committed within the county; that, subsequent to such convictions, there had been a great number of similar crimes committed therein; that a great many people, without any knowledge on the subject or touching the identity of the offenders, did not hesitate to publicly assert that they were committed by some member of the defendant's family, and that the defendant himself was guilty of such things, without the slightest evidence upon which to base the assertion; that it had been charged that one of the sons of defendant was concerned in the theft of the goods which defendant is accused of concealing; that in consequence thereof the feeling in the county became so strong that in different parts thereof the people talked quite freely of lynching the defendant, and in some places expressed a determination to do so; that fictitious, false, and exaggerated reports of the manner of defendant's arrest, and of his conduct and demeanor prior thereto, had been persistently and extensively circulated throughout the county; that such things had been talked of in Hillsboro, and, as the informants believe, among the jurors; that by reason thereof a widespread and deep-seated public prejudice sprang up against the defendant and his family, to such an extent that it is believed a majority of the people of the county who have heard of the matter, without any knowledge of the facts, have formed an opinion, and many of them have expressed it, to the effect that the defendant is guilty of the crime charged; and that by reason of all these facts and circumstances the defendant could not expect a fair and impartial trial within the county. Counter affidavits were filed by the state, showing, in effect, that the crime of which the defendant is charged was committed in the western part of the county; that, while there had been some discussion of the alleged crime, in and around Greenville, West Union, and Forest Grove, yet there are large sections of the county where the defendant and his family are scarcely known, and the incidents surrounding the commission of the crime but little talked of, if at all; and that many people in the county have never heard of the alleged crime with which defendant is charged. Upon the showing thus made, the motion was overruled. It is

usually regarded that such a motion lies largely, if not exclusively, within the sound discretion of the trial court, the exercise of which is judicial in its nature, and is subject to review only when abused to the prejudice of the applicant, and that fact is in some way made to appear. 3 Am. & Eng. Enc. Law, 108. Our statute (Hill's Ann. Laws Or. § 1222) provides that "the court may order the place of trial to be changed * * * when it appears by affidavit, to the satisfaction of the court, that a fair and impartial trial cannot be had," etc. Under similar statutes it has been held that the exercise of the power granted by this section is within the sound discretion of the trial court. *State v. O'Rourke*, 55 Mo. 440-446; *State v. Sayers*, 58 Mo. 587. In *State v. Whitton*, 68 Mo. 91, upon a question of alleged prejudice, the finding of the trial court was held to be conclusive. In *State v. Guy*, 69 Mo. 432, the court says: "The finding of the circuit court on that issue [question of prejudice] is conclusive, and not to be interfered with by this court, unless it appear that palpable injustice has been done." Again, the same court, in *State v. Burgess*, 78 Mo. 235, say: "The trial of the issue made on a petition for a change of venue is by the court, and, unless manifest error occur on the trial of that issue, to the prejudice of the accused, we cannot interfere with the finding of the court. There was evidence to sustain the finding." In *State v. Brownfield*, 83 Mo. 451, the court, in passing upon facts very similar to those suggested by the case at bar, say: "In this state of the evidence we cannot say that the court, in overruling the application of defendant, abused its discretion; and it is only when it appears that such discretion has been palpably abused that we can interfere, under the ruling of this court." See, also, *State v. Hill*, 72 N. C. 352; *Watson v. Whitney*, 23 Cal. 375; *Hyde v. Harkness*, 1 Idaho, 601; *State v. Hunt*, 91 Mo. 490, 3 S. W. 858; *People v. Yoakum*, 53 Cal. 566; *People v. Perdue*, 49 Cal. 425; *People v. Mahoney*, 18 Cal. 180. In the case at bar it does not appear that any difficulty whatever was experienced in obtaining an unbiased jury, a circumstance which leads to the conclusion that the accused suffered, by the refusal to grant the motion, no injustice; so that it is not obvious that there was an abuse of its discretion by the trial court, and its action in that respect will not be disturbed.

The evidence adduced at the trial tended strongly to show that John Pomeroy, a son of the defendant, and one John Holcomb stole the goods, which defendant is charged with concealing, from the store of Briggs Bros., in the town of Dille, Washington county, on the night of March 21st, or the morning of the 22d, 1895; that on the morning of the 23d, these parties took the goods to the defendant's barn, where they were found about noon of the same day, covered with straw. The thieves

were traced to this locality by the track of a horse and buckboard, supposed to be the property of one Lousignont. The horse was found in the barn, and the buckboard under a shed close at hand. E. B. Sappington, a constable, one of the persons instrumental in the apprehension of the accused, being called as a witness for the state, testified as follows: "I took a track of the vehicle that came out of the gate (at Lousignont's) and tracked it as far as Mr. Pomeroy's field or pasture, or a gate that goes into his pasture, in sight of his house. I didn't go any further then, but went back to Greenville." After stating that he procured the assistance of Joseph and Andrew Vaughn, the witness continues: "We went down on the track to the gate, and tracked the vehicle inside, and, just as we got inside, Joe called my attention to a man coming down from the barn on a ladder. Then we rode as fast as possible. We had probably two hundred yards to go to get across a ravine to the barn, and, when we got there, I got down, and opened the gate, and there was a man standing right on the inside,—Mr. Pomeroy [the defendant]. He went on the inside of the house, and I heard Joe Vaughn ask him who drove that rig in there, and he said he didn't know, * * * and he went on towards the house, and I caught up with him, and told him we were hunting for Holcomb, and asked him if he was there, and he said he didn't know whether he was or not, and it was none of our business. He went inside the house, and came out with a shotgun, and told us not to come in, he had enough of that kind of foolishness around there, and for us to get out of there. Just then Andrew Vaughn, who had gotten off the road, come across hallooing to us, and I turned around, and saw two men running from behind the barn across the field going west." The witness recognized one of them as Holcomb. After relating his experience in giving chase to the fugitives, he continues: "I took up my watch between the barn and the house. After a while Mr. Pomeroy came out, and said he would go and fix his barn,—something, I don't know what. He went on the inside, and I kept on the outside. I got as close to the barn as I could, and I heard him go around to that corner [in proximity to the goods], and work in the straw. Of course, I couldn't see. He would work there a little while, and he would come out with a board, and throw it down, and go back in again. He made several trips, and I could hear him in this straw. I heard the straw moving, and him going in there; and after awhile he came out and said he would have to go to Greenville." After the accused left the witness went into the barn and found the goods. Among them were a hat and two overcoats belonging to John Pomeroy and John Holcomb. Joseph Vaughn gave testimony of a like nature, except he describes the accused, when they first saw him, as being well up to the top of the ladder in an open gable of the barn; that he turned around, and looked over his shoulder towards them, and

came tearing down. H. P. Ford, the sheriff, who had come up while the accused was at Greenville, testified: "When he returned home, I asked him whose horse and wagon that was, and he disclaimed any knowledge of knowing whose it was,—said he didn't know. I asked him who had been there, and he said there hadn't been any one there. I asked him directly if his son John and John Holcomb had not been there, and he said they had not that he knew of. I told him there was quite a quantity of goods stored out there, and it seemed to me very strange a horse and wagon would be there, and he didn't know whose it was, nor who brought it there. Well, he said, it might seem strange, but he didn't; he didn't know a thing about it; there hadn't been a soul on the place that he knew of during that night,—that is, excepting his own family." Eugene C. Hughes testified to a conversation he had with the accused about the time he started to Greenville, as follows: "I asked him, then, if John Holcomb wasn't there that night, and he said, if he was, he didn't know it, and I said, 'Was your son John there?' and he said, 'No, I haven't seen him for three months.'" The defendant, in explanation of his presence upon the ladder when first seen, gave evidence tending to show that he was up there for the purpose of readjusting some of the rafters, which had been displaced by the wind the night before, and was coming down when seen by Sappington and Vaughn. In this he was corroborated by his daughter, who, as they testified, assisted him in replacing and securing the rafters. The boards which he carried out, he explained, were taken in and used by him in getting the rafters in place. The defendant and his wife and daughter all testified that John Pomeroy and John Holcomb came there in the morning about 6 o'clock and wanted breakfast; that the accused objected to their being there, but that the wife gave them their breakfast, and they left the house about 7. While they were at breakfast, the accused and his daughter were engaged in milking some cows at the barn. John Pomeroy's wife was stopping with defendant's family at the time. John himself and Holcomb were fugitives from justice, and defendant had heard that officers had been watching his house and premises before for the purpose of apprehending them. He denied all knowledge of the goods prior to the time that he was informed of their discovery by the officers.

Among other instructions asked for, the defendant's counsel requested the court to give the following, viz.: "There has been no sufficient evidence to sustain a conviction of guilt as charged in the indictment, and I therefore instruct you to render a verdict of not guilty." All the evidence produced on the trial is here in the bill of exceptions, and we are asked to pass upon it, and say whether it is sufficient to warrant a conviction of the crime charged. It is strenuously insisted that the state has not shown that the accused had any knowledge whatever of the presence of the goods in his

barn, and, further, that the evidence is too meager and unreliable from which to determine that he either received or concealed or attempted to conceal them. Knowledge that the goods were stolen and concealment, or an attempt to conceal them, are essential elements that go to constitute the crime with which the defendant is charged; and the rule seems to be that, where there is some evidence pertinent to go to the jury upon the issue, it becomes a question of fact for them to determine, and it is not permissible for the court to invade the province of the jury in respect thereto. As put by Black, J., in *State v. Glahn*, 97 Mo. 689, 11 S. W. 262: "In the disposition of the question whether the trial court should have directed a verdict for the defendant, it is to be remembered that it is not our province to try the case on its facts. * * * It is sufficient for our purposes to determine what inferences may be drawn from the evidence. It is, of course, the duty of the trial court to say whether there is any evidence entitling the state to go to the jury, and the ruling upon the question is open to review here. The rule, even in criminal cases, is that, before this court will relieve on the ground that the verdict is not supported by the evidence, there must be either a total failure of evidence, or it must be so weak that the necessary inference is that the verdict is the result of passion, prejudice, or partiality." This language is approved in a later case (*State v. Howell*, 100 Mo. 659, 14 S. W. 4) after an exhaustive review of the evidence. In *State v. Kearney*, 21 Or. 504, 28 Pac. 623, Strahan, J., says: "At the conclusion of the state's evidence, the defendant might have asked the court to direct the jury to acquit him if there were no evidence whatever implicating him in the commission of the crime charged." In *State v. Jones*, 18 Or. 260, 22 Pac. 842, the same learned judge says: "Where the state proves enough to require the defendant to produce evidence in his own behalf, such a direction would be improper. As soon as enough is shown to require the defendant to enter upon his defense, and to introduce evidence, it is the province of the jury to weigh the evidence, and to pass upon the credibility of the witnesses. A direction to acquit in such a case would be an invasion of the province of the jury, and could not be sustained." As bearing upon this question, see, also, *State v. Clements*, 15 Or. 237, 14 Pac. 410; *State v. Daly* 16 Or. 240, 18 Pac. 357; *Smith v. State*, 63 Ga. 90; *State v. Glover*, 10 Nev. 24; *Com. v. Cunningham*, 104 Mass. 545. The evidence adduced touching defendant's knowledge of the goods, and their character as stolen property, and his participation in their concealment, is wholly circumstantial. With it there is interwoven much that is damaging to the accused, so much so that it was deemed prudent and advisable to introduce proofs in explanation of his acts and demeanor, and of the motives which induced them. We think there was evidence sufficient to go to the jury, and hence it became their exclusive province to determine its effect re-

specting his guilt or innocence. Much has been said regarding the inference to be drawn from the fact of finding recently stolen property in the possession of the accused. The inference is one of fact, and not of law, from which the jury may, in connection with all the attending circumstances, determine the guilt or innocence of the accused. It never rises to the dignity of a conclusive presumption of guilt, and is strong or weak according to the character of the property, the nature of the possession, and its proximity in time with the theft. *State v. Hale*, 12 Or. 353, 7 Pac. 523; *State v. Hodge*, 50 N. H. 510; *State v. Graves*, 72 N. C. 482; *State v. Walker*, 41 Iowa, 218; *Yates v. State*, 37 Tex. 202; *People v. Noregea*, 48 Cal. 123. The simple finding of the goods in the barn of defendant, to which it was shown other persons had access, was but slight evidence that they were even in his possession; but the question whether or not he ever had possession, or received or concealed them, or assisted in their concealment, was properly submitted to the jury under appropriate instructions.

The court was requested to give the following instructions, and its refusal to give them in *haec verba* is assigned as error: "If the jury is satisfied that whatever the defendant did at the time and on the day that the goods were discovered was done for the purpose of aiding John Pomeroy and John Holcomb to escape from arrest, and the jury are satisfied that at the time the said John Holcomb and John Pomeroy had committed the crime of larceny in stealing the goods charged in the indictment, and that the defendant knew that said goods had been stolen by John Pomeroy and John Holcomb, then the defendant would be guilty of being accessory to the crime of larceny, and it would be your duty to acquit him." "If the jury has a reasonable doubt whether the defendant, upon the occasion described in the indictment, was endeavoring to shield the persons who had committed the larceny, and assist in their escape, or whether he was engaged in buying, receiving, or concealing, or attempting to conceal, stolen property, then in that case, also, it would be your duty to give the defendant the benefit of the doubt, and acquit him." "The state cannot split one transaction, and make out of it more than one crime. The defendant could not at the same time be guilty of receiving stolen goods and an accessory after the fact to the crime of larceny by aiding those who had committed the crime." The crime of receiving, concealing, or attempting to conceal stolen property is made a substantive offense by the statute (*Hill's Ann. Laws Or.* § 1774), and the defendant was on trial charged with such offense. He may have been guilty at the same time of aiding in the escape of John Pomeroy and John Holcomb, thus rendering himself amenable as an accessory to the crime of larceny; but, if he has done those things which are essential to the crime charged, there seems to be no good reason why one should bar a pros-

ecution for the other. The doctrine of carrying can have no application here, as that can only be made available under a plea of former conviction or acquittal. The court quite fully, and very correctly and explicitly, covered the subject by the following instruction: "The defendant cannot be convicted on this indictment for secreting or harboring John Pomeroy and John Holcomb. If Holcomb and Pomeroy were charged with a crime in Multnomah county, and the defendant, inspired by a desire to aid them to escape arrest, received them and concealed them, with intent to aid them to escape from such arrest, or if you have a reasonable doubt as to whether his conduct was done for that purpose only, he cannot be convicted; but if, with a guilty knowledge that the goods described in the indictment had been stolen, he secreted them with a view of preventing the officers of the law from finding them, and thereby detecting and arresting Holcomb and Pomeroy, the fact that he also desired their escape from arrest on the Multnomah county charge would not be a defense." So the court was not in error in refusing to entertain the charge as requested.

Another instruction is as follows: "Every witness is presumed to speak the truth, but this presumption may be overcome by evidence; and you have a right, in considering the testimony of every witness, to consider the manner in which he testifies upon the stand,—to consider his motives and his relationship to the case. In this case the defendant and members of his family have given testimony. You have no right to reject the testimony they have given, simply because it comes from a source in which there would be strong motives to give the most favorable coloring possible to the facts on behalf of the defendant; but you have a right to consider, and you should consider, that testimony the same as you would other testimony, taking into the account the relationship of the parties and the motives which may induce them to testify. That is to say, in estimating the value of the defendant's testimony, you have a right to consider what he has at stake in this case, the gravity of the charge against him, and the motives which might induce him to misrepresent or speak falsely in regard to it; and you have a right to consider the motives of the other members of the family, and, after considering these, not only in their own intrinsic light, but in the light of all the testimony in the case, give such testimony the value you consider, under all the circumstances of the case, it is entitled to in coming to a final conclusion." Objection is urged to this instruction as tending to discredit the testimony of the wife and daughter of the defendant by giving undue prominence to the motives which might induce them to color their testimony with a view to his exculpation, and we think it is well taken. The jury were told, in effect, that the wife and daughter had strong motives for giving the most

favorable coloring possible in behalf of the accused to the facts which they were called to delineate. The vice of this instruction consists in the fact that it is an expression of an opinion by the trial court touching the motives of these witnesses. The jury might have inferred from the language employed that the court not only believed that these witnesses had motives for coloring their testimony, but that such motives were strong for the most favorable coloring possible. The expression in part runs in the superlative, and could hardly have escaped their attention. Motive is a thing itself to be proven, or such facts established from which it may be inferred, and, when disclosed by the testimony, its nature and degree is a fact to be determined; so, also, is the probability that the witness has indulged it to the impairment of the oath which he has taken to tell the truth, the whole truth, and nothing but the truth. The statute provides that "every witness is presumed to speak the truth." But the presumption may be overcome. How? "By evidence * * * affecting his character or motives." Hill's Ann. Laws Or. § 683. So the jury must determine whether a motive exists, its nature, and whether or not the testimony of the witness has been colored or warped by it. It all goes to the credibility of the witness, of which they are the exclusive judges. See *Com. v. Barry*, 9 Allen, 276. Mr. Thompson, in his work on Trials (2 Thomp. Trials, § 2421) says: "It is a rule, applicable alike in civil and criminal cases, that it is error for the judge, directly or inferentially, to express an opinion to the jury, or in their hearing, as to the credibility of a particular witness, or as to the weight which they should attach to his testimony." As supporting this rule, see *McMinn v. Whelan*, 27 Cal. 300; *Rice v. State*, 3 Tex. App. 451; *People v. Christensen* (Cal.) 24 Pac. 888; *State v. Brown*, 76 N. C. 222; and *Com. v. Barry*, supra. For error of the court below in this particular, its judgment is reversed, and a new trial ordered.

STATE v. GRAY. (No. 1,480.)

(Supreme Court of Nevada. Nov. 20, 1896.)

BURGLARY—SUFFICIENCY OF EVIDENCE.

In a case in which defendant was charged with burglary, committed June 4th by entering a barn in the nighttime and stealing therefrom a saddle, a verdict of guilty was not supported by evidence as to the time the saddle was taken that it was in the barn at 6 o'clock in the evening and was gone at 7 o'clock in the morning, under a statute defining the "nighttime" as the period between sunset and sunrise.

Appeal from district court, Washoe county; A. E. Cheney, Judge.

Austin Gray and one McIntire were convicted of burglary, and Gray appeals. Reversed.

Curler & Curler, for appellant. F. H. Norcross, Dist. Atty., and Robt. M. Beatty, Atty. Gen., for the State.

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BIGELOW, C. J. The defendant was convicted, with one McIntire, of the crime of burglary, alleged to have been committed June 4, 1896, by entering a barn, in the nighttime, in the town of Reno, and stealing therefrom a saddle. One ground of the appeal is that the evidence is insufficient to justify the verdict. In our opinion, this point is well taken. Burglary is the entering of a building in the nighttime, with or without force, for the purpose of committing certain crimes therein. "Nighttime" is defined by the statute as the period between sunset and sunrise. One of the essential elements of the crime of burglary is that the felonious entry must have been in the nighttime, as above defined. The evidence showed: That the saddle in question was in the owner's barn at 6 o'clock in the evening, and that at 7 o'clock in the morning it was gone. The door of the barn was left open during the night. That one Miss Moe lived in the same block in which the barn was situated, but the defendants lived in another part of the town. That, early on the morning of June 5th,—but how early does not appear,—these three people left the town, starting from Miss Moe's house. The next day the officers overtook them on a road running from a place called the "Cedars," about 12 miles from Reno, to the town of Reno, traveling towards Reno, and found this saddle in the possession of the defendant Gray. When asked where he got it, he said it belonged to McIntire; that, the day before, McIntire had traded a little bay mare for it. McIntire spoke up, and said that the day before a Spaniard, whom he did not know, had met them near the Cedars, and bantered them for a trade, and he had traded his mare for the Spaniard's horse and saddle,—that being the saddle in question. Upon the part of the defense it was shown that, in company with Miss Moe, they left town, as has been stated, somewhere about 6 o'clock in the morning, for the Cedars, where they were going for several purposes; that during the day McIntire traded for the saddle, as they told the officers. They stayed at the cabin at the Cedars overnight, and started for Reno the next morning, Gray having changed saddles with McIntire for the purpose of trying the new saddle.

It is a well-settled rule of law that the possession of stolen property alone is not sufficient to justify a conviction for the larceny of that property. *State v. Jones*, 19 Nev. 366, 11 Pac. 317; *State v. I. En*, 10 Nev. 277. Personal property passes so easily from hand to hand that it was found that reliance upon such evidence alone was too liable to result in the conviction of innocent men, for it to be depended upon. Generally, however, this evidence does not stand alone. There are other circumstances usually surrounding the case, having more or less tendency to connect the possessor with the theft, if he be guilty; and, where such evidence is given, it is generally held sufficient to support the verdict. Wheth-

er such circumstances exist here or not, we need not determine. The defendant was convicted of burglary, and, admitting that the evidence was sufficient to support the conclusion that the defendants entered the barn and stole the saddle therefrom, there was absolutely nothing to prove that it was done in the nighttime, and nothing from which that fact could be inferred. We may suspect quite strongly that it was, but suspicions, however strong, are not sufficient to convict men of crimes. There must be evidence of every essential element of the crime, and it must be of sufficient weight to convince an impartial jury beyond reasonable doubt. It is evidence of the crime itself that is missing here. It is impossible to say that a burglary was committed by anybody, and, as already stated, if we were to admit that it was proven that the defendants took the saddle, it is quite as possible that they took it after arriving at Miss Moe's house, after sunrise, as before. We know that in June 6 o'clock in the evening is some time before sundown, and 7 o'clock in the morning is several hours after sunrise, and there is nothing to show that it was not taken during either period, instead of between them. In *State v. Watkins*, 11 Nev. 30, it was shown that certain articles which were in a room at 9 o'clock at night were missing in the morning; that it was impossible for any one to have taken them without entering the room; and they were found in defendant's possession between 12 and 1 o'clock that night. To the objection that the evidence did not establish the burglary, the court said: "It was necessary to show that the entry was effected in the nighttime, and proof that defendant had in his possession, outside of the house, between twelve and one o'clock, goods which were in the house at nine o'clock, and which could only have been obtained by entering the house, was proof of an entry in the nighttime, and, taken in connection with the other proof, completely established the *corpus delicti*." That case illustrates what would be sufficient proof upon this point, and, by contrast, tends to show the weakness of the evidence in this case. Judgment reversed and cause remanded.

BONNIFIELD and BELKNAP, JJ., concur.

STATE v. ZICHFELD. (No. 1479.)
(Supreme Court of Nevada. Nov. 19, 1896.)
MARRIAGE—VALIDITY—BIGAMY—EVIDENCE—CRIMINAL LAW—INTENT.

1. Act Nov. 28, 1861 (Gen. St. c. 4) § 1, provides that a marriage is a civil contract, to which the consent of parties capable in law of contracting is essential. The act contains provisions requiring a license, directing how and by whom marriages may be celebrated, and prescribing other regulations, but contains no express clause making void marriages contracted by mutual consent, *per verba de presenti*, except a prior license is obtained or solemnization had in accordance with its provisions. *Held*, that such statutes did not make void a com-

mon-law marriage by contract *per verba de presenti*.

2. Where a statute forbids the doing of a certain thing, and is silent concerning the intent with which it is done, a person who does the forbidden act is not guiltless because he has no wrongful intent beyond that which is involved in the doing of the prohibited act. *State v. Gardner*, 5 Nev. 377, overruled.

3. Gen. St. c. 22, § 127, provides that bigamy consists of having two wives or two husbands at the same time, knowing that the former husband or wife is still alive, and that nothing contained in the section shall extend to any person or persons whose husband or wife shall have been continually absent from such person or persons for five years prior to the second marriage, and he or she not knowing such husband or wife to be living within that time, or to any divorced person, or to any person where the former marriage has been declared void. *Held* that, in a prosecution for bigamy, evidence was not admissible to show that defendant, by his second marriage, had no criminal intent, he believing that the first marriage had been annulled by agreement between him and his wife.

Appeal from district court, Washoe county: A. B. Cheney, Judge.

C. H. Zichfeld was convicted of bigamy, and appeals. Affirmed.

Curier & Curier, for appellant. F. H. Norcross, Dist. Atty., and Robt. M. Beatty, Atty. Gen., for the State.

BONNIFIELD, J. The appellant was convicted in the district court of the Second judicial district in and for Washoe county of the crime of bigamy, and appeals from the judgment of the court and an order denying his motion for new trial. The following facts are not disputed: In the year 1893, in said county, the appellant was married to Sophia Koser, by written contract, without the services of any of the persons authorized by the statute to join persons in marriage, or to solemnize marriages. Subsequently, and in 1896, the parties separated by mutual consent, and the appellant, while he was so married to Sophia Koser, and knowing that said Sophia was still alive, was formally married to Lauretta Bosford, by J. J. Linn, a justice of the peace of Washoe county.

There is no contention as to the sufficiency of said first marriage to constitute a valid marriage at the common law; but counsel for appellant contend that our statute concerning marriages has superseded the common law, and that all marriages not entered into in conformity to the provisions of the statute are null and void. It is well settled that under the common law the marriage relation may be formed by words of present assent (*per verba de presenti*), and without the interposition of any person lawfully authorized to solemnize marriages, or to join persons in marriage. The first act passed by our territorial legislature was an act entitled "An act adopting the common law." At the same session of the legislature, it passed the act relating to marriages, of which the following is section 1: "That marriage so far as its validity in law is concerned, is a civil contract to which the consent of the parties capable in law of con-

tracting, is essential."¹ Although this act contains provisions requiring a license, directing how and by whom marriages may be celebrated, or by whom persons may be joined in marriage, and prescribing other regulations in reference thereto, the statute contains no express clause of nullity, making void marriages contracted by mutual consent *per verba de presenti*, except a prior license is obtained, or solemnization had, in accordance with its provisions.

Authorities: The supreme court of the United States in *Meister v. Moore*, 98 U. S. 76 (opinion by Justice Strong), in construing the Michigan statute, which is substantially the same as ours, said: "It [the instruction] certainly withdrew from the consideration of the jury all evidence, if any there was, of informal marriage by contract *per verba de presenti*. That such a contract constitutes a valid marriage at common law there can be no doubt, in view of the adjudications made in this country from the earliest settlement to the present day. Marriage is everywhere regarded as a civil contract. Statutes in many states, it is true, regulate the mode of entering into the contract, but they do not confer the right. Hence they are not within the principle that where a statute creates a right, and provides a remedy for its enforcement, the remedy is exclusive. No doubt, a statute may take away a common-law right; but there is always a presumption that the legislature has no such intention, unless it be plainly expressed. A statute may declare that no marriages shall be valid unless they are solemnized in a prescribed manner, but such an enactment is a very different thing from a law requiring all marriages to be entered into in the presence of a magistrate or a clergyman, or that it be preceded by license, or publication of bans, or attested by witnesses. Such formal provisions may be construed as merely directory, instead of being treated as destructive of a common-law right to form the marriage by words of present assent. And such, we think, has been the rule generally adopted in construing statutes regulating marriage. Whatever directions they may give respecting its formation or solemnization, courts have usually held a marriage good at common law to be good notwithstanding the statutes, unless they contain express words of nullity. * * * In many of the states, enactments exist very similar to the Michigan statute, but their object has manifestly been, not to declare what shall be requisite to the validity of a marriage, but to provide a legitimate mode of solemnizing it. They speak of the celebration of its right, rather than of its validity, and they address themselves principally to the functionaries they authorize to perform the ceremony. In most cases the leading purpose is to secure a registration of marriage, and evidence by which marriages may be proved; for example, by certificate of a clergyman or magistrate, or

by exemplification of the registry. In a small number of the states, it must be admitted, such statutes have been construed as denying validity to marriages not formed according to the statutory directions. * * * As before stated, the statutes are held merely directory, because marriage is a thing of common-law right, because it is the policy of the state to encourage it, and because, as has sometimes been said, any other construction would compel holding illegitimate the offspring of many parents conscious of no violation of law. The Michigan statute differs in no essential particular from those of other states which have generally been so construed. It does not declare marriages void which have not been entered into in the presence of a minister or magistrate. It does not deny validity to marriages which are good at common law. The most that can be said of it is that it contains implications of an intention that all marriages, except some particularly mentioned, should be celebrated in the manner prescribed. * * * The sixth section declares how they may be solemnized. The seventh describes what shall be required of justices of the peace and ministers of the gospel before they shall solemnize any marriage. The eighth section declares that in every case (that is, whenever any marriage shall be solemnized in the manner described in the act) there shall be at least two witnesses present besides the minister or magistrate. The ninth, tenth, eleventh, sixteenth, and seventeenth sections provide for certificates, registers, and exemplifications of records of marriage solemnized by magistrates and ministers. The twelfth and thirteenth impose penalties upon justices and ministers joining persons in marriage contrary to the provisions of the act, and upon persons joining others in marriage, knowing that they are not lawfully authorized so to do. The fourteenth and fifteenth sections are those upon which most reliance is placed in support of the charge of the circuit court. The former declares that no marriage solemnized before any person professing to be a justice of the peace or minister of the gospel shall be deemed or adjudged to be void on account of any want of jurisdiction or authority in such minister or justice, provided the marriage be consummated with full belief on the part of the persons so married, or either of them, that they have been lawfully joined in marriage. This, it is argued, raises an implication that marriages not in the presence of a minister or justice, or one professing to be such, were intended to be void. But the implication is not necessarily so broad. It is satisfied if it reach not beyond marriages in the mode allowed by the act of the legislature. The fifteenth section exempts people called 'Quakers' or 'Friends' from the operation of the act. * * * As to them the act gives no directions. From this, also, an inference is attempted to be drawn that lawful marriages of all other persons must be in the mode directed or allowed [by the statute.] We

¹ Act Nov. 23, 1861; Gen. St. c. 4.

think the inference is not a necessary one. Both these sections (the fourteenth and the fifteenth) are to be found in the acts of other states, in which it has been decided that the statutes do not make invalid common-law marriages." We think that in the above opinion by Justice Strong a clear and proper construction of the statute is given.

Bishop says: "It was well observed by Lord Stowell that in a state of nature no forms need be added to an agreement of present marriage, to render it complete. In the opinion of the Scotch people, and of the people of a part of our states, marriage, emphatically a thing of nature, is properly regulated by the law of nature. But in England, in other of our states, and largely in Continental Europe, civilization has undertaken to refine and improve nature's law, by denying marriage except under specified forms and ceremonies. The consequence of which is that shrewd rakes entrap single girls into nature's marriage; then, at their whim or exalted pleasure, cast them off, and leave a family of children under the disabilities and disgrace of bastardy." 1 Blash. Mar., Div. & Sep. §§ 385, 386. Bishop, after an extended review of the authorities on the subject which he cites, restates the doctrine recognized by the courts of nearly all the states having statutes similar to ours, as follows: "Any required, formal solemnization of marriage is an impediment to entering into it. Therefore, since marriage is favored in law, statutory provisions establishing forms are to be strictly interpreted, not being encouraged by the courts. In the absence of any statute or local usage controlling the question, only the consent treated of in our last two chapters is indispensable to the constitution of marriage; and legislation commanding formalities, even punishing those who celebrate marriage contrary to its provisions, or punishing the parties themselves, will not render a marriage had in disregard of it void, unless the statute expressly, or by necessary implication, declares this consequence. But it is otherwise of a statute which authorizes the intermarriage of persons before incompetent, for in this case there is no common law to fall back upon. And such parties must strictly conform to the legislative direction, to render their marriage valid. In the ordinary case, wherein the common law may be relied on except as excluded by the statute, only the particular things which the statute declares to be nullifying if omitted need be observed; all the rest being directory, and noncompliance immaterial." Id. § 449.

In an elaborate review of the authorities, and an exhaustive discussion of the question now under consideration, the supreme court of Missouri, in *Dyer v. Brannock*, 66 Mo. 391, held that a marriage by contract, without solemnization before a minister of the gospel or an officer of the law, was valid, the statute concerning marriages containing no positive declarations that a marriage not so solemnized shall be void. Numerous other authorities might be cited to the same effect as the above, but we deem it unnecessary.

In *Fitzpatrick v. Fitzpatrick*, 6 Nev. 63, this court has construed section 2 of our statute, and the reasoning of the court is applicable to the construction of all the sections relied on by counsel for appellant, and by the authorities holding that the statute nullifies common-law marriages. In that case the plaintiff brought suit to have her marriage declared annulled on the ground that she was under age, and the consent of her parent or guardian had not first been obtained. Section 2 provides that "male persons of the age of eighteen years and female persons of the age of sixteen years * * * may be joined in marriage, provided always, that male persons under the age of twenty-one years and female persons under the age of eighteen years shall first obtain the consent of their fathers" or mothers or guardians, respectively, "and provided further, that nothing in this act shall be construed so as to make the issue of any marriage illegitimate, if the person or persons shall not be of lawful age." The plaintiff's counsel contended that "the plaintiff, by reason of want of age, was incapable of contracting a valid marriage, except with the consent of her parent or guardian." He argued: "The statute provides that marriage by females under the age of eighteen shall be contracted only with the consent of their parents or guardian, and a penalty is imposed on the county clerk who shall issue a license for the marriage of such minor without such consent. * * * Besides, the statute of Nevada is peculiar, in providing that nothing in it shall be construed to make the issue of any marriage illegitimate if the persons shall not be of lawful age. Evidently the legislature intended by this act that all marriages entered into, except as provided in said act, should be void. If this was not their intention, then that portion of the act which provides against bastardizing the issue of such marriage is mere surplusage and without meaning, for the reason that it would be the merest folly to provide by statute that issue of a valid marriage shall not be illegitimate." The court held, however, that: "That proviso did not indicate any such intent as claimed by counsel, as it only relates to issue of persons not of lawful age; that is, eighteen and sixteen years in males and females, respectively. * * * That by the common law, and the statute law of this state, marriage is held to be a civil contract. To render the contract valid, the parties must be able and willing to contract. At common law the age of capacity to make the contract of marriage was fixed at fourteen years for males, and twelve years for females. * * * Marriage before such age is voidable at the election of either party, on arriving at the age of consent, if either of the parties be under age when the contract is made. 2 Kent, Comm. 94. The statute of this state does not alter the common law, save by substituting the ages therein named for the common-law ages, and it has been generally, if not universally, held, in construing similar statutes, that, in the absence of any provision declaring marriage made in violation of the statutory proviso void, it was a binding and valid contract, upon the theory that persons of the consenting

or lawful age, voluntarily entering into a contract, should be held thereto, precisely as they would be held to any other lawful contract voluntarily assumed at the legal age, or upon majority." It will be observed that the court held, in effect, that in the absence of any provision of the statute declaring the marriage of a minor, without the consent of parent or guardian, void, the marriage was valid, notwithstanding the explicit requirements of the statute that such consent shall first be obtained. Our statute does not expressly, nor by necessary implication, as we view it, render a marriage had in disregard of its prescribed formalities void. We are to presume that the legislature knew that marriages by contract are valid at common law; that they have thus been entered into from time immemorial, and are liable to continue to be so contracted. And if the legislature intended to prohibit such marriages and render them void, and thus entail upon parties conscious of no wrongdoing, and their children, such evil consequences as must necessarily result therefrom, it would have expressed such intent in such terms as need no construction, and about which even laymen could have no doubt, and would thus have given due notice to all of the invalidity of informal marriages entered into simply by contract. It seems to us clearly that the legislature, by the terms used in the first section of the marriage act, intended to specifically recognize the common law in respect to marriages. It therein declared "that marriage, so far as its validity in law is concerned, is a civil contract to which the consent of the parties capable in law of contracting is essential." If the legislature had intended that compliance with any of the provisions of the succeeding section should also be essential to its validity in law, we are of opinion that it would have so expressed itself, and not left the definition of a valid marriage in law "a civil contract to which the consent of the parties capable in law of contracting is essential." We are of opinion that the subsequent sections were enacted for the purposes named above in the opinion delivered by Justice Strong, and for the additional purpose of accommodating the views of those who do not believe in marriages by contract simply, and would not be satisfied with entering into the marriage relation except by some mode prescribed by the statute, and for the purpose of giving to the forms and ceremonies in practice among many classes statutory recognition. While any form or ceremony the parties interested may choose is recognized by the statute, no particular form is required. The elements essential to a common-law marriage are required,—a contract *per verba de presenti*. In the language of the statute, the parties "shall declare that they take each other as husband and wife,"—not necessarily by word of mouth, but in some manner to declare such assent. From the great preponderating weight of authority and reason, we are of opinion that all other provisions of the statute are directory, so far as the validity of the marriage is concerned, and that a marriage by contract between parties competent to enter into that relation with each other

is valid under our statute. We therefore hold that the said marriage of the appellant to Sophia Koser is valid.

Errors assigned: On the 14th day of September, 1895, about three weeks before the alleged second marriage of the defendant, he and his first wife, Sophia, entered into a written agreement between themselves in settlement of their property rights, and agreed to then and there separate, and further agreed in terms as follows: "The parties hereto, each with the other, covenant and agree to sever their marital relations, and by these presents do sever their marital relations." Counsel for defendant offered to introduce this agreement in evidence, to which the district attorney objected on the ground that it was incompetent, irrelevant, and immaterial. The court sustained the objection. This ruling is assigned as error. Counsel argues, in substance, under the authority of *State v. Gardner*, 5 Nev. 377, that the agreement was proper evidence to go to the jury, as tending to show that there was no criminal intent on the part of the defendant in entering into the second marriage, he believing that the agreement had annulled the first marriage.

Criminal intent: The rule adopted by the majority of the court in the said *Gardner* Case, to the effect that where a statute forbids the doing of a certain thing, and is silent concerning the intent with which it is done, a person commits no offense, in law, though he does the forbidden thing, within all the words of the statute, if he had no evil or wrongful intent beyond that which is involved in the doing of the prohibited act, is disapproved, and the decision to that effect is hereby overruled. We recognize the well-settled rule that, where a specific intent is required by statute to constitute the crime, such specific intent enters into the nature of the act itself, and must be alleged and proved beyond a reasonable doubt. The statute under which the defendant was indicted, tried, and convicted provides: "Bigamy consists in the having of two wives or two husbands at one and the same time, knowing that the former husband or wife is still alive. If any person or persons within this state being married, or who shall hereafter marry, do at any time marry any person or persons, the former husband or wife being alive, the person so offending shall be punished * * *. Nothing herein contained shall extend to any person or persons whose husband or wife shall have been continually absent from such person or persons for the space of five years prior to the said second marriage, and he or she not knowing such husband or wife to be living within that time. Also, nothing herein contained shall extend to any person that is or shall be, at the time of such marriage divorced by lawful authority from the bonds of such former marriage, or to any person where the former marriage hath been by lawful authority declared void." * There

* Gen. St. c. 22, § 127.

is no intent involved in this case, except the doing of the thing forbidden to be done by the statute. "Whatever one voluntarily does, he, of course, intends to do. If the statute has made it criminal to do any act under peculiar circumstances, the party voluntarily doing that act is chargeable with the criminal intent of doing it." *Com. v. Mash*, 7 Metc. (Mass.) 472. "There was the intent to marry a second time, not knowing the husband to be dead, and who had been absent for about one year only, and this is the criminal intent which is of the essence of the offense." *Jones v. State*, 67 Ala. 84. "Upon indictment for selling intoxicating liquor to a minor without authority from his parents or guardian, it does not matter that the defendant did not know that such person was a minor. He is bound to know whether such person is a minor or not." *Farmer v. People*, 77 Ill. 322. A statute of North Carolina authorized the sheriff to issue a license to sell liquor by retail only, on an order of the board of commissioners, upon application of the person seeking the license, and made it a criminal offense to retail liquor without a license. On the 1st day of January, 1883, the board, upon application of Voight, ordered the license to issue, and on the same day revoked the order. Notwithstanding this revocation, the sheriff afterwards, and on the last day of said January, issued the license, Voight knowing when he received the license that the order for its issuance had been revoked. Voight was prosecuted criminally for retailing liquor without a license. The trial court charged the jury "that if the jury were fully satisfied that the license was issued after the 1st of January, 1883, and defendant knew it was subsequent to the revoking order, and thereafter sold liquor as charged, * * * they should convict notwithstanding, at the time of the act, he had possession of the license." The supreme court approved the instruction, and said: " * * * Nor is it a defense to a criminal accusation that the defendant did not intend to violate or evade the law, or supposed he had a right to sell, when he intended to do, and did do, the criminal and forbidden act. The criminal intent is inseparably involved in the intent to do the act which the law pronounces criminal." *State v. Voight*, 99 N. C. 741. The provisions of a statute in Massachusetts are as follows: "Whoever falsely makes * * * any certificate of nomination or nomination paper, or any part thereof, or files any certificate of nomination or nomination paper knowing the same or any part thereof to be falsely made * * * shall be punished," etc. Connelly was convicted under this statute—First, for falsely making nomination papers; second, for filing the same. On appeal the supreme judicial court held: "No fraudulent intent is necessary to constitute the offense. It is immaterial that the defendant did not intend to break the law. It is enough that he did the things made offenses by the statute." *Com. v. Connelly* (Mass.) 40 N. E. 862. We cite the following additional

authorities on the question of intent, which are in line with the ones given above: *Walls v. State*, 7 Blackf. 572; *The Brig Ann*, 1 Gall. 62, Fed. Cas. No. 397; *Reg. v. Woodrow*, 15 Mees. & W. 404; *Myers v. State*, 1 Conn. 502; *State v. Goodenow*, 65 Me. 30; *State v. Whitcomb*, 52 Iowa, 85, 2 N. W. 970; *Hood v. State*, 56 Ind. 263; *Davis v. Com.*, 13 Bush. 318; *Whart. Cr. Ev.* (8th Ed.) § 725, and cases there cited.

We therefore hold that the court did not err in excluding said agreement of the appellant and Sophia Ziehfeld. This opinion disposes of all the alleged errors, and, finding no error of the court in the record, the judgment and order appealed from are affirmed.

BIGELOW, C. J., and BELKNAP, J., concur.

In re STEWART'S ESTATE.
(Supreme Court of Montana. Nov. 16, 1896.)
ADMINISTRATORS—SURVIVING WIFE—MINORITY—
NOMINATION—COMPETENCY.

1. Under Comp. St. 1887, p. 289, § 55, which provides that letters of administration on the estate of a person dying intestate must be issued to "the surviving husband or wife, or some competent person whom he or she may request to have appointed," a surviving wife may nominate a competent person for administration of her deceased husband's estate, though she herself is disqualified by her minority.

2. Comp. St. 1887, p. 290, § 58, which provides that, if the person entitled to letters of administration is a minor, letters must issue to his or her guardian, or any other person entitled, in the discretion of the court, does not apply to a surviving husband or wife under the age of majority, yet old enough to lawfully contract the marriage relation.

Appeal from district court, Missoula county; F. H. Woody, Judge.

In the matter of the estate of John P. Stewart, deceased, his surviving wife, a minor, petitioned that John M. Keith be appointed administrator. From an order denying the petition and his application for appointment, Keith appeals. Reversed.

John P. Stewart died, intestate, in Missoula county, on March 24, 1895. He left an estate valued at about \$15,000. There survived him his wife, aged 16 years, and one minor child. On March 30, 1895, the public administrator petitioned for letters of administration. On April 4th, thereafter, John M. Keith, the appellant herein, filed a protest against the right of the public administrator to letters, based upon the ground that the decedent left a widow, Mary Stewart, residing in Missoula county, who, in writing, had especially named and requested that the said Keith be granted letters of administration. Regular application for letters was made by Keith. Upon April 1st, Mrs. Stewart filed a written consent and request that Keith be appointed administrator of the estate of her deceased husband; and she expressly waived her right as his wife to qualify, in favor of said John M. Keith. The court overruled the

objections of Keith, and denied his petition for letters, and ordered that letters of administration should issue to W. B. Brooks, the public administrator. Keith duly excepted, and appeals to this court from the judgment and order rejecting his petition for appointment, and allowing the petition of Brooks, and from the order appointing Brooks administrator of the estate.

Marshall & Corbett, for appellant.

HUNT, J. (after stating the facts). The point for decision is this: Which has a better legal right to administer the estate of the deceased,—Brooks, as public administrator, or Keith, in whose favor the widow relinquished any rights she may have had?

The sections of the probate practice act (Comp. St. 1887, p. 289) applicable to the controversy are as follows:

"Sec. 55. Letters of administration on the estate of a person dying intestate must be granted to some one or more of the persons herein-after mentioned, who are respectively entitled thereto, in the following order: First. The surviving husband or wife, or some competent person whom he or she may request to have appointed. Second. The children. Third. The father and mother. Fourth. The brothers. Fifth. The sisters. Sixth. The grandchildren. Seventh. The next of kin entitled to share in distribution of the estate. Eighth. The public administrator. Ninth. The creditors. Tenth. Any person legally competent. If the decedent was a member of a co-partnership at the time of his death, the surviving partner must in no instance be appointed administrator of the estate. And provided, further, that no person who is not a resident of this state shall be appointed administrator," etc.

"Sec. 59. No person is competent to serve as administrator or administratrix who, when appointed, is: First. Under the age of majority. Second. Convicted of an infamous crime. Third. Adjudged by the court to be incompetent to execute the duties of the trust by reason of drunkenness, improvidence, or want of understanding or integrity."

The respondent's contention must be that, where the widow is a minor, she is necessarily incompetent to serve herself, and that, inasmuch as she is incompetent to serve herself, she is also incompetent to name some competent person whom she may request to have appointed. But we do not think this contention can be sustained. The first right to administer is granted to the surviving husband or wife; yet it might often happen that such survivor would be, by nonresidence or other disqualification, incompetent to serve. But the statute, as if made especially to cover such a contingency, gives to the surviving husband or wife the right to name some competent person who can serve. This right of the surviving husband or wife to nominate is not made dependent upon the competency to serve of the person occupying such relationship. It is a right of nomination given by virtue of the fact

that the person who exercises it stands in the relationship of surviving husband or wife. It is independent of the competency of such husband or wife himself or herself to serve. The person named for appointment by such surviving husband or wife must be legally qualified, as required by section 59, above quoted. But we must not lose sight of the distinction between the right to name the one who shall serve, and the competency of the person who does serve, for the distinction makes the case simple.

A question analogous to this arose in *Estate of Cotter*, 54 Cal. 215, where statutes like the provisions of the Montana Code were construed. In that case the wife was a nonresident. She requested that letters be granted to one Thomas Crane, a competent person. The public administrator objected, and claimed he had a right to administer the estate. The court held that the statutes prevented any one from serving who was a nonresident of the state, and the wife, being a nonresident, could not serve, but that, although she could not act as administratrix, yet the law did not deprive her of the right to name some one who could act, provided, always, the person suggested by her was competent to serve. The court in that case said: "The statute does not make the right of the surviving husband or wife to nominate depend upon the matter of residence, and there would be no reason in such requirement. There may be, and doubtless are, however, very good reasons for the provision which declares that no person shall serve as administrator or administratrix who is not a bona fide resident of the state; but this inhibition, and the reasons for it, only go to the right of the nonresident surviving husband or wife to serve in that capacity, and do not abridge or conflict with the right expressly conferred by section 1365 upon the 'competent person whom he or she may request to have appointed.'" A like construction of the statutes of California was adopted in *Estate of Stevenson*, 72 Cal. 164, 13 Pac. 404. Both of these decisions were expressly affirmed in *Estate of Dorris*, 93 Cal. 611, 29 Pac. 244. In the latter case the court recognize the policy of the law that the surviving husband or wife shall have administrative control, if desired, and that, therefore, such survivor, or his or her nominee, if competent and fit, has an absolute right. *Estate of Bedell*, 97 Cal. 339, 32 Pac. 323.

There was a statute of Montana (Prob. Prac. Act, § 58; Comp. St. 1887, p. 290) which provided that, if the person entitled to letters is a minor, letters must issue to his guardian, or any other person entitled to letters of administration, in the discretion of the court. But we think that statute applies to minors generally rather than to a surviving husband or wife under the age of majority, yet old enough to lawfully contract the marital relation. As to minors sustaining such marital relationship, the statute giving the right to nominate is special and controls. The order of the district court is reversed, and the cause remanded, with di-

rections to deny the application of Brooks for letters of administration, and to grant the petition of appellant, Keith, for letters, if he is a competent person. Reversed.

PEMBERTON, C. J., concurs. DE WITT, J., not sitting.

LARGEY v. CHAPMAN et al.

(Supreme Court of Montana. Nov. 9, 1896.)

CHattel Mortgage—Waiver—Construction of Statutes.

1. Under Code Civ. Proc. 1887, § 358, declaring that there shall be but one action for the recovery of any debt secured by mortgage, "which action shall be in accordance with the provisions of this chapter," to wit, chapter 1, tit. 10, relating solely to the foreclosure of mortgages, a creditor cannot waive his chattel-mortgage security, sue on the debt, and attach his debtor's property, but must bring suit to foreclose.

2. By adopting a statute of another state, the legislature adopts the construction placed thereon by the courts of such state.

Appeal from district court, Silver Bow county; J. J. McHatton, Judge.

Action by P. A. Largey against J. W. Chapman and another. A motion to dismiss the action was granted after the pleadings were filed, and plaintiff appeals. Affirmed.

F. T. McBride and J. W. Cotter, for appellant. C. R. Leonard and J. T. Baldwin, for respondents.

DE WITT, J. After the filing of the complaint, answer, and replication, the defendants moved to dismiss the action. This motion was granted, and judgment entered in favor of defendants. This action of the court was, in effect, giving judgment upon the pleadings. The action was commenced against the defendants, John Astle and J. W. Chapman. The complaint stated that plaintiff had signed two notes with the defendants, and that he (plaintiff) was in fact only surety for the defendants, and as such had been obliged to pay the notes. He sought in this action to recover the money so paid. Without reciting the pleadings at any length, we are satisfied to say that defendant Astle's answer sufficiently set forth that the indebtedness of defendants to plaintiff was secured by a chattel mortgage, which had never been foreclosed. This is not denied. Plaintiff's contention is that, notwithstanding the debt was secured by a chattel mortgage, he could bring the present action upon the debt, and procure an attachment against the property of defendant Astle, as he did, without bringing any action to foreclose the chattel mortgage. Respondents rely upon the provisions of Code Civ. Proc. 1887, § 358, which provides as follows: "There shall be but one action for the recovery of any debt, or the enforcement of any rights, secured by mortgage upon real estate or personal property, which action shall be in accordance with the provisions of this chapter." The chapter, to wit, chapter

1, tit. 10, in which this section is found, relates solely to actions for foreclosure of mortgages. Respondents contend that under these provisions the plaintiff could not sue or attach without bringing an action to foreclose. The district court adopted this view, and in this, we think, was correct. We are of opinion that the plaintiff cannot, by simply suing on the debt and attaching the property, and, in the course of such proceedings, making an affidavit that his debt is not secured by mortgage, lien, or pledge upon real or personal property, thus waive the mortgage, and consider it as naught. Our statute is the same as that of California, and was evidently taken from that state. The supreme court of California, in *Barbieri v. Ramelli*, 84 Cal. 154, 23 Pac. 1086, says: "It is contended here on the part of the defendants (appellants) that the action cannot be maintained, for the reason that it is prohibited by section 726 of the Code of Civil Procedure. That section, so far as it bears on this case, reads as follows: 'There can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real estate or personal property.' We are of opinion that the point is well taken. The statute is imperative. The word 'secured,' in the section, does not mean that the security shall be adequate, or that, in case prior liens upon it would exhaust the money derived from the land conveyed as security on a sale of it, that then the plaintiff is relieved from bringing the action to foreclose. The proper construction of the language of the statute is that if the mortgage, on its face, purports to be a security to the plaintiff, then he must bring his action for foreclosure. This word has reference only to the purport of the mortgage as it appears on its face. The interpretation of it is not proper when its meaning is sought in something outside of the mortgage instrument. The plaintiff is not authorized to waive the security and bring an action on the indebtedness, and the court erred in so holding, as it did, in effect, and rendering judgment for plaintiff." See, also, *Biddel v. Brizzolara*, 64 Cal. 362, 30 Pac. 609; *Porter v. Muller*, 65 Cal. 512, 4 Pac. 531; *Brown v. Willis*, 67 Cal. 236, 7 Pac. 682; *Porter v. Brooks*, 35 Cal. 190.

The plaintiff relies for his right to waive the mortgage upon several cases which he cites in his brief. We have examined these cases, and we find that they are decided without regard to a statute such as ours and that of California. In the states whence plaintiff's cases come, it is not provided directly by statute that there shall be but one action for the recovery of a debt secured by mortgage, which action shall be by foreclosure of the mortgage. We notice, however, in his list of cases, that of *Ould v. Stoddard*, 54 Cal. 613. But the facts in that case were exceptional, and do not disturb the doctrines held by the California court in the other cases. In that case the mortgagee had gone to the state of Ohio, and sued upon the debt, and obtained a judgment. The court held that he could not afterwards maintain an action for

foreclosure in the state of California. There is in the case language in support of the view of the plaintiff in this case. But even then the later cases in 64, 65, 67, and 84 Cal., and 4, 7, 23, and 30 Pac., which we have cited, sustain the ruling of the court below in the case at bar. We find the following in Shinn, Attachm. § 24: "The policy of the law, in most states, is that a creditor holding a security by way of 'mortgage, lien, or pledge upon real or personal property' shall not resort to the summary process of attachment until he has exhausted his security. Consequently, if a creditor have such lien for his demand, he cannot have attachment." On the other hand, we find the following remarks in Drake, Attachm. § 35: "The right of a creditor to sue his debtor by attachment is not impaired by his holding collateral security for the debt. The supreme court of Massachusetts once held that a creditor who had received personal property in pledge for the payment of a debt could not attach other property for that debt, without first returning the pledge, but this position was afterwards repeatedly overruled by that court. And a mortgagee of personal property may waive his right under the mortgage, and attach the mortgaged property to satisfy the mortgage debt, even after he has taken possession of it under the mortgage." Again, in Shinn, Attachm. § 38, we have these remarks: "There is such contrariety in the laws of the different states relating to the attachment of personal property on which some third party holds a lien, that it is difficult to lay down any rule that will be universal. Generally, chattels subject to a lien cannot, unless by virtue of a special statute, be attached. But this is for the protection of the party having the lien, and, if he waive his objection to the attachment, it does not lie in the mouth of the general owner to complain. Such an attachment is not void, but only voidable at the election of the possessor of the lien." But we are of opinion that the case depends upon the statute. The statute was clearly construed in 84 Cal. and 23 Pac., above cited, and there seems to be no reason in this case to depart from the rule that, in adopting the statute, we have adopted the construction. First Nat. Bank of Butte v. Bell S. & C. Min. Co., 8 Mont. 32, 19 Pac. 408; Stackpole v. Hallahan, 16 Mont. 40, 40 Pac. 80; Murray v. Heinze, 17 Mont. 353, 42 Pac. 1057, and 43 Pac. 714; State v. O'Brien, 18 Mont. 1, 43 Pac. 1001, and 44 Pac. 399; State v. Butte City Water Co., 18 Mont. 199, 44 Pac. 966. Again, it is to be observed that the case before us is distinguished from Parberry v. Sheep Co., 18 Mont. 317, 45 Pac. 278, which plaintiff cites in favor of his contention. In that case the court found that the debt was not secured by mortgage, lien, or pledge upon real or personal property at the time of the commencement of the action. We held that this finding of the court was supported by the evidence. It appeared by that evidence that whatever pledge, if any, had been given to secure the debt, had been returned to the pledgor, and accepted by him. Thus, the pledge was terminated, if it ever existed, by the express acts

and agreements of the parties. Whatever we here hold in reference to a debt secured by mortgage being enforced by foreclosure of the mortgage does not in any way affect the question of the enforcing of the debt by exercising a power of sale contained in the mortgage. First Nat. Bank of Butte v. Bell S. & C. Min. Co., supra; Id., 156 U. S. 470, 15 Sup. Ct. 440.

Before the decision of the motion to dismiss the case was made, the plaintiff himself moved to dismiss as to Chapman, and to pursue the action against Astle alone. This motion was denied. We do not think that the plaintiff in this case was in any way prejudiced; for, even if he had dismissed as to Chapman, the fact still remained that the debt which he then sought to enforce against Astle alone was secured by at least one chattel mortgage. Our attachment law provides that, before the writ is issued, the plaintiff shall make an affidavit stating, among other things, that the debt is not secured by a mortgage, lien, or pledge upon real or personal property, or, if so secured, that the same has become insufficient by the act of defendant, or by any means has become nugatory. Therefore, if a mortgage, lien, or pledge had existed, the attachment could not be had, unless the same had become insufficient by the act of the defendants, or by any means had become nugatory. Neither in the original replication, nor in the second one which was offered, and which the court did not allow to be filed, did the plaintiff allege either that the security had become nugatory, or that it had become insufficient by the acts of the defendants. We are of opinion that the order of the court dismissing the case, and the judgment entered in consequence of that order, are correct. The judgment will therefore be affirmed.

PEMBERTON, C. J., and HUNT, J., concur.

CHICAGO TITLE & TRUST CO. v.
O'MARR, Sheriff, et al. (BROWN
et al., Interveners).¹

(Supreme Court of Montana. Nov. 21, 1896.)

CHATTEL MORTGAGE—DEFECTIVE VERIFICATION—
VALIDITY AS TO THIRD PERSONS—DESCRIPTION
OF PROPERTY—INSERTING FURTHER DESCRIPTION
AFTER DELIVERY—PRIORITIES—LEVY BY CRED-
ITOR HOLDING MORTGAGE SECURITY—WAIVER OF
LIEN—TROVER.

1. A defect in the affidavit to a chattel mortgage will not invalidate the mortgage as against third persons if the mortgagee takes actual possession thereunder before their rights accrue.

2. A chattel mortgage described the property as "the freighting outfit of B., F., and P., consisting of 16 head of horses, all freight wagons and harness, being same property described in mortgage given to First National Bank of N., and bearing same description," etc., the bank mortgage referred to containing a detailed description of the property. Held sufficient, not only between the parties, but as to third persons who acquired rights against the property in good faith.

3. Where a chattel mortgage refers to a prior recorded instrument for a more specific description of the property, and the mortgagee's attorney is expressly authorized, after consulting the

¹ For opinion on rehearing, see 47 Pac. 4.

instrument referred to, to add the specific description therein to the general description in his client's mortgage, the insertion of such further description before the mortgage is filed, and without the presence of the mortgagor, will not invalidate the mortgage, no rights having intervened between its conditional delivery and its registration.

4. A. took possession of a stock of goods under a chattel mortgage, placing one H. in charge, and thereafter mortgages were given to defendants and to interveners in the order named; H., with A.'s consent, continuing in possession as agent of all the mortgagees. Another mortgage was subsequently executed to plaintiff, who had knowledge of the possession and claims of defendants and interveners, and plaintiff, after purchasing A.'s mortgage, presented an order to H., signed by A., whereupon H., ignoring the fact that he was holding for defendants and interveners as well as for A., surrendered possession to plaintiff, who placed one B. in charge as his agent. *Held*, that B. should be treated as holding for all parties, and that the priority of liens therefore remained as before; plaintiff having a first lien only as to the mortgage purchased from A.

5. A creditor whose claim is secured by chattel mortgage acquires no valid lien by attaching his debtor's property before exhausting his remedy under the mortgage by foreclosure. *Larvey v. Chapman*, 45 Pac. 808, followed.

6. A creditor does not waive his lien under a chattel mortgage by attaching his debtor's property while the mortgage is still in force; such attachment being unauthorized before foreclosure.

7. While defendants, interveners, and plaintiff were in joint possession of a stock of goods under chattel mortgages, defendants, whose mortgage was a first lien, brought suit against the mortgagor on their debt, attached the property, and sold the same on execution. *Held*, that defendants were liable to the other mortgagees for the value of the property so converted.

Appeal from district court, Meagher county; Frank Henry, Judge.

Action by the Chicago Title & Trust Company, as receiver, against James J. O'Marr, sheriff of Meagher county, and others. Brown Bros. & Co. and others intervened, and from a judgment for plaintiff and against defendants and interveners said defendants and interveners appeal. Reversed.

This action grows out of the alleged conversion by the defendants of chattels mortgaged to the plaintiff and the interveners. Burchard & Pierse, merchants at Nelhart, becoming involved, on July 3, 1893, executed a chattel mortgage to one Atkinson to secure a note for \$4,100. Atkinson took instant possession under the mortgage, placing one Harrison in charge as his agent. On July 12th thereafter the firm executed and delivered their chattel mortgages to other creditors in the following order, and to secure the following sums, to wit: Defendants Finch, Van Slyke, Young & Co., \$1,970; Lindeke, Warner & Schurmeler, \$145.14; Foot, Schultz & Co., \$485; McKibbin & Co., \$412.41; Brown Bros., \$1,684.50. These mortgages were filed on July 12, 1893. The affidavits to these latter mortgages were made by Harrison, as agent for the mortgagees, but are admitted not to be in proper form. Thereafter, on July 12, 1893, Burchard & Pierse gave another mortgage on the same property already mortgaged and certain other property to plaintiff to secure a

note for \$3,148.69, which mortgage was verified and filed for record on July 13, 1893. This mortgage also provided that the mortgagee might remain in possession, and contained a clause making it subordinate to the mortgages heretofore referred to, or any of them, provided, "in case they, or any of them, were duly executed, dated, and recorded prior to the date, execution, and recording" of the mortgage to plaintiff. On July 31st thereafter the Atkinson mortgage was transferred and assigned to plaintiff, and Atkinson gave to plaintiff an order requiring Harrison, his agent, to surrender possession to plaintiff's attorney. Under this order plaintiff placed one Beech in charge of the stock. On August 5th thereafter the defendant Finch, Van Slyke, Young & Co. brought an action against Burchard & Pierse for the amount of their debt, procured a writ of attachment, seized all of the mortgaged property, and thereafter sold the same under execution for the sum of \$5,372.75. On August 24th, Finch, Van Slyke, Young & Co. deposited with the county treasurer the sum of \$3,100 to pay off the balance due on the Atkinson mortgage, which sum was afterwards received by the plaintiff on said account. On August 14th the plaintiff brought this suit against Finch, Van Slyke, Young & Co. and the sheriff to recover the amount due on the Atkinson mortgage, and also the amount due on its own. The other creditors intervened, and claimed a joint possession with plaintiff, through Harrison, agent, and a joint right to share in the recovery. After this suit was begun, plaintiff took the \$3,100 on deposit as the balance due on the Atkinson mortgage. The interveners, in their complaint, asked that plaintiff recover judgment against defendants for the balance due upon the first note and mortgage after the credit of \$3,100, and for judgment against defendants for the amounts due on their notes and mortgages at the time of the conversion, and that the plaintiff take nothing until after the payment of said amounts due interveners. The cause was tried to the court, and judgment rendered in favor of plaintiff and against the defendants in the sum of \$4,910.67, the amount asked by plaintiff under its second mortgage, and that the interveners take nothing as against plaintiff, and that the interveners take nothing as against defendants. Defendants appeal from the judgment against them in favor of plaintiff, and from the order of the lower court overruling the defendants' motion for a new trial. The interveners appeal from the judgment against them and in favor of defendants, and from the judgment against them and in favor of plaintiff.

On the trial, R. W. Berry, a witness for plaintiff, testified substantially as follows: "In July and August, 1893, I was agent and attorney of plaintiff, and as such went to Nelhart, to get security on a stock of goods from Burchard & Pierse. The result of my visit was that I secured on July 12, 1893, a chattel mortgage of that date. I had an arrangement with them concerning the delivery of this mortgage. I accepted it for plaintiff

conditionally; that is, with a writing wherein it was agreed between Burchard & Pierse and myself, as attorney for plaintiff, that the chattel mortgage given by Burchard & Pierse to the plaintiff should be considered absolute at the option of myself, as agent, on the advice of said plaintiff. [The mortgage was to be absolute unless surrendered by Berry in exercise of the option.] I found that Burchard & Pierse had given a chattel mortgage to F. P. Atkinson, of Great Falls, for \$4,100, and had also placed an agent—Harrison—in charge. They claimed also that they had given other mortgages, aggregating about \$4,000, to various parties,—Finch, Van Slyke, Young & Co., Brown Bros., and others mentioned in the original mortgage. I asked them if they had copies. They said, 'No.' After some further conversation, they agreed to give a mortgage to secure this claim of \$3,148 and \$1,143, provided plaintiff would accept this mortgage as subject to the previous ones. I objected. They would make no other arrangement, and I finally agreed to accept the mortgages, and that we would insert a clause providing 'we would come in subject to those mortgages, or all of them, in case they were properly made out, executed, dated, and recorded prior to ours; or, in case any one of said mortgages was properly made out, why, we would come in subject to that; but we wanted to reserve our right to contest those mortgages, if we saw fit.' Burchard & Pierse said the mortgages were all right, so far as they knew. I told them, not being able to see the mortgages, I simply wanted to reserve rights. Burchard demurred, and I told him: 'In case those other mortgages are all right, we come in subject to them; * * * and, in case they are not, we simply reserve our legal right. * * * If we can get in ahead of all of them, we want to do that, and, if not, and if we can get in before a part of them, then that is all right.' It was under those conditions that this provision was included. After this talk I drew up the mortgage conditionally, as said. Meantime I told them we ought to have additional security, as, in case these mortgages were good, we would come in at the tail end of about \$8,000; and they objected, but finally said they owned a two-thirds interest in a freighting outfit mortgaged to the First National Bank. Pierse, for the firm, agreed to include that property in this mortgage. Having no description of the property, the mortgagors told me that I could put this property in the mortgage as the same property described as mortgaged to the First National Bank, 'with the privilege that I could consult the First National Bank mortgage, and then add a specific description of that property to the mortgage.' The mortgage had been written down to the words 'bearing same description' while in Nelhart. When I got to White Sulphur Springs, the description was added, beginning with the words, 'more particularly described as follows.' The clause that the mortgage was subject to the First

National Bank mortgage was originally put in the mortgage at Nelhart. The latter one of the two affidavits to this mortgage was added after I reached White Sulphur Springs, which was on the evening of the 13th of July; that is, one day after the date of the execution of the mortgage by the mortgagors. [The affidavit referred to by the witness is his own, to the effect that he was the attorney of the Chicago Title & Trust Company, the mortgagee; that plaintiff was absent from Meagher county at the time of the execution and delivery of the mortgage; and that the mortgage was made in good faith, to secure the amount named therein, and without any design to hinder or delay the creditors of the mortgagors, or either of them.] I advised plaintiff to take up the Atkinson mortgage, and take possession under both mortgages. They sent me \$4,100, which I turned over to Atkinson, and had the Atkinson mortgage assigned to us. I then took Mr. Beech to Nelhart, and Harrison, the agent of Atkinson, turned the stock over to me. This was on or about July 30, 1893. Beech acted as plaintiff's agent. After Beech had possession about a week, Finch, Van Slyke & Co. attached." On cross-examination he said that he had said nothing to Burchard & Pierse about verifying the mortgage, and that, after the insertion of the description of the freighting outfit, neither of said mortgagors ever did verify. Witness further said that when he went to Nelhart, Harrison was in possession of the property under the Atkinson mortgage. Harrison had a sign on the building as agent. This was taken down after the witness went to Nelhart, and the sign of O. E. Beech was substituted. When the attachment was made, witness demanded possession upon Harrison. Witness also said that when he made demand on the sheriff he notified him that he claimed under both mortgages, the Atkinson and the trust company mortgage, and that when he took possession he was acting solely for the Chicago Title & Trust Company.

W. H. Harrison testified for plaintiff. He said that he was in charge of the Burchard & Pierse stock from July 3d until about July 31st, when he turned it over to Mr. Berry; that between the 13th and 31st of July there was something over \$600 worth of goods sold. Thereafter the Atkinson order was produced, and witness turned everything over to Berry, and walked away.

E. A. Young, of the firm of Finch, Van Slyke, Young & Co., testified that on August 4, 1893, he was in Nelhart, and that Mr. Beech, who claimed then to be in possession of the stock formerly owned by Burchard & Pierse, told him that he was in possession under the mortgage given to Atkinson for about \$4,000, and that he had paid off about \$1,000 of this mortgage from the sales of merchandise. Witness also said that Beech had the keys, and delivered them up at the time the officer made the attachment. On cross-examination witness said that Beech told him he was in possession

under the Atkinson mortgage for the reason that he understood that all the balance of the mortgages were void and of no account; that he understood from Atkinson that about \$1,000 of the proceeds of sales had been turned over on the Atkinson mortgage; that he knew from some source that the trust company had purchased the Atkinson mortgage.

Max Waterman, Esq., testified that, as counsel for Finch, Van Slyke, Young & Co., he went to Neilhart at the time of the attachment by that firm; that Beech then said that he was in possession as the agent of Atkinson, and that the trust company had purchased the Atkinson mortgage, and gone into possession under that mortgage; that something was said about a number of mortgages being void; and that, as soon as witness found that Beech did not claim to be in possession except under the Atkinson mortgage, then witness advised Finch, Van Slyke, Young & Co. to attach.

Richard Bennett, in behalf of the interveners, testified that he drew all the mortgages made by Burchard & Pierse dated July 12, 1893, to the interveners in this suit, and that Berry took possession of the Burchard & Pierse stock about July 31, 1893. W. H. Harrison was recalled in behalf of the interveners, and stated that he was in possession of this property under the Atkinson mortgage, but that he acted as agent, subordinate to the Atkinson mortgage, for Lindeke, Warner & Schurmeier, Finch, Van Slyke, Young & Co., Brown Bros., Wyman & Partidge Company, and McKibbin & Co.,—in fact for all the mortgages executed about the date of the interveners' mortgages; that Atkinson permitted him to act as agent for these parties upon the condition that their mortgages were to be subordinate to his. Witness further said that the attorney for the interveners wanted him to act as agent for these mortgagees, but he declined until Atkinson consented, provided his mortgage was recognized first; and that when he yielded possession to Berry he did so believing his duty was to do what Atkinson told him to do, and in acting for other creditors he acted for them pursuant to the instructions given by Atkinson.

Richard Bennett, Smith & Gormley, Max Waterman, and Toole & Wallace, for appellants. H. G. & S. H. McIntire, for respondent.

HUNT, J. (after stating the facts). Inasmuch as the inception of any rights which may have accrued to the respective parties to this suit and the judgment rendered therein antedate the adoption of the Codes of 1895, the law as it stood at the time such rights became fixed must control. The statute (section 5182 of the Political Code of 1895) expressly provides, among other things, that the repeal of the old statutes should not abridge, abolish, or impair any vested right or rights accruing or accrued; nor should such repeal change the force and effect of any act done or judgment rendered, or suit or proceeding had or commenced, under the law as it stood prior to the taking effect of

the Codes and repeal clauses thereof, but all such rights and liabilities may be enforced, and the proceedings continued, conforming the same, as far as practicable, to the provisions and remedies prescribed by the new Codes, etc. This section preserved rights founded upon past transactions. The judgment herein determined the rights of the parties before the court as the law stood at those times. To now consider the new mortgage law as applicable, and to award one mortgage a priority over another, not awarded by the statute in force when the transactions were had and the judgment was rendered, would, by postponing the right to enforce certain liens as prior to others, materially lessen the value of the security for the payment of certain of the debts, and thus change the force and effect of the judgment already rendered, and so directly conflict with the letter of the provisions of the new Codes. We therefore dismiss defendants' contention that the new Codes affect the mortgages involved in this suit, so as to exchange their priorities as the old law may have fixed them, and we shall consider the case with relation to the Code of 1887.

The case may be simplified by first deciding whether defendants and interveners had mortgages or liens or pledges upon the personal property of Burchard & Pierse, and, if they did, what were their relations between themselves and plaintiff. The first mortgage to Atkinson is admitted to be valid in all respects. It is also conceded that Atkinson had possession of the property under this mortgage, such possession being through his agent, Harrison. But Harrison had hardly entered upon possession, when the mortgagors, to secure other indebtedness, executed subsequent mortgages to Finch, Van Slyke, Young & Co., defendants, and to the several interveners. These several mortgages were all executed by Harrison, who consented to act, and did act, as the agent of the defendants Finch, Van Slyke, Young & Co., and interveners, with the express consent of Atkinson, the mortgagee in the first (Atkinson) mortgage. Harrison verified the affidavit of good faith as the agent of the mortgagees named in the mortgages, and we think, under the evidence, held possession as much for their benefit as for Atkinson. It is true that the affidavits to these mortgages given to defendants and interveners were defective; but the mortgages, under section 1538 of the fifth division of the General Laws (Code 1887, p. 1068), were none the less valid between the parties to them, while, as against third parties, delivery of possession and taking actual possession under the mortgages before the acquisition of rights by such third parties cured the invalidity of the instruments arising from their insufficient verification. *Jones, Chat. Mortg. § 178; Chapman v. Sargent (Colo. App.) 40 Pac. 849; Cobbey, Chat. Mortg. § 498.* This doctrine is well sustained by authorities, and is thus

stated in *Petring v. Chrisler*, 90 Mo. 649, 3 S. W. 406: "Where the mortgagee, in good faith, takes actual possession of the goods prior to the levy of the attachment, for the purpose of securing the payment of his debt, and continues to hold the actual possession up to the time of the levy, he will be protected, and will, in that event, hold the goods as against the subsequent attaching creditor; and that, under this state of facts, it is immaterial that the mortgage contains stipulations which render it void, except as between the parties." In *Leopold v. Silverman*, 7 Mont. 266, 16 Pac. 584, a chattel mortgage was held void as to third persons because of the omission in the mortgage and the affidavit thereto to show the interest of a certain firm in an indebtedness to secure which the mortgage was given. But the court said that: "If the mortgagees were really in undisputed possession of the goods mortgaged, no affidavit would be necessary at all, and the defects so apparent in the affidavit would become immaterial." This undisputed actual possession of Harrison was, therefore, until July 31st, at least, the joint and valid possession of all the mortgagees (other than plaintiff), including the possession of defendants Finch, Van Slyke, Young & Co., who held the first mortgage after the undisputed one to Atkinson.

But right here another mortgage is to be considered with its attendant facts. Directly after the mortgages to interveners had been given, and while Harrison was in possession, as above stated, to wit, July 12, 1893, the failing debtors gave still another mortgage, to the plaintiff in this suit. This mortgage included the same property which had heretofore been mortgaged, namely, the stock of goods and book accounts, etc., of Burchard & Pierse, and certain other property, which, at the time of the execution of the mortgage by the mortgagors was described as follows: "The freighting outfit of Burchard, Fowler & Pierse, consisting of sixteen head of horses, all freight wagons and harness, being same property described in mortgage given to First National Bank of Nelhart, Montana, and bearing same description. This mortgage subject to mortgage of First National Bank aforesaid for \$1,500, kept in Nelhart, and on road freighting; more particularly described as follows." The mortgage authorized the mortgagees, or their attorney, to remain in possession of the property mortgaged, and also contained the following clause: "This mortgage is given subject to the following mortgages in case said mortgages, or any of them, are duly executed, dated, and recorded prior to the date, execution, and recording hereof, to wit: F. B. Atkinson, \$4,100; Finch, Van Slyke, Young & Co., \$1,917; Lindeke, Warner & Schurmeler, \$154.14; Foot, Schultz & Co., \$485; McKibbin & Co., \$412.41; Brown Bros., \$1,684.50." It appears that when this mortgage was executed and verified by the mortgagors, not having at hand a more detailed description of

the "freighting outfit," the attorney of the mortgagees was given authority by the mortgagors to consider the mortgage absolute at his option, and to consult a mortgage on record at the county seat, some 40 miles away, for the purpose of securing a further description of said outfit, and, when so secured, to add to the description already given the more specific designation of such freighting outfit. The next day the attorney for the mortgagees attached to the mortgage an amplified description of the wagons and animals constituting said outfit, and thereafter, without the presence of the mortgagors, the attorney verified the affidavit of good faith in behalf of his clients, and then filed the instrument with the county clerk. We shall treat this mortgage as valid, disregarding the appellants' contention that the description of the freighting outfit which defendants' counsel added to the description already in the mortgage "constituted a material change in the instrument after execution, acknowledgment, verification, and delivery, and thus rendered it void and of no effect." The mortgage contained a sufficient description of the freighting outfit before the more specific description was added. There was a complete means of identifying the property by reference to it, and such inquiries as the instrument itself suggested. The property was described as "the freighting outfit of Burchard, Fowler & Pierse, consisting of sixteen head of horses, all freight wagons and harness, being same property described in mortgage given to First National Bank of Nelhart, Montana, and bearing same description. This mortgage subject to the mortgage of First National Bank aforesaid for \$1,500, kept in Nelhart, and on road freighting, more particularly described as follows." This was sufficient, not only between the parties, but as to others who had in good faith acquired rights against the property. *Jones, Chat. Mortg. § 53 et seq.* But, assuming the law did demand a more elaborate description of the property, it would seem, under the circumstances of the case, that the mortgage was still not void as to defendants. The agreement between the parties was that the mortgagees' attorney could consult the bank mortgage, and then insert the description which he did insert; and, furthermore, that the mortgage should be considered absolute at the option of the mortgagees' counsel. No rights intervened between the time that plaintiff received the mortgage at Nelhart and added the description and verified and filed the mortgage at White Sulphur Springs. The added description was not the inclusion of property not already included, nor was it an alteration of the contract between the parties, nor was it a fraud in fact. It amounted to the elaborated expression of the already expressed intent of the parties, expressly made in conformity with their positive authorization, and before the instrument was finally delivered. Under these circumstances the mortgage should not be regarded as void. *Fisher* & *Dick*

v. Hutton (Neb.) 62 N. W. 488. Upon another ground, it would seem, this mortgage must be held valid as against the defendants. If we still assume it was defectively executed, we nevertheless find a possession in plaintiff under it before defendants made their levy of attachment. This proposition has heretofore been discussed, and need not be dwelt upon. The fact of possession by the mortgagees before the attachment of defendants was levied distinguishes the case from *Marcum v. Coleman*, 10 Mont. 78, 24 Pac. 701, and *Manufacturing Co. v. Johnson*, 9 Mont. 542, 24 Pac. 17, cited by the appellant defendants. Appellants make a point of the fact that taking possession was delayed until some 19 days after the filing of the mortgage; but, if the mortgage was good between the parties, in the absence of fraud and of any intervening rights accruing before possession was taken, why should it be held void on this ground?

We therefore have this résumé of affairs: Up to July 31st, Atkinson, Finch, Van Slyke, Young & Co., defendants, and the interveners were all in actual, valid possession of the property, with Harrison as their agent. Harrison stood in a capacity not unlike that of an assignee of an insolvent debtor with preferred creditors under an assignment. The mortgagors were not in possession, and his duty was to watch the property, and duly apply it to the payment of the debts due by Burchard & Pierse in the order of the mortgage liens filed, and pay over the surplus, if any, to the mortgagors. Now, while he was so executing his trust, and still held possession, the mortgagors executed the mortgage to the trust company. This brings us to consider another point in this last-mentioned mortgage, with its effect upon the various phases of the case. It was given subject to Atkinson's, defendants', and interveners' mortgages "in case said mortgages, or any of them, are duly executed, dated, and recorded prior to the date, execution, and recording hereof," etc. Testimony was heard as to exactly what was meant by the words, "said mortgages, or any of them, are duly executed," etc., and it clearly appeared that the mortgagees in the mortgage simply wished to reserve to themselves all right to assail the validity of each and every of said prior mortgages, and to be bound only by such of them as might be valid and prior to its own. Plaintiff was fighting for priority, that is all. But it should not be allowed in this instance to avail itself of the insufficient verification of the prior mortgages described in its own mortgage, because, as said before, even though there were defective verifications of such mortgages, yet the mortgagees were in actual and undisputed possession of the mortgaged property by Harrison, their agent, before and at the time plaintiff's mortgage was executed, and for the further reason that plaintiff's attorney was on the ground the day that Harrison took possession for the mortgagees with Atkinson's express consent,

and had full notice of such actual possession before he secured the mortgage to this plaintiff. The testimony of Berry, counsel for plaintiff, is that Burchard & Pierse had given all these prior mortgages, and it was because of the amount of these liens and their possible validity that he pressed for the additional security of the freighting teams, etc. Under the facts, therefore, we do not think plaintiff is in any position to ask the court to ignore the possession by the other mortgagees of the stock of goods and other property included in their mortgages, and to adjudge their mortgage liens inferior to its mortgage. Just what lien upon the freighting outfit plaintiff had is immaterial in the case, because those chattels never were in plaintiff's possession, nor were they levied upon by the sheriff. We find, therefore, that on July 31st the mortgages stood in these positions: First, Atkinson's; next, defendants Van Slyke & Co.'s; then the several interveners' in their respective orders; and, finally, the plaintiff's. On that day the plaintiff, by its counsel, Mr. Berry, purchased the Atkinson mortgage, then went up to Nelhart, and placed one Beech in charge. Berry delivered an order to Harrison, signed by Atkinson, first mortgagee, directing him to turn over possession to Berry. Berry only claimed to act for the plaintiff under its own and the Atkinson mortgages. Harrison, forgetting apparently that he was the agent of other mortgagees, and in possession for them as well as for Atkinson, delivered possession to Beech, an employé of Berry, who remained in sole charge until August 7th. It becomes important, therefore, to ascertain exactly what Beech's relation was towards the defendants Finch, Van Slyke, Young & Co. and the interveners. If Harrison had refused to surrender the possession he held under all the mortgages except Atkinson's, the case would be less complicated; but evidently he acted entirely under Atkinson's instructions, and walked out. But Atkinson had no authority to order Harrison to surrender any possession to plaintiff, except such as he held under his own mortgage. He had theretofore consented to and acquiesced in the joint possession of the property by Harrison as the agent of the subsequent mortgagees as well as for himself, and, so long as such mortgagees made no attempt to disturb his rights, his possession and theirs was jointly maintained by their one agent. Atkinson could not, by his sole order, divest other mortgagees of their possession, for, beyond looking after his own interests, he had nothing to do with their mortgages, except by way of recognition of Harrison as their agent in possession with him. Therefore Harrison should not have yielded to Beech any possession other than such as he held for Atkinson. But, as he did give up to Beech, the question is, ought his principals, the mortgagees other than Atkinson, to lose their priorities of lien, or should Beech be regarded as holding possession for such other mortgagees as well as

for Atkinson and this plaintiff? We must remember that Berry well knew of all these prior mortgages, and of the joint possession of all the mortgagees under them, which, as heretofore said, made the instruments valid. Therefore, when Berry purchased the Atkinson mortgage for plaintiff, and plaintiff went into possession under it by substituting Beech for Harrison, Beech should be regarded not alone as a mortgagee taking the same possession Atkinson had under the mortgage, but as assuming that possession for Atkinson's assignee recognizing those subsequent mortgagees for whom Harrison with Atkinson's consent agreed to act, and in whose right of possession Atkinson acquiesced so long as their rights were subordinate to his own. It would be most inequitable to hold that, because Harrison yielded to Beech in the manner he did, this plaintiff had a possession sufficiently good under Atkinson's mortgage to make that a valid first lien against the world, yet that Harrison's surrender subordinated the interveners' mortgages to plaintiff's. The plaintiff having taken its last mortgage as well as the Atkinson mortgage with full knowledge of the interveners' and defendants' actual possession and claims, cannot ask to be made first lien holder, thus affirming the possession of Harrison (recognized to be as well for others as for Atkinson), yet disaffirming that possession as for other mortgagees, in order to have its last lien precede others superior to its own. The correct, and plainly the equitable, view of the case is that, inasmuch as plaintiff knew of the possession under the preceding mortgages, which were valid and subsisting liens when Berry took possession, the priority of those liens over plaintiff's mortgage must be sustained, and that, Atkinson's consent that Harrison should remain in possession for interveners and defendants never having been withdrawn, Harrison's substitute, Beech, should be treated as having held for plaintiff by virtue of Atkinson's priority under the first mortgage, but that he held under the last mortgage as in subordination to the several other mortgages under which Harrison held, and which were recited as subsisting mortgages in the plaintiff's mortgage.

We now advance to August 7th, upon which day Finch, Van Slyke & Co., defendants, sued Burchard & Pierse on their debt, and attached the whole stock of goods which had been mortgaged to them by Burchard & Pierse. Before procuring the writ of attachment, they caused the balance due on the Atkinson mortgage to be deposited with the county treasurer to the order of the mortgagee. Finch, Van Slyke & Co. procured a judgment against Burchard & Pierse for the amount of their mortgage, \$1,917.10. Under execution they sold the stock for \$5,372.75. After this present action was instituted, plaintiff accepted the \$3,100 deposited as balance due on the Atkinson mortgage. It is contended that the levy was void, because the deposit was not made before the property

was taken, as would seem to be required by section 1546, p. 1071, Comp. St. 1887. This question, however, becomes immaterial, inasmuch as Finch, Van Slyke & Co. had no right to attach until they had exhausted their remedy by foreclosure sale under their mortgage lien. This has been decided in the case of *Largey v. Chapman* (Mont.) 46 Pac. 808. But, the levy being void, should the defendants be deprived of their mortgage lien? We think not. There was no valid lien acquired by the attachment. There could not be, if the mortgage lien was valid and subsisting. That their mortgage was valid has been heretofore decided. Therefore, as mortgagees, they were obliged to exhaust their mortgage security before attachment, and they did not waive their claims under the mortgage in order to attach, unless estopped by facts and conditions not appearing in this case. The defendants, therefore, have a right to enforce their lien as the first of the mortgages given subsequent to the Atkinson mortgage.

Finally, we inquire whether defendants were trespassers. Towards plaintiff they were not, so far as the Atkinson mortgage is concerned, because, when the plaintiff accepted the deposit of \$3,100 as fully liquidating the Atkinson mortgage, it waived that question. But, as against these interveners' rights and as against the plaintiff's lien under its last mortgage, defendants stand in a different light. The possession of Beech being a possession which should avail all the interveners as well as the other mortgagees, when defendants, including the defendant sheriff, levied their attachment, and sold the property under execution, they were trespassers; and, notwithstanding the fact that Finch, Van Slyke & Co. had rights as mortgagees, they and the sheriff nevertheless became liable to the plaintiff mortgagee under its last mortgage and the interveners' for the value of the property so converted. *Jones, Chat. Mortg.* § 448. The district court, we are advised, gave plaintiff judgment upon the ground that the interveners never had possession, hence had no rights. Under this view the question of the value of the property converted became unimportant, as the mortgagors have made no complaint. But under the ruling of this court the value is material; therefore the cause must be sent back to the district court for retrial of that question alone, and for judgment thereafter.

It being conceded by all parties that the plaintiff is entitled to the amount received by it on payment of the Atkinson mortgage, that feature of the case may be disregarded, and plaintiff should be allowed to retain the sum it received. The single point to be retried is the value of the property at the time of the conversion. When this is determined by the court, the judgment should be that the liens stand in the order we have decided they maintain to one another, namely, first, plaintiff Atkinson's mortgage, then defendants Finch, Van Slyke, Young & Co.'s mortgage, then the interveners' mortgages in their respective orders, and lastly

the plaintiff by its own mortgage lien. It should further be adjudged that defendants have been guilty of a conversion, and that, although they are entitled to first be repaid the amount they have paid on the Atkinson mortgage, \$3,100, and to the amount of their own mortgage as prior to interveners' and plaintiff trust company's mortgages, yet, after receiving the amount of their said mortgage, to wit, \$1,920, they are liable to interveners and the trust company for any sum in excess of the amount of their own mortgage, to the extent of the value of the property at the time of the conversion. We think that the defendants should pay the costs of this appeal. The judgment is therefore reversed, and the case remanded, with directions to proceed as above stated. Reversed.

PEMBERTON, C. J., and DE WITT, J., concur.

BENHAM v. LEMHI MINING, MILLING & REDUCTION CO.

(Supreme Court of Montana. Nov. 16, 1896.)

APPEAL—EXCLUSION OF EVIDENCE—RECORD—PRESUMPTION.

Where the record does not contain the evidence, and appellant's ground of error is that the court refused to permit him to introduce certain evidence claimed to be in rebuttal, the presumption is that the court's action was correct.

Appeal from district court, Silver Bow county; J. J. McHatton, Judge.

Action by Alexander Benham against the Lemhi Mining, Milling & Reduction Company. From a judgment in favor of defendant, and from an order denying a motion for a new trial, plaintiff appeals. Affirmed.

By this action, plaintiff seeks to recover of the defendant the sum of \$1,750, claimed to be a balance due plaintiff for his services as superintendent of the mining and milling operations of the defendant in Idaho and Montana. The answer admits the services, but denies the value thereof, and also pleads a counterclaim. The replication denies the counterclaim. The case was tried to the court with a jury. A verdict was rendered for the defendant, and judgment entered thereon. The plaintiff appeals from the judgment and order denying a new trial.

S. De Wolfe, for appellant. John W. Cotter, for respondent.

PEMBERTON, C. J. The respondent contends that this court cannot consider the appeal in this case, for the reason that the record nowhere contains any specification of errors. Plaintiff's notice of intention to move for a new trial is based "on the ground of errors in law occurring at the trial, and excepted to by the plaintiff." An inspection of the record discloses that this is the only attempt at any specification of errors. The rec-

ord contains nowhere any other pretense of a specification of errors. We are therefore at a loss to determine from an inspection of the record what errors were assigned and specified as grounds for a new trial in the court below, if, in fact, any errors were assigned.

The principal ground of error contended for in appellant's brief is that the court refused to permit the plaintiff to introduce certain evidence, claimed to be rebuttal; but the respondent says in his brief that the plaintiff, in opening the case, and in introducing his testimony in chief, went thoroughly into the case, including the plaintiff's evidence and cause of action, as well as all matters of the defense set up in the answer, and that the evidence which plaintiff sought to introduce under the claim of rebuttal was substantially the same evidence which the plaintiff had introduced in his evidence in chief. But, however this may be, the record does not contain the evidence in chief introduced by the plaintiff, nor the evidence introduced by the defendant, which plaintiff offered to rebut, and which he complains that the court would not permit him to do. Under these circumstances, if there were in the record sufficient specifications of errors to enable us to consider the case, still we could not determine whether the evidence sought to be introduced, and which was excluded by the court, was rebuttal or not. Under these conditions, and in view of the insufficient record in the case, the presumption is that the action of the court in the matters complained of was correct. We are therefore of opinion that the judgment and order appealed from should be affirmed, and it is so ordered. Affirmed.

HUNT, J., concurs. DE WITT, J., not sitting.

GOLDSMITH v. BOARD OF SUP'RS OF CITY AND COUNTY OF SAN FRANCISCO. (S. F. No. 399.)

(Supreme Court of California. Nov. 20, 1896.)

CITY OF SAN FRANCISCO—INDEBTEDNESS—PAYMENT WHEN FUND EXHAUSTED.

Where the fund out of which a claim against a city can be paid is exhausted, and the holder obtains judgment on the claim, he cannot have a writ of mandate to compel the board of supervisors to allow, and order paid, the judgment. *Lewis v. Widber*, 33 Pac. 1128, 99 Cal. 412, distinguished. *Pacific Undertakers v. Widber* (Cal.) 45 Pac. 273, followed.

Department 2. Appeal from superior court, city and county of San Francisco; J. M. Seawell, Judge.

Application by Max Goldsmith for a writ of mandate to compel the board of supervisors of the city and county of San Francisco to allow, and order paid, a judgment obtained against the city by plaintiff. From a judgment denying the writ, the applicant appeals. Affirmed.

Mullany, Grant & Cushing, for appellant.
H. T. Creswell, for respondents.

HENSHAW, J. This is an application for a writ of mandate to compel the board of supervisors of the city and county of San Francisco to allow, and order paid, a judgment against the city obtained by plaintiff. Plaintiff had contracted with the city to furnish subsistence and supplies for the prisoners in the jails of the municipality for the fiscal year 1892-93, pursuant to the terms of section 69 of the consolidation act. The supplies were furnished during the year. The demands of the plaintiff for the last three months were refused payment for lack of funds. Plaintiff entered suit and obtained judgment, and, upon the refusal of the supervisors to order the judgment demand paid, he applied for this writ of mandate. The supervisors, for answer, showed that the general fund for the fiscal year 1892-93 was totally exhausted, and that the claim of plaintiff, transformed into a judgment, was payable solely out of this fund. The reduction of the original claim to a judgment did not increase its dignity so as to authorize plaintiff to demand payment of it from any fund not subject to the primary demand. *Smith v. Broderick*, 107 Cal. 644, 40 Pac. 1033. It is sought to distinguish this claim from the many which this court has been called upon to discuss, and to bring it within the principle of *Lewis v. Widber*, 99 Cal. 412, 33 Pac. 1128. But, to the contrary, it is in all essential features identical with that considered in *Pacific Undertakers v. Widber* (Cal.) 45 Pac. 273. The reasoning there set forth completely covers the facts and the law of this case, and leaves little to be added. That hardships result from an observance of the law may be deplored, but this fact cannot afford reason for subverting the law, or frittering it away. The judgment is affirmed.

We concur: **McFARLAND, J.; TEMPLE, J.**

IVERSEN v. SUPERIOR COURT. (S. F. 407.)

(Supreme Court of California. Nov. 12, 1896.)

APPEALABLE ORDER—REQUIRING DISTRIBUTORS TO DELIVER SPECIFIC PROPERTY TO ADMINISTRATOR.

An order of the probate court requiring distributees to deliver to an administrator specific property in their hands under a decree of distribution, made several years after such decree, without complaint on oath, or petition, or citation made therefor by the administrator or any other person, is not a special order made after final judgment, and is therefore not appealable.

Department 2. Writ of review to superior court, city and county of San Francisco; J. V. Coffey, Judge.

v.46P.no.10—52

Application by Caroline Iversen for a writ of review to the superior court to vacate, annul, and set aside certain orders of such court. Orders vacated, annulled, and set aside.

D. I. Mahoney, for petitioner. J. O. McKee, for respondent.

HENSHAW, J. This is an application for a writ of review. No controversy over the facts is presented, but respondent rests his opposition to the granting of the writ upon demurrer alone. The admitted facts are that administration upon the estate of one Celia O. Soher, deceased, had duly and regularly proceeded until a decree of distribution therein had been made and entered, distributing certain property of the estate, consisting of diamond rings, gold watches, diamond and pearl breast-pins, and other pieces of jewelry, to the heirs of Celia O. Soher, one of whom is the petitioner herein. The administrator's final account was settled, and the decree of final distribution entered upon August 26, 1891. Upon January 27, 1896, the court, sitting in probate in the matter of said estate, made the following order: "It is hereby ordered that Emile Soher, Caroline Iversen, and Miriam Peturel deliver forthwith to Adolph Soher, administrator of the estate of Celia O. Soher, deceased, any and all property of said estate in the possession or under the control of said parties, or either of them, and particularly the following property, viz.: [Here follow the items of jewelry before mentioned.]" Petitioner herein came into possession of the property under the decree of distribution, and holds the same for the heirs and the other distributees named in the decree as owners thereof. The order above quoted was made without complaint on oath, or petition, or citation made therefor by the administrator or any other person. Petitioner having failed to comply with this order, thereafter the court issued its further order that the petitioner appear and show cause, upon a date therein named, why she should not be punished for contempt in disobeying the order of the court, and not delivering said property.

The only ground of demurrer calling for a consideration is that the order sought to be reviewed is a special order, made after final judgment; that petitioner has a remedy by appeal; and that, therefore, the writ of review will not lie. But, to show the untenableness of this position, it is necessary only to refer to the cases of *In re Calahan's Estate*, 60 Cal. 232; *In re Walkerly's Estate*, 94 Cal. 352, 29 Pac. 719; and *In re Smith's Estate*, 98 Cal. 636, 33 Pac. 744. No attempt is made to uphold the validity and legality of the proceeding. It is claimed merely that petitioner has not been harassed by them. The orders under review are clearly in excess of the jurisdiction of the court. Let the orders under review be vacated, annulled, and set aside.

We concur: **TEMPLE, J.; McFARLAND, J.**

PEOPLE ex rel. YOUNG v. BABCOCK.
(S. F. 413.)¹

(Supreme Court of California. Oct. 20, 1896.)
CITY AND COUNTY OF SAN FRANCISCO — SUPERINTENDENT OF SCHOOLS—APPOINTMENT.

Act March 14, 1883, entitled "An act to establish a uniform system of county and township governments," by section 25, subd. 21, empowering boards of supervisors in their respective counties to fill by appointment all vacancies in any county office, refers to the board of supervisors, of five members, which section 13 declares each county shall have, and does not repeal Act April 19, 1856 (Consolidation Act) § 31, authorizing the board of education of the city and county of San Francisco to fill by appointment a vacancy in the office of superintendent of schools of such corporation; the supervisors constituting the board of 12 which the consolidation act provides shall be elected in the city and county of San Francisco, being municipal officers.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco.

Action by the people, on the relation of Charles S. Young, against Madison Babcock. Judgment for defendant, and plaintiff appeals. Affirmed.

Atty. Gen. Fitzgerald, M. M. Estee, C. W. Croes, and James Alva Watt, for appellant. Rodgers & Paterson, for respondent.

SEARLS, C. This is an appeal from a final judgment in favor of defendant upon sustaining a demurrer to the complaint of the relator. The complaint may be epitomized thus: (1) Andrew J. Moulder, the duly elected, qualified, and acting superintendent of schools for the city and county of San Francisco, died on the 14th day of October, 1895, whereby the office of such superintendent of schools became vacant. (2) On the 4th day of November, 1895, the plaintiff, Charles S. Young, was, by the board of supervisors of said city and county of San Francisco, appointed superintendent of schools in and for said city and county, to fill the vacancy caused by the death of said Moulder. (3) Said Charles S. Young thereupon and in due time qualified, took and filed his oath of office, filed his bond as required by law, etc., as such superintendent. (4) The defendant, Madison Babcock, claims to be the superintendent of schools in and for said city and county, and since November 4, 1895, has usurped and intruded himself into said office, to the exclusion of said Charles S. Young, who on the 21st day of November, 1895, demanded to be let into possession of said office, which was refused by defendant Babcock, etc. Plaintiff demands judgment (1) that defendant, Madison Babcock, is not entitled to the said office, and that he be excluded therefrom; (2) that Charles S. Young is entitled to said office, and that he be admitted to the possession and enjoyment thereof, etc.

The single question presented on this appeal is as to the authority of the board of supervisors of the city and county of San Francisco to appoint a superintendent of schools of said city and county, to fill the vacancy caused by

the death of Andrew J. Moulder. The act of April 19, 1856, usually known as the "Consolidation Act," provided for the election in the city and county of San Francisco of a board of supervisors, consisting of 12 members; of a board of education, consisting of 12 members, and, among other officers, of a superintendent of common schools. By the thirty-first section of the act it was provided, "In case of a vacancy in the office of superintendent, the board of education may assemble and appoint a person to fill the vacancy until the regular election next following." Section 9 of the act authorized the board of supervisors of the city and county to fill vacancies which might occur in the elective offices of the city and county, where no other provision was made by law to fill the same. This last provision had no application to vacancies in the office of superintendent of schools, for the reason that other provision was made therefor. In 1868 an act was passed amending the law in reference to the board of education of the city and county of San Francisco, but retaining the provision for filling vacancies in the office of superintendent by the board of education. The power thus conferred upon the board of education by the consolidation act and the amendments thereto, which constitute the charter of the city and county, is still vested in that body, unless wrested from it by the act of March 14, 1883, entitled "An act to establish a uniform system of county and township governments" (St. 1883, p. 290), or by the several county government acts since passed. Have they repealed the law as it existed under the consolidation act?

Section 1 of article 11 of the constitution of 1879 provides that "the several counties, as they now exist, are hereby recognized as legal subdivisions of this state." Section 4 of the same article provides that "the legislature shall establish a system of county governments which shall be uniform throughout the state; and by general laws shall provide," etc. Section 5 of the article provides that "the legislature, by general and uniform laws, shall provide for the election or appointment, in the several counties, of boards of supervisors, sheriffs, county clerks, district attorneys, and such other county, township, and municipal officers as public convenience may require, and shall prescribe their duties, and fix their terms of office." Section 3 of article 9 is as follows: "A superintendent of schools for each county shall be elected by the qualified electors thereof at each gubernatorial election; provided, that the legislature may authorize two or more counties to unite and elect one superintendent for the counties so uniting." This section of the constitution, as will be observed, makes the superintendent of schools a county officer. Under the consolidation act, and the various amendments thereto, there existed, as we have seen, prior to the adoption of our Codes, in the city and county of San Francisco a superintendent of schools. Section 19 of the Political Code retained in force (1) "all acts incorporating or chartering municipal corporations, and acts

¹ Rehearing denied.

amending or supplementing such acts"; (2) "all acts consolidating cities and counties, and acts amending or supplementing such acts." The statute of March 14, 1883, entitled "An act to establish a uniform system of county and township governments" (St. 1883, p. 290), enumerates in section 57 the officers of counties, among which is "a superintendent of schools." Subdivision 21 of section 25 of the same act provides that the boards of supervisors in their several counties shall have power "to fill by appointment all vacancies that may occur in any office filled by the appointment of the board of supervisors and elective county or township offices, except in those of judge of the superior court and supervisor. The appointee to hold office for the unexpired term."

The question of the status, powers, duties, and duration of the terms of office of the several officers of the city and county of San Francisco has recently, and in the case of *Kahn v. Sutro*, 46 Pac. 87, been considered and determined by this court. The conclusions in that case reached may be in part summarized thus: (1) San Francisco is both a city and a county. (2) Some of its officers are city officers, and others are county officers. (3) The supervisors, 12 in number, authorized by the consolidation act, are endowed with municipal functions unknown to the county government act, and, while identical in name with the body authorized by the latter act, are yet separate and distinct from the supervisors or board of supervisors of such latter act. (4) Justice Temple, who filed a dissenting opinion in the case, and Chief Justice Beatty, who concurred therein, are of opinion that all the officers of the city and county of San Francisco are municipal officers, and that none of them are governed as to the duration of their term of office by the county government act of 1893. It will thus be perceived that, so far as the supervisors are concerned, the members of the court are a unit in the opinion that they are municipal officers, and not county officers, within the purview of the county government act. It must follow that the supervisors of the city and county of San Francisco are charter, and not legislative, officers. See *In re Carrillo*, 66 Cal. 3, 4 Pac. 695. The consolidation act was not repealed by the constitution of 1879. Section 1 of the schedule thereto (section 1, art. 22); *In re Stuart*, 53 Cal. 746; *Wood v. Board*, 58 Cal. 561; *In re Guerrero*, 69 Cal. 68, 10 Pac. 261. Consolidated city and county governments are subject to the control of general laws. *Ex parte Keeney*, 84 Cal. 804, 24 Pac. 84; *Thomason v. Ashworth*, 73 Cal. 73, 14 Pac. 615. The question involved here, however, does not relate to the power of the legislature to amend the consolidation act by providing a different mode of filling vacancies in the office of superintendent of schools from that designated in such consolidation act, but rather to that other question, has the legislature done so? We think this question must be answered in the

negative. When the legislature, by section 25 of the county government act, as amended in 1893, established the general permanent powers of the board of supervisors, "under such limitations and restrictions as are prescribed by law," it was dealing with boards of supervisors created by the same statute. Section 13 is as follows: "Each county must have a board of supervisors consisting of five members." It is to this board of county officers, and not to that other board of municipal officers, composed of 12 members, existing in San Francisco under the same name, but exercising other and more extended functions, that we may suppose the power is given by subdivision 21 of section 25 of the same act "to fill by appointment all vacancies that may occur in any office filled by the appointment of the board of supervisors, and elective county or township officers, except in those of judge of the superior court and supervisor, the appointee to hold office for the unexpired term." The law does not favor the repeal of statutes by implication, and it is only by means of implication that we can reach the conclusion that it was the legislative will to repeal the clause in the consolidation act which devolves the duty of filling vacancies in the office of superintendent of schools in San Francisco upon the board of education. The county government act of 1883, with its several amendments, is a general law; but it is not a general law relating to municipal corporations, and hence cannot by implication repeal the consolidation act of the city and county of San Francisco. In the general county government act the legislature has kept steadily in view those entities known as "counties," and, while some of the provisions of the act relate to the city and county of San Francisco, it is in its aspect as a county that it is dealt with. The duties and compensation of its officers, as county officers, are legitimate subjects of legislation under such county government act. But the attempt to apply this law to the board of supervisors of the city and county—to a municipal body unknown to the law, except as found in the consolidation act—is to wrest it from its legitimate object, and by indirection to amend and alter that act by taking from the board of education a power vested in that board, and conferring it upon another body created and existing by virtue of the consolidation act, viz. the board of supervisors in and for the city and county. To repeat, such an interpretation leads to an amendment of the charter of the municipality, not by a general law with that declared object, but by a law passed with another object in view, and defining the powers and duties of boards of supervisors not identical in their origin, in the number of their members, in the duration of their terms of office, or in the source or extent of their powers, with the board of supervisors in and for the city and county of San Francisco. We are of opinion that the power to fill vacancies, given to boards of su-

pervisors by the county government act, applies to the boards of supervisors in and for the several counties of the state other than the city and county of San Francisco, and that as to the latter the power to fill vacancies in office comes from the consolidation act, and does not include vacancies in the office of superintendent of public schools, which are to be filled by the board of education. It follows that the judgment appealed from should be affirmed, and we so recommend.

We concur: VANCLIEF, C.; BELCHER, C.

McFARLAND and HENSHAW, JJ. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

TEMPLE, J. I concur in the judgment.

RIDER v. REGAN et al. (No. 16,019.)¹
(Supreme Court of California. Nov. 5, 1896.)
CONSTITUTIONAL LAW — DUE PROCESS OF LAW —
SALE OF HOMESTEAD BY ONE SPOUSE —
BONA FIDE PURCHASERS.

1. Act March 25, 1874, § 1 (St. 1873-74, p. 582), provides that, if either husband or wife shall become hopelessly insane, the probate court, on application of the sane spouse, may make an order permitting the applicant to sell or mortgage the homestead. Section 2 provides for notice by publication and personal service on the nearest male relative of the insane spouse in the state, or, if no such relative reside in the state, then on the public administrator. Section 4 declares that, if the court makes the order, any conveyance shall be as valid as if the property was the absolute property of the person making such conveyance. *Held* not unconstitutional as depriving the insane spouse of vested rights in property without due process of law. Henshaw, Temple, and Harrison, JJ., dissenting.

2. Nor is such act objectionable for not requiring the applicant to give security for proper application of the proceeds of the sale.

3. On an order of the probate court made under an act enabling a husband or wife to sell or encumber the homestead in case the other spouse becomes hopelessly insane, M. conveyed to her brother a homestead declared on community property, for a nominal consideration, that was never paid. The grantee mortgaged the land to plaintiff to secure a loan, part of which was paid to M., who reloaned it to her brother, the balance being applied on a former mortgage executed by M. and her husband; and the brother subsequently conveyed the premises, in consideration of love and affection, to M., subject to plaintiff's mortgage. *Held*, that if these transactions constituted a mortgage by M. to plaintiff, through the agency of her brother, instead of a sale to the latter, and was not, therefore, authorized by the order, which directed a sale, yet plaintiff's rights were not affected, since he had neither actual nor constructive notice that the brother was not the absolute owner of the property.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco; J. M. Seawell, Judge.

Action by Matthias Rider against James Regan and others to foreclose a mortgage. Defendant Edward Kelly, by his guardian ad li-

tem, alone answered, and from a decree of foreclosure, and from an order denying his motion for a new trial, appeals. Affirmed.

Stafford & Stafford, for appellant. Reddy, Campbell & Metson, for respondent.

VANOLIEF, C. Action to foreclose a mortgage executed by defendant Regan to secure payment of his promissory note, made payable to plaintiff or order, for the sum of \$1,500, with interest thereon at the rate of 8 per cent. per annum. The defendants Edward and Mary Kelly are husband and wife, and were made parties defendant on the ground that they claimed some interest in or lien upon the mortgaged premises, which consist of a lot of land 35 by 80 feet, with appurtenances, situated in the city of San Francisco. Edward Kelly alone, by his guardian ad litem (he being insane) answered plaintiff's complaint, denying that defendant Regan ever owned or had any authority to mortgage the lot, and alleging that, at the time the mortgage was executed, he (Kelly) was, and ever since had been, sole owner of the mortgaged premises. He also filed a cross complaint, the substance of which is that in October, 1877, while he and defendant Mary C. Kelly were husband and wife, he purchased the mortgaged lot with money earned by him during the marriage, and that it thereby became community property of himself and wife; that in June, 1880, while he, with his wife and family, were residing on said lot, she, in due form, made and recorded a declaration of homestead thereon, which was never abandoned; that in August, 1884, he, after due examination before the superior court, was found to be insane, and by order of said court was committed to the insane asylum at Napa, Cal., and is now, and ever since has been, confined in said asylum, and during all that time has been, and is now, hopelessly insane, and incompetent to transact any business. These facts alleged in the cross complaint were found by the court to be true, and are not questioned. The following additional facts appear by the record, and are undisputed: In October, 1883, while defendant Edward Kelly was sane, he and his wife executed a mortgage on said homestead lot to secure their promissory note for \$600, payable to the German Savings & Loan Society one year after date. In October, 1888, suit was commenced to foreclose this mortgage, and while it was pending, to wit, in December, 1888, the defendant, Mary C. Kelly, filed in the superior court her petition praying for an order authorizing her to sell said homestead premises pursuant to an act of the legislature, entitled, "An act to enable certain parties therein named to alienate or encumber homesteads," approved March 25, 1874. St. 1873-74, p. 582. It is admitted that her petition stated all the requisite facts, according to said act, and, among them, that neither said Edward nor Mary C. Kelly had any means, property, or estate except said homestead premises and a few articles of homestead furniture and wearing apparel; that said Mary was dependent for the

¹ Rehearing denied.

support of herself and three minor female children, offspring of the marriage, upon the assistance of her relatives; and that her husband had no relatives in this state except said female children. Notice of the application was published, and also personally served on the public administrator, as required by the second section of the act, and the public administrator appeared by counsel for Edward Kelly. After hearing the court made an order authorizing the petitioner to sell the homestead premises. Thereafter, on April 11, 1889, Mary C. Kelly, by deed of grant, bargain, and sale, conveyed said homestead to the defendant James C. Regan, who on May 4, 1889, executed to plaintiff the mortgage to foreclose which this action was brought. The court below found that on May 4, 1889, when the mortgage in suit was executed, the defendant Edward Kelly "had no right, title, or interest in, or claim to," the mortgaged premises, and decreed a foreclosure of the mortgage as prayed for in plaintiff's complaint. The defendant Edward Kelly, by his guardian ad litem, appeals from the judgment and from an order denying his motion for a new trial.

1. It is admitted by counsel for appellant that all the proceedings by which the order purporting to authorize Mary C. Kelly to sell the homestead was obtained were regular, and in strict accordance with said act of March 25, 1874. But he contends that said act is unconstitutional and void, for the reason that a sale of a homestead in accordance therewith deprives the insane spouse of a vested right to property without his consent, and without due process of law. And whether it does so or not is the principal question for decision. The legislature has not, by the act in question, encroached upon the judicial department. It has adjudged nothing. The act itself does not directly deprive the insane spouse of any right. It merely declares that upon a specified state of facts, to be found by a court, such court may authorize the sane spouse to sell the homestead property. The first section of the act is as follows: "Section 1. In case of a homestead, if either the husband or wife shall become hopelessly insane, upon application of the husband or wife, not insane, to the probate court of the county in which said homestead is situated, and upon due proof of such insanity, the court may make an order permitting the husband or wife, not insane, to sell and convey or mortgage such homestead." The second section provides that notice of the application shall be published for three weeks in a newspaper, and personally served on the nearest male relative of the insane spouse to be found in the state, or, if no male relative be known to reside in the state, then upon the public administrator, three weeks prior to the application, whose duty it shall be "to appear in court and see that such application is made in good faith, and that the proceedings thereon are fairly conducted." The third section indicates generally what the verified petition

of the applicant shall contain, besides requiring that it specifically set forth the age of the insane, the number, age, and sex of the children of such insane husband or wife, a description of the homestead, and the value of the same, and such other facts as relate "to the circumstances and necessities of the applicant and his or her family as he or she may rely upon in support of the petition." The fourth section provides that, if the court make the order, any sale, conveyance, or mortgage made in pursuance thereof shall be as valid and effectual as if the property thereby affected was the absolute property of the person making such sale, conveyance, or mortgage. The fifth section provides that a fee not exceeding \$20 be paid the public administrator for his services in any case under the act. The sixth section expressly repeals all acts and parts of acts in conflict with this act. Conceding that the insane husband had a vested property right in the homestead premises, and even that it extended to absolute ownership thereof (which is not admitted), yet "all vested property rights are held subject to the laws for the enforcement of public duties and private contracts, and for the punishment of wrongs; and, if they become divested through the operation of those laws, it is only by way of enforcing the obligations of justice and good order." Cooley, Const. Lim. (6th Ed.) p. 438. The statute in question is a general remedial law, intended to enforce the legal obligation of a hopelessly insane husband or wife to apply his or her property, in case of necessity, to the support of the sane wife or husband and their minor children, and therefore is no more objectionable on constitutional grounds than would be a statute to enforce the performance of any other private or public duty or obligation. After stating the rule that private property cannot, by either a general or special enactment, be taken from one person and transferred to another for the private use and benefit of such other person, Judge Cooley says: "Nevertheless, in many cases and many ways remedial legislation may affect the control and disposition of property, and in some cases may change the nature of rights, give remedies where none existed before, and even divest legal titles in favor of substantial equities, where the legal and equitable rights do not chance to concur in the same persons." Page 436. Nor can it be truly said that the procedure prescribed by the act in question is not due process of law. The usual and only practical kind of notice of the wife's petition was given the insane defendant by publication during a reasonable period of time, and by personal service of like notice on a public officer, who pro hac vice was constituted guardian ad litem of the insane defendant, and upon whom was imposed the duty of appearing for, and protecting the rights of his ward, and who in this case did appear for him by counsel. The cause was heard and the facts found by the court before judg-

ment was pronounced, and it is not questioned that the facts proved and found justify the judgment, as tested by the provisions of the act in question. If this was not due process of law, in the constitutional sense, it would seem difficult, if not impossible, for the legislature to provide due process by which the property rights of an insane person could be affected in any case. The insane defendant is afforded all possible opportunity to be heard in defense of his rights. In addition to the guardian ad litem provided by the act, the court, at request of appellant's wife, appointed the learned counsel for appellant to that office, who appears to have ably and zealously performed the duties thereof, both in the court below and in this court.

2. The act is further objected to on the ground that it does not require of the sane spouse any bond or other security for the proper application of the proceeds of the sale. But this objection does not touch the question as to due process of law. It goes only to the quality or nature of the relief which necessarily follows the process, whether that process was or was not due process of law; and, conceding that the relief provided was defective or excessive, yet the legislature had indubitable power to authorize the courts to grant it by due process of law. It follows that, from the mere nature of the relief granted, no inference can be drawn touching the nature of the procedure or process of law leading up to it. Whether such procedure was due process of law must be determined by other means. And it having been herein above determined that the procedure provided by the act is due process of law, and it appearing and being admitted that both the procedure and the relief granted were in strict accordance with the provisions of the act, it follows that the order granting such relief was valid.

3. It appears that the defendant Regan, to whom the homestead premises were sold, was a brother of the defendant Mary G. Kelly, who sold it; that her deed to Regan recited the consideration therefor to have been \$5, which was not paid; that Regan mortgaged the property to plaintiff to secure a loan of \$1,500, which he borrowed from plaintiff; that, of the \$1,500 so borrowed, \$600 was applied by Mary C. Kelly to the satisfaction of the aforesaid mortgage executed by her and her husband to the German Savings & Loan Society in October, 1883; that the remainder of the money loaned to Regan by plaintiff (\$900) was given to Mrs. Kelly, and she loaned it to Regan; and that afterwards Regan, for the consideration of love and affection, conveyed the homestead, subject to his mortgage to plaintiff, to his sister, Mary C. Kelly. Counsel for appellant contends that the substance of these transactions was a mortgage of the homestead by Mrs. Kelly to the plaintiff, through the agency of her brother, and not a sale to her brother, according to the purport of her deed to him, and therefore was

not authorized by the order of the court, which merely authorized her to sell, and not to mortgage, the homestead. Conceding all this, the rights of the plaintiff as mortgagee are not thereby affected, unless he had actual or constructive notice of the alleged character of the transactions by and between Regan and Mrs. Kelly. There is nothing tending to prove such constructive notice. The deed from Mrs. Kelly to Regan, as previously recorded, both literally and substantially conformed to the order of the court. It purported an absolute sale to Regan, and nothing of its contents indicated anything different. As to actual notice, it is stated in the bill of exceptions that it was proven that at the time of the execution of the mortgage by Regan, and at the time of the loan of \$1,500, "plaintiff had no knowledge of any agreement between the defendants Regan and Mary C. Kelly, but at all of said times believed defendant Regan was the absolute owner of said property, in accordance with the terms of the deed of Mary C. Kelly to him, said Regan." Whether or not the appellant has suffered injury in consequence of the transactions herein above stated, for which he is entitled to any remedy against others than the respondent, is a question not involved in this appeal. I think the judgment and order appealed from should be affirmed.

We concur: SEARLS, C.; HAYNES, C.

McFARLAND, VAN FLEET, and GAROUTTE, JJ. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed. It is to be observed, however, that the propriety of trying appellant's alleged title in this action was not raised, and this decision must not be taken as authority for trying adverse and paramount titles in an action to foreclose a mortgage.

BEATTY, C. J. I concur in the judgment of affirmance. It is not necessary to decide or to consider in this case whether the act of 1874 is constitutional or not, as applied to homesteads created by the sole declaration of one spouse upon separate property of the other. The case here is of a homestead declared upon community property acquired subsequent to the passage of the act in pursuance of which it was sold. If the legislature has the power (as unquestionably it has) to provide generally for the alienation of community property by the husband alone, and his control of the proceeds of the sale, I can see no reason why it has not the power to provide, in case of the hopeless insanity of the husband, for the alienation by the wife alone of so much of the community property acquired subsequent to the passage of the act as may have been lawfully dedicated as a homestead. So far as the act of 1874 goes beyond this proposition, it may be seriously doubted whether it is operative, but I can see no reason to refuse to give it effect in a case not involving any question of vested rights.

HENSHAW, J. I dissent, under the conviction that the act in question is unconstitutional. Section 1 (Act March 25, 1874) of that act is as follows: In case of a homestead, if either the husband or the wife shall become hopelessly insane, upon application of the husband or wife not insane to the probate court of the county in which said homestead is situated, and upon due proof of such insanity, the court may make an order permitting the husband or wife not insane to sell or convey or mortgage such homestead." Section 2 provides for publication and service of notice of the application. Section 3 makes necessary the filing of a petition, and prescribes what it shall contain. Section 4 declares that, if the court shall make the order contemplated by section 1, the same shall be entered upon the minutes, and thereafter any sale, conveyance, or mortgage made in pursuance of such order shall be as valid and effectual as if the property affected thereby was the absolute property of the person making such sale, conveyance, or mortgage in fee simple. It is first to be noted that the statute is applicable, not to any particular class or kind of homesteads, but to all homesteads, whether declared upon community property, or upon the separate property of one or other of the spouses; whether declared by their joint act, or by the act of either. While the homestead exemption is only to the amount of \$5,000, yet real property of any value may be impressed with the homestead character; and, when so impressed, that character attaches to all of the property. Thus, a homestead may be declared upon the separate property of the wife of the value of \$40,000 or \$50,000. Should the wife become hopelessly insane, that homestead, at the instigation of the husband, could be subjected to sale. Next, it is to be observed that the authority to order the sale is not made to depend upon a determined need or advisability therefor. No question of the necessity of the support of the sane or insane spouse, or of minor children or other dependent persons, is necessarily involved. The bald fact that one party to a marriage has become hopelessly insane, and that there is a homestead, whether upon community property, or upon the separate property of the insane spouse, is all that is necessary to warrant the order of sale. Again, it is to be seen that the act makes absolutely no provision for distribution or disposition of the funds arising from the sale. The power of the court ceases when by its order it authorizes the sale to be made. The interest of the insane person is in no way protected. Neither the money received, nor any part of it, is required to be devoted to his support, or to the support of any person dependent upon him. The result might be, as in this case it was, that the property of the insane owner was sold, and the moneys turned over to a third person, who had not the slightest legal claim upon him or it. There are yet other matters in which this act is at least peculiar. Not only does it authorize the sale of the land of an insane person, without protecting his interests in the proceeds of the sale, but it fails even to provide for the appearance of a guardian. The proceedings

are begun and the sale made by a person standing in no fiduciary relation to him. There is no supervision by the court of the sale. No bond is exacted of the seller. The sale may be a gift, as in fact this was, or the price may be entirely inadequate. Yet no one is empowered to check any fraud which may be committed upon the unfortunate owner. He is stripped of his property, without hearing and without redress, because, having a homestead, he has become insane.

There is a species of legislation to which Judge Cooley has given the name "prerogative remedial legislation," that is not obnoxious to the law. It is based upon the recognized power of the legislature, as *parens patriæ*, to pass proper rules and regulations for superintendence, disposition, and management of the property of infants, lunatics, and others under disability. Within the legitimate scope of such legislation is the power which may be conferred upon one standing in a fiduciary relation to a minor or incompetent, to change the character of the estate, and even to dispose of its proceeds, when it is to the interest of the minor or incompetent that such should be done. But in all such legislation there is no determination of adversary rights, no deprivation of any person of his property. Says Judge Cooley: "This species of legislation may perhaps be properly called 'prerogative remedial legislation.' It hears and determines no rights. It deprives no one of his property. It simply authorizes one's real estate to be turned into personal." Cooley, Const. Lim. p. 122. In *Paty v. Smith*, 50 Cal. 153, this court gravely doubted the power of the legislature to direct a sale of the real estate of an infant by one other than a duly-appointed guardian. That act provided, however, that the person making the sale should account for the proceeds to the probate court, and this court assumed that the statute contemplated the appointment of that person as guardian by the probate court. In *Brenham v. Davidson*, 51 Cal. 852, the act under consideration authorized the guardian of an infant to sell the real estate, subject to the approval of the probate court, for the purpose of enabling the guardian to reinvest the proceeds in other property for the benefit of the ward. It was declared that such an act was not an assumption of judicial power by the legislature, and this court quoted with approval the language of Judge Cooley to the following effect: "The rule upon this subject, as we deduce it from the authorities, seems to be this: 'If the party standing in position of trustee applies for permission to make the sale, for a purpose apparently for the interest of the cestui que trust, and there are no adverse interests to be considered and adjudicated, the case is not one which requires judicial action; but it is optional with the legislature to grant the writ by statute, or to refer the case to the courts for consideration, according as one course or the other, on consideration of policy, may seem desirable.'" But in these cases, and in the many others which we have

examined from sister states, the acts have been upheld because it was apparent from them that the interest of the minor or incompetent was fully protected, and that the statutes were, in their operation, beneficent. Thus, in *Rice v. Parkman*, 16 Mass. 326, the court says: "The only object of the authority granted by the legislature was to transmute real into personal estate for purposes beneficial to all who were interested therein. * * * No one imagines that under this general authority the legislature could deprive a citizen of his estate." Authorities need not be multiplied upon so plain a proposition. We are here confronted with an act entirely different in character, an act which assumes to authorize one not standing in a fiduciary relation to the incompetent to make a sale of his real estate for purposes not connected with the incompetent's interest, necessities, or convenience, and without making any provision to secure to him his just share of the proceeds of the sale. We are not in this concerned with a definition of the particular character of the wife's interest in a homestead declared upon the community property. Whether that interest amounts to an estate, or whether it be a mere expectancy, it is unquestionably true that the husband, in whom is vested the sole right of control and disposition of the community property, has a legal interest therein. This legal estate has a money value. When a sale of the homestead is made, it involves a sale of an estate in reality belonging to him. By the act under consideration he is neither secured in that property, nor is it devoted, of necessity, to any legitimate purposes. Our attention has not been directed to the decisions of any courts in which an act like this has been construed and upheld; nor would we, against the great weight of reason and authority, be inclined to follow them if any such could be found. Respondent, it is true, makes reference to the case of *Forbes v. Moore*, 32 Tex. 195. It is there said: "During the insanity of the husband the wife is the head of the family, and, as such head, has the legal right to dispose of so much of the common property of husband and wife, or, in case there be none, of the separate property of the husband, as may be necessary to supply the wants of herself and his or her children." But in the later case of *Heidenheimer v. Thomas*, 63 Tex. 287, this language is considered, and it is said that, in so far as it seems to indicate a rule different from the true one, it must be regarded as obiter, and of no binding force. And in *Railway Co. v. Bailey*, 83 Tex. 19, 18 S. W. 482, the court quotes with approval the language of *Heidenheimer v. Thomas*, supra: "We are of the opinion that no such power rests in the wife of an insane person; at least, in reference to community property, or the separate property of the husband. The law provides for just such a case, and renders unnecessary the exercise of any such power by the wife." We are not here called upon to say whether or not the legislature has the power to accomplish

what seems to have been the principal purpose of this act, namely, to subject the community property or the separate property of an insane spouse to the support of those legally dependent upon him. It is enough to say that the attempt which finds expression in an act such as this is inadequate, improper, and unconstitutional, and amounts to but the confiscation of the property of a person, without provision for the distribution of that property, and for no other reason assigned than that he has met with the most lamentable misfortune of becoming hopelessly insane. The judgment and order should be reversed, and the cause remanded.

We concur: TEMPLE, J.; HARRISON, J.

NORTH POINT CONSOLIDATED IRRIGATION CO. v. UTAH & SALT LAKE CANAL CO. et al.

(Supreme Court of Utah. Oct. 29, 1896.)

APPEAL—ORDER FOR INJUNCTION PENDENTE LITE
—FINALITY—CONSTITUTIONAL LAW
—VESTED RIGHTS.

1. In an action to restrain defendant from discharging certain waters upon the lands of plaintiff, the district court granted an injunction pendente lite. Defendant appealed from the order granting the injunction, and respondent moved to dismiss the appeal on the ground that it was not a final judgment, and therefore not warranted by the constitution. *Held*, that the terms, "in other cases the supreme court shall have appellate jurisdiction only," as used in section 4, art. 8, Const., has reference to appeals from all final judgments of the district court as used in section 9, art. 8, Const., and no other.

2. A final judgment is a judgment that disposes of the case as to all parties, and finally disposes of the subject-matter of the litigation on the merits of the case.

3. While there is no express declaration that appeals will not lie from judgments other than final judgments, yet the court holds that the affirmative declaration, as used in the section, that "from all final judgments of the district court there shall be a right of appeal to the supreme court," in connection with the language used as to other appeals, manifests the intent of the framers of the constitution to except from the appellate jurisdiction of the supreme court appeals from the district courts other than appeals from final judgments. This intention and interpretation is founded on the manifest intent of the framers of the constitution in framing section 9, and upon the general rules of construction.

4. The expression of one thing in the constitution or statute usually implies the necessary exclusion of things not expressed, and the people, in framing section 9, intended to deny the right of appeal to the supreme court in all other cases, although no express term of negation was used, and so much of subdivision 3, § 3635, Comp. Laws Utah 1888, authorizing appeals from orders granting an injunction, is abrogated and annulled by section 9, art. 8, Const.

5. The policy of the law of the several states and of the United States is to prevent unnecessary appeals. The interests of litigants require that appeals shall not prematurely be brought to the appellate court by piecemeal, and the litigants harassed by useless expense and delay of their rights. A party against whom an interlocutory order is made can have all his wrongs redressed and his rights protect-

ed by an appeal from a final judgment, where all the alleged errors may be reviewed at one hearing in the supreme court.

6. An appeal from an order pendente lite is not an appeal from a final judgment.

7. A citizen has no vested right in statutory provisions and exemptions. A statutory right to have cases reviewed on appeal may be taken away by a repeal of the statute, even as to cases which have been previously appealed. The constitution has taken away the right of appeal from an interlocutory order granting a temporary injunction.

(Syllabus by the Court.)

Appeal from district court, Third district; John A. Street, Judge.

Action by the North Point Consolidated Irrigation Company against the Utah & Salt Lake Canal Company and others. From an order granting a temporary injunction, defendants appeal. On motion to dismiss. Granted.

Richards & Richards, for appellants. Loofbourow & Kahn, E. W. Taylor, and John M. Zane, for respondent.

MINER, J. Plaintiff filed its complaint, and obtained an order to show cause why an injunction should not be issued against the defendants restraining them from longer discharging the waste and befouled waters of a certain artificial drain ditch from Decker's Lake into the surplus water canal, and in and upon the lands of the plaintiff. Upon a hearing of this order for temporary injunction the court granted an injunction pendente lite, and on the 8th day of June, 1896, the defendants appealed from the order granting such injunction. Respondent now moves to dismiss the appeal, on the ground that no appeal lies to this court from an order granting an injunction pendente lite, and for the further reason that such order is not a final judgment under section 9, art. 8, of the constitution of this state, and that no appeal lies except from a final judgment.

Section 4 of article 8 of the constitution of this state reads as follows: "The supreme court shall have original jurisdiction to issue writs of mandamus, certiorari, prohibition, quo warranto, and habeas corpus. Each of the justices shall have power to issue writs of habeas corpus, to any part of the state, upon petition by or on behalf of any person held in actual custody, and may make such writs returnable before himself or the supreme court, or before any district court or judge thereof in the state. In other cases the supreme court shall have appellate jurisdiction only, and power to issue writs necessary and proper for the exercise of that jurisdiction. The supreme court shall hold at least three terms every year, and shall sit at the capital of the state." Section 9 of article 8 reads as follows: "From all final judgments of the district courts there shall be a right of appeal to the supreme court. The appeal shall be upon the record made in the court below, and under such regulation as may be provided by law. In equity cases the appeal may be on questions of both law and fact; in cases at law the appeal shall be on questions of law alone. Appeals shall also lie from the

final orders and decrees of the court in the administration of decedent estates, and in cases of guardianship, as shall be provided by law. Appeals shall also lie from the final judgment of justices of the peace in civil and criminal cases to the district courts on both questions of law and fact, with such limitations and restrictions as shall be provided by law; and the decision of the district courts on such appeals shall be final, except in cases involving the validity or constitutionality of a statute."

Under section 4, the supreme court is given original jurisdiction to issue writs of mandamus, certiorari, prohibition, quo warranto, and habeas corpus. In these cases named it is clear the supreme court has original jurisdiction. This language follows: "In other cases the supreme court shall have appellate jurisdiction only, and power to issue writs necessary and proper for the exercise of that jurisdiction." The question, in what other cases has the supreme court appellate jurisdiction? Is answered by section 9: "From all final judgments of the district courts there shall be a right of appeal to the supreme court. Appeals shall also lie from the final orders and decrees of the court in the administration of decedent estates, and in cases of guardianship, as shall be provided by law. Appeals shall also lie from the final judgments of justices of the peace in civil and criminal cases, to the district court on both questions of law and fact, with such limitations and restrictions as shall be provided by law; and the decision of the district court on such appeal shall be final, except in cases involving the validity or constitutionality of a statute." The term in "other cases" cannot mean in all other cases, because, as is seen in section 9, the decision of the district court is made final and conclusive in appeals thereto from justices of the peace, except in stated cases. The legislature is given power to provide by law concerning appeals in probate cases, but no such power is conferred upon the legislature concerning final appeals from the district court. It is clear that the "other cases" referred to in section 4 has reference to those appeals from final judgments referred to in section 9, and no other.

This brings us to the further consideration of section 9. Whether this court has jurisdiction of this appeal depends upon the construction given that section. If the constitution gives a mere guaranty of the right of appeal from final judgments of the district courts, the power is reserved in the legislature to give a right of appeal in other cases. But, if the constitution gives not only a guaranty of the right to appeal from final judgments, but by implication a denial of the right of appeal in other cases, then the court has no jurisdiction of the appeal in this case. "A constitution is not to be interpreted on narrow or technical principles, but liberally, and on broad, general lines, in order that it may accomplish the object of its establishment, and carry out the great principles of the government. The words are not to be stretched beyond their fair sense, but within that range

the rule of interpretation must be taken which best follows out the apparent intention of its framers." Black, *Interp. Laws*, p. 13. "One part may qualify another so as to restrict its operation or apply it otherwise than the natural construction would require if it stood alone by itself. But one part is not to be allowed to defeat another if by any reasonable construction the two can be made to stand together. In interpreting clauses we must presume that words have been employed in their natural and ordinary meaning." Cooley, *Const. Lim.* p. 72. "Under every constitution the doctrine of implication must be resorted to in order to carry out the general grants of power. So every positive direction contains an implication against anything contrary to it, or which would frustrate or disappoint the purpose of that provision, as strongly as if a negative was expressed in every sentence." That which is implied by statute is as much a part of it as what is expressed. *Id.*, pp. 78-105; *Suth. St. Const.* § 334. The maxim, "Expressio unius est exclusio alterius," is usually applied to determine the intention of the lawmaker where it is not otherwise expressed, and is applicable to constitutional or statutory provisions which grant originally a power or right. When a statute defining an offense designates but one class of persons as subject to its penalties, all other persons are deemed to be excluded. As a general rule, the expression of one thing in a constitution or statute excludes all others. So specific provisions, relating to particular subjects, must govern in relation to that subject, as against general provisions in other parts of the law which might otherwise be broad enough to include it. Where a statute enumerates the persons or things to be affected by its provisions, there is an implied exclusion of others, and the natural inference follows that it is not intended to be general. A national bank being granted the power to loan money on personal security, such banks are held precluded from loaning on real-estate mortgages. *Suth. St. Const.* §§ 325-327; *Fowler v. Scully*, 72 Pa. St. 456. The appellate jurisdiction of the federal supreme court is conferred by the constitution of the United States "with such exceptions, and under such regulations, as congress may make." Article 3, § 2. Therefore acts of congress affirming such jurisdiction have always been construed as excepting from it all cases not expressly described and provided for. *Ex parte McCordle*, 7 Wall. 506; *Durousseau v. U. S.*, 6 Cranch, 312; *Suth. St. Const.* § 327. As explained in *Durousseau v. U. S.*, 6 Cranch, 312, the court said: "Thus a writ of error to the judgment of a circuit court, where the matter in controversy exceeds the value of \$2,000. There is no express declaration that it will not lie where the matter in controversy shall be of less value. But the court considers this affirmative description as manifesting the intent of the legislature to except from its appellate jurisdiction all cases decided in the

circuits where the matter in controversy is of less value, and implies negative words." So, as a general rule, an affirmative grant of power will imply an exclusion of all others. *Potter's Dwar. St.* pp. 674, 675. So, where technical words are used in a constitution, the technical meaning is to be applied to them, unless it is repelled by the context. 1 Story, *Const.* § 453. In construing constitutions, the doctrine that what is implied is as much a part of the instrument as what is expressed is a necessity by reason of the inherent inability to put all private power into words. *Rhode Island v. Massachusetts*, 12 Pet. 657; *Ex parte Yarbrough*, 110 U. S. 651, 4 Sup. Ct. 152.

Under the light of these general principles and decisions, what is the meaning of the term used in the constitution, "From all final judgments of the district courts, there shall be a right of appeal to the supreme court," when viewed in connection with the balance of the section? It will be noticed that the word "final," or "final judgment" is used in connection with appeals from the district courts, appeals from the probate courts, and appeals from justices' courts; while a right of appeal from all final judgments to the district court is expressly granted. Yet the same section expressly grants the right of appeal from the final orders and decrees of the court in decedents' estates, and limits the right of appeal from final judgments in justices' courts to the district courts. The word "final" or "final judgment" has a plain meaning. A judgment, to be final, must dispose of the case as to all the parties, and finally dispose of the subject-matter of the litigation on the merits of the case. *Champ v. Kendrick* (Ind. Sup.) 30 N. E. 635. *Bouvier* defines a final judgment as used in opposition to interlocutory as "A final judgment is a judgment which ends the controversy between the parties litigant." "The general rule recognized by the courts of the United States and by the courts of most, if not all, of the states, is that no judgment or decree will be regarded as final, within the meaning of the statutes in reference to appeals, unless all the issues of law and of fact necessary to be determined were determined, and the case completely disposed of, so far as the court had power to dispose of it." *Freem. Judgm.* § 34. If appeals can be taken from interlocutory orders and judgments not final, from the district court to the supreme court, it follows that for the same reason appeals may be taken from rulings and decisions not final, from a justice court to a district court, and from the district court to the supreme court. It would be just as reasonable to allow an appeal from an order overruling a demurrer or granting a motion for a new trial, before final judgment from a justice of the peace, as to allow an appeal from an order granting a temporary injunction pendente lite from the district court to the supreme court. In neither case would the appeal be from a final judgment. Yet

the constitution is as explicit in allowing appeals in one case from final judgments as in the other. In each the right of appeal is from a final judgment. If the intention was to guaranty the right of appeal from a final judgment, and confer upon the legislature implied power to authorize appeals in all other cases from the district courts, then the same guaranty with implied power is also retained, and to be applied to justices' courts as well as to courts in the administration of estates. It would be no answer to this that the legislature had previously conferred the power in the one case and withheld it in the other. If the power exists in the legislature, the right could be conferred upon justices' courts at any time. It is apparent that such an unfortunate construction or implication was not contemplated nor intended. It would be presuming too much to say that the framers of the constitution were fearful that the legislature would enact laws preventing appeals from final judgments, and that, therefore, this provision was inserted, giving a guaranty of the right of appeal from such judgments, thus leaving to the legislature the right to enact laws allowing appeals from interlocutory orders. Especially is this so when we consider the fact that nearly every state in the Union allows appeals from final judgment, and restricts or prohibits appeals from interlocutory orders as being against the policy of the law. The framers of the constitution could not have anticipated that the legislature would do an unreasonable thing, and thus take away the right of appeal from a final judgment, when that right has grown to be almost inherent, and yet use words sufficient to authorize it to do that which in most states is considered questionable, and by eminent law writers to be against the policy of the law.

In granting the right of appeal from all final judgments the people intended to grant the right of appeal from all final judgments only. The supreme court, being a creature of the constitution, has only such powers as are therein conferred upon it. The only jurisdiction that is conferred by the constitution upon the supreme court in appeal cases is appeals from final judgments. There is no express declaration that appeals will not lie from judgments other than final judgments. But the court considers the affirmative declaration, as used in the section, that "from all final judgments of the district court, there shall be a right of appeal to the supreme court," as manifesting the intent of the framers of the constitution to except from the appellate jurisdiction of the supreme court appeals from the district courts, other than appeals from final judgments. This intention and implication is founded on the manifest intent of the framers of the constitution, and upon the general rules of construction that the expression of one thing in the constitution implies the necessary exclusion of things not expressed. We are of the opinion that when the framers of section 9 used the terms,

"from all final judgments of the district court there shall be a right of appeal to the supreme court," they intended to deny the right of appeal to the supreme court in all other cases, although no express terms of negation were used, and that so much of subdivision 3 of section 3635, Comp. Laws Utah 1896, authorizing appeals from orders granting an injunction, is abrogated and annulled by this section of the constitution. *Durousseau v. U. S.*, 6 Cranch, 307; *Ex parte Attorney General*, 1 Cal. 85; *Ex parte McCardle*, 7 Wall. 506; *U. S. v. Arredondo*, 6 Pet. 723, 725; *Suth. St. Const.* §§ 325-327; *Fowler v. Scully*, 72 Pa. St. 456; *Cooley, Const. Lim.* pp. 78-105; *Story, Const.* §§ 413-453; *State v. Hallock*, 14 Nev. 202; *Ex parte Vallandigham*, 1 Wall. 251; *Railroad Co. v. Grant*, 93 U. S. 401; *Page v. Allen*, 58 Pa. St. 334; *Barry v. Mercein*, 5 How. 103; *Potter's Dwar. St.* 674, 675. The policy of the laws of the several states and of the United States is to prevent unnecessary appeals. It is not the policy of courts to review cases by piecemeal. The interests of litigants require that cases shall not be prematurely brought to the highest court. The errors complained of may be corrected in the court in which they originated; or the party injured by them might, notwithstanding the injury, have final judgment in his favor. If a judgment interlocutory in its nature were the subject of appeal, each of such judgments rendered in the case could be brought before the appellate court, and litigants harassed by useless delay and expense, and the courts burdened with unnecessary labor. *Freem. Judgm.* § 33. The reason of the rule is obvious. A party against whom an interlocutory order is made may have all his wrongs redressed and his rights protected upon a final hearing, and therefore he has no ground of complaint. If these rights are not protected on a final hearing in the trial court, the error can be corrected on appeal from the final judgment.

We conclude that an appeal from an order pendente lite granting a temporary injunction is not an appeal from a final judgment, and that such an order is not a final judgment, from which an appeal will lie to this court, under section 8 of the constitution. *Artman v. Manufacturing Co. (Neb.)* 20 N. W. 873; *Baker v. White*, 92 U. S. 176; *Telegraph Co. v. Locke*, (Ind. Sup.) 7 N. E. 579; *Hume v. Bowle*, 148 U. S. 245, 13 Sup. Ct. 5-2; *Freem. Judgm.* § 34; *Bank v. Jenkins*, 109 Ill. 219; *Bostwick v. Brinkerhoff*, 106 U. S. 3, 1 Sup. Ct. 15; *Hill v. Railroad Co.*, 140 U. S. 52, 11 Sup. Ct. 630. See *Stewart v. Masterson*, 131 U. S. 151, 9 Sup. Ct. 682; *Walker v. Oliver*, 63 Ill. 200; *Brown v. Edgerton (Neb.)* 16 N. W. 474; 2 *Enc. Pl. & Prac.* p. 53; *Tinly v. Martin*, 80 Ky. 463; *Truett v. Raina*, 17 S. C. 451; *Ray v. Northrup*, 55 Wis. 396, 13 N. W. 239; *Bolles v. Stockman*, 42 Ohio St. 445; *Dows v. Congdon*, 28 N. Y. 122.

It is contended that the appellants' right of appeal is guarantied under the statute. A citizen has no vested right in statutory provisions

and exemptions. A statutory right to have cases reviewed on appeal may be taken away by a repeal of the statute, even as to cases which have been previously appealed. In this case the constitution has taken away the right of appeal from an interlocutory order granting the temporary injunction appealed from. *Cooley*, Const. Lim. pp. 471-473; *Railroad Co. v. Grant*, 98 U. S. 398; *Ex parte McCardle*, 7 Wall. 506. The appeal from the order granting the injunction is dismissed, with costs.

ZANE, C. J., concurs. BARTCH, J., disqualified to sit in case.

EASTMAN v. GURREY.

(Supreme Court of Utah. Oct. 29, 1896.)

APPEAL—ORDER VACATING JUDGMENT—FINALITY—CONSTITUTIONAL LAW—VESTED RIGHTS.

1. The plaintiff recovered judgment in an action of ejectment against defendant. The judgment, on motion for a new trial, was set aside and vacated, and a new trial granted. From the order setting aside and vacating the judgment, plaintiff appealed. Respondent moved to dismiss the appeal on the ground that the judgment not being final, it is not within the constitutional right of appeals. *Held*, affirming *North Point Consol. Irr. Co. v. Utah & S. L. Canal Co.*, 46 Pac. 824, 13 Utah, —, that, as the appeal was not from a final judgment of the district court, it is prohibited by implication under section 9, art. 8, Const., and by the application of the maxim, "Inclusio unius est exclusio alterius." The constitution has taken away the statutory right of appeal from the order vacating and setting aside the judgment appealed from. By using the terms, "from all final judgments of the district courts, there shall be a right of appeal to the supreme court," in connection with the balance of the section, the framers of that instrument intended to deny the right of appeal to the supreme court in all other cases arising under that clause, although no express term of negation was used.

2. The policy of the laws of the several states and of the United States is to prevent unnecessary appeals. Interests of litigants require that cases shall not be prematurely brought to the higher court, nor by piecemeal, and litigants harassed by useless delay and expense, and the courts burdened with unnecessary labor.

3. A citizen has no vested right in the statutory privilege or exemptions. A statutory right to have any particular question reviewed on appeal may be taken away by a repeal of the statute.

(Syllabus by the Court.)

Appeal from district court, Third district; John A. Street, Judge.

Ejectment by M. Eastman against A. R. Gurrey. From an order vacating a judgment for plaintiff, plaintiff appeals. On motion to dismiss. Granted.

C. S. Varian and Rley H. Jones, for appellant. T. Ellis-Browne, for respondent.

MINER, J. It appears from the record in this case that the plaintiff recovered judgment in the district court in an action in ejectment against the defendant in February, 1896. This judgment was afterwards set aside and vacated, and a new trial granted, on motion of the defendant. The appellant appeals from

the order vacating and setting aside the judgment. The respondent now moves to dismiss the appeal on the ground that no appeal lies to this court from an order vacating and setting aside the judgment, under section 9 of article 8 of the state constitution, and that such order was not a final judgment from which an appeal will lie to this court. The same principle is involved in this appeal as in that of *North Point Consol. Irr. Co. v. Utah & S. L. Canal Co.* (decided at the present term) 46 Pac. 824, 14 Utah, 155. That case involved the constitutional right of appeal from an order granting an injunction pendente lite. The decision in that case, on principle, is decisive of this. We shall therefore content ourselves with a reference to the reasoning in that case as applicable in this. This case, as that, involves the construction of sections 4 and 9 of article 8 of the constitution. Section 9 provides that, "From all final judgments of the district courts, there shall be a right of appeal to the supreme court." Upon that subject this court said: "There is no express declaration that appeals will not lie from judgments other than final judgments, but the court considers the affirmative declaration used in the section as manifesting the intent of the framers of the constitution to except from the appellate jurisdiction of the supreme court all appeals other than appeals from a final judgment. This restriction and implication is founded on the manifest intent of the framers of the constitution, and upon the general rules of construction that the expression of one thing in the constitution implies the necessary exclusion of things not expressed. We are of the opinion that when the framers of section 9 used the terms, 'From all final judgments of the district courts, there shall be a right of appeal to the supreme court,' they intended to deny the right of appeal to the supreme court in all other cases arising under that clause, although no express term of negation was used." *Durousseau v. U. S.*, 6 Cranch, 307; *Ex parte Attorney General*, 1 Cal. 85; *Ex parte McCardle*, 7 Wall. 506; *U. S. v. Arredondo*, 6 Pet. 723, 725; *Suth. St. Const.* §§ 325-327; *Fowler v. Scully*, 72 Pa. St. 456; *Cooley*, Const. Lim. pp. 78-105; *Story*, Const. §§ 413, 453; *State v. Hallock*, 14 Nev. 202; *Ex parte Vollandigham*, 1 Wall. 251; *Railroad Co. v. Grant*, 98 U. S. 401. We are of the opinion that an appeal from an order vacating and setting aside a judgment is not an appeal from a final judgment, and that such an order is not a final judgment from which an appeal will lie to this court under section 9 of article 8 of the constitution. *Artman v. Manufacturing Co. (Neb.)* 20 N. W. 873; *Baker v. White*, 92 U. S. 176; *Telegraph Co. v. Locke* (Ind. Sup.) 7 N. E. 579; *Hume v. Bowie*, 148 U. S. 245, 13 Sup. Ct. 582; *Freem. Judgm.* § 34; *Bank v. Jenkins*, 109 Ill. 219; *Bostwick v. Brinkerhoff*, 106 U. S. 3, 1 Sup. Ct. 15; *Hill v. Railroad Co.*, 140 U. S. 52, 11 Sup. Ct. 690; 2 Enc. Pl. & Prsc. p. 53; *Tinly v. Martin*, 80 Ky. 463; *Holcombe v. McKusick*, 20 How.

552; *Brown v. Edgerton* (Neb.) 16 N. W. 474; *Walker v. Oliver*, 63 Ill. 200; *Truett v. Rains*, 17 S. C. 451; *Dows v. Congdon*, 23 N. Y. 122; *Ray v. Northrup*, 55 Wis. 396, 13 N. W. 239; *Bolles v. Stockman*, 42 Ohio St. 445. The reason of the rule is obvious. A party against whom an order is made vacating and setting aside a judgment may have all his wrongs redressed, and his rights protected, upon a new trial. If the party whose judgment is vacated succeeds upon a new trial, he has suffered no injury. If he has a fair trial, he should not complain, as he has all the law contemplates. If these rights are not protected upon a final hearing, the errors can usually be corrected upon appeal from the final judgment. "The policy of the laws of the several states and of the United States is to prevent unnecessary appeals. The appellate courts will not review cases by piecemeal. The interests of litigants require that causes should not prematurely be brought to the higher courts. The errors complained of might be corrected in the court in which they originated; or the party injured by them might, notwithstanding the injury, have final judgment in his favor. If a judgment interlocutory in its nature were the subject of appeal, each of such judgments rendered in the case could be brought before the appellate court, and litigants harrassed by useless delay and expense, and the courts burdened with unnecessary labor." 1 *Freem. Judgm.* § 33. If it be claimed that the right of appeal is guaranteed under the statute, the answer would be that a citizen has no vested right in the statutory privileges or exemptions. The statutory right to have any particular question reviewed on appeal may be taken away by the repeal of the statute. The constitution has taken away the right of appeal from the order vacating and setting aside the judgment appealed from. *Cooley, Const. Lim.* pp. 471-473; *Ex parte McCardle*, 7 Wall. 506. The appeal in this case is dismissed, with costs.

ZANE, C. J., and BARTON, J., concur.

THIESSEN v. RIGGS et al.

(Supreme Court of Idaho. Nov. 14, 1896.)

APPEAL—DISMISSAL.

Where the record shows no final judgment or other final disposition of the case in the district court, the appeal will be dismissed on motion.

(Syllabus by the Court.)

Appeal from district court, Nez Perces county; W. G. Piper, Judge.

Action by J. D. C. Thiesen against Clifford Riggs and Henry Riggs, partners. Judgment for plaintiff, and defendants appeal. Dismissed.

James W. Reid, for appellants. E. O. Neill, for respondent.

HUSTON, J. This action was originally commenced in the probate court of Nez Perces county, and was brought to recover possession of a certain number of sheep claimed by plaintiff. The facts, as shown from the record, are as follows: The plaintiff and defendants are engaged in the sheep business in Nez Perces county. During the winter of 1895 a number of sheep from the band of plaintiff strayed into the band of defendants,—some 160 head. Within three or four days thereafter, defendants notified plaintiff of the fact, and requested him to come and remove his sheep from the band of defendants. This the plaintiff neglected to do, and defendants herded and cared for said sheep of plaintiff during the winter of 1895 and 1896. In the spring of 1896, plaintiff made demand of defendants of delivery of said sheep. Defendants refused to deliver them until their bill for herding and keeping, amounting to \$50, was paid. Thereupon plaintiff brings his action of claim and delivery. Now, it would seem to the ordinary mind that the issues arising from this state of facts are brief and simple. There was no dispute about the facts. The only question was, is the plaintiff legally bound to pay the agister's lien of the defendants to entitle him to the possession of the sheep? To settle this question (about which there should never have been any dispute, unless it arose upon the amount claimed by defendants), we find the following proceedings in the record: Action by plaintiff; complaint filed; amended complaint; answer to original complaint; answer to the amended complaint; cross complaint and answer to cross complaint. The probate court seems to have been turned into an arena for an exhibition of legal acrobatics in the way of pleadings. A trial was had before a jury upon this formidable array of pleadings in the probate court, which resulted in the following verdict: "We, the jury duly impaneled and sworn to try the above-entitled action, find that the plaintiff is entitled to recover from the defendants the possession of the one hundred and forty head of sheep described in the plaintiff's amended complaint, or the sum of \$315, the value thereof, in case delivery cannot be had. R. P. Mudge, Foreman." And further: "We, the jury duly impaneled and sworn to try the above-entitled action, find a verdict for defendants in the sum of forty dollars. R. P. Mudge, Foreman." Upon this verdict, judgment was rendered by the probate court in favor of the plaintiff for the recovery of 140 head of sheep, or their value (\$315), and for the defendants in the sum of \$40, and their costs in this action, amounting to \$76.40. From this judgment of the probate court, plaintiff appealed to the district court. The case came up in the district court upon the pleadings filed in the probate court, and, on motion of the plaintiff, judgment was rendered upon the pleadings, to wit, for the possession of 140 head of sheep, and for his costs. There were numerous motions made, as appears by the record, for retaxation

of costs, etc., and on the 21st of May, 1896, the following entry appears in the record by the district court: "Now at this time the court renders a decision on the motion to strike out the cross complaint, and for judgment on the pleadings, heretofore argued and submitted herein, and sustains the same, except as to the cross complaint, which is allowed to stand. To which ruling the plaintiff asks and is allowed an exception, and to which ruling the court also allows an exception to counsel for defendant." Upon the record thus made, defendants appeal to this court. Motion to dismiss appeal is filed by respondent. The motion is granted, for the reason the record does not show any final judgment, or other final disposition of the case. The granting of a judgment on the pleadings was error. The case should have been tried and decided by the district court as a whole. There was no excuse for dividing the issues. The verdict and judgment of the probate court was a proper disposition of the case, except that the defendants should have been given a lien upon the sheep until their bill for keeping, as found by the jury, was paid. *Stock Co. v. Delamue* (Idaho) 28 Pac. 97. The appeal is dismissed; costs to abide result of trial of the case in district court. It is suggested to the district court that it should proceed and try the action upon the issues raised by the pleadings.

MORGAN, C. J., and SULLIVAN, J., concur.

WHEELER et al. v. COMMERCIAL BANK OF MOSCOW.

(Supreme Court of Idaho. Nov. 14, 1896.)

BANKS AND BANKING—DEPOSIT—DEMAND—DRAFT—HARMLESS ERROR.

1. The failure to allege and prove a demand in an action by a depositor against a bank which has failed is not ground for reversal of judgment, where the record shows such demand would have been fruitless and unavailing.

2. Plaintiffs procured of defendant bank, within a short time of the failure of the bank, two drafts, giving their checks therefor, upon funds deposited by them with the bank. The drafts were not accepted by the payees therein, but were returned to plaintiffs by due course of mail, not having been presented at drawee bank. Held, that in an action by plaintiffs to recover amount due them from said bank, including amount of said drafts, the failure of plaintiffs or the payee in the draft to present them at the drawee bank for payment, and have them duly protested, was not, in the absence of any proof that defendant had been damaged by such remissness, under the statutes of Idaho, a defense to plaintiffs' action.

8. Section 4231, Rev. St. Idaho, commented upon and applied.

(Syllabus by the Court.)

Appeal from district court, Latah county; W. G. Piper, Judge.

Action by W. W. Wheeler and others, partners as Motter, Wheeler & Co., against the Commercial Bank of Moscow, to recover on drafts. From a judgment for plaintiffs, defendant appeals. Affirmed.

Forney, Smith & Moore and Morgan & Moore, for appellant. Sweet & Steel, for respondents.

HUSTON, J. There appears to be no dispute as to the facts in this case. They are, briefly, as follows: The defendant was on the 19th day of March, 1895, and for some time previous had been, engaged in the banking business in the town of Moscow, Idaho. The plaintiffs were customers and depositors of said bank. On the 12th day of March, 1895, plaintiffs, then having a balance to their credit in said bank, procured therefrom a draft upon the Chase National Bank of New York City, for the sum of \$500; and on the 19th day of March, 1895, plaintiffs procured from said defendant another draft upon the said Chase National Bank for the sum of \$500. For both of these drafts, plaintiffs gave checks. At the time the last draft was procured, about 3 o'clock p. m. on the 19th day of March, 1895, the plaintiffs had a deposit in said Commercial Bank of Moscow of \$1,109.92. The defendant bank closed its doors on the 19th of March, 1895. Soon thereafter both said drafts were returned to plaintiffs by the payees named therein, with a slip pasted thereon, containing the words, "Bank Failed." On the 20th day of March, 1895, this action was brought by plaintiffs for the recovery of \$1,099.92, the amount claimed by plaintiffs to be due them from the defendant, including the amount of said two drafts. To this claim of plaintiffs, defendant interposes numerous defenses. It is claimed that the action is not brought in the name of the real parties in interest; that it does not appear that said drafts have ever been assigned by the payees therein named to plaintiffs; that no demand is alleged in the complaint or was proven upon the trial; that it is not alleged in the complaint or proven in the trial that said drafts had even been protested. These propositions are elaborated largely by defendant in its brief, which is a very marvel of legal ingenuity and kaleidoscope transformations. It is seldom we are presented with so complete a superstructure of legal technicalities. But the record shows us this cold array of facts: On the 12th and 19th days of March, 1895, the plaintiffs, as customers of the defendant bank, had on deposit with said bank, subject to the check or call of plaintiffs, the sum of about \$1,109.92; that on those days plaintiffs drew their checks against that sum for the amount of \$1,000, and received therefor two drafts of \$500 each upon the Chase National Bank of New York, which they forwarded to the payees therein named, and which said drafts were returned by due course of mail to plaintiffs, without acceptance, and with a slip attached, containing the words "Bank Failed." Plaintiffs had paid \$1,000 for these drafts, and at the time one of them, at least, was issued, the defendant well knew it was exceeding its limits in making the draft, for it closed its doors and ceased doing business within an hour after issuing it.

We are admonished by section 4 of our Revised Statutes that our statutes "are to be liberally construed, with a view to effect their objects and promote justice." We are unable to discern wherein or how justice would be promoted by allowing the defendant corporation to avoid the payment of a debt which, as matter of fact, it admits it owes, because some custom of bankers or technical rule of law has not been observed by the creditor. We can see but little cogency in the claim that no demand is alleged or proven. The defendant closed its doors permanently within an hour after the issuance of the last draft. Where and of whom should a demand be made? Not of the president of the bank surely. He is not the bank. Nor of any other officer of the institution. It could only be made of the bank by shouting through the keyhole, and, had that course been resorted to, we doubt not the answer of defendant would have bristled with technical objections against such procedure. No demand was necessary, for it would have been, as the record clearly shows, one of those vain and useless things which the law does not require. And the same may be said of the want of presentation of the drafts at the Chase National Bank. It would have been a vain and useless thing. The attempt by defendant to create an impression that, if presented, the drafts would have been paid, is a failure. The testimony fails to establish any such thing. There is no pretense that the defendant has been damaged by any alleged remissness of plaintiffs. As we have before said, the record, when analyzed, shows a naked attempt to avoid the payment of a just debt through the technicalities of the law; and, whatever the result might be in other jurisdictions, we have the positive inhibition contained in section 4231 of our Revised Statutes, which is as follows: "The court must in every stage of an action disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the parties, and no judgment will be reversed or affected by reason of such error or defect." However much respect we may have for the numerous authorities cited by the counsel for defendant, we cannot recognize them as having more binding force upon us than our own statutes. The judgment of the district court is affirmed, with costs.

MORGAN, C. J., and SULLIVAN, J., concur.

NORMOYLE v. LATAH COUNTY.

(Supreme Court of Idaho. Nov. 14, 1896.)

INTOXICATING LIQUORS—AMOUNT OF LICENSE.

The Statutes of 1895 (Sess. Laws Idaho 1895, p. 82) provide that in any city, town, village, or hamlet where, at the last general election next preceding the date of the application for license, the total vote for governor ex-

ceeded 150 votes, the sum to be paid for license shall be \$500 per annum. In a precinct where the vote was in excess of 150, although there was included in said precinct an incorporated town, village, or city, but only one polling place for the whole precinct, the number of votes cast at such precinct is the criterion by which the amount of license must be governed.

(Syllabus by the Court.)

Appeal from district court, Latah county; W. G. Piper, Judge.

Action by M. C. Normoyle against Latah county. Judgment for plaintiff. Defendant appeals. Reversed.

Atty. Gen. Parsons and McNamee & Morgan, for appellant. Cozier & Pickett, for respondent.

HUSTON, J. This is an action brought by plaintiff to recover back the sum of \$50 claimed to have been unlawfully exacted from him by the sheriff of said county, as collector of licenses, and paid by plaintiff under protest. The license was collected under the provisions of section 4 of an act of the Idaho legislature (see Sess. Laws Idaho 1895, p. 82), which is as follows: "Sec. 4. The amount to be paid by each applicant for such license shall be the sum of five hundred dollars per year, or a proportionate amount for each fraction of a year, in any city, town, village or hamlet, where, at the last general election next preceding the date of the application for license, the total vote for governor exceeded one hundred and fifty votes, and three hundred dollars per year in all other cities, towns, villages or hamlets." The "City of Kendrick," so called, is within the precinct of Kendrick, only a portion of which is included in the corporate limits of the city of Kendrick. There was but one polling place in said precinct, and the number of votes cast at that polling place for governor at the election in 1894 (the last election preceding the application for license) was in excess of 150 votes. The polling list is the only evidence available or permissible to establish the facts required by the statute upon which to fix or base the amount of license to be required; and it is conceded that, by that evidence, the amount demanded and received by the sheriff was the proper amount. State v. Doherty, 2 Idaho, 1105, 29 Pac. 855. There was no brief filed by respondent in this case, nor any argument made. The judgment of the district court is reversed, with costs.

MORGAN, C. J., and SULLIVAN, J., concur.

HATTABAUGH v. VOLLMER.

(Supreme Court of Idaho. Nov. 17, 1896.)

NEW TRIAL—STATEMENT—EXCEPTIONS—APPEAL—TRANSCRIPT—SERVICE.

1. An exception to an order denying a new trial is saved by the provisions of section 4427, Rev. St., without the interposition of a formal objection to the ruling of the court or judge.
2. An appeal is perfected when the proper

notice has been served and filed, and a proper undertaking is filed within the time required by law. And under the provisions of paragraph 8, rule 27, of the rules of this court (32 Pac. xl.), the transcript of the record on appeal must be served and filed within 60 days after the appeal is perfected.

3. Under provisions of sections 4889, 4890, Rev. St., a transcript may be served by mail.

4. When amendments are offered and allowed to a proposed statement on motion for a new trial, the statement as amended must be engrossed before this court will consider such statement.

(Syllabus by the Court.)

Appeal from district court, Nez Perces county; W. G. Piper, Judge.

Action by I. C. Hattabaugh, trustee, against John P. Vollmer. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. On motion to dismiss. Granted.

James W. Reid and James W. Poe, for appellant. Morgan & Moore and Cozier & Pickett, for respondent.

SULLIVAN, J. This is an appeal from the judgment, and the order overruling a motion for a new trial. A motion was made to dismiss the appeal on the three grounds following, to wit: (1) That no exception was saved to the order overruling the motion for a new trial; (2) that the transcript was not served on respondent in the time required by the rules of this court; (3) that the statement contained in the record is not such a one as the law requires.

As to the first ground: Section 4427, Rev. St., declares that certain orders and decisions are deemed excepted to, and the order denying a new trial comes within that class, and for that reason no formal exception is required.

As to the second ground: Paragraph 8 of rule 27 (32 Pac. xl.) provides that a transcript of the record must be served upon the adverse party, and filed in this court, within 60 days after the appeal is perfected. Section 4808, Rev. St., provides that "an appeal is taken by filing with the clerk of the court in which the judgment or order appealed from is entered, a notice stating the appeal from the same or some specific part thereof and serving a similar notice on the adverse party or his attorney." Said section also provides that an appeal so taken is ineffectual for any purpose unless, within five days after the filing and service of the notice of appeal, an undertaking be filed, or a deposit of money be made, with the clerk, as thereafter provided. From this section of the statute it will be observed that an appeal is taken by filing and serving a notice, but the appeal is of no effect unless an undertaking be filed within five days after filing and serving the notice. Section 4814, Rev. St., provides, *inter alia*, that whenever an appeal is perfected as provided in the preceding sections of chapter 2, tit. 13, of the Revised

Statutes, it stays all further proceedings in the court below upon the judgment or order appealed from, or upon the matters embraced therein. Paragraph 8 of rule 27 (32 Pac. xl.) provides that, in all cases where an appeal is perfected, a transcript of the record must be served and filed within 60 days after the appeal is perfected. Taking into consideration the provisions of said section 4814 applicable to the point under consideration, and paragraph 8 of said rule 27, they clearly indicate that the time for serving and filing the transcript does not begin to run until the three acts have been done, to wit: The filing and serving of notice of appeal, and filing the undertaking. See *Shissler v. Crooks*, 1 Idaho, 369; *Miller v. Mining Co.*, 2 Idaho, 1140, 31 Pac. 802. In the last-cited case this court said that an appeal is perfected when the notice of appeal is served and filed, and the proper undertaking is placed on file, according to law. In this case the notice of appeal was served and filed on the 25th day of July, 1896, and the undertaking on appeal was filed on the 27th day of said month. It is shown by affidavit that the transcript was served by mail on the 25th day of July, 1896. Service of transcript, under certain circumstances and conditions, may be made by mail. Rev. St. §§ 4889, 4890. The transcript was served in time.

As to the third point made by the motion: Appellant prepared a proposed statement on motion for a new trial, and served it on respondent's attorneys, whereupon they proposed 21 amendments thereto, which amendments were allowed by the judge. The 21 amendments thus allowed required the insertion of certain words, sentences, and paragraphs in various parts of the proposed statement, designating the page and line wherein such amendments were to be inserted. And, instead of engrossing the proposed statement and amendments, the amendments were simply attached to the proposed statement, and the certificate of settlement indorsed thereon. The statement, as settled, was handed to the printer, in connection with the other papers required to be printed in the transcript of the record. When the transcript was printed, neither the lines nor pages of the printed transcript corresponded with lines and pages of the original written or typewritten transcript. For instance, the second amendment allowed was the insertion after the words "Bank of Moscow," in the fifteenth line of page 2 of said proposed statement, the following, to wit: "For the purpose of showing that the trust mentioned in paragraph two of plaintiff's complaint was therein entered into and sanctioned by the board." The words "Bank of Moscow" do not occur in line 15, p. 2, of the statement, as printed in the record before us, and the words proposed to be inserted have no relevancy in connection with the language used in said line 15. The same is true in re-

gard to some of the other amendments. The attorneys for appellant filed in this court on November 11, 1896 (the decision having been announced in October, 1896), an exhibit showing where the amendments should be inserted in the statement, wherein it is shown that the amendment which was directed to be inserted after the words "Bank of Moscow," in line 15 of page 2, above referred to, should be inserted in line 30 of said page 2. The third amendment allowed consisted of several questions and answers, and they were directed to be inserted after the figures "1895," in line 29 of page 2. The said figures do not appear in said line. It is shown by said exhibit that said amendment should be inserted in line 19, page 3, instead of in line 29, page 2, as stated in said amendment. This is sufficient to illustrate the condition of the transcript of the record in this case, and to show the necessity of engrossing the statement after amendments have been allowed thereto. The printed transcript very seldom, if ever, would correspond in page and line to the original, and it would be an utter impossibility to ascertain the place in the transcript where amendments should be inserted. Hence arises the necessity of engrossing the statement before the transcript of record is printed. The trial judge should not settle a statement, where amendments are allowed, until after the engrossment thereof. Said exhibit shows the difficulty under which appellant's attorneys labored in inserting the amendments into the printed transcript, and that it could not have been correctly done without reference to the original transcript, which is not among the files of this court. It is impossible for this court to properly consider a case on such a transcript as is here presented, and we shall not undertake to complete a transcript by engrossing it. That duty devolves upon the appellant or plaintiff in error. In the case of *Pence v. Lemp* (Idaho) 43 Pac. 75, the statement on motion for a new trial was in substantially the same condition as the one in the case at bar. It consisted of the proposed statement and the proposed amendments thereto, and was not engrossed after the allowance of the amendments. In *Smith v. Davis*, 55 Cal. 28, the court, in commenting on a statement such as the one under consideration, said: "Such documents, not engrossed into one, and attested by the signature of the judge, have never been regarded as the statement required by law, and have never been considered by this court on appeal." The motion to dismiss is granted, with costs in favor of respondents.

On Rehearing.

A petition for rehearing has been filed in this case, and, after carefully considering the same, a rehearing is denied. It is ordered that a remittitur issue at once.

MORGAN, C. J., and HUSTON, J., concur.

v.46P.no.10—53

WILSON et al. v. JOHNSON et al.

(Court of Appeals of Kansas, Southern Department, E. D. Oct. 6, 1896.)

JOINT TENANCY—ESTATES IN ENTIRETY—CONVEYANCE BY WILL—ACQUIESCENCE.

1. Estates in entirety and joint tenancies are recognized by our supreme court as existing in Kansas; and, until the passage of chapter 203 of the Session Laws of 1891, the right of survivorship under the common law was in full force and effect.

2. Where a husband and wife own an estate in entirety, they can be divested of such estate, and become tenants in common, only by executing regular conveyance, or by a contract legally entered into between them.

3. Where a wife, who is one of the owners of an estate in entirety in a homestead, states in her will that she owns an estate as tenant in common with her husband, each owning the undivided one-half thereof, and bequeaths a life estate to him, and her interest in such homestead after such life estate to another, and also in the same will bequeaths all of her household goods and other property to the same legatee, *hild*, that this is not a sufficient contract or conveyance upon her part to divest her of the estate in entirety, and create the estate of tenant in common as to her.

4. Where the husband, who is the other owner of an estate in entirety, consents to the conditions of the will mentioned in section 3 of this syllabus, and to the disposition of the property thereunder, *hild*, that such consent is not a sufficient contract or conveyance upon his part to divest him of his estate in entirety, and create the estate of tenant in common as to him.

5. To attempt to construe such will and consent as a contract, we are unable to find a consideration passing to the husband to recompense him for transferring his contingent estate in fee simple.

(Syllabus by the Court.)

Error to district court, Franklin county; A. W. Benson, Judge.

Action by Matilda Johnson against Mary E. Wilson and others. Judgment for plaintiff, and defendants Mary E. Wilson and William M. Wilson bring error. Reversed.

Wm. H. Clark, for plaintiffs in error. John W. Deford and H. P. Welsh, for defendants in error.

DENNISON, J. This is an action brought in the district court of Franklin county, Kan., by Matilda Johnson, as plaintiff, to recover the possession of the undivided one-half of certain real estate, and to procure the partition thereof, alleging ownership in her, and that Mary E. Wilson, William M. Wilson, and J. R. Barnett, the defendants, were wrongfully withholding the possession from her. Barnett filed a disclaimer, alleging that he was a tenant under James Davis. On February 24, 1884, George W. Dawson and wife, by warranty deed, conveyed to James Davis and Catherine Davis lots 13, 15, and the north 19 feet of lot 17, in block 55, in the original town site of Ottawa, Franklin county, Kan. James Davis and Catherine Davis were at that time husband and wife, and, from about the time of the conveyance above mentioned until their death, they occupied the above premises as their homestead.

On February 7, 1887, Catherine Davis executed a will, which contained, among other things, the following sections, numbered 2 and 3:

"(2) Since the homestead where I now live with my husband, James Davis, to wit, lots thirteen (13), fifteen (15), and north nineteen (19) feet of lot seventeen (17), block fifty-five (55), Ottawa city, is now owned by both of us as tenants in common, each of us owning the undivided one-half thereof, and in order that my husband may have the use of said homestead, I hereby give and devise to my said husband, James Davis, the possession, use, and control of all my interests in and to said homestead, for and during the natural life of my said husband, and also the use of all the household furniture therein. (3) I give, bequeath, and devise to my sister Matilda Johnson, and to her heirs and assigns, forever, all my property, of every kind and nature, both real and personal, to have, hold, use, control, and dispose of as to her may seem best, including all my interest in said homestead above mentioned and said household furniture, subject, however, to the life estate of my said husband in the property mentioned in item 2 of this will."

Attached to said will is the following statement, made by James Davis:

"I, James Davis, the husband of Catherine Davis, having been made acquainted with the provisions of the within will, and of the disposition therein made by said Catherine Davis of her property, do hereby consent to the same. Witness my hand, this 7th day of February, 1887. James Davis.

"We hereby certify that the said James Davis signed the above consent in our presence, this 7th day of February, 1887. Maggie Davis. Lucy J. Latimer. Wm. H. Clark."

On June 23, 1888, Catherine Davis died, and on June 25th her will, as above stated, was duly probated. The claim of the plaintiff below, Matilda Johnson, is based upon the above facts.

On December 15, 1888, James Davis executed a will, which contained, among other things, the following section, numbered 2.

"(2) To Mary E. Wilson and William M. Wilson, her husband, I give, bequeath, and devise, in fee simple absolute, all the following described real estate, situated in Franklin county, Kansas, to wit: Lots thirteen (13) and fifteen (15), and the north nineteen (19) feet of seventeen (17), in block fifty-five (55), in the city of Ottawa, Franklin county, Kansas, to have and to hold to them, their heirs and assigns, forever."

On November 5, 1890, James Davis died, and on November 10, 1890, his will was duly probated. The defendants below are in possession of the property, claiming title under the will of James Davis. The case was tried by the court, without a jury, and judgment was rendered against the plaintiffs in error (defendants below), the Wilsons. They bring the case here for review.

The only question to be determined by us is: Did the will of Catherine Davis and the consent of James Davis attached thereto vest the title to the real estate in dispute in Matilda Johnson, after the life estate of James Davis had been determined? It must be conceded that the deed from Dawson and wife conveyed to James Davis and Catherine Davis an estate in entirety in the real estate. Estates in entirety and joint tenancies are recognized by our supreme court as existing in Kansas, and, until the passage of chapter 203 of the Session Laws of 1891, the right of survivorship under the common law was in full force and effect. See *Baker v. Stewart*, 40 Kan. 442, 19 Pac. 904; *Shinn v. Shinn*, 42 Kan. 1, 21 Pac. 813; and *Simons v. McLain*, 51 Kan. 160, 32 Pac. 919. In estates in entirety held by husband and wife, each owns a life estate and a contingent estate in fee simple in the entire estate. The contingent estate is founded solely upon survivorship. The survivor takes the whole estate. The estate of the one who dies first is ended at death. The life estate of that one is ended, and the contingency has occurred which vests the entire estate in the survivor. The deceased never has been vested with such an estate as could have been transmitted to his or her heirs either by will or otherwise.

In the case at bar the following language is contained in the will of Catherine Davis: "Since the homestead where I now live with my husband, James Davis, * * * is now owned by both of us as tenants in common, each of us owning the undivided one-half thereof, * * *." The defendants in error contend that the consent of James Davis to the provisions of his wife's will, and the disposition of her property, was in fact a deed, whereby he agreed to stand seised thenceforth as tenant in common with her, and that, being a tenant in common, the devise of her one-half of the property is valid. This is the pivotal point in this case. If, by the will of Catherine Davis and the consent of James Davis attached thereto, the estate in entirety was destroyed, and they thereafter held the estate as tenants in common, then the judgment of the district court is correct, and must be affirmed; otherwise, the judgment must be reversed. If Mrs. Davis was a tenant in common with Mr. Davis, she could, with the consent of her husband, have bequeathed her one-half to Mrs. Johnson. If she owned the estate in entirety with Mr. Davis, she could not have bequeathed her interest therein. In the nature of things a life estate cannot be bequeathed. The only estate which could be bequeathed would be the contingent estate which goes to the survivor. As Mrs. Davis was not the survivor, she had no descendible estate in the homestead. In analyzing the will of Mrs. Davis, it is clearly apparent that she was ignorant of the estate she owned in the homestead. She says she is a tenant in common with Mr. Davis, and owns the undi-

vided one-half of such homestead. The fact is she was the owner of an estate in entirety with her husband. She was solicitous of securing to her husband a life estate, and attempted to do so by the will. He already had a life estate. Had she been fully apprised of the interest she had in the homestead, we do not know what she might have desired to do, unless we are guided by the provisions of the will. We have only to deal with what she did. At the time she was about to make the will, she owned the estate in entirety. Is the assumption in the will, that, as tenant in common, she owned the undivided one-half thereof, sufficient upon her part to change her estate in the homestead? At the time of the making of Mrs. Davis' will, James Davis owned the estate in entirety. Is his statement that he had been made acquainted with the provisions of Mrs. Davis' will, and the disposition made of her property thereby, to which he consents, sufficient upon his part to change his estate in the homestead? To answer each of these questions in the affirmative, we must decide that the effect of the will of Catherine Davis was to convey to James Davis her quitclaim interest in the undivided one-half of the homestead, and that the effect of the consent signed by James Davis was to convey to Catherine Davis his quitclaim interest in the undivided one-half of the homestead; and we must further decide that such conveyances took effect at once. If it is to take effect only upon the death of either of the makers, it is testamentary in its nature, and not a conveyance. If it is to pass a present interest, although its possession and enjoyment may not accrue until some future time, it is a conveyance of contract. See *Reed v. Hazleton*, 37 Kan. 321, 15 Pac. 177. If we determine that Mr. and Mrs. Davis divested themselves of their estate in entirety, and became owners of the homestead as tenants in common, it should clearly appear that they did so by regularly executed conveyances, or by a contract legally entered into between them. There is no contention that there is any conveyance other than the will of Catherine Davis and the consent of James Davis.

We must establish these instruments as conveyances of their estates in entirety upon the theory that the will and consent are a contract between them, by which each agrees to change the estate from an estate in entirety to tenants in common. We fail to see how an analysis of the will and consent can be made more favorable to the claim of the defendants in error. We find Mr. and Mrs. Davis in possession of their homestead, each owning an estate in entirety in the same. Surely, a person's title to his property or his rights or estate therein cannot be divested except by some process of law, or by some contract between him and another. Interpreting the will and consent as a contract, we find James Davis and his wife each seised of an estate for life and a contingent estate in fee simple in the

homestead. In section 2 of the will, Mrs. Davis first assumes that she owns an interest which she does not own, and then bequeaths James Davis a life estate in the homestead and all the household furniture therein. In section 3, she bequeaths all of her property to Matilda Johnson, including her interest in the homestead and all the household furniture contained there, subject to the life estate of Mr. Davis. When James Davis signed the consent, which he did in the presence of two witnesses, besides the one whom he had sign for him, as he was unable to write, it must be assumed that he did so to enable his wife to bequeath away property which she could not otherwise have done, as is provided in paragraph 7239 of the General Statutes of 1889, which reads as follows: "No man while married shall bequeath away from his wife more than one-half of his property, nor shall any woman, while married, bequeath away from her husband more than one-half of her property. But either may consent, in writing, executed in the presence of two witnesses, that the other may bequeath more than one-half of his or her property from the one so consenting." It will be noticed that the will speaks of "all the household furniture" in the homestead, and "all my property, of every kind and nature, both real and personal, * * * including all my interest in said homestead." Mrs. Davis was, at least, bequeathing away from her husband more than one-half of her household furniture, which she could not do without his consent, executed in the presence of two witnesses. It seems more reasonable to us to suppose that he signed the consent to permit her to do this than it does to suppose that he signed it to permit her to bequeath away from him his own property, to wit, his contingent estate in fee simple in the homestead. By the writing itself, he consents to the disposition she makes of her property. There is no consent or authority that she may bequeath his contingent estate in fee simple. The will bequeaths Catherine Davis' interest in the homestead, not James Davis' interest. Had Catherine Davis survived James Davis, the will would have bequeathed the interest of Catherine Davis, which would have been the entire estate in fee simple. James Davis being the survivor, Catherine Davis had no descendible interest, and the defendants in error took no interest in the homestead under her will. If we are to construe these transactions as a contract between Mr. and Mrs. Davis, all the elements of a contract must appear. Not only must they have contracted understandingly, and their minds have met upon the same proposition, but a consideration must have passed between them. If either is to receive nothing, we cannot construe the transactions as a contract. Admitting all the contentions of the defendants in error, we are unable to discover what consideration was to pass to James Davis. Certainly not the life estate. It was already his. He signed the consent to permit his wife to bequeath her

property, which is provided for by statute, and this consent imports its own consideration; but, when we are asked to construe that consent into a conveyance of an interest or estate in his property, the consideration therefor must appear. James Davis did not recognize the right of Matilda Johnson to the property, for, while he was in possession of the property, he made the will by which he bequeathed and devised, "in fee simple absolute," all the homestead in question to Mary E. and William M. Wilson.

It is claimed that James Davis acquiesced in the will of his wife, by giving up the household goods to the legatee, and that, although he lived more than two years after the probate of Mrs. Davis' will, he never contested the validity of it. No one questions the validity of the will now. The plaintiffs in error have questioned the execution of the consent by James Davis, but we deem it unnecessary to consider that point. The judgment of the district court is reversed, and the cause remanded, with instructions to render judgment for the defendants below. All the judges concurring.

FAHEY et al. v. PEOPLE.

(Court of Appeals of Colorado. Nov. 9, 1896.)

RECOGNIZANCES—BOND TO REPLEVY FINE— VALIDITY.

A bond with sureties, given by the defendant in a criminal case, conditioned for the payment, within five months, of the fine and costs adjudged against him, and taken and approved by the clerk after the adjournment of court, is not a recognizance upon which, in case of default, execution may at once issue, under Gen. St. 1883, § 966, providing that the defendant in a criminal case may replevy the fine and costs by entering into a recognizance and sureties before the district court for the payment of such fine within five months, which recognizance shall create a lien on the real estate of the principal and sureties, and authorizing the clerk, on breach thereof, to issue execution thereon as upon a judgment of the court.

Error to district court, Weld county.

Motion by Max Wickhorst and John P. Klug, as sureties, to quash an execution issued upon a bond given by William H. Fahey to replevy a fine and costs adjudged against said Fahey upon conviction for stealing cattle. From an order denying the motion, the petitioners bring error. Reversed.

Miller & Sayer, for plaintiffs in error. Byron L. Carr, Atty. Gen. (H. N. Haynes, of counsel), for the People.

REED, P. J. On the 2d day of December, 1894, William H. Fahey was found guilty of stealing one steer, the property of one Gage, and on the 22d day of December was sentenced to pay a fine of \$200, and costs amounting to something more than \$200; the whole amounting to \$464.35. After the adjournment of court, Fahey attempted to replevy the fine, and for that purpose executed, with Wickhorst and Klug, the following bond:

"Know all men by these presents, that we, William H. Fahey, principal, and Max Wickhorst and John P. Klug, sureties, are held and firmly bound unto the people of the state of Colorado in the penal sum of four hundred and sixty-four ²⁵/₁₀₀ dollars, lawful money of the United States, for the payment of which well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly, severally, and firmly. Witness our hands and seals this 22d day of December, A. D. 1894. The condition of the above obligation is such that whereas, the said Wm. H. Fahey was, at the November term of the district court sitting in and for Weld county, Colorado, A. D. 1894, convicted of the crime of larceny of live stock, and was sentenced by said court to pay a fine of two hundred dollars and the cost of said prosecution, and stand committed until said fine and costs be paid. Now, if the said Wm. H. Fahey shall well and truly pay said fine and costs within five months from the date of this acknowledgment, then the above obligation to be void, otherwise to remain in full force and effect. William H. Fahey. [Seal.] John P. Klug. [Seal.] Max Wickhorst. [Seal.]

"Taken and approved by me at my office this 22d day of December, A. D. 1894. John B. Cooke, Clerk of District Court, Weld County, Colorado."

After the approval and acceptance of the bond, Fahey was released. The fine and costs not having been paid, after the expiration of five months an execution was issued, levied upon the real estate of Klug, the surety, and the land advertised for sale. On August 5, 1895, plaintiffs in error filed the following motion to quash the execution: "Motion of Max Wickhorst and John P. Klug to recall, suppress, and quash the said execution, and to release and vacate the levy of said execution upon the lands and premises of John P. Klug, and enter such release of record. Filed Aug. 5th, A. D. 1895: First, for defect appearing on the face of said execution; second, because the said execution was improvidently and illegally issued, and issued in violation of law; third, because the said execution was not issued upon any bond undertaking to obligation judicially forfeited pursuant to any order of any court; fourth, because the said execution was not issued upon any recognizance entered into before any court, nor was the same issued upon any judgment against the said Max Wickhorst or John P. Klug, or either of them; fifth, because no recognizance of record was ever entered into before court by either the said John P. Klug or Max Wickhorst; sixth, because any sale made under said execution of the lands or the property of said John P. Klug will operate as a cloud upon the title to such lands or property of said John P. Klug; seventh, because the said John P. Klug and Max Wickhorst are entitled to their day in court before being involuntarily divested of any of their property; eighth, for other good and sufficient reasons." And with

such motion was filed the affidavit of Klug, supposed to be in support of it. The affidavit was regarded as of no importance at the time, and of no importance in determining the question presented. The motion to recall and quash the execution was denied, and from such judgment error was prosecuted to this court.

The case has been ably and carefully argued by counsel of both parties; it seems, unnecessarily so, considering that there is but one apparently very simple question involved. In the elaborate and carefully prepared argument of the learned attorney general the bond in question and a recognizance entered of record in court are contended to be legally identical, and subject to the same method of procedure, or at least that the difference in the two is so slight that in the printed argument it is discussed as follows: "The foregoing makes it manifest that plaintiffs in error seek to escape liability under an obligation which they voluntarily assumed, and the full benefits of which their principal has enjoyed upon a bare technicality. They contend that the recognizance should have been read aloud to the recognizers in open court, with their hands uplifted, and that they should have verbally assented thereto. Because this perhaps was not done, but, instead of that, the necessary obligation was reduced to writing, and signed and sealed by them, and filed with the clerk on a juridical day, though perhaps a few minutes after the adjournment of the court, it is seriously urged that they can escape all liability. To our minds, this is reducing a technicality to the thinness of a spider's web." I cannot agree with the learned attorney general that the difference between the two is merely technical. I regard it as radical and fundamental. It is admitted in argument that the attempted proceeding to replevy the fine and costs was by the bond, that it was done with the clerk after the adjournment, and, after admitting the slight irregularity, contends that the legal identity of the bond with the statutory recognizance was such that, upon the default of the obligors in the bond, an execution could legally issue upon it without a judgment. The legal difference between a simple bond for the future payment of money, executed by sureties, and under seal, deposited with the clerk of the court, and placed on file, and a statutory recognizance in criminal proceedings, is so marked and well defined that we should hesitate to discuss it, were it not for the argument of the learned counsel for defendant in error. The replevying of a judgment for a fine and costs is purely statutory, and only in criminal proceedings is a provision ingrafted upon the criminal law by statute; and as in any other criminal proceedings, as well as in all remedies purely statutory, the strict adherence to the provisions of the statute is necessary to the validity of the proceeding, any departure is deemed serious. It will not do to say that something "like"

can be substituted, and that the requirements of the statute will be complied with. The law in regard to the replevy of fines and costs is the following: "It shall and may be lawful for any person or persons convicted of any criminal offence to replevy the judgment for the fine and costs, or the costs only, when no fine shall be imposed, by such convicted person or persons, with one or more good and sufficient freeholders entering into a recognizance before the district court, to the people of this state, for the payment of such fine and costs, or costs only, within five months of the date of the acknowledgment, which recognizance so taken is hereby declared valid in law, and to create a lien on the real estate of all such persons as shall acknowledge the same, and upon the breach thereof the clerk hereby authorized to issue an execution against the goods and chattels, lands and tenements of the persons who entered recognizance, in the same manner as if it had been a judgment of the court, which execution shall be collected in the same manner as is prescribed in the foregoing section. No scire facias shall be necessary previous to issuing such execution." Gen. St. 1883, § 966. The cognizance must be entered into in the district court, in open court. The clerk, in his office, after adjournment, or at any time, is not a district court, nor is any power conferred upon him to discharge a person from custody or allow a replevy. A recognizance in open court is a solemn confession of judgment individually and collectively, to be enforced at the end of five months, if the money remains unpaid. It is entered of record, and the judgment so entered is declared valid in law, and to create a lien upon the real estate of all such persons as shall acknowledge the same (confess the judgment); and upon default the clerk is authorized to issue an execution as upon any other judgment of record. No scire facias is required, simply for the reason that it is already a judgment that may be enforced, and no proceeding is necessary to reduce it to a judgment. Compare the provisions of the bond in controversy with the requirements of a recognizance, and something more than a technical difference is discovered. The wording of a recognizance entered into in open court is: "Do acknowledge yourselves to owe and be indebted unto the people of the state of Colorado in the penal sum of * * * lawful money of the United States, to be levied of your and each of your goods and chattels, lands and tenements, to the use of said people, if default be made in the following conditions," etc. It was already a judgment that could be enforced under the provisions of the statute providing for it. The other—the bond in controversy—was the ordinary bond for the payment of money upon which, in case of default, it was necessary to issue process bringing the parties in, if necessary, an adjudication, and an entry of

judgment, before an execution could issue; and an attempt to substitute and use it as a statutory recognizance in a criminal case did not change its character. I can find no authority, nor any decided case, where an execution was allowed to be enforced against the estate of bondsmen on this sort of a contract without their being allowed to defend, or an entry of judgment. "A recognizance is an obligation of record entered into before a court or officer duly authorized for that purpose, with a condition to do some act required by law which is therein specified." 1 Bouv. Inst. 264; Jacob, Law Dict.; 2 Bl. Comm. 341, 465; State v. Walker, 56 N. H. 178. "A recognizance differs from a bond in this: that while the latter, which is attested by the signature and seal of the obligor, creates a fresh or new obligation, the former is an acknowledgement or record of an already existing debt." State v. Crippen, 1 Ohio St. 401; State v. Daily, 14 Ohio, 91; People v. Kane, 4 Denio, 535. "But the principal difference between the two forms of obligation lies in the fact that a recognizance is a matter of record in the nature of a conditional judgment, and is proceeded upon by *scire facias* or summons." Republica v. Cobbett, 3 Dall. 475. Our statute is exceptional, and differs from the statutes of nearly all the states. Although the recognizance is, as in all cases, a conditional judgment until default, in nearly all the states it is necessary to enter the default and a judgment upon which a *scire facias* issues to the obligors to appear and show cause why the judgment should not be final. By our statute, upon default the judgment becomes final, and no proceeding by *scire facias* is required. Whether default and final judgment should be entered of record before the issuing of an execution we shall not determine. In all the states the recognizance entered of record is so far a judgment that *scire facias* is the proper writ, while upon the bond in controversy for the payment of money at a future time no one would presume to proceed by *scire facias*, but would be compelled to proceed by complaint and summons, as upon any other contract or obligation. It is needless to say that, until there was an adjudication and a judgment, no execution could issue. The difference in the remedy to enforce the two kinds of obligations is so marked that no attempt should be made to substitute one for the other. We are not called upon to decide whether the bond was absolutely void, or one that could be enforced by proper proceedings; consequently shall make no decision upon that point. If the parties see fit to proceed upon the bond, the question can be adjudicated. The issuing of the execution by the clerk was unwarranted, and execution void. The illegality of the entire proceeding in the attempt to replevy the fine and costs appeared upon the record and files and the clerk's entries, and, when the attention of the court

was called to it, the execution should have been quashed. The affidavit of Klug in support of the motion to quash was unnecessary. Whether it was or was not regular and proper practice, it is not necessary to determine. It is, at least, a novel practice for a litigant to file an affidavit to show what appeared of record in the case. At any rate, it might be regarded as harmless. The execution should have been recalled and quashed. In refusing the motion the court erred. The judgment of the district court will be reversed, and cause remanded, with instructions to quash the execution. Reversed.

HORN v. CITIZENS' SAVINGS & COMMERCIAL BANK OF DENVER.

(Court of Appeals of Colorado. Nov. 9, 1896.)

REPLEVIN—REQUISITES OF VALID JUDGMENT.

In replevin, where both parties, by their pleadings, claim the right to possession of the property, the judgment must be for its return if in the hands of the defeated party, or for its full value where possession cannot be had (Civ. Code, § 227); and a judgment permitting the party in possession to retain it, and establishing a lien thereon in favor of the other party for a specified amount, is not responsive to the issues, and is unauthorized and void.

Appeal from district court, Arapahoe county.

Action by Simon T. Horn against Wallace Bruce and the Citizens' Savings & Commercial Bank of Denver, intervener. From a judgment in favor of intervener, plaintiff appeals. Modified.

Simon T. Horn, in pro. per. R. H. Gilmore and W. W. Anderson, for appellee.

REED, P. J. On August 21, 1894, appellant brought suit against Wallace Bruce to obtain possession of cows, horses, milk wagons, farming machinery, and utensils, dairy appliances, etc., constituting the property of the "Bruce Dairy," of the alleged value of \$5,000. Plaintiff claimed title to the property by purchase from Christiana Bruce, July 9, 1894. The defendant claimed title by a chattel mortgage, alleging, in his answer, default, foreclosure, and purchase at foreclosure sale. The Bruce mortgage was a second mortgage, and was so expressed in it, and was subject to the prior mortgage of F. W. Reed & Co., executed by Christiana Bruce, for \$850, with interest for a given time at 3 per cent. a month, and afterwards, until maturity, at 5 per cent. a month. The note secured was by Reed & Co. sold and assigned, and became the property of the appellee. On February 13, 1895, appellee, having obtained leave, filed its petition of intervention in the suit of appellant against Bruce. The following appears of record in the judgment order of the court: "And it further appearing that, by consent, in open court, no evidence should be required on the part of the intervener to establish the facts alleged in its petition, because the same had theretofore been determined by the verdict of the jury, and judgment thereon, in the case of George Bruce

et al. v. Frank W. Reed et al., heretofore pending in this same court, in the same division thereof." A trial was had to a jury, resulting in the following verdict: "We, the jury, find the issues herein joined for the plaintiff, and assess his damages at the sum of eight hundred dollars, and that he is entitled to the possession of the property in controversy." The court required the plaintiff to remit the damages found in excess of \$255, which was done by consent of the plaintiff. Motion for new trial was overruled, and on March 12, 1895, judgment was entered in favor of appellant, against Bruce, as follows: "It is ordered, adjudged, and decreed that the said plaintiff have and retain the possession of the goods and chattels in controversy, and have and recover from said defendant the sum of \$255, and his costs incurred in this action;" and the following order: "And let the judgment for intervention for the sum of twelve hundred and twenty-six and 25-100 dollars be recorded in the judgment book; and let said intervener have a lien upon said property for said amount." And, on the same date, the following judgment was entered of record: "Wherefore, by virtue of the law, and by reason of the premises aforesaid, it is ordered, adjudged, and decreed that said intervener have and recover the sum of \$1,226.25, together with its costs, from the plaintiff herein, on account of the lien heretofore established against the property here in controversy by the Intervener herein, and that it may have a lien on and against said property thereof, which said lien shall be discharged on the payment of the sum of said \$1,226.25, together with the costs of said suit." Plaintiff prayed an appeal, and perfected it by filing an appeal bond on March 26, 1895. The above proceedings were had at the January term, 1895, of the district court. On the 29th day of April, of the April term, 1895, application was made ex parte to the judge at chambers to correct the judgment of March 12th. A form of order and entry required were presented and signed by the judge; but fearing the proceeding was irregular, being ex parte and without notice, a notice was served, and on May 3d the following motion was filed: "Now comes the intervener, and moves the court that a nunc pro tunc order be entered by the court, correcting the judgment entry filed March 12, 1895, in this action, so that the same will correspond with the facts, and the findings and decision of the court, in the following respects, viz. so that it will appear therein that the intervener had, before said entry of judgment, taken possession of the property described in the complaint, and that the said intervener had the right of possession and of property in the said chattels, as provided under the chattel mortgage described in the petition of intervention, and that the plaintiff might redeem the said property by paying the intervener \$1,226.25, interest and costs of suit." On May 13, 1895, the court sustained the motion to correct the judgment entry of March 12th, and made the following order and judgment entry: "And now, to wit, on this 13th day of May, A. D. 1895, the same being one of the regular days of the April term of said

court, this cause coming on to be heard on the motion of the intervener to correct the judgment entry as made herein on the 12th day of March, A. D. 1895, so as to have the same conform to the judgment as pronounced by the court, * * * and it appearing to the court that the said judgment entry heretofore made herein as aforesaid was not correct, was not in accordance with the findings, and did not correctly set out the judgment as pronounced by the court in said cause, it is therefore ordered that the said judgment entry be corrected and entered nunc pro tunc as of the date of March 12, A. D. 1895, so as to read according to the judgment entry now signed by the judge of this division of this court, as follows: * * * Wherefore it is ordered and adjudged that, as against the defendant, the plaintiff is entitled to the possession of the said property described in the complaint, and have and recover of the defendant the sum of \$255 and his costs incurred in this action against the defendant. And it appearing to the court that this court had heretofore found that the chattel mortgage made in favor of F. W. Reed & Co., under which the said intervener claims the right to the possession of the said chattels, and that its assignee was still in such possession, by reason of breaches in the conditions of said chattel mortgage, it is therefore ordered and adjudged that the said intervener and its assigns retain the said possession until the said plaintiff shall pay the amount of the indebtedness due on the said chattel mortgage, which on this date, March 13, 1895, the court find to be the sum of \$1,226.25 and costs of this action incurred by the said intervener; and, upon payment of the said sum by the said plaintiff, he shall be entitled to the possession of the said chattels, but until such payment the said intervener or his assigns has the right of possession and of property in the said chattels, under the terms and provisions and conditions of the said chattel mortgage."

The contention of appellant is based upon the action of the court in entering up the order and judgment entry of May 13th, in place and stead of the judgment entered on March 12th. It is urged (1) that, the term having expired, the judgment was beyond the control of the court; (2) that, the judgment entered March 12th not having been vacated, the judgment of May 13th was void; (3) that the court had no power to enter a nunc pro tunc judgment; that such action could be taken only when there had been a delay or a failure to enter the judgment at the time it was made. Then appears a claim that the petition of intervener was insufficient, in substance, to warrant a judgment in the first instance.

On examination, we think the complaint sufficient. The complaint alleges its title and right to the possession of the property, a demand for the possession of all the property from Horn, the plaintiff, and a refusal; then prays judgment against both plaintiff and defendant, and for the possession of the mortgaged property, "or the value thereof if the

same cannot be found and delivered to the intervenor." The value of the property as alleged in the complaint was \$5,000. The answer of the defendant Bruce admitted that to be the value. Consequently, as between those two, the value was settled; also, as to the intervenor if he had no reason to attack it, which it appears he had not. Section 227 of the Civil Code is as follows: "In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession or the value thereof, in case a delivery cannot be had, and damages for the detention. If the property has been delivered to the plaintiff, and the defendant claim a return thereof, judgment for the defendant may be for a return of the property, or the value thereof in case a return cannot be had, and damages for taking and withholding the same." The judgment entered was a void judgment. It should have been for the possession of the entire property. *Stevenson v. Lord*, 15 Colo. 131, 25 Pac. 313; *Smith v. Bauer*, 9 Colo. 380, 12 Pac. 397; *Rhoads v. Gatlin*, 2 Colo. App. 93, 29 Pac. 1019. The action was replevin. The judgment, to have been operative, must have been as provided in the Code. The finding in regard to the amount due intervenor was correct, and fixing his liability for the surplus. *Rhoads v. Gatlin*, supra. The statute required the judgment to be the return of the entire property when in the hands of the other party, or for its full value if the possession cannot be had. There is no statute allowing the possession to remain, and a money judgment to be entered against the party in possession for the amount found due, nor was any such judgment asked. It is true, the order and judgment for \$1,226.25 provided that intervenor should have a lien upon the property. But what was the nature of the lien, and how to be enforced? Plaintiff was invested with both title and possession, and the intervenor was given a lien upon his own property in the possession of the other party. Such was the judgment entered upon the specific order of the court. The judgment entered March 12th was erroneous and void. But with the verdict and the stipulation in regard to the rights of the intervenor we have the data upon which the proper judgment can be entered; and it should have been entered on March 12, 1895, and this court will enter the judgment that the district court should have entered on that date: "That the intervenor (the Citizens' Savings Bank) was entitled to the possession of all the property covered by its chattel mortgage; that the amount due the intervenor was \$1,226.25, with interest and costs of suit; and that it proceed to make the money from the property; and that the proceeds of such property, after paying and satisfying such debt, be paid by the intervenor to the plaintiff, Horn; and that any property remaining unsold after payment of intervenor's debt be delivered by the intervenor to the plaintiff; and

that the plaintiff, Horn, have judgment against the defendant Wallace Bruce for \$255 damages, with interest and costs of suit," and have execution therefor.

We are relieved from the necessity of discussing and deciding the question of the power of the court to revise and correct the judgment on the 13th of May, and enter the judgment that should have been entered on March 12th, as it becomes unimportant. We will simply remark that the judgment of May 13th, awarding possession of the property to the intervenor, was radically and fundamentally different from the verdict and the judgment of March 12th, awarding the possession to the plaintiff; and as the latter was the judgment appealed from, and no appeal was taken from that of May 13th, we, in effect, substantially decide the questions involved in the case appealed to this court. We are still unable to understand what appellant appealed from, and why he is in this court. The judgment in the suit against Bruce was in his favor. The damages, in excess of \$255, were remitted with his consent. The amount due to, and the rights of, the intervenor, were fixed by the stipulation to which he was a party. As modified above, the judgment of the district court of March 12th will be affirmed. Modified and affirmed.

ANDERSON et al. v. UNION PAC., D. & G. RY. CO.

(Court of Appeals of Colorado. Nov. 9, 1896.)
INJURY TO EMPLOYE — NEGLIGENCE — EVIDENCE.

Mere evidence that deceased, a track repairer, while walking outside the track, in the performance of his duties, was fatally injured by a large lump of coal which fell from a passing train, is insufficient to show negligence on the part of the company.

Error to district court, Arapahoe county.

Action by Gustaf Anderson and another against the Union Pacific, Denver & Gulf Railway Company. Judgment for defendant, and plaintiffs bring error. Affirmed.

Walter M. Duff, for plaintiffs in error. Teller, Orahood & Morgan, for defendant in error.

THOMSON, J. This action was brought by the plaintiffs in error to recover damages for the death of their son, Andrew Gustafson. The complaint charges that on the 8th day of March, 1893, Andrew was in the employ of the Denver & Rio Grande Railroad Company as roadbed and track repairer; that the roadbed and track were used by the defendant company under contract with the Denver & Rio Grande Company; that the roadbed and track were kept in repair by the latter company by virtue of that contract; that on that day Andrew, who was unmarried, while engaged in repairing the roadbed and track, stepped from the track a proper and suitable distance to allow the passage of an approaching train, owned, run, and operated by the defendant; that while

the train was passing a lump of coal fell from the tender attached to the engine, striking him, and inflicting injuries upon him, from the effects of which he shortly afterwards died. The answer denies the allegations of the complaint. The only witness to the accident was Peter Magnuson. He testified that he was working for the deceased, who was in the employ of the Denver & Rio Grande Railroad Company as section boss; that he and the deceased, in the performance of their duties, were walking northwardly, one on each side of the track, and entirely off the track, when a train of 20 or 30 cars passed, going at the rate of 15 or 18 miles an hour; that when the train had passed a noise from the other side of the track attracted his attention, and he crossed the track and found the deceased lying upon the ground, groaning; that witness asked him what was the matter, and he replied that a lump of coal fell from the engine and struck him in the stomach, and that he would die; that he was lying 8 or 9 feet from the track, and a lump of coal of about 16 pounds weight was lying a foot from him; that his watch was knocked out of his pocket, and was lying alongside of his hat; that the injury was received about 4 o'clock in the afternoon of March 8th, and on the morning of the 10th he died. It was admitted by the defendant that the train was being managed and operated by its employees, and that the portion of the roadbed and track where the accident occurred was used by it and the Denver & Rio Grande Company under contract between it and the latter company. The relationship between the plaintiffs and the deceased was proved. When the plaintiffs rested their case, the court, on motion of the defendant, gave judgment of nonsuit against the plaintiffs, and the cause is in this court by writ of error.

The question is, was there sufficient evidence to sustain a verdict for the plaintiffs, if the case had been submitted to the jury? If there was, it was the duty of the court to submit it. If there was not, the nonsuit was proper. The cause of the injury to the deceased was probably a lump of coal hurled from the tender. At least, we think the evidence was sufficient to go to the jury on that question. But upon the question of negligence of the defendant or its employees there seems to have been no evidence whatever. Mere proof that the accident occurred is not enough. In a case like this, negligence must be proved. At least, some facts must appear from which it is a legitimate inference. For aught that appears, the coal may have been safely and securely deposited in the tender at first, and this lump loosened from the mass by the roughness of the track over which the train had passed. To throw the lump eight or nine feet from the track, there must have been some propulsive force, such as a sharp curve in the road, which the engine was rounding at the time, because, if it was passing over a straight, smooth track, the lump would not have been affected by any force except that of gravity and the forward motion of

the train, and would simply have fallen by the side of the track. No lateral motion could have been imparted to it. On this portion of the road the discharge of coal from the tender may have been of frequent occurrence, and owing to a curved or crooked roadbed, constructed to conform to the topography of the country, or for some other reason, may not have been preventable by ordinary care or prudence. That coal was frequently thrown from the tender in this way may have been well known to the deceased, in which case it was plainly his duty, when the train passed, to step a sufficient distance to one side to be out of the reach of danger. The evidence does not disclose a single circumstance from which it could be inferred that the defendant was in fault. The bare fact appears that a lump of coal was thrown from the tender, and that it struck the deceased. All else is left to conjecture. The naked fact proven gives rise to no presumption, and a verdict against the defendant upon that alone would not be sustained. The court could not well do otherwise than grant the nonsuit asked, and the judgment must be affirmed.

FARRELL v. PEOPLE.

(Court of Appeals of Colorado. Nov. 9, 1896.)

FAILURE TO PREVENT CRIME—INDICTMENT.

An indictment under Gen. St. § 701 (providing that "an accessory during the fact is a person who stands by, without interfering or giving such help as may be in his power to prevent a criminal offense from being committed"), which merely states that defendant, on the occasion of a robbery, stood by, without interfering and without giving such help as was in his power to prevent its commission, and fails to show what it was in his power to do without placing himself in danger, is insufficient.

Error to district court, Arapahoe county.

Lawrence Farrell was convicted, and brings error. Reversed.

H. B. Johnson, for plaintiff in error. B. L. Carr, Atty. Gen. (Calvin E. Reed, of counsel), for the People.

THOMSON, J. The plaintiff in error was tried and convicted upon the following indictment: "That John Doe, whose true name and a description of whose person is to the said grand jurors unknown, late of the county of Arapahoe, aforesaid, on, to wit, the twenty-sixth day of April, in the year of our Lord one thousand eight hundred and ninety-five, in the county of Arapahoe aforesaid, in the state of Colorado, in and upon one Katie Hebard, in the peace of the people then and there being, feloniously and violently did make an assault, and her, the said Katie Hebard, in bodily fear and danger of her life then and there feloniously did put and place, and one breastpin, with diamond setting, of the value of five hundred dollars, and one pair of earrings, with diamond setting, of the value of three hundred and fifty dollars, of the goods and chattels of the said

Katie Hebard, from the person and against the will of the said Katie Hebard then and there, feloniously and violently, by force and intimidation, did rob, seize, steal, take, and carry away; and that Lawrence Farrell, upon the day and year aforesaid, and during the commission of the said offense, in manner and form as aforesaid, at the county of Arapahoe, aforesaid, unlawfully and feloniously did then and there stand by, without interfering and without giving such help as was then and there in his power to prevent said crime of robbery from being committed, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the people of the state of Colorado." The indictment was framed upon the following statutory provision: "An accessory during the fact is a person who stands by, without interfering or giving such help as may be in his or her power to prevent a criminal offense from being committed." Gen. St. § 701.

The sufficiency of the indictment is called in question. It will be observed that the charge against the defendant is in the exact language of the statute. Where the statute specifies the act or acts constituting the offense, it is sufficient generally, as to such act or acts, to follow the language of the statute; but, where the acts constituting the offense are not described by the statute, they must be set forth specifically. *Johnson v. People*, 113 Ill. 99. The offense in this case, if any was committed, consisted, not in the doing of an act, but in the omission to do some act. The statute does not specify what the act or acts are the failure to do which makes the person falling an accessory during the fact. The offense, as it is defined, consists in standing by, without interfering or giving such help as may be in the power of the person charged, to prevent a crime from being committed. Language could not well be more indefinite. It might be in one's power to prevent the commission of a crime, but he might succeed at the cost of his own life. He might be ready and willing to interfere, but fail to do so, because he has reason to believe that he could not act without exposing himself to danger. The law does not require him to hazard his personal safety. If he does what he can without endangering himself, he is guiltless. The indictment, in merely stating that the defendant, upon the occasion of the robbery, stood by without interfering, and without giving such help as was then and there in his power to prevent the commission of the crime, does not charge an offense. He might have possessed a power to do something, which, under the attendant circumstances, the law would not require him to exercise. The indictment should show what it was in his power to do without placing himself in peril. It should set forth what act he failed to do which he might have safely done. The general and comprehensive language of the charge gave the defendant no information of what case against him the prosecution expected to establish by proof; and, in preparing his defense,

he had nothing but conjecture to guide him. It is not the form merely of the indictment that is objectionable. The paper is substantially and radically defective, and the failure to take the objection before the trial did not waive the defects. There are other palpable errors in the record, but it is unnecessary to notice them. The insufficiency of the indictment is fatal to the case, and the judgment is reversed. Reversed.

CRESWELL v. WOODSIDE et al.

(Court of Appeals of Colorado. Nov. 9, 1896.)

ATTACHMENT—BOND—ACTION ON—OBJECTIONS TO COMPLAINT.

1. A bond by defendant in attachment conditioned for redelivery of the property if plaintiff prevail is not satisfied by redelivery of the property in a depreciated condition, due to his use or neglect of the property.

2. Complaint on a bond by defendant in attachment for redelivery of the property, alleging that the property as redelivered was worn, injured, and damaged, by wear and tear, usage and neglect, sufficiently states that defendant was in fault as to its condition.

3. Complaint on bond by defendant in attachment, conditioned for redelivery of the property if plaintiff recover judgment in the action, and the attachment be not dissolved, must allege, not only that plaintiff recovered judgment, but that the attachment was not dissolved.

4. Objection that a complaint is substantially defective in its statement of a cause of action may be made for the first time in the appellate court.

Appeal from district court, Arapahoe county.

Action by John Creswell against A. J. Woodside and another. Judgment for defendants. Plaintiff appeals. Affirmed.

C. J. Blakeney, for appellant. Thos. W. Lipscomb and Geo. L. Hodges, for appellees.

THOMSON, J. This suit was brought upon a forthcoming bond in attachment. The complaint alleges that the plaintiff, on the 26th day of May, 1892, commenced his action against C. W. Phelps and W. D. Pennock, and caused a writ of attachment to be issued in aid of the suit, by virtue of which writ certain personal property of the attachment defendants, of the value of about \$700, was levied upon and seized; that thereupon the attachment defendants procured the release of the property from the attachment, by executing a bond or undertaking, as provided by the statute, with the defendants as sureties, conditioned for the redelivery of the property to the proper officer in case the plaintiff should recover judgment in the action, and the attachment should not be dissolved, and for the payment to the plaintiff of the value of the property in default of such redelivery. The complaint further alleges that the plaintiff recovered judgment against the attachment defendants, but that default was made in the redelivery of the property, in that, when the property, which consisted of printing material, was released to the at-

tachment defendants, it was new and in good condition, whereas when it was redelivered, about a year afterwards, it was "worn, injured, and damaged, by wear and tear, usage and neglect," and its value had deteriorated and depreciated to the amount of \$476.18. The defendants interposed a demurrer to the complaint on the expressed ground that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained, and, the plaintiff declining to amend, final judgment was entered against him for costs, from which judgment he has appealed to this court.

The only question for determination relates to the sufficiency of the complaint. It is contended in behalf of the defendants that the complaint shows upon its face that the same property taken in attachment, and released to the defendants upon the execution of the bond, was by them redelivered to the proper officer, and that there was therefore no breach of the conditions of the bond. The allegation, however, is that, when the property was delivered to the defendants, it was new and in good condition; and when it was redelivered by them, about a year afterwards, by reason of wear and tear, usage and neglect, it was worn, injured, and damaged, and its value depreciated and deteriorated, so that the plaintiff sustained damage and loss in a considerable sum. The same articles of property received by the defendants seem to have been returned by them, and perhaps it may be said that, technically, they complied with the conditions of the undertaking in that particular; but, as the property was returned in a worn and damaged condition, the compliance was only technical, because the bond or undertaking contemplated the return of the property in substantially the same condition in which it was received. A return of property worn and damaged, where it was new and in good condition when received, although nominally the property may be the same, is not a return of substantially the same property. There is a difference between the property as received and the property as returned, which makes the return to the extent of the depreciation in value fall short of the requirements of the undertaking. If the depreciation in value is due to causes beyond the control of the custodian, then there is, of course, no liability on the undertaking; but if it is the result of his use of the property, or of his negligence in caring for it, himself and his sureties must make the deficiency good; otherwise, he might utterly destroy its value, and, by redelivery of the articles released to him in a worthless condition, defeat not only the plaintiff's remedy, but the very purpose for which the statute authorizing the undertaking was enacted. Mr. Wade, in the course of a discussion of the question, says: "But the liability of the obligors is not extinguished in every instance by delivering the property, as it may have greatly deteriorated in value, owing to the negligence with which it has been

kept during the pendency of the action. If chattels are wantonly injured or destroyed, or if they are negligently suffered to waste or deteriorate while in the hands of the defendant or other custodian under the bond, the obligors may be held to answer to the amount of their diminished value. But, if the loss or injury is without fault on the part of those who hold possession by virtue of the bond, they will, as we have seen, be exonerated." 1 Wade, *Attachm.* § 198. In *Yelton v. Slinkard*, 85 Ind. 190, the court, construing the language of a bond in replevin, conditioned for the return of the property if a return should be adjudged, said: "A return of less than all the property is not sufficient, and a return of what is nominally all the property, but is damaged, worn out, and decayed by exposure to the weather, and neglect and bad usage, or any act or omission of the plaintiff, is not sufficient. The statute contemplates that the property shall be returned substantially as it was taken."

It is objected, however, that the complaint does not show that the defendants were in fault. The allegation is that the property was worn, injured, and damaged, by wear and tear, usage and neglect. As the property was turned over to the attachment defendants, presumptively it remained in their custody, and presumptively the usage and neglect from which it suffered was their usage and neglect. The allegation is, we concede, somewhat general. Upon proper motion, the court would probably have ordered the plaintiff to make it more specific, but the objection cannot be taken by demurrer.

The remaining objection to the complaint is of a much more serious nature. The bond was conditioned for the redelivery of the property in case the plaintiff should recover judgment in the action, and the attachment should not be dissolved. The attachment might be dissolved, and the plaintiff, nevertheless, recover judgment in the action. If the attachment was dissolved, the obligors upon the bond were discharged, notwithstanding a recovery of judgment in the action. Hence, in order to state a cause of action against the obligors, it was essentially necessary to state that the attachment was not dissolved, or to make some equivalent statement. The complaint alleges the recovery of judgment by the plaintiff against the attachment defendants, but as to what became of the attachment it is silent. In this respect the complaint is fatally defective, and the demurrer was therefore properly sustained.

Plaintiff's counsel complains that, in the argument of the demurrer in the lower court, counsel for the defendants confined themselves to the objection first considered by us, and that they make the point that the complaint fails to state that the attachment was not dissolved for the first time in this court; and, for that reason, he contends that they ought not to be heard by us upon this objection. We have no means of knowing what course

the argument upon the demurrer took, because the record does not disclose it; but, where a complaint fails to state facts sufficient to constitute a cause of action, the objection may be raised at any time. Civ. Code, § 55. The defendants did not need to demur at all; or, having demurred, they might in the argument point out such alleged defects as they saw fit, or they could have submitted the demurrer without argument. Where a complaint is substantially defective in its statement of a cause of action, the point may be made for the first time in the appellate court. We must affirm the judgment. Affirmed.

PEOPLE v. DISTRICT COURT OF ARAPAHOE COUNTY.

(Court of Appeals of Colorado. Nov. 9, 1896.)

COURT OF APPEALS—JURISDICTION.

The court of appeals, by granting one convicted a writ of error, and granting a supersedeas on condition that he enter into a recognizance in a certain amount, acquires sole jurisdiction of the case, so that, though he does not execute a recognizance, the district court cannot order his release on habeas corpus.

Petition of the people of the state of Colorado for a writ of certiorari to review an order of the district court of Arapahoe county. Order set aside.

B. L. Carr, Atty. Gen., and Calvin E. Reed, Asst. Atty. Gen., for the People.

THOMSON, J. Lawrence Farrell was convicted in the district court of Arapahoe county of the statutory offense of being accessory during the fact to the crime of robbery. After his conviction and sentence, he lodged in this court a transcript of the record, a bill of exceptions, and an assignment of errors, and applied for a supersedeas, which was granted upon condition that he enter into a recognizance to the people of the state of Colorado, in the penal sum of \$2,000, conditioned according to law, with good and sufficient sureties. He failed to furnish recognizance, and remained in the jail of Arapahoe county, in the custody of the sheriff. He afterwards filed in the district court his petition for a writ of habeas corpus, alleging that the sentence of that court was in contravention of the statute, and void, and that he was therefore unlawfully restrained of his liberty. On this petition the writ issued. The sheriff made return that he was holding the petitioner by virtue of a mittimus from the district court commanding him to convey the prisoner to the jail of Arapahoe county, and from thence to the penitentiary of the state of Colorado, and setting forth the suing out of writ of error from, and the granting of a supersedeas by, this court, and averring that the cause was pending and undetermined in this court. The petitioner demurred to the return. Upon the hearing the district court

sustained the demurrer, and ordered that the prisoner be forthwith released from custody, upon his entering into a recognizance in the penal sum of \$500, conditioned for his appearance in the district court on the first day of its next regular term, and from day to day and term to term thereafter, etc. He gave the bond and was discharged from custody. Upon proper application, and showing made of the foregoing facts by the attorney general, this court ordered the sheriff to apprehend the petitioner, take him into custody, and confine him in the common jail of Arapahoe county until the further order of this court. By the writ of error and supersedeas, this court acquired the sole jurisdiction of the case, and no other court, in any proceeding or upon any pretext, could lawfully interfere with its order. The order of the district court, attempting to modify the supersedeas and change the conditions upon which the prisoner should be released from custody, was wholly outside of its jurisdiction and void. The order will be set aside and for naught held.

PHENICIE v. POWELL.

(Court of Appeals of Colorado. Nov. 9, 1896.)

APPEAL—REVIEW—EVIDENCE.

A verdict on conflicting evidence will not be disturbed unless it was the result of bias, prejudice, or passion.

Appeal from district court, Otero county.

Action by J. W. Phenicie against Emma T. Powell, administratrix of J. M. Powell. There was a judgment for defendant, and plaintiff appeals. Affirmed.

A. F. Thompson, for appellant. James Hoffmire, for appellee.

BISSELL, J. Phenicie filed a claim in the county court against Mrs. Powell, the administratrix of J. M. Powell, deceased, to recover \$181, as the amount due from the decedent to him, on the basis of an alleged co-partnership theretofore existing between the plaintiff and Powell. After the matter had been disposed of in the county court, an appeal was taken to the district court, and the case tried before a jury.

A good many questions are presented in the argument and on the appeal, but there is only one to which we are at liberty to give any attention. The case was heard at very considerable length, and a great amount of testimony was submitted on both sides to establish and refute the existence of a co-partnership between Phenicie and Powell. According to the abstract and bill of exceptions which is certified to us, there was no exception taken to any of the rulings of the district judge made during the progress of the trial, and the only one which the record contains is that entered on the overruling of a motion for a new trial. Of course, the only substantial question this presents is as to whether, on the case made,

the plaintiff was entitled to a judgment, or whether, on the other hand, the jury were justified in reaching their conclusion that the defendant was not a co-partner. We shall not enter into a discussion to justify our conclusions. It has many times been ruled in the supreme court and in this that we are concluded by the verdict of the jury unless we can discover that the jury was evidently influenced by bias, passion, or prejudice, and we are satisfied that substantial justice has not been done the parties. We have carefully examined the record, and we are unable to discover that the jury acted otherwise than from honest motives, and upon thorough conviction as to where the truth lay as between the contending witnesses. There is enough evidence to support the verdict, and under these circumstances we are not at liberty to disturb it. Finding no errors in the record, the judgment will be affirmed. Affirmed.

COLORADO FUEL & IRON CO. v. RIO GRANDE SOUTHERN R. CO. et al.

(Court of Appeals of Colorado. Nov. 9, 1896.)

RAILROAD COMPANIES—CONSTRUCTION OF ROAD—ACTION FOR MATERIALS—SUFFICIENCY OF PETITION—APPEAL—ABSTRACT.

1. In an action against a railroad company and the receiver of such company for the price of materials furnished by plaintiff for the construction of the road, and to foreclose a lien on the road, plaintiff alleged that it had obtained leave to bring the suit, and prayed judgment against the railroad company for the sum named, and to foreclose its lien. *Held*, that the petition showed that plaintiff had the right to bring the suit.

2. In an action against a railroad company and a receiver of such company for materials furnished by plaintiff for the construction of the road, plaintiff alleged that it had obtained leave to bring the suit. On appeal by plaintiff from an order sustaining a demurrer to its complaint, defendants were given leave to file a supplemental abstract, which contained, when filed, the petition for the appointment of the receiver in the original suit, the petition for leave to sue, and the order, the purpose being to show that plaintiff had no right to sue unless it could establish its lien. *Held* that, as a demurrer could not be sustained by matters dehors the record, the supplemental abstract could not be considered.

Appeal from district court, Arapahoe county.

Action by the Colorado Fuel & Iron Company against the Rio Grande Southern Railroad Company and Edward T. Jeffery, receiver of such company. There was a judgment in favor of defendants on demurrer to the complaint, and plaintiff appeals. Reversed.

D. C. Beaman, for appellant. Wolcott & Valle and H. F. May, for appellees.

BISSELL, J. In January, 1894, the Colorado Fuel & Iron Company commenced this suit in the district court of La Plata county to obtain a judgment against the Rio Grande Southern Railroad Company for \$49,837.08, and to foreclose a lien on the road for materials furnished for its construction. The complaint

was demurred to, and from the judgment thereon in favor of the defendants the fuel company prosecutes this appeal. As the matter is presented in argument as well as by the record, there are very few elements of the pleading with which we are concerned. The corporate character of the parties was stated. The plaintiff averred the filing of the lien in the various counties through which the road ran, and set out a copy of its lien statement, which showed the furnishing of materials between the 20th of August, 1892, and the 13th of June, 1893. The great bulk of all the iron and steel furnished was steel rails, which were delivered between August 20 and October 5, 1892. During the same year, and between August and November, as well as in 1893, between February and June, there were sundry deliveries of bar iron of small amounts and limited values. Out of a total account of \$72,968.68, the total delivery of bar iron after the last item of steel rails had been furnished only amounts to \$91.57. The plaintiff set up that it had asked and obtained leave to bring this suit, and prayed judgment against the railroad company for the sum named, and to foreclose its lien. The plaintiff afterwards amended, and alleged that the materials were furnished under two or more contracts, and that the furnishing of the material was continuous. The venue of the cause was changed to Arapahoe county on the defendants' motion. In 1895 the railroad company and the receiver demurred.

Before proceeding with the discussion of the matters legitimately involved, we must dispose of a supplemental transcript which has crept into the record, and presents matters with which we have nothing whatever to do. Leave was given the appellees to file it, and it is therefore, in one sense, properly in the record, but in another has no place there. This supplemental abstract was filed to supply a basis on which to rest the contention that the leave which the court granted to bring the suit did not confer the right to prosecute it to judgment, unless the plaintiff could establish a lien, and maintain the right to foreclose it. The supplemental abstract contains the petition for the appointment of a receiver in the original suit, the petition for leave to sue, and the order. We do not understand the theory on which appellees' counsel insist that these things are regularly before us. The only thing we have to consider is the right of the plaintiff to maintain the suit on the complaint which was filed. The only legitimate question thereby raised is whether therein a cause of action is stated which may be maintained against either one or both of the defendants. Nothing else is presented. The supplemental abstract cannot be very aptly described. It is more nearly akin to what is called "impertinence" in an equity bill than any other legal thing with which it can be compared. There is no known way, so far as our experience goes, by which a demurrer can be aided by matters dehors the pleading. A motion to strike this supplement-

tal abstract from the files was not disposed of. The motion must be granted, and this matter expunged from the record. The same course must be taken with what the appellant filed in answer to this very irregular proceeding. The record will then stand stripped of all verbiage, and leave us free to consider what is alone before us, and that is the sufficiency of the complaint.

Much of the argument is based on the oral opinion which the court delivered. These opinions are useful, and they are frequently very clear expositions of the law. But they are in no sense conclusive. We can only look to the judgment to discover whether, according to our views, there was a proper solution of the questions presented. In the present case we do not agree with the trial judge. On its face the complaint states a cause of action. We do not undertake to say whether leave was granted to bring the suit, nor whether, under the order, the plaintiff would have the right to prosecute this particular suit to judgment against the railroad company for a sum named, unless the right to foreclose the lien was sustained. This we are unable to do, because there is nothing to show what leave was given, except as it is averred. According to the complaint, leave was granted to bring this suit. Unless that is successfully controverted, the plaintiff could prosecute the suit to judgment, even though the court should refuse to decree foreclosure. We are not prepared to say that a failure to obtain leave would, in any event, be pleadable in bar to the action. Under some circumstances, possibly, the receiver could restrain the plaintiff from proceeding, and there may be cases which hold that the action will be dismissed on the receiver's application. It is not a universal rule, and some decisions intimate the application would be too late if made after the defendant had moved for a change of venue and filed a demurrer. The right to dismiss is treated as thereby waived. High, Rec. c. 8, subd. 5, § 261; Hubbell v. Dana, 9 How. Prac. 424. Whether this be or be not true, the complaint, on its face, is sufficient. It alleges a leave granted. In the absence of a showing to the contrary, this would necessarily include the right to prosecute the suit to judgment in any form which the law warrants. If the plaintiff should fail to establish the lien, or a right against the receiver, the suit might be dismissed as to him, and judgment had against the railroad company; or, in case of a failure to establish the lien, the proof might possibly warrant a judgment against the railroad company or the receiver or both. Therefore the demurrer was not well taken.

The fundamental question, had the fuel company acquired a mechanic's lien, and, on proof of its allegations, was it entitled to a decree of foreclosure? is still undisposed of. We do not intend to hold the lien good, nor that what was done necessarily entitled the company to a lien. We cannot determine this question. The record is insufficient. The complaint alleges that all the materials, both the rails and

the bar iron, were furnished under one or more continuous contracts between August, 1892, and June, 1893. If this be the fact, and the contract provided for the bar iron as well as the steel rails, and the one as much as the other was delivered thereunder, we cannot now see why the fuel company would not be entitled to a lien if it was filed in good time and under the statute. If the lien be adequately proven, the right to foreclose it as against all persons who were not prior in time and right would follow. What the evidence may disclose, what the terms of the contract may be, or at what conclusion we might arrive if the case had been tried, and all the facts were before us, we cannot declare. The plaintiff has stated a case. For this reason we shall reverse the judgment, send it back, and permit the parties to answer as they may be advised, and try the issue. We think, in any event, the plaintiff had the right to bring suit against the railroad company, and obtain a judgment for the amount of the claim. What rights would thereby be acquired as against the receiver, or as against other creditors, we do not state. Those matters are not before us. The effect of the judgment as against the other lien holders or creditors we do not undertake to determine. When the appellees speak of the appointment of the receiver as an incumbrance, it is a misuse of terms, and of no significance. We conclude the district court erred in sustaining the demurrer, and the case will be returned for further proceedings in conformity with this opinion. Reversed.

SCHOOL DIST. NO. 1, PITKIN COUNTY, et al. v. CARSON.

(Court of Appeals of Colorado. Nov. 9, 1896.)

SCHOOLS—POWERS OF SCHOOL BOARD—DISCHARGE
OF TEACHER—RIGHT OF TAXPAYER
—INJUNCTION.

1. Under the provisions of Gen. St. § 3046, giving to school boards the power to employ and discharge teachers, injunction will not lie at the suit of a taxpayer to restrain the discharge of a teacher with or without cause.

2. A teacher employed under contract to teach for a given length of time has an adequate and speedy remedy at law for a violation of the contract, precluding him from maintaining a bill to enjoin his arbitrary discharge by the school board.

Appeal from district court, Pitkin county.

Bill for injunction, brought by R. B. Carson against school district No. 1, Pitkin county, and others. From an order making the injunction perpetual, the defendants appeal. Reversed.

Wm. O'Brien, H. C. Rogers, and Chas. R. Bell, for appellants.

REED, P. J. One George E. Rohrbaugh was employed as a fourth-grade teacher in appellant school district. He administered to one Frank Flynn what was alleged to have been an unduly severe chastisement, with a leather strap. Complaint was made by the

parents to the board of directors of the district, who investigated the case with a good deal of care, considered the charge at two meetings of the board, at both of which Rohrbaugh attended with his friends, and defended against the charges. As is generally the case, the question divided the community of the district, and both the Flynns and the teacher had quite a number of adherents. At the second meeting of the board, the officers, by a vote of three to two, decided to discharge the teacher at the expiration of 30 days, and he was so informed; whereupon appellee, alleging himself to be a taxpayer and the father of a boy attending that branch of the school taught by Rohrbaugh, filed the complaint, and brought this suit, in the interest of Rohrbaugh, asking an injunction restraining the board of directors from discharging Rohrbaugh, or in any way interfering with him in his employment as a teacher. In the absence of the district judge, application was made to the county judge, without notice to the other party, and a temporary injunction obtained. Application was made to the district court to dissolve the injunction, which was denied. A trial was had, and perpetual injunction decreed, and an appeal taken to this court. Much testimony was introduced to show that the action of the board was prejudiced and arbitrary, its proceedings irregular, and the discharge of the teacher unwarranted. Much counter testimony was put in by the board.

We do not find it necessary to examine the facts, or to decide upon the preponderance of the testimony or the regularity of the board's proceedings. The facts stated in the complaint were insufficient to warrant equitable interference, confer jurisdiction, and obtain an injunction. If the teacher was employed and under contract to teach a given length of time, and he was arbitrarily discharged, without sufficient cause, he had an adequate and speedy remedy at law for the violation of the contract. By statute, the board of school directors are empowered to employ, and, for cause, discharge, teachers. If they abuse the discretion vested in them, and discharge without cause, they are liable in damages. The provision of Gen. St. § 3046, re-enacted in Sess. Laws 1887, p. 392, is: "Every school board, unless otherwise provided by law, shall have power, and it shall be their duty, to employ or discharge teachers." The teacher employed was not, as supposed by the learned judge, an officer, but an employé (in the language of the old authorities, a servant), whose employment and discharge were in the discretion of the board. Nor can we find any authority sustaining the position of the court that a teacher cannot be summarily discharged by the board. Nor can we find any authority authorizing and requiring the board to become a court for the trial of charges against a teacher; that he should be summoned to appear, given time to answer, and produce testimony; that he has a right to appear by counsel, cross-examine witnesses, etc.; nor "that all proceed-

ings towards his dismissal must be exercised in accordance with the recognized principles of law." It would be the organization of a new court, without any authority of law. The proper conduct and administration of schools, and the good of the public, require that the board should have the power of summarily discharging a teacher unfitted for the position, and, if unfit, his retention until the judicial determination was reached might work great harm. I express no opinion in regard to the merits of this case, nor whether the discharge was proper or improper. It was in the power and discretion of the board. As a taxpayer and patron of the school, all that the complainant could require was that the school should be open, under the charge of proper, competent, and qualified instructors, as provided by law; and that his children should be allowed to attend, and afforded equal educational facilities with the balance. He had no authority, in law or equity, to compel the employment and retention of a particular teacher. If such rights were recognized and exercised in different directions, by different taxpayers and patrons, the conduct of schools would be impossible. Another teacher was immediately substituted by the board, and there was no charge that she was not properly qualified and eminently fitted for the position, and that the child of complainant was not receiving all the benefits and rights to which it was entitled.

The law as to injunctions in this class of cases is stated in 2 Story, Eq. Jur. § 955a, as follows: "The question has been made, how far a court of equity has jurisdiction to interfere in cases of public functionaries, who are exercising special public trusts or functions. As to this, the established doctrine now is that, so long as those functionaries strictly confine themselves within the exercise of those duties which are confided to them by the law, this court will not interfere. The court will not interfere to see whether any alteration or regulation which they may direct is good or bad." And see *Frewin v. Lewis*, 4 Mylne & C. 254; *Attorney General v. Aspinall*, 2 Mylne & C. 613; *Auckland v. Board*, 7 Ch. App. 597; 2 High. Inj. § 1242. In *Thomas v. Supervisors*, 56 Ill. 351, complainant filed a bill to restrain defendants from removing him from his "office of engineer in charge of the heating apparatus of the county." The allegations were: "If the complainant is discharged in this summary way, his reputation as a mechanic and a citizen will be greatly injured, without an adequate remedy; * * * and if the board of supervisors do proceed to carry out their threat, and discharge complainant, they will do him an irreparable injury." This case is so parallel, and the opinion of Mr. Justice Breese so terse, emphatic, and brief, that no apology is necessary for inserting it: "The attempt disclosed by this record to exalt the overseer of the heating apparatus in the basement of a county courthouse into an officer, and claim for him the protection of a court of equity, borders on the ludicrous,

With as much propriety might an engine driver on a railroad claim protection from the court when he has received notice of dismissal from his employment. The idea is preposterous, and no precedent can be found for such a proceeding in any country, state, or nation. If appellant had made a contract with the board of supervisors, which they have violated, the courts of law are open to him, in which he cannot fail to receive the full measure of redress to which he may be entitled." In the above case the bill was by the employé, instead of taxpayer. The case of *Schwier v. Ziltke*, 136 Ind. 210, 36 N. E. 30, was almost an exactly parallel case. The school board hired Jackson to take charge of a department in the public school. Then one Benham was appointed to the same place, and assumed and entered upon the duties. The bill was by taxpayers and patrons to enjoin the discharge of Jackson. A demurrer was sustained to the complaint, and the judgment affirmed in the supreme court. In the opinion it is said: "If Jackson, with whom the board made a contract, could not enjoin such board from dismissing him, and employing another in his stead to teach the schools in the town of Batesville, it is difficult, if not impossible, to perceive how these appellants can perform that feat for him. To permit them to do so would be to permit that to be done by indirection which could not be done directly. It is now so well settled that a person cannot be enjoined from violating a contract for personal services when such contract contains no negative stipulations that it seems not to be an open question,"—citing numerous authorities. See, also, *Case of Mary Clark*, 1 Blackf. 122.

In *Lawson, Rights, Rem. & Prac. § 2595*, it is said: "Contracts for work and labor or for personal services or personal skill or attention will not be enforced; nor will the putting an end to such contracts, or dismissing a servant or employé, be restrained." See, also, *Delahanty v. Warner*, 75 Ill. 185; *McCrea v. School Dist.*, 145 Pa. St. 550, 22 Atl. 1040; *State v. McGarry*, 21 Wis. 502; *Trimble v. People*, 19 Colo. 187, 34 Pac. 981; *People v. Martin*, 19 Colo. 565, 36 Pac. 543.

It follows that the complainant had no ground for equitable relief; that the court was without jurisdiction; and the allowance of an injunction unwarranted. The decree will be reversed, and cause remanded, with instructions to dissolve the injunction, and dismiss the suit. Reversed.

SIEDLER v. SEELY.

(Court of Appeals of Colorado. Nov. 9, 1896.)

EMINENT DOMAIN — LAND TAKEN FOR RESERVOIR PURPOSES—NECESSITY—PROCEDURE—DAMAGES.

1. In an action under the Colorado irrigation statute to condemn land covered by water, for reservoir purposes, after respondent demands a jury, and enters on the trial, it is too late to ask for the appointment of commissioners un-

der the statute to determine whether or not a necessity exists for the condemnation of the land. *Irrigation Co. v. Davis*, 29 Pac. 742, 17 Colo. 326, followed.

2. In a proceeding to condemn land covered by water, where there is no question respecting the title to the water itself other than that which comes from the ownership of the land beneath, there are no recoverable damages other than the value of the land taken and the resulting damage to the balance of the land owned by the respondent.

Appeal from district court, Weld county.

Action by Joseph Seely against Charles Siedler to condemn and acquire title to certain land covered by water under the Colorado irrigation statute. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

James C. Scott and James E. Garrigues, for appellant. H. E. Churchill, for appellee.

BISSELL, J. The substantial controversy between the parties to this action is not presented by this record in such way that the court is at liberty to express its views respecting their legal status as it existed before this suit was begun. This took the form of condemnation proceedings to obtain title to a little more than 15 acres of land covered by water. About 6 miles northwest of Greeley there is a large lake in a natural depression of the land, covering something like 200 acres. All of it except the 15 acres sought to be reached by this proceeding belonged to Seely, the appellee. As nearly as may be ascertained from the record, Seely was the owner of the land where the lake now is, and of other lands, which could be irrigated from waters if they were stored in this natural depression. In 1872 the Greeley Colony built the Cache La Poudre Canal, which ran along the country some little distance above the lake, and supplied water to its stockholders. As is always the case, there was a good deal of seepage from the canal, and it gradually filled up this hollow. Seely was a stockholder in the canal, or a person entitled to water therefrom, and he made an arrangement with the association to run his water into the reservoir, and store it there, and also to take whatever seepage waters might naturally make their way into the lake. It also served as a drainage for the adjacent farming lands, and some ditches were cut to render lands fit for cultivation which otherwise, by reason of the seepage, would be swamp lands and unavailable. The result of all this was the creation of this large lake. Aside from what has been stated, nothing was done by Mr. Seely with reference to obtaining title until 1889, when provision was made by statute for acquiring title to waste, seepage, and spring waters, and protecting the rights of ditches which might utilize such water. Mr. Seely thereupon filed a record under the irrigation statute, and attempted to acquire title. He had already taken water from the reservoir by means of a ditch, to irrigate a good deal of land, and had other lands which could likewise be watered from this source. We are not concerned with the char-

acter, extent, or legality of his appropriation, because these matters are not called in question in the present proceeding. In making this reservoir, some 15 acres or more of land belonging to the appellant was flooded with water, and it was Mr. Seely's purpose to further increase the general level of the water for uses which he deemed legitimate. To bring about this result, it seemed to him to be necessary to condemn the land covered by the water. We will now state the real nub of the controversy, although it is not presented in such manner as to require an expression of our opinion with reference to it. The reservoir was utilized for other purposes than irrigation. It was stocked with fish, and made a pleasure resort for the neighboring country. Seely likewise cut ice from it in the winter, to supply the neighboring towns with this article of use and luxury. These collateral uses begot this litigation. Other parties desired to avail themselves of the gains and advantages resulting from such use of the lake, and evidently attempted to acquire title to this 15 acres, in order to deprive Seely of the exclusive use of water for these particular purposes. This is stated in order to illustrate the real animus of the suit, and also to illustrate one of the questions raised on the trial, and urged here as error. After the initiation of this proceeding, when the cause was called, it was set down for trial on a fixed date, and a jury demanded by the appellant. When the case was reached for trial, a jury was impaneled, and the parties proceeded to introduce their testimony. As soon as the cross-examination of the petitioner's witnesses was commenced, counsel attempted to prove or show, by the evidence he was able to elicit, the value of the water for the purposes above indicated. This was objected to, and the court ruled this testimony out. When the respondent came to his side of the case, he undertook to pursue the same policy, and introduce proof respecting it, which was likewise excluded. Thereupon the respondent made a motion that the trial be suspended, and commissioners appointed to determine the necessity for the condemnation of this particular tract of land, which was refused.

Out of this grows the only question which is of sufficient consequence to disturb the judgment if it was resolved in favor of the appellant. It may be true the appellant is right in his contention that the reservoir could exist, and all of Mr. Seely's rights be protected, without the condemnation of these particular 15 acres, and that the proceeding had an ulterior object, which would not either legally or legitimately support condemnation. About this we express no opinion, because the matter is not legitimately open to discussion. The whole question has been settled by the supreme court, and that tribunal has held that after the respondent demands a jury, and enters on a trial, it is too late to ask for the appointment of commissioners under the statute, in order to determine whether or not a neces-

sity exists for the condemnation of the land embraced in the petition. By proceeding to trial, it is held he waives his right to the appointment of commissioners, and therefore the question of necessity is not an open matter, nor is it one which can be considered by the jury in their estimate of damages. *Irrigation Co. v. Davis*, 17 Colo. 326, 29 Pac. 742. The court, then, did not err in refusing to permit the respondent to introduce this testimony, or prove any other injury save that which came from the appropriation of land of a proved value, with the resulting damage, if any, to the balance of the tract belonging to Siedler.

A great multitude of errors were assigned on the rulings of the court admitting and rejecting testimony. It would be quite impossible in the limits of any ordinary opinion to pass upon each one of these questions, and sustain the court's action by a direct expression, supported by sufficient argument. The only thing we feel called upon to say is, the court tried the case on the proper theory, and on the correct lines. In a proceeding to condemn land covered by water, where there is no question respecting the title to the water itself other than that which comes from the ownership of the land beneath, there is no recoverable damage other than the value of the land taken, and the resulting damage to the balance of what may be owned by the respondent. All waters in this state are now subject to appropriation, whether they be running waters or waters coming from springs or derived from seepage. The appellee, so far as the record shows, owned almost the entirety of the reservoir; made provision for its construction, and the storage of waters therein; and apparently had title to the water, as against the appellant. There is nothing tending to impeach his title, or to support any claim which Siedler could make to it.

The only other matter to which we need refer is what is recited in the bill of exceptions,—that, at the time of the argument to the jury, counsel attempted to argue a question of damage, and was restrained by the court. This action does not seem to constitute error, nor is there anything in the record wherefrom we can determine that prejudice came to the appellant. From the statement in the bill of exceptions, the elements of damage which counsel was restrained from discussing were those predicated upon the loss of the right to use the water and the surface of it for purposes other than irrigation, whereby the collateral advantages referred to might be enjoyed by Siedler. We must assume this to be true, because, in the court's instructions, the jury were told that the respondent was entitled to recover, not only the actual value of the land taken, but also whatever damage might have been proven to accrue to the other portions of his farm by the taking of this particular piece. The instructions were not objected to. They fairly stated the law, and put the correct and only issues before the jury for consideration; and, whatever this ruling may have been, it

could not, so far as we see, have been erroneous.

This disposes of all matters raised by the record, and, since the court committed no errors in the trial of the case, the judgment must be affirmed. Affirmed.

MUNKERS v. FARMERS' & MERCHANTS' INS. CO.

(Supreme Court of Oregon. Nov. 30, 1896.)

EVIDENCE—PROOF OF HANDWRITING—COMPARISON—FIRE INSURANCE—ACTION ON POLICY—EVIDENCE OF CHARACTER.

1. Under Hill's Ann. Laws, § 765, providing that evidence as to handwriting may be given by a comparison by a skilled witness, or by the jury, with writings admitted or treated as genuine by the party against whom the evidence is offered, it is competent for a party to introduce letters admitted to be in the handwriting of the adverse party, but not bearing on the controversy in issue, for the purpose of showing, by a comparison of handwriting, that a material letter was written by such adverse party.

2. In an action upon a fire insurance policy, payment of which was contested on the ground that the fire was set by the insured, evidence as to the general good character of the plaintiff was not admissible.

Appeal from circuit court, Linn county; George H. Burnett, Judge.

Action by G. W. Munkers against the Farmers' & Merchants' Insurance Company. From a judgment for plaintiff, defendant appeals. Reversed.

J. R. Wyatt, for appellant. W. R. Bilyeu, for respondent.

BEAN, J. This is an action on a fire insurance policy issued to the plaintiff by the defendant company. As a defense it is, among other things, alleged "that the plaintiff either by his own hand set fire to the building which contained the property covered by said policy of insurance, or to the property itself, or caused fire to be set thereto through some person unknown to the defendant, and that he willfully, and for the purpose of cheating and defrauding this defendant out of the said sum of \$900, caused the said property to be destroyed by the said alleged fire set forth in plaintiff's complaint." On the trial there was offered and received in evidence a communication addressed to the editor of the Oregonian, purporting to be a statement made by one J. N. Listmon as to the origin of the fire, but which the defendant claims, and gave evidence tending to show, was written by the plaintiff, and published at his instance, to avert suspicion from himself. For the purpose of showing that this communication was in the handwriting of plaintiff, the defendant offered to use for comparison therewith four certain letters admitted by the plaintiff to be genuine, and to have been written by himself; but the court allowed only one, which had some reference to the matter in controversy, to be used for that purpose, and this ruling is assigned as

one of the errors in the case. No papers not otherwise competent could be introduced in evidence in the courts of England for the mere purpose of enabling a jury or an expert to institute a comparison of handwritings with the document or signature in dispute until 1854, when parliament passed an act expressly authorizing such comparisons to be made. Rog. Exp. Test. § 130. In this country there is an irreconcilable conflict in the adjudged cases as to the right to institute a comparison of handwriting placed in juxtaposition, in the absence of a statute allowing such a procedure. 9 Am. & Eng. Enc. Law, 279 et seq.; Lawson, Exp. Ev. 375 et seq. But all dispute on this question has been put to rest in this state by section 765, Hill's Ann. Laws, which provides that "evidence respecting the handwriting may also be given by a comparison, made by a witness skilled in such matters, or the jury, with writings admitted or treated as genuine by the party against whom the evidence is offered." Under this statute it is clear that any writing which is admitted to be or treated as genuine by the party against whom the evidence is offered may be used for the purpose of comparison with the writing or signature in question, although it may not be admissible in evidence for any other purpose. *Holmes v. Goldsmith*, 147 U. S. 150, 13 Sup. Ct. 288; *Peck v. Callaghan*, 95 N. Y. 73; *Baker v. Mygatt*, 14 Iowa, 131. The objection principally urged against such evidence is the embarrassment likely to arise from the multiplication of issues in respect to the genuineness of the writing offered as the standard of comparison. But under our statute no such question can arise, for it provides that such writings only as are admitted to be genuine, or such as the adverse party has so treated, shall be used for that purpose.

The next assignment of error is based upon the ruling of the trial court in admitting evidence of the good character of plaintiff for honesty and fair dealing, and as a peaceable and law-abiding citizen. This ruling we think was error. The rule is well settled that evidence of the character of a party is not admissible in civil actions, except in those cases in which the issue involves his character. Hill's Ann. Laws, § 842; 1 Greenl. Ev. § 54; 1 Whart. Ev. § 47. Now, the character of plaintiff is not involved in the issue in the case under consideration, nor does his recovery depend upon whether it is good or bad. It is true that if the allegation of the answer that he burned, or caused the property in question to be burned, should be proved, his reputation for honesty would be seriously affected; but so would that of a party against whom a charge of gross fraud, forgery, or deceit should be established in a civil action, and it has never been supposed that evidence of good character would be admissible on that account. It is not every allegation of fraud or wrongdoing that involves character, within the meaning of this excep-

tion; for, if it were so, the defendant's character would be in issue in most of the controversies in the courts of justice. The exception is of a technical nature, and is confined to certain cases, from the nature of which character is of particular importance, such as actions for breach of promise, libel and slander, malicious prosecution, criminal conversation, seduction, and the like. In such cases character is directly involved in the issue, as affecting the amount of the damages, and evidence in respect thereto is therefore held admissible. But this action is not of that class. It was so held in *Stone v. Insurance Co.*, 68 Iowa, 737, 28 N. W. 47, and *Schmidt v. Insurance Co.*, 1 Gray, 529, both of which are directly in point. They were sections on insurance policies, and the defense in each case was that the plaintiff had burned the property himself; and the court held that proof of his good character was inadmissible because it was not involved in the issue, and this ruling is supported by the adjudged cases. See 7 Am. & Eng. Enc. Law, 112, for reference to the authorities. It follows, therefore, that the judgment of the court below must be reversed, and a new trial ordered.

WOLVERTON, J., having been of counsel in the court below, did not participate in this decision.

STATE v. STOCKMAN.

(Supreme Court of Oregon. Nov. 30, 1896.)

WAREHOUSEMEN—WHO ARE.

On trial of a mill company's manager for shipping wheat stored in the company's warehouse without written assent of the holder of the receipt therefor, it appeared that, according to its usual course of business, known to the person whose wheat was shipped, all wheat received became a part of the consumable stock of the mill, was manufactured into flour and other mill products, and sold; that it satisfied its obligation to the depositors by paying them the market price when demanded, or by returning a like quantity and quality of other wheat; and that, in the former case, no storage was charged, but in the latter a charge of eight cents a bushel was made. *Held*, that the company was not engaged in the warehouse business, and the wheat was not received on storage, within Laws 1885, p. 61 (2 Hill's Ann. Laws Or. § 4201 et seq.), regulating warehousemen.

Appeal from circuit court, Marion county; George H. Burnett, Judge.

John R. Stockman was convicted of a violation of the act commonly known as the "Warehouse Act" by shipping wheat, stored in a warehouse of which he was the manager, without the written assent of the holder of the receipt therefor, and he appeals. Reversed.

M. L. Pipes, for appellant. C. M. Idleman, Atty. Gen., and John M. Somers, for the State.

BEAN, J. The defendant was convicted of a violation of section 4 of the act of 1885,

commonly known as the "Warehouse Act," being section 4204 of Hill's Annotated Laws, by shipping wheat, stored in a warehouse of which he was the manager, without the written assent of the holder of the receipt therefor. The facts are that at the time of the commission of the alleged crime the defendant was the manager of the Red Crown Roller Mills, a corporation owning and operating a flouring mill in Albany, Or., and engaged in the business of manufacturing flour and other mill products for sale. A part of the mill building was used for the storage of wheat belonging to the company, and such as it might receive from the neighboring farmers. The wheat so stored was all mixed in one common mass, from which the company drew from day to day for the purpose of its business. In September, 1894, one E. D. Barrett delivered to it 2,198¹⁵/₁₀₀ bushels of wheat, for which a receipt in the following form was issued to him:

"Red Crown Mills,

"No. 1,078. Albany, Oregon, Sept. 18, 1894.

"Received of E. D. Barrett, by self, two thousand one hundred ninety-eight ¹⁵/₁₀₀ bushel No. 1 merchantable wheat, subject to sacks and storage, .08 cents per bushel, if withdrawn from mill.

"Red Crown Roller Mills,

"2,198¹⁵/₁₀₀ Bu. Lyons."

Immediately upon the receipt of the wheat, it was, with the knowledge and consent of Barrett, mixed and mingled with the other wheat on hand at the time, and was subsequently manufactured into flour by the mill company, and sold for its own use and benefit. No storage was paid or demand made for the wheat until after the failure of the company in March, 1895, when Barrett demanded the then market value thereof, which, being refused, he tendered the storage, and demanded a return of the wheat, and obtaining neither, commenced this prosecution.

The indictment charges that the defendant, as the manager of a warehouse for the storage of grain, received for storage therein the wheat in question, issued a receipt therefor, and afterwards sold, shipped, transferred, and removed the same from such warehouse, and beyond his control, without the written assent of the holder of the receipt. In order to sustain this charge, it was incumbent upon the state to prove that the wheat in question was in fact placed in a warehouse, within the meaning of that term as used in the statute, and, in addition thereto, that it was placed therein on storage. A failure of proof in either particular would necessarily be fatal to the prosecution. Upon its face the receipt issued to Barrett affords no solution of either of these questions, for it is silent as to whether the building was in fact a warehouse, and as to whether the wheat was received on storage, or for some other purpose; and therefore resort could be had to parol evidence to ascertain the true character of the business in which the mill company was

engaged, as well as the terms on which the wheat was received. *Lyon v. Lenon*, 106 Ind. 567, 7 N. E. 311. Upon the trial, evidence was given and offered tending to show, and from which the jury could have found, that the mill company did not receive grain for storage or safe-keeping, but that, according to its usual course of business, known to its customers, and particularly to Barrett, all wheat received by it was mixed with, and became a part of, the consumable stock of the mill, and was manufactured into flour and other mill products, and sold and disposed of by the mill company in the usual course of business, and that it satisfied its obligation to the depositors by paying them the market price when demanded, or by returning a like quantity and quality of other wheat. In the former case no storage was charged or paid, but in the latter a charge of eight cents a bushel was made for sacks and storage; and this accounts for the provision in the receipt to Barrett concerning the payment of storage if the wheat should be withdrawn from the mill.

Assuming these facts to be true, as we must for the purposes of this appeal, the question of law is presented as to whether the transaction comes within the provisions of the act of 1885. And, as its solution involves the merits of the entire theory upon which the cause was tried in the court below, we shall proceed to examine it without incumbering the opinion with a statement of the various ways in which the question was raised during the progress of the trial. It is conceded by counsel for the state, as we understand them, that if, assuming the facts stated to be true, the corporation of which defendant was the manager was not engaged in the warehouse business, or if the wheat was not received on storage, within the meaning of the statute, the judgment from which this appeal was taken is erroneous, and should be reversed. The statute in question (Laws 1885, p. 61; 2 Hill's Ann. Laws Or. § 4201 et seq.) is entitled "An act to regulate warehousemen, wharfingers, commission men and other bailees, and to declare the effect of warehouse receipts," and makes it the duty of every person owning or operating "any warehouse, commission house, forwarding house, mill, wharf or other place where grain, flour, pork, beef, wool or other produce or commodity is stored," to deliver to the owner thereof a warehouse receipt, which "shall bear the date of its issuance and shall state from whom received, the number of sacks if sacked, the number of bushels or pounds, the condition or quality of the same and the terms and conditions upon which it is stored"; prohibits the issuance of fraudulent receipts, or for a commodity "not actually in store at the time of issuing such receipt"; prohibits the bailee from mixing commodities of different qualities or grades; provides that no person op-

erating "any warehouse * * * or other place of storage" shall sell, incumber, ship, transfer, or remove, beyond his custody or control, any grain or other produce, for which a receipt has been given by him, without the written consent of the holder of the receipt; makes all checks or receipts given by any person operating "any warehouse * * * or other place of storage," for any grain or other commodity "stored or deposited," and all bills of lading and transportation receipts of any kind, negotiable; provides that the same may be transferred by indorsement, which shall be deemed a valid transfer of the commodity represented thereby; that on the presentation of the receipt given by any person operating "any warehouse * * * or other place of storage" for grain or other produce, and payment of all the charges due thereon, the owner shall be entitled to the immediate possession of the "commodity named in the receipt"; that it shall be the duty of the warehouseman or bailee to deliver the same to him; and the violation of any provision of the act is thereby made a penal offense, punishable by fine, or imprisonment, or both.

From this summary, it is apparent that the statute, as its title and contents clearly indicate, is designed to cover the special business of warehousemen, wharfingers, commission men, and other bailees who are engaged in receiving and storing the goods of others as a business. Its principal object is to make warehouse receipts negotiable, and to protect the rights of the holders thereof, by requiring the warehouseman or bailee to keep constantly on hand the specific goods stored, or a sufficient portion of the bulk of which they become a part, to satisfy his outstanding receipts. In short, it was designed to compel a warehouseman or other like bailee, under the penalties of a criminal prosecution, to live up to and abide by the contract of bailment. But the evil sought to be remedied by this legislation and the remedy sought to be applied alike show that it never was within the legislative mind that it should apply to a case where the bailee has the right, under the contract, express or implied, to sell or use the goods committed to his care. In such case, in the very nature of things, there can be no storage or bailment; but the transaction is, in essence, a sale of the commodity, and an extension of personal credit to the bailee. There is an inherent difference, recognized by all the authorities, between a bailment and a sale. In the one case, the property remains in the depositor, and the bailee is but the custodian of the thing, with no right to use or dispose of it in any way; while, in the other, he may use it as his own, the depositor relying upon his personal credit for its value, either in money or kind. A warehouse, therefore, within the meaning of this statute, is a place where any of the commodities enumerated therein is received

on storage for the owner, by some person or corporation engaged in the general business of receiving such goods in store for compensation or profit. *Bucher v. Com.*, 103 Pa. St. 528; *Fishback v. Van Dusen*, 33 Minn. 111, 22 N. W. 244; *State v. Bryant*, 63 Md. 68. Under the rule in this state, wheat stored with a warehouseman does not cease to be a bailment, within the meaning of this act, because it is, by the consent of the depositor, mixed with other wheat of like grade and quality (*McBee v. Ceasar*, 15 Or. 62, 13 Pac. 352); but, when it is delivered and received under an agreement, express or implied from the course of dealing, that the person to whom it is delivered may use it as a part of his consumable stock, and fulfill his obligation to the owner by either paying its market value when demanded or returning an equal amount of other wheat of like grade and quality, the transaction is not a bailment or storage, within the meaning of the statute, and the deposittee cannot be convicted of a crime for doing that which he is permitted to do by the very terms of his contract. *Lyon v. Lenon*, 106 Ind. 567, 7 N. E. 311; *McCabe v. McKinstry*, 5 Dill. 506, Fed. Cas. No. 8,667; *Andrews v. Richmond*, 34 Hun, 20; *Johnston v. Browne*, 37 Iowa, 200; *Nelson v. Brown*, 44 Iowa, 455.

Now, as already suggested, there was evidence in this case tending to show (1) that the company of which the defendant was the manager was not engaged in the business of receiving grain on storage for the owner, and so was not a warehouse keeper, within the meaning of the statute; and (2) that, if it was keeping a warehouse for the storage of grain, the Barrett wheat was not so received. The case, therefore, should have been submitted to the jury, with a direction that they could not convict unless they were satisfied, from the evidence, that the place where the grain was deposited was, in fact, a warehouse for the storage of grain, and that it was received there on storage, and not on an agreement, express or implied, that the mill company might use it in the course of its business. And, because these questions were not so submitted to the jury, the case must be reversed, and a new trial ordered.

WOLVERTON, J., took no part in this decision.

KUHN v. McKAY.

(Supreme Court of Wyoming. Dec. 1, 1896.)

APPEAL—DISMISSAL.

At the time a petition in error and transcript of the record were filed, no praecipe for summons in error was filed, and summons was not issued. About 160 days afterwards, and after plaintiff in error filed his brief, and a motion to dismiss was filed, but less than a year after the judgment was rendered, summons in error was issued and served on defendant in error. *Held*, that the proceedings in error

should not be dismissed, under Rev. St. 1887, § 3141, providing that a proceeding to reverse a judgment shall be commenced within two years after the judgment complained of.

Error to district court, Sweetwater county.

Action between Adam Kuhn and George McKay. There was a judgment in favor of McKay, and Kuhn brought error. Defendant in error moves to dismiss. Motion denied.

S. T. Corn, for plaintiff in error. C. C. Hamlin and J. T. Norton, for defendant in error.

POTTER, J. On the 4th day of June, 1896, a motion was filed herein for the dismissal of these proceedings in error. The grounds assigned are: First. Because the defendant in error has had no notice of the appeal. Second. Because no summons in error has been issued or served. No notice of proceedings in error is required, except the service of summons in error; and this is not required if the issuance and service of such summons is waived. The petition in error, with the transcript of the record, was filed on February 22, 1896. At that time no praecipe for summons in error was filed, and summons was not issued; but on April 20, 1896, counsel for plaintiff in error filed their brief. After the motion to dismiss was filed, and on July 30, 1896, summons in error was issued and served upon the defendant in error. Counsel for plaintiff in error presents his affidavit, showing that, at the time the petition in error and record was filed, it was intended to secure the usual waiver of summons in error from opposing counsel, but from oversight the same was neglected; that upon learning of the motion such attempt was made, but the waiver was not obtained, and thereupon the issuance of the writ was procured. The judgment brought up by the record for review was rendered October 11, 1895, by the district court of Sweetwater county. A proceeding to reverse, vacate, or modify a judgment or final order is required to be commenced within two years after the rendition of the judgment or the making of the final order complained of. Rev. St. 1887, § 3141. It is manifest that the issuance and service of summons in error occurred within the period prescribed by law for the commencement of proceedings in error, and was accomplished prior to the hearing upon the motion. Whether the proceedings in error are commenced by the mere filing of petition in error and transcript, or whether they are not to be deemed as commenced without the issuance of summons, is immaterial, in the present condition of the case. We find not only the petition and record on file, but also a summons in error regularly issued, served, and returned, all within the period of limitation, which, indeed, has not yet expired. No good reason, therefore, exists for dismissing the case. In *Seibel v. Bath* (Wyo.) 40 Pac. 756, a new party was permitted to be brought in, the statutory limitation not having expired, although a motion to dismiss on the ground of defect of parties had been filed. The motion

is denied. Defendant in error will be allowed 45 days within which to file briefs.

GROESBECK, C. J., and CONAWAY, J.,
concur.

STATE ex rel. BLYDENBURGH v. BURDICK,
Secretary of State.

(Supreme Court of Wyoming. Oct. 20, 1896.)

ELECTIONS—NOMINATIONS OF PRESIDENTIAL ELECTORS—CERTIFICATE OF SECRETARY OF STATE—VALIDITY—BALLOTS—ELECTORS.

1. One of three persons nominated by the Democratic state convention as presidential elector declined, and the vacancy was filled by the nomination by the state committee of one V., who had been previously nominated by the People's state convention, and certified to the secretary of state, as candidate for elector. The two candidates other than V. nominated by the latter convention declined. To fill the vacancies, there was delivered to the secretary of state a certificate of nomination of J. and S., signed by 100 electors. It was verified by one of such electors, who made oath that its statements were true, and described himself in his affidavit as chairman of the state committee. The secretary of state, in certifying the nominations of electors to the county clerks, after naming three persons, and designating them as Republican, wrote the names J., S., and V., with the word, "People's" after each of the two former, and the words "Democrat and People's" after V.'s name. He then wrote the names of the two Democratic nominees who had not declined, with the word "Democrat" after each. *Held* that, in the absence of any law regulating the manner in which party nominations may be made, the secretary of state's certificate complied with Laws 1890, c. 80, § 93, which provides that such secretary shall certify to the county clerk of each county the names and description of each person nominated for office, as specified in the certificate of nomination with the said secretary; and he was not required to place V.'s name in the group with the two Democratic nominees, or place some such word as "Independent" or "Electors" after the names of J. and S., to indicate that they were nominated by certificate, instead of grouping them with V.'s name as People's candidates, because section 104 provides that every ballot shall contain the names of every candidate whose nomination for any office has been certified or filed according to such chapter, and no other names; that the names of candidates for each office shall be arranged under the designation of the office in alphabetical order according to surnames, except that the names of presidential electors presented in one certificate of nomination shall be arranged in a separate group; and that every ballot shall contain the name of the party or principle which the candidate represents, etc.

2. Since the candidates for presidential electors presented in one certificate of nomination are entitled to be arranged on the official ballot in a separate group, and the officer charged with the duty of arranging them can have no other source of official information than the contents of the certificate of the secretary of state, the secretary should so certify the names of the candidates and their description as to convey to the county clerks all requisite knowledge.

3. The statute does not authorize the printing of the name of one person as candidate for presidential elector in more than one place on the ticket, though nominated by two or more parties.

4. Laws 1890, c. 80, § 89, prohibiting the same person joining in a certificate of nomina-

tion by electors of more than one person for the same office, and providing that, if any such person does so join, his name shall not be counted on either certificate, does not prohibit an elector who has participated in a convention of one party from joining in a certificate of nomination of a candidate of another party for the same office.

5. The secretary of state, in certifying nominations to the county clerks, may respect the designation of a political party or principle mentioned in a certificate of nomination by electors where the certificate is signed, sworn to, and presented by the state chairman of such party, in the absence of any other nomination by such party for the same office; and he is not bound to disregard such description, or add something to it, not found in the certificate, indicating the manner in which the nomination was made, in the absence of any law limiting party nominations; and such limitation is not provided by Laws 1890, c. 80, §§ 84-86, 88, authorizing a convention to make nominations, and defining a convention as an organized assemblage of electors representing some political party or principle; and also authorizing nominations to be made by certificate of electors in a manner described.

Original action by the state of Wyoming, on relation of Charles E. Blydenburgh, against Charles W. Burdick, as secretary of state of the state of Wyoming, to compel defendant, by writ of mandamus, to change his certificates to the county clerks of the state regarding the candidates for presidential electors. Writ denied.

Walter R. Stoll, for relator. Lacey & Van Devanter, for respondent.

POTTER, J. The relator, chairman of the Democratic State Central Committee, brings the present action, seeking thereby the allowance of a writ of mandamus to compel the secretary of state to rescind or modify the form or character of his certificates to the several county clerks respecting the candidates for electors of president and vice president of the United States. The respondent certified such nominations in the following manner and order: the names of three candidates of the Republican party, simply naming them with the word "Republican" following each of their names; the names of Patrick J. M. Jordan, John Sims, and Daniel L. Van Meter, with the word "People's" accompanying the names of Jordan and Sims, and the words "Democrat and People's" following the name of Van Meter; the names of three Prohibition candidates; and lastly the names of John A. Martin and Patrick J. Quealy, with the word "Democrat" following each of their names. The petition discloses: That at the regular Democratic state convention George H. Cross, John A. Martin, and Patrick J. Quealy were nominated for presidential electors, and at the regular state convention of the People's party Francis M. Matthews, Charles H. Randall, and Daniel L. Van Meter were nominated for such office. All of these nominations were duly certified to the respondent by the respective chairmen and secretaries of such conventions. That within the time allowed by the statute. Cross, one of the Democratic nominees, and

Randall and Matthews, two of the nominees of the People's party, duly declined. That in pursuance of the authority expressly conferred upon it by the convention making the original nominations the state committee of the Democratic party filled the vacancy caused by the declination of Cross by the nomination of Daniel L. Van Meter. That neither any convention or committee of the People's party attempted to fill the vacancy occasioned by the declinations of Matthews and Randall, nor took any action concerning the matter, and that the People's party convention had not empowered its state committee to fill such or any vacancies. It further appears that on the 8th day of October one John W. Patterson, who had been appointed by the said convention of the People's party as the chairman of the state committee of that party, delivered to the respondent a certificate of nomination purporting to nominate for the office of presidential electors to fill the vacancy in the list of People's party candidates caused by the declination of Matthews and Randall, respectively, Patrick J. M. Jordan and John Sims; it appearing from the record that in the body of such certificate it was recited that "the undersigned and the said Patrick J. M. Jordan and the said John Sims so nominated to fill such vacancies represent the People's party"; and that the same was verified by said John W. Patterson, who made oath that the statements contained in the certificate were true, and described himself in his affidavit as the chairman of the state committee of the People's party. The said certificate was signed by 100 electors, including said Patterson. The relator, in his petition, charges that this certificate of nomination was void. The allegations to support such charge, summarized, are to the effect that the nominations mentioned therein were not made by the People's party; that the laws of this state contemplate and expressly require that vacancies occurring in the ticket of any political party nominated in regular convention shall be filled only by the convention itself or by the party committee duly authorized; that the certificate was not filed within the time required for original nominations; and that no number of electors can supplant or supersede the action of an organized political party; and the electors whose names are subscribed to the certificate in question were not authorized to represent the People's party, or act in its behalf. It was also averred that a large number of the persons whose names were signed to the certificate had joined in nominating at least three other candidates for the same office by attending and participating in the primaries of the Republican party. This last-mentioned allegation is general in character. It is neither stated when they so attended and participated, or in what the participation consisted, nor are the particular individuals referred to indicated. The petition avers that the certificate of the respondent is illegal and wrong in two respects: First, in failing to certify the name

of Daniel L. Van Meter in the same group and in conjunction with the names of Martin and Quealy, the other Democratic candidates; and, second, in including the names of Jordan and Sims in the group of the candidates for electors of the People's party. The prayer of the petition is that a writ of mandamus issue directing the respondent to rescind his certificate, and to issue therefor new ones, placing the name of Van Meter in the group of Democratic candidates, and omitting the names of Jordan and Sims from the group of the candidates of the People's party, or requiring him to so modify his certificates already sent out that the same result may be accomplished.

The case was heard upon the petition and the various certificates of nominations for the office of presidential electors filed in the office of respondent. From the record outside of the petition it appeared that on the 25th day of September—several days before the chairman and secretary of the convention of the People's party filed their certificate of the nominations made by that party at its said convention—a certificate of nomination, signed by 100 electors representing themselves as members of the People's party was filed, making original nominations of candidates for electors to represent the principles of the People's party, naming as the nominees thereof the same persons who were nominated at the state convention of that party, viz. Matthews, Randall, and Van Meter.

The duty of the secretary of state with respect to the certification of nominations filed in his office is defined by the provisions of section 93 of chapter 80 of the Laws of 1890, as follows: "Not less than twenty-five nor more than thirty days before an election to fill any public office, the secretary of Wyoming shall certify to the county clerk of each county within which any of the electors may by law vote for candidates for such office, the names and description of each person nominated for such office as specified in the certificate of nomination with the said secretary." If the respondent has complied with this duty, then the writ prayed for should not be allowed. It is contended that he has failed to perform the duty in the two particulars already mentioned. Upon the hearing, although it was not conceded by counsel for relator that the names of Jordan and Sims were entitled to be certified in any manner whatever, the chief contention seemed to be narrowed to the proposition that they were not properly certified as People's candidates, and in one group with Van Meter; but that, if certified at all, some word, such as "Independent" or "Electors," should be used to indicate that they were nominated by certificate of electors. The argument respecting the grouping of the Democratic nominees, and including therein the name of Van Meter in the certificate of the secretary, was based upon the requirements concerning the official ballot. Section 104 of chapter 80 of the Laws of 1890 provides that: "All ballots prepared under the provisions of this act shall be white in color and of a good quality of paper, and the names shall be printed thereon in black

ink. Every ballot shall contain the name of every candidate whose nomination for any office specified in the ballot has been certified or filed according to the provisions of this act and no other name. The names of candidates for each office shall be arranged under the designation of the office in alphabetical order according to surnames, except that the names of electors of president and vicepresident of the United States presented in one certificate of nomination, shall be arranged in a separate group. Every ballot shall also contain the name of the party or principle which the candidates represent as contained in the certificate of nomination. At the end of the list of candidates for each office shall be left a blank space large enough to contain as many written names of candidates as are necessary to fill such office. And on the ballot may be printed such words as will aid the voter to vote, as 'Vote for one,' 'Vote for two,' 'Vote for three,' 'Yes,' 'No,' and the like." It is not required of the secretary that he prepare the official ballots. With this he has nothing whatever to do. That duty resides with the county clerk of each county. Under our system of voting, the elector is required to place a cross opposite the name of each candidate for whom he desires to vote; and, although the names of candidates for electors presented in one certificate of nomination are required to be arranged upon the ballot in a separate group, one cross will not suffice to vote for the three, or for the group thus arranged, but the voter, if desiring to vote for three, as he may do, is required to place a cross opposite the name of each one of the three. At the time of orally announcing the conclusion of the court it was stated that the secretary was not required to group the candidates for electors at all, and that, if he did so, his arrangement into groups was not binding or conclusive upon the officers charged with the duty of preparing the ballots. This statement was made in view of the rather meager provisions affecting the duty of the secretary, and the nature of a mandamus proceeding; and it seemed that, unless it was clearly the duty of the respondent to group the candidates, he ought not to be directed by a writ of mandamus to do so. The statute does not expressly require that he shall certify such candidates in the manner in which they are required to be arranged upon the ballot; and, so far as the name of Van Meter is concerned, that is the extent of the prayer of relator. But we are somewhat apprehensive that a misunderstanding of the views of the court may arise from what was said when its conclusion was announced, without some further explanation. While it is true, as above suggested, that there is no express provision requiring the secretary to do more than certify the names and description of each person nominated, as specified in the certificate of nomination, it is likewise true that those candidates for presidential electors presented in one certificate of nomination are entitled to be arranged upon the official ballot in a separate group, and that the officer charged with the duty of thus arranging them can have no other source of official in-

formation than the contents of the certificate of the secretary. It would, therefore, seem reasonably clear that in the performance of the duty devolving upon the secretary he should so certify the names of such candidates and their description as will convey to the county clerk all requisite knowledge. The relator and his counsel assumed that this could only be accomplished by the proper grouping of the candidates in the certificate of the secretary. We are not, however, prepared to assent to that view. If the information sufficient for the appropriate performance of the duty of the county clerk can be given in other ways than by grouping,—and we apprehend that may be practicable,—then it would be erroneous to say, in the absence of an express requirement to that effect, that the secretary is under official obligation to place the candidates in groups, as they are entitled to appear on the ballot, and by this method alone to certify the necessary information to the county clerks. The alternative writ commanded the respondent to thus group the names, or show cause to the contrary. In case the writ should be made peremptory, the same command would continue, notwithstanding the duty to afford proper information could as well, and perhaps even better, without trespassing upon the discretion of the county clerks, be capable of performance in another manner. The soundness of the contention of the relator, moreover, depends upon the correctness of his theory that the name of Van Meter should appear upon the ballot in a group to be comprised of his name and the other two Democratic nominees. If that is not a right to which he is entitled, then assuredly the respondent is not required to certify his name in such a group in any event, and we will not rest our conclusion entirely upon the fact that the respondent might employ different methods, but will inquire into the proposition thus insisted upon by the relator. It is manifest that the issues in this case do not directly involve the preparation of the ballot; but that matter bears a close relation to the obligations imposed upon the secretary, and as affecting his duties it may very properly be considered.

It was decided by this court in the case of *Sawin v. Pease*, 42 Pac. 750, that as to any office other than elector for president and vice president a candidate nominated by more than one party for the same office was not entitled to have his name appear upon the ballot more than once, and we can see no reason for departing from that rule. The opinion in that case out of abundant caution expressly stated that whether or not a different rule would apply as to presidential electors was not decided. The reason for the principle adopted in *Sawin v. Pease* arose out of our system of ballots and voting; the requirement that a cross must be placed opposite the name of each candidate for whom the elector desired to vote; the impossibility of voting a straight ticket, or for any number or group of candidates representing the same party or principle, by a single mark or cross; and, as a consequence,

the probability of mistake and confusion should the name of any candidate be printed in more than one place as a candidate for the same office. Are those reasons, and is the rule deduced therefrom in the case of other offices, inapplicable to the office of presidential elector? The one difference existing in the law between that and other offices is that the names of those candidates for presidential electors presented in one certificate of nomination shall be arranged upon the ballot in a separate group. In view of the further provision of law affecting alike all candidates upon the ballot that one cross votes for but one individual, and that the name of the presidential nominee nowhere appears on the ballot, we are unable to distinguish the case of such candidates from that of candidates for any other office in the respect under consideration; otherwise any person or group of persons nominated by more than one party would be entitled to as many places upon the ballot corresponding with the number of parties nominating them, or certificates lawfully filed of such nominations. The same group of three persons might be presented by several parties, and the entire group be given as many places upon the official ballot. Such a result could only cause much confusion, and throw doubt upon the correctness of the returns of the votes cast. We are clearly of the opinion that the law does not contemplate the printing of the name of one person as candidate for elector of president and vice president in more than one place upon the ballot. Daniel L. Van Meter was regularly nominated by the People's party, and the certificate thereof duly filed. He has not declined that nomination. There is certainly no authority to remove his name from the People's party group. His nomination by that party was made long prior to its adoption by the Democratic party. His name being entitled to but one place upon the ballot, and no one possessing the right to ignore his first nomination in the preparation of the ballot, it necessarily follows that his name is not imperatively required to be also printed in the same group, and in conjunction with the other Democratic candidates. He is described as Democratic as well as People's, and this description indicates to the voter that he has been nominated as representing both parties. An arrangement of the ballot in which all appropriate groups could be maintained, and yet the name of Van Meter immediately precede or follow the names of the other Democratic candidates, thus bringing the three into closer proximity, would certainly not violate the letter or the spirit of the law; but that matter has been left to the discretion of the county clerks, which, unless the statute is departed from, is not subject to the control of the courts. These views find support in *State v. Allen* (Neb.) 62 N. W. 35, and *Miller v. Pennoyer* (Or.) 31 Pac. 830.

Had some one, not already a candidate of another party, been nominated to fill the vacancy caused by the declination of George H. Cross, the name of such nominee would be entitled to a place in the same group with the original associates of Cross. A reasonable construction of the statutory provision would clearly require the name of one thus substituted to be given the same place upon the ballot that the name of the candidate who had declined would have been entitled to.

The next question submitted involves the status of the nominations of Jordan and Sims. One ground of objection is that a large number of the persons purporting to sign the certificate of nomination had joined in nominating at least three other persons for the same office by attending and participating in the primaries of the Republican party. Independent of the very general character of the allegation, we are of the opinion that the provision of the statute (section 80, c. 80, Laws 1890) attempted to be thus invoked is prohibitory only of the same person joining in a certificate of nomination by electors of more than one person for the same office. The last part of the clause containing the provision referred to provides that, if any person does so join, his name shall not be counted upon either certificate, and the context clearly indicates that it was only intended to forbid one from joining in more than one elector's certificate making a nomination for the same office. Whether any one shall have so joined can then easily be ascertained by the officer with whom the certificates are required to be filed. It is, however, contended that 100 electors cannot supplant a regularly organized political party, and are not authorized to place in nomination any candidate as representative of such a party. The position taken is that a party nomination is permitted to be made only by a party convention. Counsel for relator stated upon the hearing that they were until that time unaware that the People's nominees had first or at any time been nominated by an electors' certificate; and it was conceded by such counsel that, if a vacancy occurs in the nominations made by such an electors' certificate, it might be filled in the same manner. The papers upon which the cause was submitted conclusively show that 100 electors had nominated by certificate in due form said Randall, Matthews, and Van Meter as candidates of the People's party, or representing the principles of that party, and that filing preceded the certificate of the officers of the convention. The resignation of Randall and Matthews declined by clear and express language only the nominations conferred by the state convention of the People's party; but included in their respective statements of declination was a direction to the secretary of state to omit their names from the official ballot, sufficiently indicat-

ing an intention upon their part to entirely withdraw as candidates for presidential electors. It is at least certain that the respondent has not certified their names, and that no person or party is insisting that his action in that regard was erroneous. A vacancy, then, occurred in the list of candidates for the office in question, presented by the said certificate of electors. That vacancy at least was filled by the certificate which is now attacked, naming Jordan and Sims. It is not necessary, therefore, for this court to decide whether or not a vacancy in nominations made by a regular convention of a political party can be filled by an electors' certificate, even though, as in the case at bar, such political party has not again acted in the matter by convention, and the convention making the original nominations has not empowered any committee to fill vacancies. Indeed, the contention seemed to have narrowed to an attack upon the action of the respondent in grouping the names of Jordan and Sims with that of Van Meter, and using in connection with their names the party name "People's," without any qualifying words to indicate that they were not presented by a party convention. So far as concerns the objection to their being grouped with Van Meter, what has already been said is sufficient, bearing in mind that the latter-named person was originally nominated by the certificate of electors conjointly with Randall and Matthews, for whom Jordan and Sims were afterwards substituted.

It is, however, very seriously insisted on behalf of the relator that the respondent is not authorized to certify the designation of "People's" in connection with the names of these substituted candidates, but that he should use some other word of description, or add to that so used, which would clearly indicate that they were nominated by certificate of electors; and in support of that view we are referred to the case of *Phillips v. Curtis* (Idaho) 38 Pac. 405, which gives countenance to that proposition. That case, however, is founded upon a statute which, although quite similar in some respects to our own, and particularly so concerning the making of nominations, is radically different in others, which must have considerable bearing upon the question. In that state the method of preparing the ballot follows that of most of the states using the Australian system. Their statute expressly requires that "the width of the ticket shall be divided into as many equal parts by lines the whole length of the ticket, * * * as there are political principles or parties represented by the candidates; each of said parties or divisions to have a heading or caption designating the political principle or party represented by the several candidates." The ballot in that state therefore is arranged in separate columns, the candidates of each party being contained in one column with the name of the party or principle at the head.

In the case cited we are led to infer from the opinion that the People's party, although holding a convention, and making certain nominations, had failed to mention any one as a candidate for state senator; and Phillips, who had been nominated for that office by another party, sought to have his name placed upon the ticket of the People's party under a nomination made by a certain number of electors, the certificate thereof designating him as People's party candidate. The effect would be, if his prayer had been granted, that his name would have gone upon the regular People's party ticket, and in the column upon the ballot set aside for the ticket of that party, and with the other candidates regularly nominated by a convention of that party. It was held that the certificate authorized his name to go upon the ballot as an independent candidate only, and that any number of electors could not secure the name of any candidate which they saw fit to indorse to be placed upon the ticket of any party. It will be observed, whether it is important or not, that the candidate seeking the aid of the court in that case was already named upon the ballot in the ticket of another party. The same comments are applicable to the case of *Atkeson v. Lay*, 115 Mo. 538, 22 S. W. 481, which was not cited by counsel, but has come to our notice. While according to each of those courts our entire respect, if the conclusions arrived at in the cases cited are not at all depending upon the character of their ballot, we would hesitate to follow them in their application to a statute such as that in force in this state. We are inclined, however, to the opinion that there is a well-defined distinction between those cases and the one at bar. In this state, any convention or primary meeting held for the purpose of making nominations to public office, and also a specified number of electors, may nominate candidates for public office to be filled by election. Section 84, c. 80, Laws 1890. A convention or primary meeting is defined as "an organized assemblage of electors or delegates representing a political party." Section 85. Nominations made by a convention or primary meeting are required to be certified in writing containing the name, residence, and business of the person nominated, and, in not more than five words, the party or principle which such convention or primary meeting represents. It is required to be signed by the presiding officer and secretary of the convention or primary meeting, and verified by them in a certain manner. Section 86. Candidates for office may be nominated otherwise than by convention or primary meeting, as follows: A certificate containing the name of a candidate for the office to be filled with such information as is required to be given in certificates of nominations by convention shall be signed by electors, etc. When the office is to be filled by the electors of the entire state, the certificate must be signed by not less than 100 electors. Such certificates may be filed in the same manner,

and with the same effect, as a certificate of nomination made by a party convention. Section 88. Provision is made for declining a nomination, at least 25 days before election (section 95); and, in case of vacancy occurring for any reason, the same may be filled in the manner required for original nominations. Section 96. In case the nomination thus vacated has been made by a party convention, which has delegated to a committee the power to fill vacancies, the same may be filled by such committee. Section 97. It was urged by counsel for respondent that the language of section 96, viz. "may be filled in the manner required for original nominations," expressly permitted a vacancy to be filled in either of the ways provided for the making of original nominations, irrespective of the manner in which the original nomination in the particular instance had been made; that is to say, either by convention (or committee, if authorized), primary meeting, or certificate of electors. Whether or not the language or purport of the statute goes to that extent we do not, as already intimated, express any opinion, as we find in this case the vacancies to have been filled in the same manner as the original nominations were made and presented.

In an earlier part of this opinion we adverted to the method of making up the ballot, from which it appears that there are no party headings thereon, nor columns set apart for separate parties; but the ballot is required to contain, in addition to the names of the candidates, the name of the party or principle represented by them respectively as contained in the certificate of nomination. It must be observed that the certificate under which the controversy arises as to the right to use the word "People's" is not arraigned by any persons or authority representing the People's party. No one claiming any allegiance to that party is here complaining of the act of Chairman Patterson and his associates. The complaint comes from the chairman of the state committee of an entirely separate political party. While he probably has the right to prefer such a complaint, and have the matter adjudicated, nevertheless we are confronted with the fact that at the instance of one not affiliated with the People's party in any manner, so far as the record discloses, we are asked to judicially deny the right of more than 100 electors, including the one highest in authority in the party in this state, describing themselves as the representatives of that party, from giving the party name to their candidates. If this certificate had come in conflict with other nominations made by the same party in regular convention, a very different question might arise. In the case at bar, however, we have before us the broad question whether, in any case, the secretary of state is at liberty to respect the designation of a political party or principle mentioned in a certificate of nomination by electors, when the certificate is sign-

ed, sworn to, and presented by the state chairman of such party, and in its body alleges that the signers represent the party, in the absence of any other existing nomination by such party for the same office; or whether he is bound to disregard such description, or add something to it, not found in the certificate, indicating the manner in which the nominations were made. There can hardly exist a doubt but that our legislation on the subject of elections is more or less imperfect, which fact invites conflict, and possibility of confusion; but the courts cannot supply omissions in the law. Anticipating, or perhaps having experienced, controversy along this very line, many of the states have explicitly regulated the manner in which party nominations may be made. There is nothing of that character in our law. We have searched the election law in vain to discover any limitations upon party nominations. There is not a clause or line anywhere requiring or tending in that direction that a political party can only present nominations for public office through the medium of party conventions or primary meetings. The writer of this opinion believes that a wise regulation in that regard, and legislation explicitly defining the status of nominations by certificate of electors, would be desirable; but there is no such legislation at present, and the courts have no authority to place restrictions upon those matters when the legislature has left them open. A convention of delegates, or even a mass convention, is, after all, but a representation of some political party; neither constitutes the party itself; and until the appropriate department has limited or restricted the method by which a party may be represented, and through what character of representation it may act, we do not consider it within the province of the courts to do so. If there is any doubt about a matter of this character, then that construction of the statute should be adopted which will accord to the citizen the greater liberty in casting his ballot. *People v. District Court*, 18 Colo. 26, 31 Pac. 339. It has been held that, where two factions of the same political party have held separate conventions, and certified nominations, using the same political designation, the secretary of state is without authority to decide which of the two is entitled to the party name, and is required in such case to certify both sets of nominations, giving to each the political designation found in the certificate of nomination. *People v. District Court*, supra; *Phelps v. Piper* (Neb.) 67 N. W. 755; *Shields v. Jacob*, 88 Mich. 164, 50 N. W. 105. In Kansas a nomination by electors designating their single candidate as the nominee of the Miners' and Laboring Men's party was recognized as a party nomination, and the court say: "We think that each political party has a perfect right to select its candidates as it pleases, and have their names printed under its party heading.

There is nothing in the law nor in reason preventing two or more political parties, whether acting through conventions or by petitions, from selecting the same individuals for one or more of the offices to be filled." *Simpson v. Osborn*, 52 Kan. 328, 34 Pac. 747. In Minnesota the supreme court upheld as party nominees certain candidates named by a mass convention, in opposition to rival candidates presented by a delegate convention of the same party; one of the reasons assigned being the entire absence of any statutory provision regulating the manner in which political parties should proceed in organizing conventions or making nominations. *Manston v. McIntosh* (Minn.) 60 N. W. 672. To hold that the provisions of the statute authorizing a convention to make nominations, and defining a convention as an organized assemblage of electors representing some political party or principle, necessarily confines a political party to proceedings by and through a convention, especially in view of the other provisions affecting nominations by electors' certificate, or by petition, as it is sometimes popularly termed, would require the judiciary to interpolate something which has been omitted, perhaps purposely, from the statute. In the case at bar no convention of the People's party has acted as to two candidates for electors subsequent to the declination of two persons named in convention as well as by petition. No committee was given authority to act. The chairman of the state committee, with 100 associates, present the certificate in question as alleged representatives of the party. If a party may, under any circumstances, act otherwise than by convention or primary meeting, no lawful or reasonable objection can be urged to such action in the case and upon the facts before us. We conclude, therefore, that the respondent was not bound to disregard the political designation accompanying the names of the candidates Jordan and Sims in the certificate nominating them, that a fair and reasonable construction of the statute does not require him to add to or qualify the party name thus used. No such duty being imposed upon that officer, it does not rest upon the court. The writ prayed for must be denied.

CONAWAY, J., concurs. GROESBECK, C. J., did not participate in the decision.

JOHNSON & LARIMER DRY-GOODS CO. v. CORNELL.

(Supreme Court of Oklahoma. Sept. 4, 1896.)

LIMITATIONS—RUNNING OF STATUTE—NONRESIDENTS—BOND FOR COSTS—SECONDARY EVIDENCE.

1. The statute of limitations does not run in favor of a nonresident corporation which neglects and refuses to comply with the laws of the territory upon which it is permitted to do business here, and by which neglect and re-

fusal persons having claims against the corporation are precluded from obtaining service of process upon it.

2. No bond for costs, deposit in money, or affidavit of poverty by the plaintiff was required under the practice act contained in the Statutes of 1890, under which this action was begun, and neither a bond, deposit, nor affidavit of poverty were required in order to entitle the court to take jurisdiction of the case before summons issued, in a suit begun under that act.

3. In a suit for damages against the plaintiff in error here, defendant below, the plaintiff, defendant in error here, testified as to the value of a stock of goods, and afterwards, upon cross-examination, he testified that he knew the value of the goods by footing up the bills and the sales on the books, and that he had turned over the books to one of his attorneys, and that he now had no control of them, and that they were out of his possession.

(Syllabus by the Court.)

Error to district court, Logan county; before Justice Frank Dale.

Action by S. P. Cornell against the Johnson & Larimer Dry-Goods Company for conversion. From a judgment for plaintiff, defendant brings error. Affirmed.

O'Bryan & Gordon and Green & Strang, for plaintiff in error. Harper S. Cunningham, for defendant in error.

McATEE, J. This case was tried upon an amended petition filed in the district court of Logan county on the 27th day of January, 1894, by the plaintiff, S. P. Cornell, defendant in error here, in which the plaintiff alleged that he and one George Siltzell were owners of a stock of goods in the town of Noble, valued at \$1,000, and that before the commencement of this suit plaintiff became the sole owner thereof, and that on the 15th day of August, 1890, the defendant, plaintiff in error here, forcibly took possession of the said goods, and on September 20, 1890, converted the same to its own use; and that also on the 15th day of August, 1890, the defendant forcibly took possession of another stock of goods owned by plaintiff in the town of Orlando, and on the 22d day of September, 1890, converted the same to its own use, to the plaintiff's damage in the sum of \$2,500; and that the plaintiff was the owner of a frame building in the town of Orlando, and that on the 16th day of September, 1890, the defendant converted this property also to its own use, to the damage of the plaintiff in the sum of \$300. Judgment was prayed for in the sum of \$3,800, damages, and interest from the 15th day of August, and for costs of suit. There was no cost bond, no deposit for costs, and no poverty affidavit. Summons was issued, and returned on January 30, 1894, and duly served on Enos Kulhman, agent of the defendant, plaintiff in error here, on February 1, 1894. The defendant filed a general denial of all the charges set forth in the petition on February 20, 1894, and on the 12th day of April, 1894, obtained leave to withdraw its answer, and file a general demurrer, which was by the court overruled. De-

fendant thereupon again filed its general denial, and upon the issues thereupon raised the cause was tried to a jury. The jury was fully instructed upon the propositions of law applicable to the case, and thereafter rendered a verdict in behalf of the plaintiff, defendant here, for the sum of \$1,100 and costs of suit. Findings of fact were also made by the jury upon 23 special interrogatories proposed by the defendant. The defendant moved the court for judgment upon the special findings of the jury, notwithstanding the general verdict, and filed its motion for a new trial, and further moved the court to dismiss the action for the reason that no bond for costs had been given, and for the further reason that the plaintiff had failed to comply with the order of the court requiring him to give bond for costs; all of which motions were by the court overruled, and exceptions reserved by the defendant, and judgment was thereupon entered up in behalf of the plaintiff for the amount of damages awarded in the verdict of the jury.

Thirteen assignments of error were made by the plaintiff in error, all of which were argued upon three propositions, as follows: (1) That under the laws of the territory the claim of the plaintiff was barred by the statute of limitations upon the 27th day of January, 1894, the date of the filing of the amended petition herein; and (2) that, no bond for costs having been filed, no deposit in money of a sum less than \$15 having been made, and no affidavit by the plaintiff that, by reason of his poverty, he was unable to pay the costs of the action, having been filed in the district court before the issuance of the summons, the court was, therefore, without jurisdiction, and should have dismissed the cause upon its attention having been called to that fact; and (3) that secondary evidence was admitted in behalf of the plaintiff while primary evidence existed, and was under the control of the plaintiff or his attorney. No argument is made upon the law as given to the jury by the court, nor has there been any discussion as to the correctness of the verdict of the jury in view of the special findings of fact made by it at the instance of the defendant.

This action was begun shortly after the conversations set forth in the amended petition, and while the practice act contained in the Statutes of 1890 was in force. The defendant corporation had at that time not complied with the requirements of the Statutes of Oklahoma as they existed at the time, and as they are now found in chapter 17, art. 21, of the Statutes of 1893, and no agent of the defendant corporation had been appointed in the territory upon whom service of process could be made. Shortly after the defendant corporation complied with this statute, the amended petition was filed, summons issued and served upon its agent,

and the defendant then entered its appearance, and answered in the case. It is obvious that the statute of limitations does not run in favor of a nonresident corporation which neglects and refuses to comply with the laws of the territory upon which it is permitted to do business here, and by which neglect and refusal persons having claims against it are precluded from obtaining service of process upon it. The defendant did not plead the statute of limitations as a bar, and evidently did not rely upon it.

Upon the second ground of error which has been argued in the briefs it is to be said that, while the case was tried upon the amended petition filed January 27, 1894, the action was begun under the practice act contained in the Statutes of 1890, and that no bond for costs, deposit in money, or affidavit of poverty by the plaintiff was required under that act as a prerequisite to the issuance of summons. This action was pending at the time of the adoption of the present Code of Civil Procedure, which provides in section 754, p. 888, of the Statutes of 1893, that: "The provisions of this Code do not apply to proceedings in actions or suits pending, when it takes effect. They shall be conducted to final judgment or decree, in all respects, as though it had not been adopted." The contention of plaintiff in error cannot, therefore, be sustained upon this ground.

Upon the third ground of error which has been argued it is contended that the best evidence attainable should be first produced before any evidence of a secondary nature should be allowed by the court, and that the court erred in allowing testimony of a secondary nature while the primary evidence was under the control of plaintiff or his attorneys. The plaintiff testified that he was familiar with the stock of goods at Orlando from handling them, and ordering them, and having charge of them, and from these circumstances could state what the fair market value of the goods was. The defendant in error testified that he had been in business in the territory since August of 1889, and gave his personal attention to it, and thereupon stated that the value of the goods at Orlando was \$2,800. Afterwards, upon cross-examination, he testified that he knew the worth of the goods at Orlando by the footing up of the bills and the sales on the books, and that he had turned over the books to one of his attorneys in the case, Mr. Cunningham; that he had no control of them, and that they were out of his possession, and that he did not know whether his attorney now had control of them or not. Mr. Cunningham was in court at the time of the trial. He testified that the books and accounts had been in his possession, but that he had lost them, and that they were not now in his control, and that he did not know where they were. We do not think that the case should be reversed upon this

ground. The judgment of the court will be affirmed. All the justices concurring, except DALE, C. J., who presided in the cause below, and BIERER, J., not sitting.

WOODBURY v. NEVADA SOUTHERN RY. CO. (L. A. 243, 244.)

(Supreme Court of California. Nov. 24, 1896.)

APPEAL BY CORPORATION—DISMISSAL—RIGHTS OF STOCKHOLDERS—SUBSTITUTION OF ATTORNEYS.

1. In an action against a corporation, pending an appeal by the defendant, certain stockholders, claiming to be the governing body of the corporation, filed a motion, supported by ex parte affidavits, to dismiss the appeal, as taken without authority. *Held* that, in the absence of sufficient evidence to establish affirmatively the facts alleged, the motion should be denied.

2. In an action against a corporation, pending an appeal by the defendant, a motion, supported by ex parte affidavits, was filed in the appellate court by certain stockholders, claiming to control the corporation, to substitute another attorney for the attorney of record. *Held* that, in the absence of sufficient evidence to establish affirmatively that the moving parties are in control, the motion should be denied.

3. Under Code Civ. Proc. § 946, providing that an appeal stays proceedings upon the judgment or order appealed from, but that the court below may proceed upon any other matter not included in such order; and section 284, providing that the attorney in an action may be changed at any time by order of the court, upon application, an application, pending an appeal, to substitute another for the attorney of record, should be made in the trial court.

In bank. Appeal from superior court, San Bernardino county; J. S. Noyes, Judge.

Action by R. W. Woodbury against the Nevada Southern Railway Company. Pending an appeal by the defendant from a judgment in favor of plaintiff, certain stockholders moved to substitute another attorney for the attorney of record, and to dismiss the appeal. Motion dismissed.

A. B. Hotchkiss, for appellant. H. C. Dillon, for respondent.

McFARLAND, J. Several actions to enforce alleged mechanics' liens were consolidated, and judgments were rendered against the defendant, the Nevada Southern Railway Company, a corporation, for a large sum of money, to wit, \$151,710.79, together with attorney's fees, costs, etc. It appears that other large interests are, to some extent, incidentally involved in the case. On April 15, 1896, an appeal was taken to this court by the said railway company, defendant, by its attorney, A. B. Hotchkiss, who is an attorney and counselor in all the courts of this state. The transcript on appeal was filed May 27, 1896. Afterwards two motions were made to this court, and submitted for decisions. One is a motion made by respondent to dismiss the appeal. The other is a motion purporting to be made by the appellant, the said railway company, for a substitution of attorneys. The notice of this second motion is addressed "to A. B. Hotchkiss, Esq., attorney of record for said appellant," and is signed, "The Nevada Southern Railway Company, by M. A. Conkling, Its At-

torney"; and, in the notice, Hotchkiss is informed that the said railway company will apply for an order of this court to change the attorney for said company, appellant, by substituting said Conkling as its attorney in the place of said Hotchkiss. These two motions are based upon substantially the same grounds, namely, that said appeal was taken without the authority of said appellant, and, particularly, that since the taking of the appeal the appellant has ordered that Conkling be substituted as its attorney in place of said Hotchkiss, and that said appeal be dismissed. Hotchkiss, for himself and for the appellant, makes certain preliminary objections to the hearing of these motions, and contends that the procedure adopted to bring before this court the matters sought to be presented by said motions is irregular and unwarranted, and that the said motions cannot, therefore, be considered. But we do not deem it necessary to pass upon these objections, or to consider other objections to the competency of certain evidence submitted on the hearing of the motions, because, waiving all of said objections, we do not think that the evidence submitted warrants the granting of either of said motions. The motions were submitted here upon ex parte affidavits, which is a very unsatisfactory method of presenting issues which involve important rights and large property interests. If these motions should be granted, some of the parties would be forever precluded from raising in any form questions which they seek to have decided on the appeal sought to be dismissed, and which involve large sums of money. Evidently, therefore, the motions should not be granted unless the showing made by the moving parties is strong and clear, and the showing made is not of that character. There are a number of affidavits made on behalf of each of the contesting parties, and they are sharply conflicting. It would be useless to state here the contents of the various affidavits. It is sufficient to say that the evidence which they furnish, considered as a whole, does not affirmatively establish the alleged facts upon which the motions are based, or show who, among contesting stockholders, have the control of the corporation appellant. If, upon the hearing of the appeal, the judgment of the court below shall be affirmed, the moving parties in these motions will have obtained substantially what they are now demanding. On the other hand, if the judgment shall be reversed it should be an easy thing in the court below, where questions of fact can be fully investigated, to determine who constitute the proper governing body of said corporation, and such governing body can then make such disposition of the case as it may deem advisable. For these reasons we are satisfied that the motions should be dismissed. The motions to dismiss the appeal and for substitution of attorneys are both denied.

I concur: GAROUTTE, J.

HARRISON, J. I concur. In addition to the reasons given in the opinion of Mr. Justice

McFARLAND for denying the motions, the motion for the substitution of attorneys for the appellant should have been originally presented to the superior court. Section 946, Code Civ. Proc., provides that the perfecting of an appeal stays all further proceedings in the court below "upon the judgment or order appealed from," or "upon the matter embraced therein," and also declares that "the court below may proceed upon any other matter embraced in the action, and not affected by the order appealed from"; and section 284, Id., provides that the attorney in an action may be changed at any time "before or after judgment. * * * (2) Upon the order of the court, upon the application of either client or attorney, after notice from one to the other." The appellate jurisdiction of this court can be exercised only upon the matters appealed to it, which in the present case is the judgment rendered by the superior court against the appellant. This judgment was for a large amount of money, and it does not appear that any undertaking was given to stay proceedings thereon. The enforcement of the judgment, as well as any proceedings to vacate it or to grant a new trial, must be taken in the superior court. These are matters not embraced in the judgment appealed from, and consequently remain within the jurisdiction of that court to proceed upon; and, irrespective of all statutory provision, it is eminently fitting that the court which has jurisdiction of the proceedings should determine who is authorized to represent the parties thereto as their attorney. There would be a manifest impropriety for this court to direct a substitution of attorneys to conduct the litigation in reference to the matters that have not been appealed, and the statute contemplates that the same attorney shall represent the party in both the trial and the appellate courts. If any substitution is to be made, it should be made in the court of original jurisdiction, and, if requisite, the action of that court in the matter can then be properly certified to this court.

We concur: VAN FLEET, J.; HENSHAW, J.

DAVIS v. CITY AND COUNTY OF SAN FRANCISCO. (S. F. 332.)

(Supreme Court of California. Nov. 24, 1896.)
RECOVERY OF TAXES PAID—SPECIAL ASSESSMENT—STATUTE.

Pol. Code, § 3819 (Laws 1893, p. 32), authorizing actions against counties for the recovery of illegal taxes paid under protest, does not apply to a special assessment levied by the city and county of San Francisco, and collected for a fund in which the county, as such, has no interest. *Easterbrook v. City and County of San Francisco* (Cal.) 44 Pac. 800, followed.

Department 2. Appeal from superior court, city and county of San Francisco.

Action by Andrew M. Davis against the city and county of San Francisco. Judgment for defendant, and plaintiff appeals. Affirmed.

Naphtaly, Freidenrich & Ackerman, for appellant. H. T. Creswell and W. C. Belcher, for respondent.

McFARLAND, J. A general demurrer to the complaint was sustained, and, plaintiff having declined to amend, judgment was rendered for defendant. Plaintiff appeals from the judgment. The purpose of the action is to recover of the city and county of San Francisco, under the provisions of section 3819 of the Political Code (Laws 1893, p. 32), certain alleged taxes, averred to have been paid by appellant under protest. But the alleged taxes were, in fact, founded upon special assessments for a specific purpose, under an act of the legislature approved March 23, 1876 (St. 1875-76, p. 433), generally known as the "Dupont Street Act," to which the said section 3819 of the Political Code does not apply, and for which no action can be maintained against said city and county. This was expressly decided by this court in *Easterbrook v. City and County of San Francisco*, 44 Pac. 800, and upon the authority of that case the judgment in the case at bar must be affirmed. See, also, *Elberg v. San Luis Obispo Co.* (Cal.) 41 Pac. 475, and *Pacific Mut. Life Ins. Co. v. San Diego Co.*, Id. 423. It is proper to state that the *Easterbrook* Case had not been decided when this appeal was taken, or when the briefs in this case were filed. The judgment is affirmed.

We concur: HENSHAW, J.; TEMPLE, J.

PEOPLE v. CRESPI. (Cr. 177.)

(Supreme Court of California. Nov. 21, 1896.)

CRIMINAL LAW—EXAMINING MAGISTRATE—JURISDICTION—IMPEACHMENT OF WITNESS—EVIDENCE.

1. The powers and jurisdiction of the officials designated by Pen. Code, §§ 807, 808, as magistrates, while acting as such, are not derived from the statutes relating to their several offices, but from such sections and from Const. art. 1, § 8, authorizing the prosecution of indictable offenses by information after examination and commitment by a magistrate; and a police judge in a city, being ex officio a magistrate, possesses jurisdiction to conduct such examinations, without regard to whether or not it is, in terms, conferred by the statute creating his office.

2. A defendant on trial for a criminal offense cannot be permitted to impeach the prosecuting witness by placing him on the stand, and, on his denial of statements imputed to him, contradicting him by other witnesses.

3. To rebut evidence introduced to prove a conspiracy by which certain druggists were making dishonest profits by the improper filling of prescriptions, the testimony of a physician practicing in the locality, that he knew of no such practice, and had heard of no complaint, was admissible, though he was not shown to have any connection with the parties charged, such fact affecting only the weight of his evidence.

4. Permitting a prosecuting witness in a trial for criminal libel to testify that he was married and had a family is not reversible error.

5. In a prosecution for a criminal libel, a

statement in an instruction that libels tend to incite breaches of the peace, and that it is the policy of the law, in the interest of its preservation, to discourage such libels by punishment of the libeler, is not error.

Department 2. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Cesare Crespi was convicted of criminal libel, and from the judgment, and from an order denying a new trial, he appeals. Affirmed.

Van Ness & Redman, for appellant. W. F. Fitzgerald, Atty. Gen., and Henry E. Carter, Dep. Atty. Gen., for the People.

HENSHAW, J. The defendant, convicted of criminal libel in the superior court of the city and county of San Francisco, appeals from the judgment, and from the order denying him a new trial. The trial was had upon information filed in the superior court after examination held in the police court of said city and county.

Appellant contends that his examination was without authority of law, and that, therefore, jurisdiction was never acquired by the superior court. This is based upon the provisions of the act of 1893 relative to the police court of San Francisco (St. 1893, p. 9). Section 2 of that act declares: "Sec. 2. The police court of the city and county of San Francisco shall have jurisdiction: First. Of all violations of city ordinances or orders of the board of supervisors of the city and county of San Francisco. Second. Of all misdemeanors punishable by fine not exceeding one thousand dollars, or by imprisonment not exceeding one year, or by both such fine and imprisonment. Third. Of all examinations of felons committed in the city and county of San Francisco. Fourth. Said court, or any judge thereof, shall have the same powers in all criminal actions, cases, examinations and proceedings as are now or are hereafter conferred by law upon justices of the peace." From the foregoing it is argued that the police court has no jurisdiction to try this particular kind of misdemeanor, for which the maximum penalty exceeds \$1,000 fine and one year's imprisonment. This is quite correct. It is next insisted that, as the statute expressly authorizes the police court to hold examinations in all cases of felony, but makes no mention of examinations for offenses less than felony, it must be construed as a withholding of jurisdiction in this particular. Notwithstanding the unreasonable and absurd anomaly which would result if the legislature should have conferred jurisdiction upon the court to examine the graver offense, and should have denied it power to investigate the lesser, still, if, by oversight or intent, such an omission or hiatus in the law should be found to exist, naught would be left for us to do but to recognize the fact. We think, however, that no such situation exists; and this, aside from

the contention of respondent that subdivision 4, above quoted, makes good any apparent deficiency, and confers jurisdiction to hold examinations in the case of misdemeanors like the one under consideration. At the time of the adoption of our present constitution, the criminal procedure was remodeled by that instrument in one important particular. Article 1, § 8, provided that "offenses heretofore required to be prosecuted by indictment shall be prosecuted by information after examination and commitment by a magistrate, or by indictment with or without such examination and commitment, as may be prescribed by law." Criminal libel was one of the crimes required to be prosecuted by indictment. Magistrates are defined and enumerated in the Penal Code. Sections 807, 808. Police judges in towns and cities are magistrates. It has been prescribed by law that all offenses formerly cognizable only by indictment may now be prosecuted either by indictment or by information filed after examination. The chapters and sections of the Penal Code treating of the powers and duties of magistrates make no distinction between the different judicial officers who may act in such capacity. Justices of the supreme court, judges of the superior court, justices of the peace, and police judges, when sitting as magistrates, have the jurisdiction and powers conferred by law upon magistrates, and not those which pertain to their respective judicial offices. They derive their powers and jurisdiction from the constitution, operating with the acts of the legislature upon the subject. Therefore, if it should be held that the statute of 1893, relative to the police court of the city and county of San Francisco, did not confer jurisdiction upon the police judges to hold examinations in misdemeanors such as this, the oversight or deficiency is fully made good and repaired by the provisions of the constitution and of the Penal Code. It is the same jurisdiction, and drawn from the same source, as that conferred upon and used by justices of the peace. In the section defining their criminal jurisdiction (Code Civ. Proc. § 115), no authority whatever will be found for the holding by them of examinations, either upon felons or misdemeanors. They derive it, as do police judges, from their character, not of justices of the peace, but of magistrates.

1. A part of the libelous matter was a published charge that the complaining witness, Almagia, himself a newspaper editor or proprietor, was paid by "the camorra" to libel and vilify certain people. By "camorra" is understood to have been meant a clique, ring, cabal, or confederation of Italians in the city, banded together for dishonest and dishonorable purposes. Defendant undertook to prove the existence of this camorra, and Almagia's connection with it. He called Almagia to the stand, as his own witness, and asked him with specifications of time, place, and persons present, if he had not stated that he had in

stituted the prosecution of defendant at the instance of others. Almagia answered that he had not. Defendant then sought to impeach him by showing that he had made this statement. The court refused to admit the impeaching evidence. This ruling is complained of. It was clearly right. It was an attempt by a party to impeach his own witness, not because that witness had given hostile evidence which had taken him by surprise, but because he did not admit what was sought to be elicited from him. Indeed, he was apparently questioned for the sole purpose of impeachment. Such practice is not permissible. *People v. Jacobs*, 49 Cal. 384; *People v. Mitchell*, 84 Cal. 556, 29 Pac. 1106.

2. In connection with the statement of defendant concerning the relation of the prosecuting witness to the so-called "camorra," and for the purpose of showing the dishonest character of such camorra, evidence was introduced by the defendant to prove the control by said camorra of the Italian Benevolent Society of San Francisco, and the improper making of money out of that society by druggists who were connected with both the society and the camorra. It was sought to be shown that the druggists referred to were realizing dishonest profits out of the improper putting up of prescriptions ordered by or through said benevolent society; and, to this end, witnesses were called who testified that various persons had complained that medicines obtained from druggists who were alleged to be members of the camorra had been barren of beneficial result, while medicines obtained upon the same prescriptions from other druggists, not members of the camorra, had proved efficacious in effecting the results for which intended. In rebuttal of this testimony the prosecution called as a witness Joseph Pesca, a physician practicing his profession in the city and county of San Francisco. Dr. Pesca, over the objection and exception of defendant, was allowed to testify that he knew nothing personally of the use of inferior medicines, and that, in his practice, no complaints had been made to him. The point is made that these rulings of the court were erroneous, because it was not shown that Dr. Pesca had any relation with the benevolent society, or any of the parties to the controversy, which would render his testimony of any value upon the matter. That may well be, but the complete answer is that the value or weight of the testimony was for the jury alone. It would certainly have tended to disprove the charge, if, in rebuttal, the prosecution had called all of the practicing physicians of San Francisco to give like evidence. That they called but one certainly affects the weight to be given to that one's testimony by so much as it fails to establish a perfect rebuttal, but the evidence was none the less admissible, even though of slight importance.

3. Almagia was allowed to testify that he was a married man, the father of a family. The admission of this fact is complained of.

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True, the evidence tended neither to prove nor disprove the criminal charge, but, if it be so that "he that bath wife and children bath given hostages unto fortune," then the fact might affect his credibility before the jury, and, in any event, could have done defendant no harm.

4. In advising the jury, the court spoke as follows: "It is proper to remind you that this is not an action brought by Almagia against Crespi to recover damages for injuries or supposed injuries sustained by the alleged libel. It is not a private, but a public, prosecution, conducted by the people of the state purely for public purposes. *The publication of a libel has a tendency to provoke a breach of the public peace, which the law is solicitous to maintain and preserve. Persons feeling themselves injured by such publications are incited, in many instances, to seek satisfaction by personal violence inflicted upon the supposed libeler.* It is the precautionary policy of the law, in the interest of the preservation of the peace of society, to discourage such violent remedies, involving a breach of the peace; and the law has therefore provided for the punishment of the libeler, as being one who wantonly puts the public peace at hazard, by printing and publishing untrue and malicious attacks on private character." The defendant detaches the italicized portion, and complains of it. But neither segregated nor with its context do we perceive anything in this language but a clear and correct exposition of the law, and the cause of its existence. The judgment and order appealed from are affirmed.

We concur: TEMPLE, J.; McFARLAND, J.

McALPINE et al. v. LAYDON et al. (S. F. 405.)

(Supreme Court of California. Nov. 24, 1896.)
CONTRIBUTORY NEGLIGENCE—PROVINCE OF JURY—
—MASTER AND SERVANT—UNSAFE APPLIANCES.

1. Where the defendant pleaded that plaintiff's intestate was guilty of contributory negligence in standing where he did at the time of the accident, and one witness testified that deceased was not standing in a proper place, while another testified that he was standing just where he should stand, under the requirements of his duties, *held*, that the evidence did not warrant a nonsuit on the ground of contributory negligence.

2. Upon an issue as to the negligence of a master in not providing a proper head block for a pile driver used in pulling up piles, the testimony showed that generally the head blocks on pile drivers used for that purpose were cross bolted to prevent splitting; that, in the opinion of experts, they were unsafe unless so made; and that the head block on defendant's pile driver was not cross bolted, as a result of which it split, causing the death of plaintiff's intestate. *Held*, that the question as to defendant's negligence should have been submitted to the jury.

Department 2. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by H. S. McAlpine and others, heirs of W. S. McAlpine, against Darby Laydon and others, for damages for the death of plaintiffs' intestate. An order of nonsuit having been set aside, and new trial granted, on motion of the plaintiffs, defendants appeal. Affirmed.

Van Ness & Redman, for appellants. A. Morgenthal, for respondents.

HENSHAW, J. The action is prosecuted by the heirs of W. S. McAlpine to recover damages of defendants for negligently occasioning his death. At the time of the accident the Young America pile driver, owned and operated by defendants, was engaged in pulling out piles driven in the Bay of San Francisco. McAlpine was employed in connection with the work as a raftsman. A pile, suddenly leaving its bed, released the strain, and a hook struck the head block, splitting it and knocking off a piece, which fell about 75 feet, striking McAlpine upon the head and killing him. Defendants were granted a nonsuit, but upon motion the judge reopened the case for a new trial, and from his order defendants prosecute their appeal. Newly-discovered evidence was one of the grounds urged, but the court granted the motion believing it had erred in ordering a nonsuit. The claim of plaintiffs was that the head block had been improperly bolted and fastened; that, for the work of pulling piles, it should have been cross bolted, to prevent the very splitting which occurred. The grounds of motion for a nonsuit were: First, the failure of plaintiffs to show negligence upon the part of defendants; and, second, the contributory negligence of deceased, in placing himself where he was when struck.

In considering these matters, it is to be remembered that the trial court, in passing upon the motion for a nonsuit, was not called upon to substitute its judgment for that of the jury, and thus to decide the motion in accordance with what it might conceive to be a preponderance of the evidence. If, upon all of the material issues joined, the plaintiffs had offered some evidence in legal contemplation fairly tending to prove them, then, even though there was conflicting evidence offered by other witnesses for plaintiffs, the determination of the questions, and the decision upon the conflict, was for the jury. This court, in reviewing the ruling of the trial judge, is governed by the same considerations.

The second ground urged upon the motion for nonsuit, namely, the contributory negligence of deceased, may be briefly disposed of. One witness called by plaintiffs testified that deceased should not have been where he was at the time of the accident. Another witness, the foreman of the dredger, swore that deceased was standing where he should have been,—in his proper and usual place. Both of these witnesses were in the employ of defendants. Such

being the evidence, the nonsuit could not be supported upon this ground.

Coming to the consideration of the first ground urged for a nonsuit (that is to say, the alleged failure of the plaintiffs to show that defendants were guilty of negligence), plaintiffs' claim in that regard was that defendants' negligence consisted in failing to cross bolt the head block, and that for pile pulling, as distinguished from pile driving, the unbolted head block was a radically faulty, unfit, and dangerous appliance, and liable to the very accident which befell, and resulted in the death of, McAlpine. An employer is not bound to furnish for his workmen the safest machinery, nor the latest and best appliances, in order to save himself from responsibility for accidents resulting from their use. If the machinery or apparatus be of an ordinary character, and reasonably fitted for the purposes for which it is designed, the employer, in this regard, has fulfilled his duty. The burden is upon the injured servant to show that the machinery or appliances were so defective and inadequate as to make the use of them by the employer negligent and culpable. The plaintiffs undertook this burden, but upon the question whether or not the head block was reasonably appropriate for the use to which it was subjected, as upon the question of McAlpine's contributory negligence, the evidence offered by the different witnesses called by plaintiffs is in sharp conflict. But, as has been before said, we are not here concerned with a decision upon that conflict. If there be found evidence in the record reasonably tending to establish plaintiffs' claim that the appliance in question was unsafe and inadequate, then, whether a conflict upon that point be raised by the evidence of plaintiffs' other witnesses, or be raised by evidence produced by the defendants, the question still remains open for decision by the jury. The trial court, in passing upon the motion for a new trial, and reviewing its rulings upon the motion for a nonsuit, concluded that it had erred, and that there was evidence in plaintiffs' case tending to establish the unfitness of the appliance in question. In this we think the court was correct. The witness Pengally superintended the construction of the pile driver Young America, and was shown to be an expert upon the matter. Of his testimony it must be said that it is in some respects unsatisfactory, and that its statements are at times self-contradicting; but enough may be clearly gathered therefrom to show that the witness testified that, if the pile driver Young America was to be used for pile driving, the head block in use was sufficiently strong and secure without cross bolting. If, however, it was to be used for pile pulling, then it was an unsafe and unfit appliance unless cross bolted. Asked whether, when he constructed the Young America, he cross bolted the head block, he replied: "I do not say that I did not cross bolt it. I think I did. If I omitted to do it, it would be because I thought it was not necessary. If a pile driver had to be used to draw piles, and there was any extra strain coming

upon the wood, I would take extra precaution to fasten it accordingly; but, for ordinary pile driving,—a solid piece of white oak that size,—I do not see how it is possible to split.” Asked further, whether he would consider the head block used upon the Young America at the time of the accident to be a safe apparatus for pulling piles, without any cross bolts, he answers: “I would not consider it so for pulling piles. I mean to say, if bolts are put there it is certainly safer and stronger, but it is a question of judgment as to whether it is not strong enough without bolts.” Again, Robert Cheesman, an expert who had constructed 15 or 20 pile drivers, testifies, in effect, that he always used cross bolts for safety, to keep the head blocks from splitting. And J. R. McAlpine, a cousin of deceased, testified that shortly after the accident he examined six different pile-driving and pile-pulling machines in the harbor, and that the head blocks of each and all of them were cross bolted, saving that upon the Young America. There was thus at least some evidence in the case tending to show that the appliance in question was unfit and unsafe, and upon this ground, also, the trial judge should not have granted the nonsuit and withdrawn the case from the jury. Such, as has been said, was the conclusion which he reached upon the motion for a new trial, which order was therefore properly granted, and is sustained. The order appealed from is affirmed.

We concur: McFARLAND, J.; TEMPLE, J.

CHAPMAN v. NEARY et al. (S. F. 247.)
(Supreme Court of California. Nov. 24, 1896.)
APPEAL—REVIEW—EVIDENCE—STATEMENTS BY
THIRD PERSONS.

1. In an action by an attorney to recover fees alleged to have been payable in certain installments as the case progressed, the fact that the court found for defendant as to the amount of the first installment is not ground for reversing findings for plaintiff as to the others.

2. In an action by an attorney to recover fees, conversations between defendant and another attorney, who was associated with plaintiff in the case in which the services were rendered, are inadmissible against plaintiff, such conversations having taken place in the absence of and without the knowledge of plaintiff.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; D. J. Murphy, Judge.

Action by M. C. Chapman against Mary A. Neary and another. There was a judgment for plaintiff, and defendants appeal. Affirmed.

Henry E. Highton, for appellants. W. W. Foote, Wm. R. Davis, and Young & Powers, for appellee.

BELCHER, C. This is an action to recover for professional services alleged to have been rendered by the plaintiff as an attorney at law for the defendant Mary A. Neary. The court below found the facts and gave judg-

ment in favor of the plaintiff, from which, and from an order denying a new trial, defendants appeal.

The action in which the services are alleged to have been rendered was commenced March 30, 1888, in the superior court of Alameda county, by the defendant herein, Mary A. Neary, then Mary A. Godfrey, to obtain a divorce from her husband, George Godfrey. The defendant in the action denied the plaintiff's right to a divorce, and filed a cross complaint, asking that a divorce be granted to him. The trial of the cause was commenced September 25 and concluded October 29, 1888, and it consumed just 19 days of the intervening time. On November 30, 1888, the court announced from the bench that the plaintiff had failed to make out her case, and the defendant had made out a case on his cross complaint, and thereafter, on January 9, 1889, it made and entered its judgment and decree granting to the defendant and cross complainant a divorce from the plaintiff in said cause. The plaintiff moved for a new trial on a statement of the case, and her motion was denied April 15, 1889. Thereupon she appealed from the judgment and order. The appeal from the judgment was dismissed, at the request of the appellant, on June 21, 1889, and the appeal from order refusing a new trial was dismissed, upon like request, on August 24, 1891. On the next day after the appeal from the judgment was dismissed, June 22, 1889, the appellant Mrs. Godfrey was married to her co-defendant here, Nicholas E. Neary.

It is averred in the complaint in this case that the plaintiff was an attorney and counselor at law, and as such was engaged and retained by the plaintiff in the divorce case at the time the action was commenced; that he continued to render services as such attorney for the plaintiff in that action, without any specific agreement or contract as to his compensation therefor, until some time in November, 1888, when he and Mrs. Neary, then Mrs. Godfrey, entered into an agreement that, in consideration that he would continue to render professional services for her in said action, she would pay him for his services \$1,000 down, \$1,000 more when the motion for new trial should be decided by the superior court, and \$1,000 more when the cause should be finally disposed of in the supreme court; that, after the making of said agreement, and pursuant thereto, plaintiff continued to render valuable professional services to and for the plaintiff in said action until August 24, 1891, when said cause was finally disposed of in and by the supreme court; that under and according to said agreement there became due and payable to the plaintiff at once the sum of \$1,000, of which only \$750 was paid, and on April 15, 1889, when the motion for new trial was denied, there became immediately due and payable to plaintiff the further sum of \$1,000, and on August 24, 1891, when the appeal was finally dismissed in the supreme

court, there became due and payable the further sum of \$1,000, no part of which sums had ever been paid; wherefore judgment was asked for the sum of \$2,250, with interest. The answer of Mrs. Neary denies that she made the specific agreement, or any agreement, with the plaintiff, as alleged in the complaint, and avers that after the motion for new trial in the divorce case was denied she and the plaintiff agreed that he should receive, in full compensation for his services theretofore rendered in said cause, the sum of \$750, and that no further services should be rendered by him; that the said sum of \$750 was paid by her to plaintiff, and was by him then and there accepted as a full compensation for all his services rendered in said cause; and that the relation of attorney and client between the said parties was then and there dissolved, and no further services were ever rendered by plaintiff in said cause. The court below found that Mrs. Neary agreed to pay the plaintiff for his services in the trial of the case of Godfrey against Godfrey, from the commencement to the conclusion thereof in the superior court, the sum of \$750, and that she had paid him that sum, and no more. It also found that on or about the 30th day of October, 1888, after the trial of the case was concluded, and before the motion for a new trial had been disposed of, plaintiff and Mrs. Godfrey entered into an agreement whereby, in consideration that he would continue to render his professional services in said action on motion for a new trial and on appeal to the supreme court, she was to pay him for such services the further sum of \$2,000 in addition to the \$750 to be paid for the trial of the case in the superior court, the payments to be made as follows: one thousand when the motion for new trial should be decided, and the other thousand on the final disposition of the appeal; that under and in pursuance of said agreement plaintiff did continue to render further and valuable professional services in said action on motion for new trial and on appeal to the supreme court, up to and including August 24, 1891, when said action was finally decided by the dismissal of the appeal on account of the remarriage of the plaintiff therein; that by reason of the dismissal of the appeal plaintiff was not required to render as much service on the appeal as was contemplated when the agreement was made; and that the reasonable and fair value of all his services was the sum of \$1,250, in addition to the \$750 already paid; and for that sum, with interest thereon, judgment was entered.

The case is very ably and elaborately argued by counsel upon both sides, but, in view of the conclusion reached, we deem it necessary to notice only a few of the points made.

1. The fact that the complaint avers that under the agreement between the parties the first payment to the plaintiff was to be \$1,000, while the court found that it was to be only \$750, is no ground for a reversal. It was a disputable question as to what the

amount of that payment was to be, and the finding was within the issues raised, and was justified by the evidence.

2. There was a clear conflict of evidence upon many of the issues presented, but it would subserve no useful purpose to set the evidence out. After a careful inspection of the record, we think there was evidence tending to support each of the findings, and the judgment cannot, therefore, be reversed on this ground.

3. There was no error in denying the defendants' motion for nonsuit. When the motion was made, the plaintiff had made out a prima facie case, and there was no material variance between the averments and the proofs. The case of *Owen v. Meade*, 104 Cal. 179, 37 Pac. 923, cited by appellants, is not in point.

4. The point that the court erred in sustaining objections to certain questions propounded to Mrs. Neary and Mr. Davidson, one of her attorneys in the divorce case, cannot be sustained. The questions related to transactions and conversations between Mrs. Neary and Mr. Davidson in the absence and without the knowledge of the plaintiff, and under no circumstances could the plaintiff's rights be affected by the evidence sought to be elicited. It was therefore clearly inadmissible under any known rule of law.

We advise that the judgment and order appealed from be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

WOOLRIDGE v. BOARDMAN et al. (Sac. 202.)

(Supreme Court of California. Nov. 24, 1896.)

FRAUDULENT CONVEYANCES—PROOF OF INSOLVENCY—SUFFICIENCY OF EVIDENCE—ADMISSIBILITY OF EVIDENCE—TAX LISTS.

1. In an action to set aside a transfer of stock as in fraud of creditors, the debtor testified that at the time of the transfer his assets were double his liabilities. Other testimony valued his assets at only about half the valuation thus given, and the debtor's petition in insolvency stated the assets to be of a value much less than that now claimed. The petition in insolvency was filed six months after the transfer, and it did not appear that any business reverses had occurred in that time. *Held*, that the evidence justified a finding that the debtor was insolvent at the time of the transfer.

2. In an action to set aside a transfer of stock as in fraud of creditors, a tax list made out by the debtor just prior to his insolvency, and within six months after the transfer in issue, was admissible as tending to show what taxable property was owned by the debtor.

3. An objection to such tax list as a whole on the ground that the valuations affixed were the estimates of the assessor, and not the debtor, was properly overruled.

Commissioners' decision. Department 2. Appeal from superior court, Placer county; J. E. Prewitt, Judge.

Action by E. Woolridge, assignee of A. F. Boardman & Co., against A. F. Boardman, Mary Boardman, and others, to set aside a transfer of stock as made in fraud of creditors. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Affirmed.

F. P. Tuttle and W. B. Lardner, for appellants. Jo Hamilton and G. W. Hamilton, for respondent.

BRITT, C. A. F. Boardman and William Watts, individually and as partners composing the firm of A. F. Boardman & Co., filed their petition in insolvency on the 28th day of March, 1895, and were thereupon duly adjudicated insolvent debtors. Subsequently plaintiff was elected their assignee. As such assignee he obtained judgment in this action requiring the defendant Mary Boardman, wife of said A. F. Boardman, to reconvey to him, the plaintiff, 990 shares of stock in a certain mining corporation, of the value of \$2,970, which Boardman had transferred to her as a gift on September 22, 1894; this on the ground that such transfer was fraudulent and void as to the creditors of the husband. A motion of defendants Boardman and wife for new trial was denied; hence the appeal.

The chief contention of appellants is that the evidence did not sustain the finding of the court that Boardman gave his wife the stock intending thereby to hinder, delay, and defraud his creditors. It would be unprofitable labor to abstract at length the evidence in the record touching the pecuniary condition of Boardman at the time of the transfer assailed by the plaintiff. Boardman gave testimony to the effect that in September, 1894, the assets of his firm were worth \$30,000, while the indebtedness was less than half of this amount, and counsel insist that the evidence in this particular was without substantial conflict. But we find discrepancies concerning the items making up said total which tended to cast discredit on his estimates. Thus he valued certain stock in trade then on hand at \$6,000, when other testimony in the case placed it at \$2,400. He testified that certain lands were worth at that time \$2,900, but in his petition in insolvency rated them at no more than \$1,100. Substantially the same credits in favor of the firm, which, according to his testimony at the trial, were worth in September, 1894, their nominal amount,—over \$10,000,—he stated in said petition to be uncollectible beyond one-half their face. Confessedly, a little more than six months after the gift in question, both Boardman and his partner were insolvent; and, in our opinion, the matters to which we have alluded, and other evidence in the case of similar tendency, warranted the conclusion that Boardman's circumstances were not materially worse when he commenced proceedings in insolvency than

when he gave to his wife the mining stock. Indeed, the business of the partnership seems to have resulted in a small profit during the intervening period. We concede the point of appellants that the insolvency of the concern in March is of itself no foundation for an inference that it was insolvent in the preceding September (*Windhaus v. Bootz*, 92 Cal. 617, 23 Pac. 557); but the subsequent insolvency, occurring after lapse of no great interval of time, and when the business had suffered no considerable reverse by flood, fire, or other casualty, was a fact pertinent to the inquiry whether the like condition did not exist at the time of the gift to the wife, and to illustrate the intent of the donor (*Butler v. Collins*, 12 Cal. 457; *Bump, Fraud. Conv.* § 254). It is said that the insolvency was precipitated by an unexpected attachment; but the claim on which this issued was outstanding at the time of the gift, and therefore the attachment was a contingency which Boardman was then bound to take into account in balancing the probabilities of his solvency or insolvency. *Id.* § 261; *Elwell v. Walker*, 52 Iowa, 256, 265, 3 N. W. 64. The condition of insolvency was a circumstance tending to show fraudulent intent. *Emmons v. Barton*, 109 Cal. 663, 671, 42 Pac. 303, 305. There was, besides, other evidence concerning the same issue. Three weeks before the gift in controversy here, Boardman transferred to his wife, without valuable consideration, shares of stock in the Auburn Orange Company worth \$4,000; and some later dispositions made by him, but unnecessary to detail, tended to withdraw smaller portions of his property from the reach of creditors. It appears also that only two days after the transfer of the mining stock to Mrs. Boardman the firm of A. F. Boardman & Co. settled an account of more than \$4,000 with an importunate creditor by giving him their note (which has never been paid), telling him they could pay him nothing, as they could collect nothing. Notwithstanding some matters in proof which consisted well enough with good faith in the transaction impeached, we are satisfied that the finding of fraud made by the court upon all the facts before it cannot be disturbed.

Said insolvents resided in Placer county, and most of their assets were situated there. At the trial the court received in evidence the statement of the property owned by A. F. Boardman & Co. on March 5, 1894, rendered to the county assessor for purposes of taxation under section 3629, Pol. Code. This was subscribed by Boardman, and showed only real estate valued at \$200 above mortgage deductions, and personalty consisting of horses, harness, vehicles, and farming utensils valued at \$320. Defendants objected generally to the introduction of this document on the ground that it was incompetent, irrelevant, and immaterial. It was not shown that Boardman fixed or suggested the value which was placed on the property. This was the duty of the assessor; and, if the objection had been confined to the valuation, it would have been

the duty of the court to exclude the same. *Railroad Co. v. Mayne*, 83 Cal. 566, 23 Pac. 522. But, being a list ostensibly accurate of the property owned by the firm at that time, verified by Boardman's signature, the statement was admissible to show what taxable property was then claimed by the firm; not as conclusive, but as any other declaration of Boardman on the subject. Since the paper was competent and relevant for some purposes, defendants cannot complain that the objection made to it as a whole was overruled. Some minor points are raised, but not much pressed. We find, on examination, that they are not well taken. The order appealed from should be affirmed.

We concur: HAYNES, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

**RAUER v. JUSTICES' COURT OF CITY
AND COUNTY OF SAN FRANCISCO.** (S. F. 308.)

(Supreme Court of California. Nov. 24, 1896.)

JUSTICE OF THE PEACE—JUDGMENT—PRESUMPTIONS
—CERTIORARI—APPEAL—RECORD.

1. The entry of a judgment in a justice docket, regular on its face, is prima facie evidence that it was rendered on the date shown.

2. The petition for a writ of certiorari to review a judgment of a justice court is no part of the record on appeal from the judgment dismissing the writ.

Commissioners' decision. Department 2. Appeal from superior court of city and county of San Francisco; A. A. Sanderson, Judge.

Certiorari by J. J. Rauer to review a judgment of the justices' court of the city and county of San Francisco. From a judgment dismissing the writ, petitioner appeals. Affirmed.

G. H. Perry, for appellant. Kennedy & Gray, for respondent.

BRITT, C. Rauer, the petitioner, brought an action in the justices' court against one Fields, in which action judgment was entered in favor of Fields for costs. To review such judgment Rauer obtained the writ in the present proceeding from the superior court. Upon the hearing, after return made, the writ was dismissed. Petitioner claims that the provision for the recovery of costs against him was not part of the judgment as originally rendered in the case of *Rauer v. Fields*, but was inserted therein a month after the trial, and that in this the justices' court exceeded its jurisdiction. The alleged fact of an antedated clause in the judgment does not appear from the justice's docket entries returned with the writ. Those show a judgment for costs apparently rendered on the day *Rauer v. Fields* was tried. They are prima facie evidence that such was the truth,

and are not rebutted by anything else in the record. Code Civ. Proc. §§ 93, 912. The petition for the writ, alleging matters inconsistent with the docket in this particular, is no part of the record on appeal, and cannot be considered here. Code Civ. Proc. § 1077; *Reynolds v. County Court*, 47 Cal. 604. The judgment dismissing the writ should be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment dismissing the writ is affirmed.

CRAIG et al. v. BROWN, Secretary of State. (S. F. 709.)

(Supreme Court of California. Oct. 8, 1896.)

ELECTIONS—BALLOTS—PARTY NAME.

The party designation, "National Democratic," on the official ballots, is not calculated to deceive. Beatty, C. J., and Garoutte, J., dissenting.

In bank. Petition by William Craig and others for writ of mandamus to L. H. Brown, secretary of state. Denied.

E. R. Taylor, William Thomas, W. W. Foote, Patrick Reddy, Garret W. McEnerney, and R. Y. Hayne, for petitioners. Atty. Gen. Fitzgerald, for respondent.

HENSHAW, HARRISON, VAN FLEET, and TEMPLE, JJ. We are of opinion that the application for a writ of mandate should be denied, holding that the designation, "National Democratic," is not calculated to deceive.

McFARLAND, J. I concur in the judgment; but I also think that the question—under the peculiar form which this petition for a writ takes—was determined by the secretary of state when he accepted and filed the certificate, and that his action cannot be reviewed on this proceeding.

GAROUTTE, J. I dissent.

BEATTY, C. J. I dissent. I cannot distinguish this case from the *Dolan and Ewing Cases*,¹ in which we held that candidates nominated by petition are not entitled to a party designation which might mislead voters.

MCDONALD v. HINTON, Registrar. (S. F. 684.)²

(Supreme Court of California. Oct. 9, 1896.)

ELECTIONS—CERTIFICATES OF NOMINATION—FILING BY REGISTRAR.

The registrar is not bound to file every certificate of nomination that is in due form, but, where certificates are presented from each of

¹ No opinions filed.

² Rehearing denied.

two conventions claiming to represent the same political party, it is for him to determine, in the first instance at least, which represents the party. Beatty, C. J., and Harrison and Garoutte, JJ., dissenting.

In bank. Petition by McDonald for writ of mandamus to Hinton, registrar. Denied.

Eugene Lent, William F. Humphrey, Jos. Rothschild, Chas. J. Heggerty, D. Friederich and P. F. Dunne, for petitioner. Garret W. McEnerney, for respondent. T. C. Spelling, for interveners.

PER OURIAM. The writ should be denied. Whether a registrar, in filing or refusing to file a proffered certificate of nomination by a convention, acts ministerially or judicially, it is clear that he cannot be commanded by mandamus to do an act which the law does not require him to do. Now, sections 1186 and 1187 of the Political Code clearly contemplate that a political party which at the last election polled at least 3 per cent. of the entire vote can be represented by only one convention. A contrary view would certainly defeat the purpose of the law. Therefore, when each of two or more bodies of voters claims to be the convention contemplated by the Code, the registrar must determine, in the first instance, at least, which one of the bodies was "an organized assemblage of delegates representing" the particular political party named. To say that the presentation of a certificate in due form is conclusive of the essential fact upon which the alleged right rests is to announce the principle that each party to a controversy is the exclusive judge of his own case. If the issue were presented here whether or not the convention which the petitioners represent was the convention which in fact represented the Democratic party, then this court would have to consider whether or not it would, upon mandamus, hear evidence, and, after a trial here, itself determine the essential fact in dispute. But this proceeding was submitted upon the admission that the convention represented by petitioners only "claimed to be," but was not, a convention representing said political party, and upon the theory that the registrar was bound to file their certificate merely because it was in due and regular form. Therefore the question whether or not this court should, upon mandamus, inquire into the fact, and determine whether said convention did or did not represent said political party, is not before us. It therefore does not appear that the registrar has refused to do any act which the law enjoins upon him as a duty. The petition for the writ of mandamus is denied, and the proceeding dismissed.

We dissent: BEATTY, C. J.; HARRISON, J.

GAROUTTE, J. I dissent. There are three constructions to be placed upon this

statute: (1) That the action of the registrar is final and conclusive. (2) That it is the duty of the registrar to decide as a fact whether or not the certificate presented to him comes from the regular and genuine Democratic or Republican party which it purports to represent, and that such decision by him is reviewable by this court. (3) That it is the duty of the registrar to file all certificates which upon their face comply with the statute.

To hold that the action of the registrar is final I cannot indorse for a moment. Every court which has given the question any consideration whatever has held against such a construction. It is placing a power so tremendous in the hands of the registrar that such a construction should not be held if possible to avoid it. The language indicating such intention upon the part of the legislature must be so plain as to admit of no doubt. If the language needs construction, it should be construed in some other direction. If the rejection of a certificate by the registrar is final, if it is beyond all review by courts, he could refuse to file all certificates purporting to come from opposing political parties, and, in effect, hold the result of the election in the hollow of his hand. The secretary of state, by refusing to file a certificate presented to him coming from one of the great political parties, could absolutely prevent that party, through its electors, from voting for a candidate for president of these United States. It is needless to say that the court is bound to look further for the true construction of this act.

The second construction suggested cannot be maintained. It seems impossible that it was ever intended for this court to enter into a trial of fact as to which set of claimants constituted the regular, true, genuine Democratic or Republican party. It is admitted by counsel that such question of fact is not to be determined by the principle or principles represented by these respective claimants; but it is insisted that such question of fact must be decided by an investigation as to the regularity of the organization, that respective abstracts of title must be furnished, and that the legal title must prevail. Such an investigation would open up most interesting fields. As in titles to real estate, I see no way of cutting off the investigation until it goes back to the original or paramount source of title, whether that original title originated in the city, state, or nation. I do not know what particular principles of law could be invoked in the investigation of such a fact. Its determination would depend upon the validity of the action of a committee; and this validity would depend upon the regularity and validity of motions to adjourn, to reconsider, to lay on the table, to postpone, as to what constitutes a majority, a quorum, a special meeting, a legal committee, and a thousand other matters purely of parliamentary usage. In the trial of such a question Blackstone and Kent would

be entirely displaced by Cushing or Roberts. That character of investigation had better come for consideration before a high-school debating society, rather than a court of last resort. Again, let us assume that the members of the genuine central committee which guided the destinies of its party all resign. The power to perpetuate the organization rested in its hands alone, and now that committee is no more. Thus a great party would be placed in a sorry plight. It would be in the position of a trust without a trustee; and I presume, upon the happening of such a grave emergency, a court of equity would fill the breach, and appoint a new committee. Let us assume a case where the committee would neither resign nor take any steps to nominate a ticket to be voted for by its party electors. We thus have a present, live organization; it is regular; there is no flaw in its title; it is beyond suspicion; it represents and stands for the Republican party, but it does nothing. Under such circumstances, is it possible that no Republican ticket could be placed in the political field for which Republicans might cast their votes? Time is too short for me to indulge in other suggestions showing absurd results. It is not because they do not exist, for there are more and worse; and I am of the opinion that this construction must not be maintained if there is any other road to travel, however long and rough it may be.

I think the third construction contended for should be adopted, and that when a certificate is presented to the registrar, which is in the form required by the law, he is bound to receive and file it. Penalties are provided against forging certificates, and it is further provided that affidavits as to the truthfulness of the facts therein recited must be attached. In a limited way these provisions seem to afford the registrar some protection; but, however that may be, if the protection against fraud is insufficient, it is the fault of the law. The statute provides that the registrar must "then and there forthwith" act upon the certificate presented, either by accepting or rejecting it. The very language itself clearly indicates that there shall be no hearing upon the facts. The language, ex necessitate, precludes such hearing. If the registrar is not first to investigate the facts, then certainly the law does not contemplate that the court shall subsequently investigate them. The construction which I think should be adopted is simply this: All certificates, valid upon their face, should be received and filed, and, if two or more certificates are presented by persons claiming to represent the same party, they should each be filed, and the nominees therein contained have an equal chance upon the ballot. The only serious result to flow from such holding is that it tends to disorganize and disintegrate party organizations. It casts upon each elector the duty of making a personal investigation as to the candidate whom he desires to support with his suffrage. It forces him to rely upon his own knowledge,

rather than depend upon party names or party symbols. Possibly this construction may, for this reason, be seriously objectionable, but such objection is entirely overshadowed by the objections raised to the other constructions suggested. Of all the evils, it is certainly the least, and, this being so, it will be assumed that the legislature intended the statute to be so construed. The intention of the legislature in this regard could be made plainer, and probably the objections here suggested could be avoided, by future legislation. Possibly the whole law should be repealed by reason of its many crudities and contradictions. The writ should be granted.

STATE v. McDONALD.

(Supreme Court of Utah. Oct. 30, 1896.)

ASSAULT WITH INTENT TO KILL — INDICTMENT — MALICE AFORETHOUGHT — DESCRIPTION OF OFFENSE — INSTRUCTION.

1. Defendant was found guilty of an assault with intent to do bodily harm, under an indictment of an assault with intent to murder, and excepts to the sufficiency of the indictment, and to the charge to the jury. The indictment alleges that defendant "did unlawfully assault one S. with a deadly weapon, to wit, a revolver, loaded with powder and leaden bullets, which he, the said Frank McDonald, then and there held in his hands, and then and there tried to discharge upon and into the body of the said S., with the intent him, the said S., to then and there kill and murder." Where the offense is described in the statute in the terms, "Every person who assaults another with intent to commit murder" (Comp. Laws 1888, § 4471), the words "with malice aforethought" are not necessary in the indictment, as the word "murder" sufficiently described the crime. From the description the defendant and the court could understand the offense charged, and the defendant's conviction of it can be pleaded in bar of another prosecution for the same crime.

2. By statute (section 4488, Comp. Laws Utah 1888), the crime is defined as follows: "Every person who, with intent to do bodily harm, and without just cause or excuse, or when no considerable provocation appears, or when the circumstances show an abandoned or malignant heart, commits an assault upon the person of another, with a deadly weapon, instrument or other thing, is punishable," etc. The allegations in the indictment that the assault was unlawful, and that it was done with intent to murder, exclude the existence of "just cause" or "excuse" or "considerable provocation" as clearly as the words themselves would have done, and their use in the indictment was unnecessary under the above section.

3. It was not necessary for the court, in its charge to the jury, to use all the words in the description of the statutory definition; hence the words "without just cause or excuse" were sufficient, without adding thereto the words "or when no considerable provocation appeared."

People v. Fairbanks, 24 Pac. 538, 7 Utah, 3, overruled.

(Syllabus by the Court.)

Appeal from district court, Salt Lake county; S. A. Merritt, Judge.

Frank McDonald was convicted of assault, and appeals. Affirmed.

Powers, Straup & Lippman, for appellant. A. C. Bishop, Atty. Gen. (B. X. Smith, of counsel), for the State.

ZANE, C. J. The defendant was indicted for assaulting one Emil Sacherson, with intent to murder him, and was found guilty of an assault with a deadly weapon, with intent to do him bodily harm. On his trial, the court overruled an objection to the admission of any evidence under the indictment, and also a motion for a new trial, and a motion in arrest of judgment, and sentenced him to four months' imprisonment. From the order overruling the motion for a new trial, and the sentence, the defendant has appealed. He alleges that the court erred in holding that a public offense was described in the indictment, and in admitting evidence under it.

The offense charged in the indictment is defined in the statute as follows: "Every person who assaults another with intent to commit murder is punishable by imprisonment in the penitentiary, not less than one, nor more than ten years." Comp. Laws Utah 1888, § 4471. The offense is described in the indictment as follows: "Frank McDonald is accused by the grand jury * * * of the crime of assault with intent to commit murder, committed as follows: The said Frank McDonald, on the 11th day of August, A. D. 1895, at the county of Salt Lake, in said territory of Utah, did unlawfully assault one Emil Sacherson with a deadly weapon, to wit, a revolver, loaded with powder and leaden bullets, which he, the said Frank McDonald, then and there held in his hands, and then and there tried to discharge upon and into the body of the said Emil Sacherson, with the intent him, the said Emil Sacherson, to then and there kill and murder. * * *" The crime designated as an assault with intent to murder is described in the above section of the law in very general terms. It consists of the terms, "Every person who assaults another with intent to commit murder." Counsel does not object to the description of the offense in the indictment so far as it mentions actual physical acts; but he insists that the other element of the crime is not sufficiently described, to wit, the intent; that the term "murder" is not a sufficient description of that crime in an indictment for an assault with intent to murder. He insists that the words "with malice aforethought" should be added to the words "unlawful assault with intent to commit murder." The law defines "murder" as "the unlawful killing of a human being with malice aforethought." Id. § 4452. To any man of ordinary intelligence, as well as to a lawyer or judge, "murder" means "killing with malice aforethought," and, conversely, "killing with malice aforethought" means "murder." The phrase "assault with intent to kill" is sometimes used. In the Utah statute, "assault with intent to commit murder" is adopted. The former term would include all intentional homicides, while the latter includes only killing with malice

aforethought; in other words, murder. The killing may be without malice, as in manslaughter; or excusable and intentional killing, as in the execution of a convicted person; or in self-defense, as in justifiable homicide. In the latter case the statute declares that the slayer must act wholly from his fears, not in any degree from malice. The crime that the indictment alleges the defendant intended to commit is described with as much clearness by the use of the term "murder" as it would be by the use of the terms "killing with malice aforethought." The use of the latter term is required in indictments for murder, but the question here is, are they required in indictments for assault with intent to commit murder?

The second subdivision of section 4930 of the Laws of Utah of 1888 requires "a clear and concise statement of the acts or omissions constituting the offense, with such particulars of the time, place, person and property as will enable the defendant to understand distinctly the character of the offense complained of, and answer the indictment." Subdivision 6, § 4938, Id., declares "that the act or omission charged as the offense [must be] clearly and distinctly set forth, without repetition, and in such a manner as to enable the court to understand what is intended." Section 5255 declares that "neither a departure from the form or mode prescribed by this act in respect to any pleading or proceeding, nor an error or mistake therein, renders it invalid, unless it has actually prejudiced the defendant or tended to his prejudice, in respect to a substantial right." In this indictment these acts are alleged: "An unlawful assault with a deadly weapon, to wit, a revolver loaded with powder and leaden bullets, held in the defendant's hands, and which he then and there tried to discharge upon and into the body of Sacherson." The acts are clearly stated, and the intent with which they were performed is alleged to have been to kill and murder Sacherson. The acts and the intent as alleged, we are of the opinion, sufficiently describe a public offense. From this description the defendant and the court could understand the offense charged, and the defendant's conviction of it can be pleaded in bar of any other prosecution for the same crime. *People v. Swenson*, 49 Cal. 388.

But defendant also insists that he was convicted of a crime not described in the indictment. The offense of which the defendant was convicted is defined in section 4438, Comp. Laws Utah 1888: "Every person who, with intent to do bodily harm, and without just cause or excuse, or when no considerable provocation appears, or when the circumstances show an abandoned or malignant heart, commits an assault upon the person of another, with a deadly weapon, instrument, or other thing, is punishable by imprisonment in the penitentiary not exceeding two years, or

by fine not exceeding one thousand dollars, or by both." The objection is that the indictment does not say that the assault was not without just cause or excuse, or that no considerable provocation appeared, or that the circumstances showed an abandoned or malignant heart. The allegations of the indictment do exclude the possibility of the existence of any just cause or excuse for the assault, or the possibility of the existence of any provocation which the law regards as a considerable provocation; and, that being so, an allegation that the circumstances showed an abandoned and malignant heart would have been superfluous. If the killing of a person should be purely accidental, from a lawful act performed by another with due care and circumspection, the killing would be excusable; or, if an officer executes a condemned criminal, the killing would also be excusable; or if a person were to slay another when assaulting him under circumstances of danger, sufficient to induce in him a reasonable belief of the necessity to do so to save his own life, or under such circumstances as the law would regard as a justification, the killing in either case would be justifiable and lawful. The definition of murder excludes the idea of any just cause or excuse for the killing, or any provocation, however great, to justify it. Killing upon just cause or excuse, or upon a considerable provocation, would be excusable or justifiable homicide, and in either case the killing would be lawful. The circumstances might be such as to reduce the killing from murder to manslaughter, but that would not justify or excuse it. The definition of an "assault" will not admit of a just cause or excuse, or of a considerable provocation. A just cause or excuse, or a considerable provocation, makes the attempt at violence lawful. It is true that the term "assault" is used in the section defining the offense of which the defendant was convicted; but it must have been used there in the sense of an attempt to commit violence, or the use of violence for which there might be a just cause or excuse, or a legal provocation. In the indictment, however, the assault is alleged to have been unlawful. The allegations in the indictment that the assault was unlawful, and that it was with the intent to murder Sacherson, exclude the existence of just cause or excuse, or any considerable provocation, as clearly as the words "without just cause or excuse," or that "there was no provocation," would have done. We hold that the offense of which the defendant was convicted was included in the crime described in the indictment, as therein alleged.

The court charged the jury, among other things: "If you find that the said defendant made an assault upon Emil Sacherson without just cause or excuse, with the intention of doing him bodily harm, you should find him guilty of an assault with a deadly weapon, with intent to do bodily harm." To this the defendant excepted, because the court did not

add after the words "just cause or excuse" the words "or when no considerable provocation appeared." It is impossible to conceive of a considerable provocation when the assault is made without just cause or excuse. We find no reversible error in this record. The judgment and order appealed from are affirmed.

BARTCH and MINER, JJ., concur, and the case of *People v. Fairbanks*, 7 Utah, 3, 24 Pac. 538, is overruled.

CITY OF MOSCOW v. LATAH COUNTY.

(Supreme Court of Idaho. Nov. 20, 1896.)

CITY TAXES — COMPENSATION OF TAX COLLECTOR.

1. Under the provisions of an act entitled "An act to provide for the organization, government and powers of cities and villages," approved March 4, 1893 (Sess. Laws 1893, p. 97), it is made the duty of the county tax collector to collect all taxes levied by the council or trustees of a city or village, and on demand he must pay over all of the money thus collected to the city or village treasurer.

2. Under the provisions of said act neither the county nor the tax collector is authorized to retain any part of the money so collected as compensation for collecting the same.

(Syllabus by the Court.)

Appeal from district court, Latah county; W. G. Piper, Judge.

Action by the city of Moscow against Latah county to recover 7 per cent. of taxes collected by the tax collector. Judgment in favor of defendant, and plaintiff appeals. Reversed.

G. G. Pickett, for appellant. Clay McNamee, Dist. Atty., and McNamee & Morgan (Atty. Gen. Parsons, of counsel), for respondent.

SULLIVAN, J. This action was brought to compel Latah county to pay to the city of Moscow the sum of \$766.97, money collected by the tax collector of said county. Said tax collector collected, during the fiscal year commencing on the first Tuesday in May, 1895, \$11,723.97 as taxes levied upon the taxable property of said city for general revenue purposes. After the collection of said taxes, the board of county commissioners of said county ordered the tax collector to retain 7 per cent. of the sum collected as payment for the collection of said taxes, which he did; and plaintiff alleges that such detention was without right and unlawful. The judgment of the court below was in favor of the county, and the city of Moscow appeals.

Section 82 of an act concerning the organization of cities and villages (Sess. Laws 1893, p. 123) provides that the council or trustees of a city or village shall certify to the county tax collector the percentage or number of mills on the dollar of tax levied for city or village purposes by them, and that the tax collector shall place the same upon the proper tax lists, and proceed to collect the same; and section 84 of said act provides as follows, to wit: "The tax collector of the county shall pay over, on demand, to the treasurer of any city

or village, all money received by him arising from taxes levied belonging to such city or village, together with all money collected as a tax on dogs from the residents of such corporation for the use of the general fund therein." Under the provisions of said section 84 the tax collector is required to pay over, on demand, to the treasurer of Moscow, all money received by him arising from taxes levied by said city. Neither the tax collector nor Latah county has any legal right to retain 7 per centum, or any part whatever, of the taxes so collected; but all such money must be paid to the city treasurer on demand. The judgment of the court below is reversed, with instructions to enter judgment in favor of appellant.

MORGAN, O. J., and HUSTON, J., concur.

COLORADO FUEL & IRON CO. v.
CUMMINGS.

(Court of Appeals of Colorado. Nov. 9, 1896.)

MASTER AND SERVANT—ACTION FOR PERSONAL INJURY—PLEADING AND PROOF—ASSUMED RISK—COMPETENCY OF PHYSICIAN AS WITNESS—APPEAL.

1. Where a servant in an action against the master to recover damages for a personal injury alleged that he received the injury while in the execution of a specified order from his superior, and, in his testimony, denied having received such order, and did not show that the act in which he was engaged, and by which he placed himself in the position of danger which led to the injury, was required in the performance of a duty imposed on him by his employment, there is an entire lack of evidence to sustain the action.

2. An employé working in a place lighted by an electric lamp, which, as he knew, had been out of repair and the light intermittent for several months, during which he continued to work without objection or promise of remedy, assumed the risk of injury incident to the defective light, though he was told on the particular night when he was injured, by another employé in charge of the lights, that they were all right; it not appearing that such employé was authorized or assumed to speak for the employer, or that the light had been repaired.

3. The relation of physician and patient exists between a surgeon employed in a hospital maintained by two corporations, and supported, in whole or in part, by contributions reserved from the wages of their employés for the purpose, and an employé of one of the corporations who is treated for an injury by the surgeon in such hospital; and, under the statute (Gen. St. § 3649), the testimony of the surgeon is incompetent, unless with the consent of the patient, as to any information concerning the injury acquired by his attendance on the patient.

4. Where a judgment in an action to recover for a personal injury, involving questions of fact, is reversed because of error in instructions, it will be remanded for a new trial, though, on the pleadings and evidence in the record, the defendant may have been entitled to an instruction directing a verdict in its favor.

Appeal from district court, Pueblo county.

Action by Richard Cummings against the Colorado Fuel & Iron Company. Judgment for plaintiff, and defendant appeals. Reversed.

John M. Waldron and D. C. Beaman, for appellant. Arrington & McAlney, for appellee.

BISSELL, J. This is an action for personal injuries. In September, 1892, the appellant, the Colorado Fuel & Iron Company, was operating a rolling mill in Pueblo, wherein Cummings, the appellee, was employed, and at which he was injured on the 30th of the month. It is exceedingly difficult, if not impossible, without the aid of the photographs which were furnished the court, to describe to one who is unfamiliar with a steel mill the exact situation of the circumstances under which the appellee was hurt. With this limitation the case will be stated.

Located at one end of the mill, or at a point somewhat remote from the roller, is a soaking pit, from which steel ingots 5 or 6 feet long, and weighing some 2,800 to 3,400 pounds, are taken and run on a tramway of rolls to the table of the machine, which is called a "roller," and by which the ingot is rolled through a various set of rolls of progressive sizes, until it has been greatly lengthened, and, from being square, has become a long, flat piece of steel. The rolls are fastened in a frame, beneath which is a table on which the ingot rests. The table receives its motion through a system of cog wheels, and the bed of it consists of rolls which carry the ingot forward underneath the rolls themselves; and the joint action of the rolls proper, as well as those of the table, carry the ingot through the machine. It is then brought back to its former position, under that or another roll further along in the machine. There seem to be two sources of power, the motion of the cogs being furnished by an engine, and the upward pressure of the table by an independent hydraulic machine. It is unimportant in what form the power is provided. At all events, the table is raised and lowered by hydraulic power, and, when it first receives the ingot, it is substantially level with the floor of the mill, and raised several feet therefrom, when the ingot is to be subjected to pressure and the action of the rolls. The framework of the machine is called its housing. Along the side of the table there is a steel guard, bolted onto it, which prevents the ingot from sliding off, and which projects quite a distance above the common level of the rolls, though it is fixed at the edge of the table, and within the inner line of the cogs themselves. The machinery is under the direction and control of the "leverman" or "motorman," as he is indiscriminately called. He stands at a lever in the rear of the machine, which controls the hydraulic power, and he also manages the steam power which otherwise runs and operates the roller. The helper's station is near the framework of the machine. Ordinarily, he is out of sight of the motorman, under whose direction he is while he is discharging his duties. These seem to be to keep the ingot in place, to see that it enters the rolls properly, and to keep the machinery free from the flakes or scales which are constantly made and put off from the ingot as it is subjected

to pressure. These scales, of course, fall directly under the rolls, and gather about what is called a "shoe" inside the housings, and along the framework or platform below which sustains the weight of the machine when it is lowered. Above the rolls there is a pipe which discharges water onto them when they are in motion, to preserve a uniform temperature, and prevent them from getting exceedingly hot. The water is discharged from the pipe through a valve, which is opened or closed by the helper, either as directed by the motorman according to the defendant's testimony, or, as the appellee says, as he may judge the situation to require it. There is considerable controversy in regard to the way in which the mill is lighted up, and as to a necessity for the electric light which is sometimes used, and which was charged by the plaintiff to be out of order, and the occasion of his accident. Some year or more prior to the accident, the company had put in an electrical plant, and had an electric light near the soaking pit, and some distance from the roller where Cummings was working. The works had been operated for many years without artificial light, other than what was furnished by torches. The light which always came from the furnaces when they were in operation, and that furnished by the ingot, so lighted the vicinity, according to the testimony of one of the witnesses, that you could see to pick up anything 10 or 12 feet away from the roller. The witnesses differ as to the condition of the electric light at the time of the happening of the accident. The plaintiff asserted it went out, and others that it burnt brightly. The conclusions of the jury were probably with the plaintiff. According to the general testimony, the electrical plant had been for many months in a bad condition. The light went out frequently, sometimes every few minutes, and sometimes some six or eight or a dozen times in the course of a night. The plaintiff had been working there during all this time, and had full knowledge of the condition of the plant in this respect. According to Cummings' story, they had run three ingots through the roller prior to the accident. This made what he called a "heat." After a heat, the roller would usually remain idle for 15 minutes or more. According to his story, he discovered the water was not running freely through the valve, and he stepped with his left foot onto the guard, grasped a rod with his hand, and started to raise his right foot to place it on the guard, whereby he could reach the valve, and open it, when the machinery suddenly started. Because of the extinguishment of the light, he was unable to see where he put his right foot, and it was caught by the cogs, his big toe cut off, and the foot otherwise mashed, which necessitated its amputation between the toes and the instep. He charges the accident was caused by the extinguishment of the light, which rendered it impossible for him to see. Witnesses differ respecting the condition under those circumstances; those for the defense testifying that the light from the furnaces, which were running,

although the doors were more or less closed, and from the heated bars and ingots which were either on the shears table or at the pit, furnished light enough to enable anybody to do their work without the aid of an electric light. A good many witnesses testified work had been done for years without any other aid than light coming from these sources.

The plaintiff's knowledge of the defective condition of the electrical plant is conceded. To escape the force of that knowledge, he testified to a conversation with Mr. Ellsworth, whom he termed the "electrician," which, in substance, was that he met Ellsworth when on his way to work that night, and asked him how the lights were. Ellsworth's response was that they were all right, and, if he made as much tonnage as the lights would show him, he was all right. The plaintiff stated he relied on this statement, and believed that the lights would be satisfactory. He makes no attempt to show a complaint on his part, and a promise on the part of the corporation to remedy the difficulty. According to Cummings' own story, he got on the frame to regulate the valve, without any order from the motorman, and without informing him in any way that he intended to do that particular act. The defendant's witnesses testified substantially that the helper was under no obligation to attend to the water except on direction of the motorman. Whether this be or be not true, it is uncontradicted that he should not have proceeded to step on the machine to adjust the valve without informing the motorman of his intention. If he proceeded otherwise, he did it at the peril of his life, for the motorman took no notice whatever of the helper in running the machine, except as he might be informed by the helper of his purpose to do some particular thing which required the machinery not to run. The plaintiff states he got no order, and that he did not communicate with the motorman, and indicate his purpose to adjust the valve. The injury, according to Cummings' story, came from the starting of the machinery while he was doing this act. The cogs ran with great rapidity, from 100 to 300 revolutions a minute, and, of course, the plaintiff was in very great danger when he stepped onto the framework of the table if the machinery started up. The theory of the defense was—and there was testimony which tended that way—that he was kicking scales out from under the cogs, and that, when the table was lowered, it caught his foot. We are not concerned what the fact may be, because it is on other bases that the cause must be reversed.

One of the principal contentions of the appellant is that there is a variance, pronounced, irreconcilable, and fatal, between the allegations of the complaint and the proof which the plaintiff offered. It is insisted that, ever under our Code, there has been no such wide departure from the rules by which parties are governed as to permit the plaintiff to allege one state of facts as his cause of action, and

recover on proof of another. As a general proposition, this is undoubtedly true, though the old rule is not so strictly enforced under our Code as it was at the common law and is still in some states. In fact, it may, perhaps, be truthfully said of it, as Cicero said of Catiline, "Abiit excessit evasit erupit." It, undoubtedly, still prevails, and the only difficulty is in the inquiry whether the particular case requires its enforcement. It is illustrated in many cases: *York v. Fortenbury*, 15 Colo. 129, 25 Pac. 163; *Bank v. Devenish*, 15 Colo. 229, 25 Pac. 177; *Greer v. Heiser*, 16 Colo. 306, 26 Pac. 770; *Salazar v. Taylor*, 18 Colo. 539, 33 Pac. 360; *Hallack v. Hinckley*, 19 Colo. 38, 34 Pac. 479; *McLaughlin v. Thompson*, 2 Colo. App. 135, 29 Pac. 816; *Railway Co. v. Rubenstein*, 5 Colo. App. 121, 38 Pac. 76; *Railroad Co. v. Cahill* (Colo. App.) 45 Pac. 285. Under our liberal practice, the pleadings and proof must correspond. A disregard of this principle will defeat the plaintiff, unless the case be brought within the tolerably well recognized exception. Wherever the evidence which tends to make a case other than that laid in the complaint is received without objection, and the defendant has not been surprised, the judgment will not always be overturned. The difficulty may be met by a motion to amend the pleadings, or such procedure to correct the error followed as the authorities and the Code permit, and the plaintiff thereby avert the ultimate defeat which he could not have escaped at the common law. This case would not be reversed on this account but for the difficulty which arises from the instructions.

According to the complaint, Cummings was ordered to turn the valve to start the water running. He was ordered to do this specific thing, and by a man who was authorized to give the order; and, in its execution, he got hurt, because of the defective machinery operated by the company. All these elements were essential parts of his cause of action as stated. If he was not ordered to turn on the valve, then getting onto the machinery was negligence on his part, and he could not recover, unless he departed from the cause of action as stated. In the latter case he must prove that he got onto the table in the performance of a duty which he was obligated to perform, and which he had a right to execute as his judgment should dictate, and that, at the time of his attempted performance, his duty required him to turn the valve and let on the water. Possibly, if he had proved the latter case, he might recover notwithstanding the variance. One of the other of these conditions must have existed: He must either have been ordered to do that particular thing, or he must have attempted to do it in the performance of some duty then resting upon him, and which it was necessary for him to discharge at the time he did it. Failing in either, he cannot recover. He did not attempt to show it was necessary to turn the valve at the time he did, in the performance

of any duty which he was obligated to perform. Therefore he was compelled to fall back on the cause of action as stated in the complaint, to wit, the giving of an order. This he denied. Thereupon, on the conclusion of the case, the defendant asked an instruction substantially reciting the allegations of the complaint, and telling the jury that, if they believed the plaintiff was not ordered to turn on the water, they must return a verdict for the defendant. The company was entitled to this instruction barring proof, which was not given. According to the case, as the plaintiff made it, and as it was supported by the uncontradicted testimony of the witnesses for the defense, Cummings had no right to attempt to get on the table, and open the valve, without first notifying the motorman of his intentions; otherwise, he took a risk which he had no right to take, and, so far as the case now stands, this contributed to the injury. This, without other proof, would bar his recovery.

Another proposition which is equally fatal to the judgment springs from a modification of an instruction asked by the company with reference to the presumption that the servant assumed the risk of the defective machinery, in the absence of a complaint on his part about it, and a promise by the employer to remedy the defect complained of. The instruction which the defendant company asked was given with a modification. The modification substantially recited that if the jury should find the plaintiff had been informed by persons in control or having the custody of the machinery that the defects had been remedied, and, relying on the statements, and believing the machinery to be in good condition, he remained, he could still recover. This cannot be the law. In the first place, it is not put in the form which the cases recognize, and according to the rule which has been laid down in this state. In *Railroad Co. v. Liebe*, 17 Colo. 280, 29 Pac. 175, the present learned chief justice of the supreme court states the rule, which is supported by the modern authorities. The servant is conclusively assumed to waive his right to hold the company responsible, and to take the risk on himself, unless he shows that he objected to the use of the machinery of which he complained, and remained in the employ of the defendant because of a promise to remedy the defect. This is the law, and the instruction asked stated it in the language of that authority. Whether the modification would ever be the law would, of course, depend on the particular circumstances of the case where it was sought to be applied. It was totally inapplicable to the proofs. Ellsworth did not undertake to say that the machinery had been remedied or repaired, nor was the statement made after a complaint by the employé, nor can it be taken as a promise by the employer to correct what the workman complained of. Ellsworth was not the employer. It was not shown that he was in a position or bore any relation to the company which entitled him to make a promise to the plaintiff, or any statement on which the plaintiff had a right to rely; nor was it shown

that the statements were made after the workman had made any complaint of the defective lights. The case lacks all the elements and all the proof which warranted the modification. It is very evident to one accustomed to the trial of this class of cases before juries that it furnished a very substantial basis on which the jury might act, and escape the force and effect of the antecedent accurate statement of the law that, if a workman continued in the service with knowledge that the machinery was defective, he could not complain of an injury received because of it, but was conclusively presumed to have accepted the risk himself. It must have operated to the prejudice of the company, and should not have been added to the instruction asked.

There are many other errors complained of, but none of sufficient consequence to compel us to notice them, or of the kind likely to reoccur on the subsequent trial of the case, except one, which we will proceed now to notice.

While the proof is not entirely satisfactory respecting all of the details which we state, since no one was called with reference to the subject except the surgeon, whose knowledge was indefinite and uncertain and largely hearsay, we find the question raised and sufficiently presented to compel a decision. Our statement is gathered from the doctor's testimony, and may have accorded literally with the facts, or they may not be exactly accurate, but, as we have no other source of information, we state them as we get them. The C. C. & I. Co., as the appellant used to be known, and the D. & R. G. Ry. Co., established a hospital in Pueblo for the use of both companies. This hospital was supported by contributions, more or less voluntary or compulsory, from the employes of both corporations, out of whose monthly wages a certain sum was deducted for what was called a "hospital fund," and devoted to the maintenance of the building, the purchase of supplies for it, and the hire of physicians and nurses who were employed about it. The companies were apparently responsible for the hospital, and for all bills which were contracted in connection with it, whether for supplies, attendance, or medical service, though the funds which they used may all or partially or otherwise have come from these monthly contributions. Whatever the fact may be, the doctor who was employed by the company, and received his salary from them, under these circumstances, attended Cummings after he was hurt. He was put on the stand, and interrogated respecting his observation of the foot, and respecting his opinion about the manner in which it was hurt. This was evidently in support of the defendant's theory that Cummings was not hurt while climbing onto the table to turn the valve, but got his foot underneath the table in kicking out the scales, as one witness testified he had stated to him directly thereafter, and got his foot caught when the motorman was lowering the table. The importance of this evidence is quite apparent on any theory which the plaintiff had advanced, for if the doctor should testify that, according to his examination, the hurt came by a pressure from

above, and not by the interlocking of cogs, it would support the contention that the injury was received while kicking scales. The testimony was excluded, and the appellant strenuously insists the ruling was erroneous. According to the better authorities, the testimony is inadmissible if the relation of physician and patient existed. Our statute (Gen. St. § 3649) prohibits the examination of a physician or surgeon without the consent of his patient as to any information which he may have acquired by attending him. This provision is as broad as the statute of any state to which our attention has been called. As we view the case, and as we believe the law to be, the inhibition is broad enough to exclude an examination of the surgeon as to any information which he has acquired while attending a patient, whether this information is deduced from statements or gathered from his professional or surgical examination. It is a common knowledge that the eye and finger of the attending surgeon is vastly more expert in locating cause or trouble than the tongue of the most astute patient. The authorities hold that no matter how the information may be acquired, whether it comes to the surgeon in the shape of oral statements, or by reason of his examination, he cannot be interrogated respecting it. *Freel v. Railway Co.*, 97 Cal. 40, 31 Pac. 730; *Gartside v. Insurance Co.*, 76 Mo. 446; *Briggs v. Briggs*, 20 Mich. 34; *Dilleber v. Insurance Co.*, 69 N. Y. 256; *Association v. Beck*, 77 Ind. 203.

This leaves only the question whether the relation of physician and patient existed. It is a narrow inquiry, and one possibly a little difficult of satisfactory solution. We are, however, entirely satisfied that the circumstances under which the doctor was employed, and the relation existing between the company and its employes and the doctor, were such as to put the physician and the plaintiff directly in the relation of doctor and patient. The plaintiff's contributions may have been slight, but the circumstances of the situation were such as to lead him to put himself implicitly under the care of the surgeon, and to trust himself in his hands for care, to the same extent and under the same circumstances as though he had sent out for another physician, and put himself directly in his charge. Unless something more can be shown than the present case discloses, we are compelled to hold the evidence properly excluded.

This disposes of all the errors which require attention, and, since the jury were not properly instructed, we must reverse the case. We have been asked by the appellant to enter judgment on the record. We do not concede this to be our duty, and we gravely doubt our right in a case of this description to enter a judgment of that sort. We should thereby turn ourselves into a tribunal for the trial of questions of fact, and usurp the place of the jury, whose sole function it is to pass on such questions. What the subsequent trial may disclose it is impossible for us to foresee, and, while the appellant is entitled to a new trial by reason of the errors which the trial court committed, the appellee is equally en-

titled to submit his case to another jury, which, when properly instructed with reference to the law, may determine the issue between the workman and the company. The judgment is reversed. Reversed.

NELSON et ux. v. FIRST NAT. BANK OF LA JUNTA.

(Court of Appeals of Colorado. Nov. 9, 1896.)

REVIEW ON APPEAL—PRESUMPTIONS—BILL OF EXCEPTIONS—NECESSITY FOR SPECIFIC OBJECTIONS.

1. In a cause tried by the court, the appellate court will not review the judgment upon the evidence unless exceptions to such judgment were preserved.

2. The fact that no exceptions to the judgment were preserved will not prevent a review of errors appearing in the record proper, or occurring during the trial, where exceptions were properly taken.

3. Where a bill of exceptions merely shows that the court permitted the sheriff to amend his return on a summons in another cause, but contains neither the summons nor return, nor anything to show why the amendment was desired, or why it was resisted, the ruling of the court will be presumed correct.

4. The action of the trial court in receiving in evidence the files, judgment roll, and transcript in another case will be presumed correct, where such papers do not appear in the record, and there is nothing in the bill of exceptions to show that their reception was erroneous.

5. A bill of exceptions which merely states, at the bottom of an offer of evidence, "Defendant objects," without showing the specific grounds for the objection, is insufficient to enable the appellate court to review the action of the trial court in admitting the evidence.

Appeal from district court, Otero county.

Action by the First National Bank of La Junta against Charles Nelson and wife to subject certain property to the payment of a judgment. From a judgment for plaintiff, defendants appeal. Affirmed.

James Hoffmire and G. Q. Richmond, for appellants. Chas. E. Gast and Geo. A. Kilgore, for appellee.

THOMSON, J. This suit was brought by the appellee to set aside certain sales and conveyances made by the appellant Charles Nelson to the appellant Texanna Nelson, who was his wife, and to subject the property sold and conveyed to the payment of a judgment theretofore obtained by the appellee against Charles Nelson and others. The complaint alleges the recovery of the judgment against Charles Nelson, impleaded with G. T. Miller and W. P. Dunn, and the filing and record of a transcript of the judgment with the recorder of the proper county, the issue of an execution on the judgment, and its return unsatisfied, and the transfer prior to the rendition of the judgment by the defendant Charles Nelson to the defendant Texanna Nelson, his wife, of certain property, real and personal, owned by him, averring that the transfer was without consideration, and was made for the fraudulent purpose of avoiding the payment of his indebtedness to the plaintiff, and further

averring that the defendant Charles Nelson had no property, so far as the plaintiff was able to discover, other than the property transferred, out of which the execution could be satisfied, in whole or in part. The defendants answered, denying the allegations of the complaint, and averring a valuable consideration moving from Texanna to Charles for the property in question, and also that, at the time of the transfer to her, she had no information or knowledge of the indebtedness from Charles to the plaintiff. The decree was for the plaintiff, and the defendants appeal.

The defendants ask a reversal, on the ground that the judgment is contrary to the law and the evidence. No exception to the judgment was preserved, and for that reason we are precluded from inquiring whether the evidence was sufficient to sustain it. It has been repeatedly held by the supreme court and this court that, in a cause tried by the court without a jury, the judgment must be excepted to, in order to enable the appellate court to review it upon the evidence. *Patton v. Manufacturing Co.*, 3 Colo. 265; *Law v. Brinker*, 6 Colo. 555; *Jerome v. Bohm*, 21 Colo. 322, 40 Pac. 570; *Manners v. Fraser*, 6 Colo. App. 21, 39 Pac. 889; *Whitehead v. Jessup* (Colo. App.) 48 Pac. 1042. The rule does not, however, prevent us from passing upon errors assigned, which appear in the record proper, or occur during the progress of the trial, where exceptions are properly preserved. *Springs Co. v. Hopkins*, 5 Colo. 206; *Farncomb v. Stern*, 18 Colo. 279, 82 Pac. 612. We shall therefore consider the rulings of the court during the trial which are assigned for error.

The court permitted the sheriff to amend a return. All that we know in relation to this ruling we find in the bill of exceptions, as follows: "Plaintiff here asks that the sheriff of Otero county be permitted to amend the return of his service nunc pro tunc, in order to conform with the true facts, in case No. 344. Defense objects to the same being allowed, and also moves the court to set aside the judgment in that case as against Charles and Texanna Nelson. By Court: The motion to set aside the judgment will be overruled, and the sheriff may be permitted to amend his return to conform with the true facts. Defendants Charles Nelson and Texanna Nelson, by their attorney, except to the ruling of the court allowing the sheriff to amend his return upon the summons so as to show that the court had jurisdiction of the person of Charles Nelson and Texanna Nelson at the time, and also except to the ruling of the court in overruling the defendant's motion to set aside the judgment." The foregoing is all that appears in the bill of exceptions in relation to the amendment allowed, and it is insufficient to enable us to pass upon the exceptions. It is inferable that the return amended was a return upon a summons issued in a case in which Charles and Texanna Nelson were de-

endants, but what relation that case bore to this case, or why the amendment was desired, or why it was resisted, does not appear. Some attempt at explanation is made in argument, but our information must be derived from the bill of exceptions. Neither the summons nor the return is contained in the bill, and, in the absence of any knowledge on the subject, we must presume that the ruling was proper.

For the purpose of disposing of another allegation of error, we quote further from the bill of exceptions, as follows: "Plaintiff now offers in evidence the files and judgment roll in case No. 344 in this court, in which a judgment was obtained by the First National Bank of La Junta against G. T. Miller, Charles Nelson, and W. T. Dunn, on the 27th day of December, 1894, for the principal sum of \$1,499.17 and costs. Defendant objects. Objection overruled by the court, to which ruling the defendant saves an exception. Plaintiff offers in evidence the transcript of judgment book showing judgment last introduced in evidence, and filed with the county clerk and recorder of Otero county on the 28th day of December, 1894. Defendants object. Objection overruled by the court, to which ruling the defendants save an exception." We are powerless to disturb this ruling for two reasons: First. The files, judgment roll, and transcript are not before us. We have quoted all that appears in the bill of exceptions concerning them. Without any showing to the contrary, we are bound to presume that they were in all respects regular, and that they were properly receivable in evidence. Second. The objection to their introduction was not sufficient. To merely say, "Defendants object," is not enough. Objections to evidence must be based on specific grounds, so that the trial court can pass upon them intelligently. Naked objections cannot be considered on appeal. All objections made by the defendants to evidence offered were in this form. They are therefore unavailable here, and, it not appearing that there was any exception taken to the judgment, it must be held to be sustained by the evidence. The complaint states a cause of action, and, as the cause stated was cognizable only in equity, the defendants were not entitled to a jury. Let the judgment be affirmed. Affirmed.

ROBERTS et al. v. DENVER, L. & G. R. CO. et al.

(Court of Appeals of Colorado. Nov. 9, 1896.)

ATTORNEY AND CLIENT—RATIFICATION—RAILROAD MORTGAGES—BONDHOLDERS' RIGHTS—ENFORCEMENT.

1. A client may ratify the act of his attorney in commencing suit, so as to prevent a dismissal for want of original authority on the part of the attorney.

2. The holder of overdue coupons of railroad mortgage bonds cannot sue thereon, and enforce

the judgment against the income of the railroad company.

3. The railroad company and the trustee of the railway mortgage may sue to enjoin the enforcement by a bondholder against the income of the company of a judgment recovered on overdue coupons, regardless of any action on the part of the trustee on behalf of all the bondholders.

Appeal from district court, Arapahoe county.

Action by the Denver, Lakewood & Golden Railroad Company and another against A. W. Roberts and others. There was a judgment for plaintiffs, and defendants appeal. Affirmed.

Error is laid to the rulings of the court on a motion to dismiss the action for want of authority on the part of the attorney to bring it for one of the plaintiffs, and the overruling of a demurrer to the complaint for want of facts sufficient to constitute a cause of action. We take the complaint as an accurate statement of facts, though, as to some of its details, it would be more preferable to set out the exact phraseology of the security involved. This is impossible, because the instruments are not set out in *hæc verba*. The Denver, Lakewood & Golden Railroad Company is a corporation organized under the laws of the state to construct and operate a railroad within certain designated points, and branch lines run in connection with it. About the time of its organization, the company issued a series of bonds, 400 in number, each for the principal sum of \$1,000, bearing a specific rate of interest, payable on definite dates, as provided for by coupons attached to each of the bonds. According to the following recital in the securities, each bond was one of a series "of first mortgage bonds, numbered from one upward, each of like amount, tenor, and date, all of which said bonds and coupons are equally and without preference secured by mortgage or deed of trust of even date herewith, duly executed and delivered by the Denver, Lakewood and Golden Railroad Company to the Farmers' Loan and Trust Company of the city of New York." To secure the payment of these bonds, the corporation executed to the Farmers' Loan & Trust Company of New York a mortgage, whereby there was "granted and conveyed unto the trust company and its successors all of the property, franchises, and privileges of the railroad company." As is universally the case in railroad mortgages, both by general language and particular designation, the railroad company conveyed to the trustee whatever property it then had or might thereafter acquire, of every sort and description, including its rents, income, and profits. It was recited in the mortgage that the conveyance was made to the trust company for the benefit of parties who might become purchasers or owners of the bonds, and that the bonds secured by the deed of trust were issued and to be held by the holders of the bonds subject to the agreements and conditions set out in the deed. Among other con-

ditions expressed in the conveyance, and on which the bonds were issued, was this: "That the bonds secured by said deed of trust, though issued and sold at different times, are all to be of the same date, and payable at the same time as set forth in said deed of trust, and are to be equally and without preference secured by said mortgage or deed of trust. It is further provided that in default of payment of either the principal or interest, or until the railroad company shall make default or breach in the performance of some of the conditions imposed by the deed, it should have the right to possess and operate the road, and use the income or revenue, in the same manner as though it was unmortgaged." It was further provided that in case of default in the payment of the principal or interest, and the default should continue for six months, the trust company could enter into possession of the railroad and its property, and operate it for the benefit of the bondholders, appropriating the income to the payment of the delinquent interest, and to the principal which would then be due. The holders of the majority of the bonds were given the right, under certain circumstances, to compel the trustee to proceed. According to another article in the mortgage, the right of action under it was vested exclusively in the trustee, and under no circumstances could any bondholder or bondholders institute an action or other proceeding to enforce any remedy provided, or foreclose the mortgage, except on a refusal of the trustee to act. These are all the provisions stated in the complaint, and probably all which would be needful for us to consider. In November, 1894, Roberts brought suit against the company, before a justice of the peace in Arapahoe county, to recover judgment on nine interest coupons cut from bonds, which he evidently held, of \$30 each, being the interest coupons on bonds Nos. 18, 19, and 184, of the series of 400, originally issued and heretofore described. Roberts had judgment for \$296.80, and execution was issued against the company for that sum, and costs to a constable, who attempted to execute it by the service of a process of garnishment on the Colorado National Bank. The bank answered that it had funds in its possession belonging to the railroad company, in the sum of \$310. The complaint thereafter alleged that the moneys which the bank answered it had belonging to the railroad were moneys which had come into the hands of the treasurer of the railroad as revenue and income in the ordinary business of the operation of the road, and had been deposited by the railroad company in the bank, to be paid out by checks drawn by the treasurer in liquidation of its current debts. These moneys were alleged to be necessary in the management of its ordinary business as a carrier in the state, and that Roberts would appropriate these funds to the payment of his interest coupons, unless he was restrained by the order of the court. As will be observed, after Roberts had obtained his judg-

ment, and levied his process on the funds in the bank, this suit was brought to prevent its enforcement. The action was in the names of the railroad company and the loan and trust company. The only relief sought was an injunction to restrain Roberts and the constable from enforcing the judgment. After the process and writs were served, Roberts appeared, and filed his demurrer to the complaint, and likewise a motion to dismiss the action, because the attorney who brought it was not thereunto authorized by the trust company, which was made a party plaintiff. The motion was denied; the demurrer was overruled; and final injunction issued; and Roberts prosecutes this appeal.

Bartels & Blood, for appellants. Yeaman & Gove, for appellees.

BISSELL, J. (after stating the facts). While the authorities are not entirely in harmony respecting the practice which must be adopted in order to successfully contend for the dismissal of an action because of the want of authority on the part of the attorney to commence it, we can affirm the ruling with very little difficulty. We do not attempt to determine whether the railroad company was a necessary or an indispensable party, nor that the motion would not lie if it appeared the attorney had authority to proceed on its behalf in beginning the suit. It is quite possible the railroad company might maintain this bill to protect its revenues, as well as incidentally to defend the rights of the bondholders. It transpired at the hearing of the motion that the trust company adopted the acts of the attorney, and authorized him to prosecute the action in its behalf and in its name, in the general discharge of its duties as trustee to the owners of the bonds. This authority came to the attorney almost immediately after the suit was begun, and, on the principle of the ratification of the acts of an agent who proceeded without an original delegation of authority, justified the court in refusing to dismiss the action, and proceeding with it to judgment. *Great West Min. Co. v. Woodmas of Alston Min. Co.*, 12 Colo. 46, 20 Pac. 771; *Williams v. Canal Co.*, 13 Colo. 469, 22 Pac. 806; *Dillon v. Rand*, 15 Colo. 372, 25 Pac. 185; *Weeks, Attys.* § 247; *Mason v. Stewart*, 6 La. Ann. 736; *Little v. Giles*, 27 Neb. 179, 42 N. W. 1044; *Clark v. Fitch*, 2 Wend. 461. On principle, there should be no trouble with this proposition. While it is the privilege of the defendant to question the authority of the attorney who has brought the suit, his acts may be adopted; and, on general principles, an act ratified is the full equivalent of an act done under antecedent authority. The general law of agency disposes of the contention. We think the court was right in refusing to dismiss the suit.

The questions presented on the demurrer are of much greater difficulty, and of very large importance. In the numberless foreclosure proceedings brought against railroad companies,

with which the state and federal courts have been so largely occupied for many years, some phases of the question have come up and been frequently decided; yet the most difficult branch of the inquiry would seem only to have come before the courts of one state for adjudication. This does not, of necessity, signify that it has infrequently been presented to the profession. It may be that the particular remedy has not been often invoked, because the general professional judgment may have been against the action. At all events, we are so thoroughly satisfied with the basis on which the direct adjudications are rested that we unhesitatingly reach the same conclusion, for the same general reasons.

The rights and remedies of mortgagor and of mortgagee at the common law, and generally under the statutes and practice of the states, are tolerably well settled. Except as varied by statute or practice, the mortgagee may pursue any one of several remedies. He may take possession, and apply the rents and profits of the estate to the liquidation of the debt, or he may foreclose the mortgage, or sue on the bond or note. Speculation respecting the existence of one or all of these remedies in Colorado would be profitless, and the principle only is stated because it illustrates the general notion of all the decisions wherein it is adjudged the holder of the promise may sue at law, and get judgment on his debt, or foreclose his security at his option. This is really the basis of all those cases which hold that wherever one holds securities, whether of this class or any other, he may sue the debtor, and obtain judgment, though he may not interfere with the property which is covered by the security. This rule is enforced in some of the cases, and recognized in others. The authorities on which the appellant relies, directly adjudicating the right of the holder of the debt to sue at law, rest on this doctrine, but they go no further than to adjudge the general right to belong to the holder of the debt to sue at law on his obligation. Many of them undoubtedly hold that, notwithstanding the mortgage may cover the rents, income, and profits of the company, these are not bound by the security; but the corporation has a right to devote them to its general purposes in the payment of its current obligations, to the same extent as though they had not been included within the terms of the instrument. The cases also hold that this general right on the part of the mortgagor to enjoy the rents of his estate preserves the income to the railroad company, freed from the obligation of the security, unless there has been some attempt on the part of the trustee or the bondholder to sequester the property, and the income thereby become applicable to the payment of the security. Though the income is included by the terms of the instrument, it must be inoperative until after possession taken. The rule is adopted because of the necessities of the situation; otherwise, the company would be not only embarrassed in its operations, but absolutely debarred from the successful prosecution of its enter-

prise. In nearly all these securities, as in this, the right to use the income in the operation of the road is expressly reserved to the company, notwithstanding its inclusion in the instrument. *Gilman v. Telegraph Co.*, 91 U. S. 603; *Fosdick v. Schall*, 99 U. S. 235; *U. S. v. County of Macon*, 99 U. S. 582. Many other authorities hold this same general doctrine. None are more exhaustive and satisfactory than these, and the opinion is therefore left unincumbered by the citation of the long line of cases which announce this proposition. It must be observed that the right to maintain the suit was either limited to those persons who come within the description of "general creditors," or the right was limited to the seizure of property which was not embraced in the security. The right to maintain the suit, and to prosecute it to judgment, so far as we have been able to learn, is always subject to one or the other of these limitations; and, where neither the one nor the other exists, the right to prosecute the suit to judgment and to collect has never been affirmed. This same eminent authority has likewise settled the right to maintain such a suit as that brought by the railroad company against *Roberts*. It has been pretty generally held that where there is an attempt by one of the creditors, to the prejudice of those of his class, or by creditors generally whose rights are protected by the security, to interfere with the mortgaged property, an injunction to protect the others will be maintained. *Macalester's Adm'r v. Maryland*, 114 U. S. 598, 5 Sup. Ct. 1065; *Gilman v. Telegraph Co.*, *supra*.

The only question remaining unsettled respects the real basis of the suit, to wit, the right of the trustee and the railroad company to restrain the individual bondholder from enforcing a judgment against the income, regardless of any action by the trustee on behalf of all the bondholders, or of any suit brought by the bondholders themselves where the trustee has failed or refused to act. This is in reality the nub of the controversy. If the bondholder has the right to bring suit on the overdue coupons, and obtain judgment and levy on the income of the railroad company, or on the specific property covered by the mortgage, then the bill cannot be maintained, and the judgment creditor should be permitted to proceed with the enforcement of his judgment. As we before observed, the question has not been often before the courts. The only cases to which our attention has been called are undoubtedly against it. As has been observed in some of the cases already referred to, railroad mortgages are of recent invention, peculiar in their form, comprehensive in their scope, essential to the internal commerce of the country, and either require the modification of old rules governing the foreclosure of mortgages, and the rights of mortgagees and mortgagors respectively, or the creation of new ones, which shall subserve the best interests of the country, as well as of the parties most immediately concerned. These ideas or those similar in form and expression have led that eminent tribunal from which all of the

cases thus far have been cited to very clearly limit and control the rights of the mortgagees in the enforcement of their securities, and to control the railroad companies when the trustees have taken possession, and thereafter sought to apply the income and profits of the company to the liquidation of its securities. The rights and equities of general creditors, as well as of mortgage bondholders; the rights of those who are entitled to a preference in the application of the revenues and incomes to the liquidation of their debts, as against the bondholders before and after possession taken,—have been much considered and discussed. Litigation of this description has settled many of the questions, and the opinions have laid down principles which are clearly applicable to the present controversy. The Pennsylvania courts have undoubtedly declared the bondholder may not reduce his claim to judgment, and levy his execution on the property covered by the mortgage; nor may he, by this proceeding, get from under the binding force of the general rule that bondholders are a class, and the bonded debt a unit. So far as respects its right of enforcement, the trustee is bound to treat the debt as a whole, and obligated to enforce the security for the benefit of all the bondholders, who are entitled only to share pro rata in the proceeds. This principle is most undoubtedly hostile to the action which Roberts commenced, and, if recognized, must prevent the enforcement of his judgment. The real principle of the Pennsylvania cases is recognized by the supreme court of the United States in *Fosdick v. Schall*, *supra*, where it is held that every railroad mortgagee impliedly agrees that the current debts shall be paid out of the current funds of the company, and that he has no claim to the income until after possession taken. In the language of the distinguished late chief justice, "the business of all railroad companies is done to a greater or less extent on credit. This credit is longer or shorter, as the necessities of the case require; and, when companies become peculiarly embarrassed, it frequently happens that debts for labor, supplies, equipment, and improvements are permitted to accumulate, in order that bonded interest may be paid, and a disastrous foreclosure postponed, if not altogether avoided. In this way the daily and monthly earnings, which ordinarily should go to pay the daily and monthly expenses, are kept from those to whom, in equity, they belong, and used to pay the mortgage debt. The income out of which the mortgagee is to be paid is the net income obtained by deducting from the gross earnings what is required for necessary operating and managing expenses, proper equipment, and useful improvements. Every railroad mortgagee, in accepting his security, impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts before he has any claim upon the income. If, for the convenience of the moment, something is taken from what may not improperly be called the 'current debt fund,' and put into that which

belongs to the mortgage creditors, it certainly is not inequitable for the court, when asked by the mortgagees to take possession of the future income, and hold it for their benefit, to require as a condition of such an order that what is due from the earnings to the current debt shall be paid by the court from the future current receipts before anything derived from that source goes to the mortgagees." According to the force and effect of this decision, the earnings of the company are subject to its control as against the bondholders, who have no right to appropriate it to the payment of their security, so long as there are outstanding debts which are unliquidated, and which equitably have a right to have that income applied to the satisfaction of their claims before the bondholder may compel its appropriation to the liquidation of his debt. If this be true, it is not easy to see on what principle the bondholder may insist on his right to bring an action at law on the overdue coupon, and seize by execution that which he might not appropriate if he intended to enforce his security on which he has agreed to rely. The remedy of the bondholders for the enforcement of their debt, which is represented by the bonds and coupons, is through the trustee only, and by the adoption of some one of the remedies for which the security provides. *Bradley v. Railway Co.*, 38 Pa. St. 141; *Com. v. Susquehanna & D. R. R. Co.*, 122 Pa. St. 306, 15 Atl. 448; *Addison v. Lewis*, 75 Va. 701.

This in no wise infringes on the right of the general creditor to bring his action and collect his judgment, wherever he is able to establish a debt in his favor. The limitation is only operative and applicable to the bondholders, who are a numerous class, which has accepted the security for the payment of the debt which provides a particular remedy to which they must look for the enforcement of these obligations. The character of these securities, their immense number, the diversity of their holdings, as well as the preservation of the mutual rights and obligations of the railroad company and the creditor, require the application of this principle. As was very forcibly suggested in 38 Pa. St., the long periods of time over which these securities run would absolutely debar the railroad company from effecting the loans essential to their creation and existence if the holder were not assured that no other creditor of his class could seize and sell the security without his participation in the result. To permit suits by bondholders on coupons to be begun, and the judgments obtained thereon enforced against the income, would inevitably result in preventing the railroad company from carrying on its operations. In case of a default in the payment of interest by the railroad company, a flood of disastrous litigation would be started, which would undoubtedly force it out of business, and turn it into the hands of a receiver appointed by the court to protect it from the demands of insistent creditors. These results should not be permitted unless they are inevitable. We do not believe it. We think

the principle announced in the Pennsylvania case is just and legitimate, and one which should be held universally applicable to cases of this description.

The judgment of the court below was in accordance with these views, and it will accordingly be affirmed. Affirmed.

FOREST GROVE DOOR & LUMBERING CO. v. McPHERSON et al.

(Supreme Court of Oregon. Dec. 7, 1896.)

MECHANICS' LIENS—TIME OF FILING—EVIDENCE.

In an action to establish a material man's lien, the question was whether the material was furnished on October 24th, in which case the lien was filed one day too late, or was furnished on the following day. Plaintiff's employé who delivered the lumber testified that his recollection was that it was on the 25th. The manager of plaintiff's business testified that the material was obtained about October 25th, though he was not present when it was delivered; and again, referring to the date, he said, "That was, I think, on the 25th." The purchaser of the material and his employé who hauled it testified positively that it was delivered on October 24th. *Held*, that the material was delivered on October 24th, and a judgment in favor of plaintiff was erroneous.

Appeal from circuit court, Washington county; T. A. McBride, Judge.

Action by the Forest Grove Door & Lumbering Company against Donald McPherson and others to foreclose a mechanic's lien. Judgment in favor of plaintiff. Defendants appeal. Reversed.

Thos. H. Tongue, for appellants. S. B. Huston, for respondent.

PER OURIAM. This is a suit to foreclose a mechanic's lien. The facts are that the plaintiff, a corporation, having furnished to the defendant Donald McPherson lumber and building material to be used in the construction of certain buildings situate upon a tract of land in Washington county, filed on November 24, 1893, a claim of lien thereon in the office of the county clerk of said county, containing a statement of its demand, to secure the payment of \$369.64, and on the next day commenced this suit to foreclose the same. Issue having been joined, a trial was had, at which the court, having found that there was due the plaintiff \$341.50, gave a decree foreclosing the lien for that amount, from which the defendants appeal.

It is contended by counsel for the defendants that the claim was not filed within the time prescribed by law, and that, in consequence thereof, no lien ever attached to the property sought to be charged therewith. The decision of this question depends upon whether the material was furnished on the 24th day of October, 1893, or the day after. The defendants claim that they received it on the former date, while the plaintiff insists that it was not delivered until the next day. Albert W. Mills testifies that

In October of that year he worked for the plaintiff, at its Buxton mill, and delivered the lumber to the defendants; and, referring to the date, says: "My recollection is, it was on the 25th. The reason for that, we were working at the dam, and I was in charge of the yard that day." This witness also says that McPherson made out a bill of the lumber so obtained on a piece of board, which was delivered to John L. Banks, the manager of the mill. The latter testifies that the lumber was obtained about October 25th, although he was not present when it was delivered; and again, referring to the date, he says, "That was, I think, on the 25th day of October." The office of the plaintiff is located at Forest Grove, where its books are kept; and its journal being offered in evidence, shows that on October 29th the plaintiff furnished the defendants merchandise valued at \$1.70. On the next line below this entry appears the following: "Oct. 25. To Mdse., \$2.12." This relates to the lumber in question, but the entry, having been made after the 29th of that month, shows that the report of the sale had not reached the office on that date, and hence not much importance can be attached to the date of the sale of the lumber as evidenced by the entry in the journal. McPherson testifies that the lumber was obtained October 24th, and that he remembers the date because on the next day he paid a bill of \$10, and took a receipt therefor, which is dated October 25th. The receipt, however, is not in evidence. Charles Smith testifies that he hauled the lumber in question from the mill on October 24th. In fixing the date of the delivery of the lumber, neither of the witnesses for plaintiff is positive that it was on the 25th of October, while McPherson and Smith each say that it was on the day before. We therefore find that the material was delivered on October 24, 1893, and the claim, not having been filed until the 24th of the next month, was not filed within the time prescribed by law, and, as a consequence, the lien had expired at the time of filing the claim. The decree will therefore be reversed, and the complaint dismissed.

BOOTH v. MOODY.¹

(Supreme Court of Oregon. Dec. 7, 1896.)

BROKERS—ACTION FOR COMMISSIONS—COMPLAINT—AIDED BY VERDICT.

A complaint alleging that defendant employed plaintiff, as a broker, to procure a purchaser for his farm, agreeing to pay a commission of 5 per cent. on the selling price: that plaintiff procured and produced a certain person as purchaser therefor, at the agreed price of \$6,000; that all times have elapsed, and all acts have been done, and all things happened, to entitle plaintiff to his commission, but defendant has paid no part thereof,—is insufficient, even after verdict; it not being alleged, even generally, that there was a sale to the person produced as purchaser by plaintiff, or that he was

¹ Rehearing pending.

ready and willing to purchase at the price fixed by defendant.

Appeal from circuit court, Marion county; George H. Burnett, Judge.

Action by J. C. Booth against Z. F. Moody. Judgment for plaintiff. Defendant appeals. Reversed.

R. E. Moody and W. H. Holmes, for appellant. J. A. Carson and Tilmon Ford, for respondent.

BEAN, J. This is an appeal from a judgment rendered in favor of the plaintiff in an action brought by him to recover commissions as a real-estate broker. The principal question presented is the sufficiency of the complaint, and is raised in this court for the first time. Omitting formal parts, it is as follows: "(1) That at all the days and times hereinafter mentioned the plaintiff was, and for a long time prior thereto has been, and now is, a real-estate agent and broker, carrying on business as such agent and broker in the city of Salem, Marion county, Oregon. (2) That at the city of Salem, in Marion county, Oregon, in or about the month of May, 1892, the defendant employed the plaintiff, as such broker and agent, to find, obtain, procure, and produce a purchaser for the defendant's farm, of sixty acres, near Salem aforesaid, and the defendant agreed to pay the plaintiff for his said services the customary commission or fee of five per cent. upon the selling price of said land. (3) That immediately thereafter the plaintiff entered upon the performance of his duties under said contract with said defendant, and continued to perform his said duties thereunder, to find, obtain, procure, and produce such purchaser, and so continued his said services until the month of January, 1893, when the plaintiff found, obtained, procured, and produced W. G. Westacott and W. J. Irwin, co-partners doing business under the firm name and style of Westacott & Irwin, at Salem aforesaid, as purchasers for the defendant's said farm at and for the agreed price or sum of six thousand dollars. (4) That the plaintiff's said commission on said sum of six thousand dollars, at said rate of five per cent., amounts to the sum of three hundred dollars, and the plaintiff's said services are reasonably worth the said last-mentioned sum. (5) That all times have elapsed, and all acts have been done, and all things happened, under the said contract of agency, to entitle the plaintiff to his said commission of three hundred dollars, but said defendant has not paid the same, nor any part thereof." Defendant's counsel contend that the complaint is defective because it does not aver either that the land was sold to the parties produced as purchasers by the plaintiff, or that such parties were ready, able, and willing to purchase at the price fixed by the defendant, and that he refused to consummate the sale. In this position they are abundantly supported by authority. The rule, unquestionably,

is that, before a real-estate broker can recover his commissions, he must allege and prove either that he was the procuring cause of an actual sale, or that he produced a purchaser ready, able, and willing to purchase upon the terms named by the vendor. *Fisk v. Henarie*, 13 Or. 156, 9 Pac. 322; *Kyle v. Rippey*, 20 Or. 446, 26 Pac. 308; *Penter v. Staight*, 1 Wash. St. 365, 25 Pac. 469; *Jacobs v. Shenon*, 2 Idaho, 1002, 29 Pac. 44; *Fraser v. Wyckoff*, 63 N. Y. 445; *Sibbald v. Iron Co.*, 83 N. Y. 378; *Sayre v. Wilson*, 86 Ala. 151, 5 South. 157; *Hayden v. Grillo*, 26 Mo. App. 280. The complaint before us does not comply with this rule. There is no allegation therein that the land was actually sold by the defendant to a purchaser produced by the plaintiff, or, indeed, that it was sold at all. Upon this matter the complaint is silent. It simply alleges that plaintiff procured Messrs. Westacott & Irwin as purchasers at and for the agreed price of \$6,000, but does not aver that the land was sold to them, or that the sum named was the price fixed therefor by the defendant, or that he ever agreed to sell for that sum, or that the parties produced by the plaintiff as purchasers were ready, able, and willing to purchase the land at a price fixed by the defendant. In the absence of an allegation either that the land was actually sold, or that the purchaser was ready, able, and willing to purchase on the terms of the vendor, the complaint is manifestly insufficient, and the judgment will have to be reversed, unless the defect is cured by the verdict. Now, a verdict will cure formal defects in a pleading, such as imperfect statement, or the omission of formal allegations, and establishes every reasonable inference that can be drawn from the facts stated, but it will not supply a total omission to state some fact essential to the cause of action. In short, a verdict will aid a defective statement of a cause of action, but will not cure the omission of a material allegation. *David v. Waters*, 11 Or. 448, 5 Pac. 748; *Welner v. Lee Shing*, 12 Or. 276, 7 Pac. 111; *Bingham v. Kern*, 18 Or. 199, 23 Pac. 182. It is often difficult to distinguish between a defective statement in a pleading, which a verdict will cure, and a failure to state a cause of action, not so cured. The extent and principle of the rule of aid by verdict is that whenever the complaint contains terms sufficiently general to comprehend a matter so essential and necessary to be proved, that, had it not been given in evidence, the jury could not have found the verdict, the want of a statement of such matter in express terms will be cured by the verdict, because evidence of the fact would be the same, whether the allegation of the complaint is complete or imperfect. But if a material allegation, going to the gist of the action, is wholly omitted, it cannot be presumed that any evidence in reference to it was offered or allowed on the trial, and hence the pleading is not aided by the verdict.

The rule in such cases, as laid down by Mr. Proffatt in his work on Jury Trials, and which seems to have been adopted by this court in *Houghton v. Beck*, 9 Or. 325, is that "a defect in pleading, whether of substance or form, which would have been fatal on demurrer, is cured by verdict, if the issue joined be such as necessarily required, on the trial, proof of the facts defectively stated or omitted, without which it is not to be presumed that either the judge would direct the jury to give, or that the jury would have given, the verdict." Proff. Jury, § 419. Applying these principles to the case at hand, we are of the opinion that the defect in the complaint was not cured by the verdict, because it does not contain terms sufficiently general to include the matter omitted, and the issue joined was not such as required the proof thereof on the trial. In other words, the allegations of the complaint could have all been proved without proving the facts omitted, and this is the test laid down by Mr. Justice Thayer in *David v. Waters*, supra. It follows that the judgment must be reversed, and it is so ordered.

MANNING v. GIGNOUX. (No. 1,482.)
(Supreme Court of Nevada. Dec. 7, 1896.)

NEW TRIAL—NEWLY-DISCOVERED EVIDENCE.

In an action for plaintiff's care and support of defendant's two minor sons under a contract therefor, defendant claimed that at a certain time the contract was canceled. One of the sons, who had returned to his father, testified to statements of plaintiff, made in the presence of both sons, that the contract was canceled, as claimed by defendant; and defendant's wife testified to seeing letters containing statements which showed the same fact. On the production of such evidence, plaintiff's counsel moved to continue the case, so that the evidence of plaintiff and defendant's other son, who resided in New York, could be produced to deny such evidence. A motion by plaintiff for a new trial on the ground of newly-discovered evidence was supported by affidavits showing that plaintiff and the son residing with her would testify to the facts disclosed in the motion for continuance, and legal excuse for their absence from the trial was shown. *Held*, that a new trial was properly granted.

Appeal from district court, Lyon county; C. E. Mack, Judge.

Action by Florence M. Manning against J. E. Gignoux to recover a balance alleged to be due plaintiff for the care and support of defendant's two minor sons, in which there was a judgment dismissing the action, and in favor of defendant for costs. From an order granting a new trial on the ground of newly-discovered evidence, defendant appeals. Affirmed.

Robt. M. Clarke, for appellant. Langan & Knight, for respondent.

BONNIFIELD, J. The plaintiff brought this action to recover the sum of \$3,320 of the defendant, balance due on contract between the parties for plaintiff's care and support of

defendant's two minor sons, as alleged in the complaint.

The following facts are not disputed: That on or about the 4th day of January, 1885, the parties entered into a contract with each other by the terms of which the plaintiff agreed to take, care for, and maintain the minor sons of the defendant, Fred and John, for the monthly sum of \$80, exclusive of doctor bills; that the defendant agreed on his part to pay the plaintiff for said care, etc., the said sum of \$80 per month, exclusive of doctor bills; that the plaintiff took said children under said contract on or about — day of January, 1885, and from that date up to the 1st day of August, 1893, cared for and supported them both; that Fred, on the 1st day of August, 1893, went to the defendant, in Nevada, on a visit, and did not return to the plaintiff; that John remained with plaintiff, and had her care and support, till the 1st day of September, 1894, and not since; that prior to June 1, 1887, the defendant paid the plaintiff for all of her said services rendered up to that date; that for the plaintiff's said services rendered after June 1, 1887, the defendant has paid her \$3,200, and no more.

Alleged facts denied: The plaintiff alleges in her complaint, in substance, and her contention is, that all of her said services in the care and support of said children were rendered under and in pursuance of the terms of said contract of date January 4, 1885, and not otherwise. The defendant denies that she rendered any services under said contract after September, 1890, and in his answer he alleges: "That on or about the — day of September, 1890, said defendant, having made preparations and arrangements to take, educate, and care for and support the said minor children, terminated said arrangement, and gave said plaintiff notice thereof, and then demanded the custody and to have the said minor children, which demand plaintiff refused, and ever since has refused. And defendant avers that said plaintiff then terminated, of her own will, the said arrangement, and insisted on keeping, caring for, and maintaining and supporting the said minor children, contrary to defendant's desire, and detained and kept them away from defendant,—the said Fred Gignoux until the 1st day of August, 1893, and the said John Gignoux until the present time,—to his great disappointment, injury, and damage, and to the injury of said children."

The main contest in the trial of the case was as to the termination of the contract. The case was tried by the court without a jury. The court found as follows: "I find from the evidence that in the year 1885 plaintiff and defendant entered into an express contract, whereby defendant was to pay plaintiff the sum of eighty dollars per month for the care and support of his two sons; that under said express contract plaintiff supported and cared for the two sons of defendant until September, 1890, at which time

said express contract was terminated; that defendant paid plaintiff in full under said express contract to October 1, 1890. I further believe from the evidence that plaintiff cared for and supported the said sons of defendant for some time after October 1, 1890, for which defendant is liable on an implied contract for what the same is reasonably worth. As a conclusion from the foregoing, let judgment be entered in favor of the defendant for his costs in defending this action." Judgment was entered dismissing the action, and in favor of the defendant for his costs. The plaintiff moved for a new trial, and the court granted the motion. The defendant appeals from the order granting a new trial.

Plaintiff's motion for a new trial was based on the following grounds: "First. Newly-discovered evidence, material for the plaintiff, which she could not with reasonable diligence have produced at the trial. Second. Insufficiency of the evidence to justify the decision of the court. Third. That the decision of the court is against law. Fourth. Errors of law occurring at the trial, and excepted to by the plaintiff. Fifth. Accident and surprise, which ordinary prudence could not have guarded against." The application for new trial for the causes named in the first and fifth subdivisions above was made upon affidavits, and for the other of said causes it was made on plaintiff's statement on said motion. No counter affidavit was filed. The court, in ruling upon the motion, stated and ruled as follows: "I have examined and considered the evidence submitted at the trial of this case and the affidavits offered in support of the motion for a new trial. In my judgment, the affidavits disclose evidence material to the issue of this case on the part of plaintiff which she could not with reasonable diligence have discovered and produced on the trial. It is therefore ordered that the judgment herein entered be set aside, and a new trial granted." From said affidavits it appears that, in support of the allegations of his answer to the effect that said agreement on which this action was brought had been terminated by both parties, the defendant introduced as a witness at the trial Fred Gignoux, one of his said sons, who testified, in substance: That about four or five years ago the plaintiff, in the presence of and in connection with witness and his brother, John Gignoux, at Albany, N. Y., and in plaintiff's residence, stated to them that the defendant in this action had written to her, demanding that said witness and his brother be sent to him; that plaintiff then and there asked the witness and his brother if they desired to go to said defendant, and they answered that they did not, and that plaintiff thereupon said that they need not, that they might remain with her so long as she had anything with which to maintain them, and that she would resist any effort to take them from her; that she was their

guardian in the state of New York, and would fight in the courts, if necessary; and that the plaintiff further stated in said conversation to witness and his said brother that she had written to the defendant, and told him that she would not give said John Gignoux and Fred Gignoux up, and was prepared to go to law. It likewise appears from said affidavits that the defendant introduced Mary L. Gignoux, defendant's wife, as a witness at the trial, who testified, among other things, in substance, that she saw a letter in the hands of the defendant, written by him to the plaintiff in the month of September, 1890, wherein defendant stated to plaintiff that he wanted his boys out here; that he would not and could not pay for them any longer; to which plaintiff replied in a letter received in or about October, 1890, and shown to witness by defendant, that she could not part with the dear boys, that money was no object to her, and while she had a dollar she would not give them up. The alleged newly-discovered evidence disclosed by said affidavits with respect to the alleged facts testified to by Fred and Mary L. Gignoux, respectively, is the proposed evidence of John Gignoux, the brother named in Fred's said testimony, and the proposed evidence of the plaintiff. The said proposed testimony of John Gignoux, if produced, will tend to show that at or about the time and place named in Fred's said testimony the plaintiff did state and say to said Fred and John that their father wrote of his intention to send for them, or that he was about to send for them to come to Nevada, but that the plaintiff did not state or say to them at any time that defendant had sent for them or demanded their custody or control; that the plaintiff did not state at said time, or at any time, to them, or either of them, in the presence or hearing of John, that she had refused, or that she would refuse, by letter or otherwise, to comply with the said or any demand of the defendant for the care, custody, control, or removal of said John and Fred, or either of them, or at all; that the plaintiff did not, in any conversation that ever occurred in the presence or hearing of John, with himself and his said brother, or at all, state or say that she was their guardian, or of either of them, in New York or elsewhere, or that she would contest or fight at law, or in any way, any attempt or effort of the defendant or any one else to take them, or either of them, from the plaintiff. The proposed testimony of the plaintiff, if produced, would tend to prove that she never was the guardian at any place of said John and Fred Gignoux, or of either of them; that she did not, at the time or place alleged by Fred Gignoux in his said testimony, or at any other time or place, or at all, state that she would fight, oppose, or contest it at law or otherwise, if any one attempted to take said boys, or either of

them, from her; that plaintiff did not at any time, in any manner, state to Fred and John, or either of them, that she had refused, or that she would refuse, by letter or otherwise, to comply with defendant's said demand, or any demand of his, for the surrender and delivery or sending of said boys, or either of them, to defendant, or to any one else; that the plaintiff never received any letter from the defendant, described by Mary L. Gignoux as being written by the defendant to the plaintiff, and never saw such letter in which the defendant stated that he would not and could not pay for them—the boys—any longer, or any letter containing any such declaration in form, substance, or effect; that the plaintiff did not reply to any such letter, as testified to by said Mary L. Gignoux, or to any other letter, "that she could not part with the dear boys, or that money was no object to her, or that while she had a dollar she would not give them up"; that the plaintiff did not write or send, or cause to be written or sent, to or for the defendant, or any one else, any letter at any time, or at all, in words or substance to the effect that she could not or would not part with or give up said boys, John and Fred, or either of them, or that money was no object to her, or that while she had a dollar she would not give them up.

We agree with the trial court in its expressed opinion that "the affidavits disclose evidence material to the issue on the part of the plaintiff in this case, which she could not with reasonable diligence have discovered and produced on the trial." We are of opinion that the said proposed evidence hereinabove named is new, was newly discovered, is not merely cumulative, is not merely impeaching evidence, and that it is such as to render a different result probable on a retrial.

The plaintiff, before the case was finally submitted, and at the first practicable moment after the witnesses Fred and Mary L. Gignoux had testified to the alleged facts named by them, moved the court for a continuance of the further trial of the case for a period of six weeks, upon affidavit, and upon substantially the same grounds and showing as appear in her affidavits for new trial, which motion was denied. The record discloses great diligence on the part of the plaintiff and her attorneys in preparing the case for trial, and in producing all the evidence known to them, or which could have been known to them, with respect to the alleged facts testified to by Fred and Mary L. Gignoux, prior to the giving of said testimony by them, unless the said alleged facts are true; the truth of which the plaintiff and John Gignoux deny by their affidavits on motion for new trial. The plaintiff and John Gignoux are residents of the state of New York, and were absent from Nevada during all the time of the pendency

of this action and the trial thereof in the court below, and good and legal excuse for such absence appears in the record.

We are of opinion that the order granting a new trial should be affirmed on the ground and for the reason stated by the trial court in its opinion granting the same, which appears hereinabove. We do not deem it necessary to pass upon or consider any of the other grounds upon which plaintiff based her motion for new trial and do not do so. The errors, if any, will not likely be repeated. The order granting a new trial is affirmed.

BIGELOW, C. J., and BELKNAP, J., concur.

HAYES v. DAVIS et al. (No. 1,471.)

(Supreme Court of Nevada. Dec. 4, 1896.)

COUNTIES—LOST CERTIFICATE OF INDEBTEDNESS—ISSUANCE OF DUPLICATE—INJUNCTION.

Where an act of the legislature authorizes and requires the county commissioners to instruct the auditor of the county to issue to the owner of the original a certificate of indebtedness similar in amount and in lieu of one that has been lost, the issuance of the certificate cannot be restrained as the creation of an unjust indebtedness against the county, or, in any just sense, an injury to taxpayers.

Appeal from district court, White Pine county; G. F. Talbot, Judge.

Bill by William Hayes against W. L. Davis and the board of county commissioners of White Pine county to restrain the issuance of a duplicate certificate of indebtedness. From a judgment in favor of plaintiff, defendants appeal. Reversed.

Henry Rives, Robt. M. Clarke, and J. Poujade, for appellants. Thos. Wren and F. X. Murphy, for respondent.

BELKNAP, J. By the act relating to boards of county commissioners, as amended at the session of 1893, it is provided that any resident and taxpayer of the county may file written objections to the allowance of any claim or demand pending before the board of county commissioners. It is then made the duty of the board to lay such claim or demand upon the table for a definite period, not less than 10 days; and at the expiration of such time it may be considered, unless proceedings be instituted in a court of competent jurisdiction to determine the validity of such claim or demand. St. 1893, p. 120. The plaintiff, being a resident and taxpayer of the county, brought this suit under the provisions of the foregoing law, for the purpose of restraining the board of county commissioners from acting in accordance with the provisions of an act entitled "An act for the relief of W. L. Davis." St. 1893, pp. 22, 23. The facts are contained in an agreed statement hereinafter mentioned, filed at the trial, and upon which the case was tried and decided. In addition to those facts, plaintiff alleged "that the issuance of said scrip to said W. L. Davis, as

aforesaid, would cause said plaintiff irreparable damage, and, plaintiff is informed and believes, would be illegal and void, and lead to vexatious, expensive, and protracted litigation." The agreed statement of facts is substantially as follows: The plaintiff, being indebted to the defendant in the sum of \$2,000, executed two promissory notes for \$1,000 each in his favor, and pledged, among other securities for their payment, a certificate of indebtedness issued by the county of White Pine for \$3,421.25. The certificate, while in the possession of defendant, was lost, mislaid, or stolen. Thereafter suit was commenced by defendant Davis as plaintiff against the plaintiff in the present action as defendant to recover the amount of one of the notes. The suit was compromised and dismissed upon the terms set forth in an agreement, a copy of which is referred to as an exhibit in this case. By this agreement, defendant Davis was to surrender one of the promissory notes to the plaintiff, and credit the other with the payment of \$464, provided that the lost certificate be not found and restored to appellant or reissued to him; but, if the certificate be subsequently found or reissued, it was to be redeemed by plaintiff upon payment of \$1,539.60. Appellant further agreed to use due diligence in finding the lost certificate, or, failing to find it, present the matter to the consideration of the legislature of the state with the view that a statute be enacted authorizing the issuance of a certificate in lieu thereof. The certificate was not found, and at the session of the legislature of 1893 a law was enacted entitled "An act for the relief of W. L. Davis," by which the county commissioners of the county of White Pine were authorized and required to instruct the auditor of the county to issue to defendant a certificate of indebtedness similar in amount and in lieu of the one that had been lost. St. 1893, pp. 22, 23. At the trial the district court enjoined the board of county commissioners from proceeding under the statute. This ruling is assigned as error.

In *State v. Gallagher*, 35 Pac. 485, we took occasion to state that a resident taxpayer could invoke the interposition of a court of equity in a proper case, quoting from the opinion of the supreme court in *Crampton v. Zabriskie*, 101 U. S. 601, as follows: "Of the right of resident taxpayers to invoke the interposition of a court of equity to prevent an illegal disposition of the moneys of the county, or the illegal creation of a debt, which they, in common with other property owners of the county, may otherwise be compelled to pay, there is, at this day, no serious question. The right has been recognized by the state courts in numerous cases; and from the nature of the powers exercised by municipal corporations, the great danger of their abuse, and the necessity of prompt action to prevent irremediable injury, it would seem eminently proper for courts of equity to interfere, upon the application of the taxpayers of a county, to

prevent the consummation of a wrong, when the officers of those corporations assume, in excess of their powers, to create burdens upon property holders." "In such cases," says Beach, "this equity jurisdiction usually rests upon fraud, breach of trust, multiplicity of suits, or the inadequacy of the ordinary remedies of law." 2 Beach, Inj. p. 1300. None of these grounds are applicable here. No fraud is alleged, nor illegal debt contemplated. There is no question that, both legally and equitably, the county owes some one this money; neither is there any question, under the agreed facts, that it is owing to the plaintiff, Davis, or, at least, that he is the present legal owner of the claim. Issuing this duplicate certificate, whether legal or illegal, creates no additional burden upon the taxpayers further than what justly exists now. If the law under which the board proposes to act is unconstitutional, and that body has no authority to issue a duplicate certificate where the original has been lost, then their action will be a nullity, and there is no occasion for a court to interfere with an injunction. *McCoy v. Briant*, 53 Cal. 247. But if, on the other hand, the certificate will have some validity, and will, in Davis' hands, constitute evidence of the county's indebtedness to him, which certainly exists, then it is simply doing what any honest debtor should do; and such action is not the creation of an unjust indebtedness against the county, to prevent which a court of equity should exercise its equitable powers. The plaintiff's demand is an unconscionable one, which such a court should not assist him in effectuating. *Scranton Electric Light & Heat Co.'s Appeal*, 122 Pa. St. 175, 15 Atl. 446. Neither will such action constitute, in any just sense, any injury to the plaintiff or any other taxpayer. Of course, if Davis cannot collect the money which seems due him without a certificate or warrant, then preventing the issuance of a duplicate certificate will, under the circumstances, relieve the county, and consequently the taxpayers, from the burden of having to pay it, even though honestly owing by the county; but this again is a result that the plaintiff can hardly expect a court of equity to assist him in consummating. Judgment reversed, and cause remanded.

BIGELOW, O. J., and BONNIFIELD, J., concur.

EVERETT et al. v. LOS ANGELES
CONSOL. ELECTRIC RY. CO.
(L. A. 62.)

(Supreme Court of California. Nov. 27, 1896.)

In bank. Appeal from superior court, Los Angeles county; J. W. McKinley, Judge.

For opinion in department, see 43 Pac. 207. Affirmed.

John D. Pope, for appellant. W. J. Hunsaker, for respondent.

PER CURIAM. Upon further consideration of this cause in bank, we adhere to the views expressed in the opinion filed in department 1 (43 Pac. 207), and for the reasons therein given the judgment and order are reversed.

TEMPLE, J. I dissent. This action was for damages for the death of Charles E. Everett, which was caused by a car of defendant. The main question presented on this appeal is whether this court can say, as matter of law, that the deceased was guilty of negligence which contributed proximately to his injury, in the face of the verdict of the jury, which is in favor of the plaintiffs, who are heirs at law of the deceased. This is not a question as to what the evidence, taken as a whole, may be considered fairly to establish, or whether the facts which we think plainly established by the evidence show such negligence on the part of the deceased, but whether the conclusion of the jury could be rationally drawn from the evidence. And this must be determined, also, in view of the exclusive province of the jury to pass upon the credibility of the witnesses. The facts may be stated thus: Deceased was an experienced bicycle rider, about 40 years old, in the possession of all his faculties, and familiar with the operation of the street railway. At least, he lived in the vicinity, and had often been on this street. Defendant had two tracks on McClintock avenue, there being $7\frac{1}{2}$ feet between them. It was in the suburbs of Los Angeles, and the street was unfinished. Outside of the two tracks the ground was higher, and too rough for travel on foot or on bicycles. The rails were raised some two inches above the roadbed. Just before the accident, deceased was seen on the north-bound track, going south. He was going at the rate of 6 miles per hour. On the south-bound track a car was following at the rate of 10 miles per hour. At that time a car was approaching on the north-bound track, and, although it was not so near as the car which was approaching from behind, deceased turned, evidently to avoid it, to the south-bound track, and in front of the nearer car on that track. At about a block and a half away, the motorman of the south-bound car rang his bell "good and hard," to warn deceased of his danger. Upon this subject the motorman testified as follows: "I was the motoneer in charge of car No. 109 at the time Mr. Everett was killed. When I first observed him, I was about two blocks away from him, I should think. I just turned around the curve off from Olin onto McClintock avenue. He was on a wheel, on the north-bound track. I was on the south-bound track. He traveled on the north-bound track, I should think, a block and a half or two blocks; something like that. Then he crossed over onto our track, the south-bound track. When he crossed over, he was about a block and a half or two

blocks ahead of me. We were going considerably faster than he was. I did not notice him look back. I saw him all the time after I left the curve. I had been ringing the bell, off and on, ever since I left the curve at Olin street. I rang the bell for the purpose of giving notice to the man on the bicycle. I should think I was then a block away from him, when I was ringing it good and hard. I had been ringing it for about two blocks constantly. When I rang the bell purposely to give him notice, I might not have been as far as a block away from him. He did not do anything when I rang, in regard to looking back, but kept right on. I called out to him when I was within about fifty feet of him, I should think. I do not remember what I said. When I was within about thirty or fifty feet of him, I threw off my currents and applied my brakes, and reversed my car, and did all that I could to stop the car from that time. I attempted to stop the car because I didn't think he heard me. I supposed all the time he did, until that time. Immediately before I put on the brakes, I rang the bell as hard as I could. Other persons called out to him besides myself; everybody in the front end of the car. There was a big crowd there, and a heavy load on the train. They called out as loud as they could hollo. He paid no attention to them. If he was a man of good hearing, he must have heard the noise. There was enough noise made in the front of that car to raise the dead, I should think. He made no attempt to get off the track at all, that I saw. I did not attempt to stop my car sooner because I expected every minute to see him get out of the road. It is the general custom of people riding bicycles to get out of the road. They generally manage to get out of the road. There is no difficulty in a man getting out of the road, if nothing is in the way." On cross-examination this witness said: "When I first began to ring my bell to warn him, I must have been a couple of blocks away, and I kept on ringing it. He paid no attention to the ringing of the bell, and did not seem to know that I was coming behind him. I did not slacken speed at that time." The south-bound train was not so near as the north-bound train, but its passengers called to deceased, and made signs to him, trying to warn him of his danger. The north-bound train had not passed when the accident occurred, but stopped on the happening of the accident, something like 100 feet away. The motorman testified that he reversed the current 30 or 50 feet before the car struck the deceased, but several other witnesses testified that speed was not slackened at all till it struck the deceased, and some that the current was reversed some 5 feet away. There was testimony to the effect that the car moved from 50 to 60 feet before it was stopped, after the accident. Upon this question of distance there was a conflict. Upon the day of the accident,

more cars than usual were run on this road, because of races. There was a strong wind from the south, which would tend to prevent the deceased from hearing.

Now, Everett was guilty of gross negligence in going upon the south-bound track without looking to see if a car was dangerously near. But he was not a trespasser there, and, in my opinion, he had just the same right to believe that, if a car did approach from behind, it would not run over him, but would stop or slacken its speed, and see that he did have fair warning and an opportunity to get out of the way, that the motorman would have had to suppose he would leave the track and avoid the danger, if it had been obvious that Everett knew the true state of affairs. The real question is, however, admitting the negligence of Everett, within the rule applicable to such cases, was it the proximate cause of the injury? or, rather, whether the jury could not reasonably draw any other conclusion from the evidence than that his negligence contributed proximately to the injury. The rule upon this subject is thus stated by Mr. Justice Sander-son in *Needham v. Railroad*, 37 Cal. 409, as follows: "Therefore, if there be negligence on the part of the plaintiff, yet if, at the time when the injury was committed, it might have been avoided by the defendant in the exercise of reasonable care and prudence, an action will lie for the injury." The rule is stated with equal clearness by Mr. Justice Garoutte in *Esrey v. Southern Pac. Co.*, 103 Cal. 541, 37 Pac. 501. He said: "By her own negligence, she placed herself in a position of danger; but defendant was aware of her danger, and did not exercise ordinary care to protect her from the danger that surrounded her. Under these conditions, the law gives the injured person a right of action, and this right of action is based upon the principle that a failure to exercise ordinary care by a defendant, under such circumstances, amounts to a degree of reckless conduct that may well be termed willful and wanton; and, when an act is done willfully and wantonly, contributory negligence upon the part of the person injured is not an element which will defeat a recovery. Some text writers and courts declare the same principle in another form, by holding that under these circumstances the contributory negligence of the party injured is not the proximate cause of the injury, but that the negligence of the defendant, being the later negligence, is the whole proximate cause. As has been said by one of our reviews, 'The party who last has a clear opportunity of avoiding the accident, notwithstanding the negligence of his opponent, is considered solely responsible.'" Upon this question plaintiff contends that the most reasonable conclusion from the evidence is that the motorman knew a sufficient time before the car struck the deceased that he was unheeding, and did not know of his danger, and that Everett would inevitably be injured un-

less he slackened his speed. To sustain the verdict, it is only necessary to find that the motorman should have believed, from what he saw, that injury was likely to happen unless the speed was slackened. The defendant must maintain the position that there was no negligence on the part of the motorman, because he believed, and, notwithstanding what he knew, had a right to presume, that the deceased either knew of his danger, or would discover it in time to leave the track before injury resulted.

I have carefully examined the evidence, and I believe the conclusion reached by the jury is fully warranted by a preponderance of the evidence. And, if we apply the rule which has heretofore always obtained in such cases, I am unable to understand how any one can reach the opposite view. It is, of course, true that there is evidence which will warrant a statement more favorable to the defendant than that which I have stated; but, even upon the view most favorable to the defendant which can be drawn from the evidence, in my opinion it is plain that the motorman must have actually known that deceased was unheeding long enough before the injury to have slackened his car sufficiently to have prevented the injury. To do this, it would only have been necessary to have reduced the speed to 6 miles per hour from 10 miles per hour. If, as defendant claims, the motorman had attempted to stop when within 20 feet of deceased, he had then 50 feet within which to stop before the injury could occur, for while the car moved 10 feet Everett moved 6. This supposing that both continued at the same speed, but as soon as the car commenced to slow up the difference of speed would diminish; and, if the car had slowed a little, Everett would have escaped. The motorman testified that he commenced ringing good and hard a block away, and had rung, off and on, from the time he was two blocks away. If we assume this distance to be 400 feet, he must have thus pursued Everett for 1,000 feet; and during all that time, according to his own testimony, Everett did not look back, and did not seem to know that he was approaching from behind. Several witnesses testified that, when about 40 feet away, a passenger called to the motorman that, if he did not stop, he would kill the man. After that time, according to the testimony, the car ran 100 feet before it struck the deceased. In fact, I cannot doubt that, had the motorman made an honest effort to stop the car when 5 feet away, Everett would not have been injured. Even from that point the car ran 12½ feet before it struck Everett, and, of course, as soon as the speed diminished the discrepancy of speed would be less. If these cars cannot be so handled, it is criminal to allow their use on the streets. I think it matter of common knowledge that they can be. Now, could this court say that the jury could not reasonably conclude from this evidence that, at some point of time when

the injury could have been avoided, the motorman knew, or should have known, that Everett was unheeding, and that injury was likely to result unless he checked his speed? Can we say, as matter of law, that such was not the fact?

It has been suggested that the rule invoked does not apply when the person injured is negligent at the very time of the injury, as it is claimed Everett was here. I deny that there is any such qualification of the rule, beyond this: that such negligence on the part of plaintiff may contribute proximately to the injury. In such case the defendant would not be the last who had a clear opportunity to avoid the injury. If Everett did not know of his peril, he had no such opportunity. If one lies upon a railway track to sleep, and is injured, his negligence continues to the injury. But the rule has been held to apply to such a case. *Williams v. Railroad Co.*, 72 Cal. 120, 13 Pac. 219. On no question are the authorities more numerous, and I think it will be found that, in a vast majority of them, such was the case as fully as in the case at bar. One who does not know of his danger does not have the last opportunity to avoid the injury. If these views be correct, they furnish a complete answer to the contention of appellant that the motorman was guilty of no negligence, and that the accident was due wholly to the negligence of the deceased; for, conceding gross negligence on the part of Everett, in going upon the track and continuing there without looking back, still, if, as we must concede to the verdict, the motorman knew, as we must also concede, that he was ignorant of his danger, and after such knowledge the motorman could, by the use of ordinary diligence, have prevented the injury, defendant is liable. I am convinced that all these propositions are established in favor of the verdict, by a clear preponderance of the evidence.

It is really not necessary to discuss the rule by which the conduct of Everett should be tried, but I cannot permit the apparent claim that the same rule which has become crystallized into a rule of law in regard to crossings of steam-railway tracks applies here, to pass unchallenged. Negligence is always relative to circumstances, and the circumstances of the two cases vary greatly. It is true, a general statement as to the duty of those using the public highways may be made which will include all cases. All such persons are bound to use ordinary care to avoid injuring others, and to escape injury to themselves, and may expect the like care from others. What conduct this rule would dictate in any given case will depend upon the special facts of that case. One has no right to obstruct unnecessarily a street car, but he has no better right to obstruct any other vehicle. As to all, he is bound to use the same diligence not to delay. On the other hand, all are bound to use ordinary care not to obstruct or injure him, and he may use the street, relying upon such dili-

gence on the part of others, including those in charge of street cars. If one were to step blindly into the street, closely in front of a push cart, and receive injury, his negligence would deprive him of a right of action. It was his duty to look and avoid danger. The same duty, and no other, rests upon him as to a street car; but as the danger is greater, and the conditions different, a different degree of diligence may be required. The rule in regard to a steam railroad, requiring that a person approaching a crossing must stop, look, and listen, implies that, if a train is imminent, he must stop until it passes. In such case it is not expected that the train will stop for him, and it would be unreasonable to require it. Not so as to street cars. As a hypothetical case, I may state that on Market street, in San Francisco, during a portion of every day, four cars per minute pass on the cable road any given point. There are two other tracks upon the street also operated. The track is thronged with trucks, drays, express wagons, and other vehicles. They have frequent occasion to pass from one side of the street to the other. It is safe to say that at such time such crossing generally stops a car upon each track of the cable road. Yet they have a right to cross, and to drive on the track, although a car is near at hand, and will be required to stop. In other words, the car must beat its way along, like any other vehicle in a crowded street. Neither should move so closely in front of another that a collision is likely to occur. All must use ordinary care not to obstruct others, and all may rely upon the use of that care on the part of others not to injure them. These considerations do not similarly affect a train on a steam railroad, even at the crossings; for the train is not expected to wait for others to pass, and its velocity and momentum would ordinarily prevent it. In conclusion, I wish to say that, in my opinion, if a man of ordinary prudence in the place of the motorman would have seen that perhaps Everett was not aware of his danger, and that injury might occur unless he stopped his car, then it was his duty to stop and make sure. I do not think the jury was misled to the injury of defendant by any instruction given, and, in my opinion, the jury was fully instructed upon all points on which instructions were required by defendants. Judgment and order should be affirmed.

We concur: BEATTY, O. J.; HENSHAW, J.

LEVY v. SCOTT, Sheriff. (Sac. 96.)
(Supreme Court of California. Nov. 21, 1896.)
FRAUDULENT CONVEYANCE—CHANGE OF POSSESSION
—TRUSTEE FOR CREDITORS—CONVEY-
SION—EVIDENCE.

1. A person engaged in other business in one city bought a stock of shoes in another, on the recommendation of a friend on whose counsel he relied. He did not quit his own business to

give his personal attention to the shoe trade, but this was left to his clerks. About two weeks later he met the former owner of the store, and, learning, by comparison, that the business was not up to its old volume, engaged him to manage the business for him. *Held*, that there was an unequivocal and substantial change of possession, following the sale.

2. A creditor of B. induced him to satisfy the indebtedness by a bill of sale of his stock, and other creditors immediately attached it. To avoid litigation, an arrangement was perfected whereby the purchasing creditor reconveyed to B., and, in consideration of a release from his creditors, he in turn made a bill of sale to M. *Held*, that the transaction was an absolute sale to M., though he bore the relation of trustee to the creditors, and that a purchaser from M. acquired a good title.

3. In an action for the conversion of property, plaintiff may show what it would cost to purchase in the open market, and replace, the property.

4. Where a sale of personal property is attacked for fraud, the purchaser should be allowed to show all the circumstances connected with the purchase and with the payment of the consideration.

Department 2. Appeal from superior court, Fresno county; J. R. Webb, Judge.

Action by E. J. Levy against J. Scott, sheriff, for the conversion of property. From a judgment in favor of defendant, and from an order denying plaintiff a new trial, plaintiff appeals. Reversed.

H. H. Hotaling, Samuel Rosenheim, Henry Ach, and Frank H. Short, for appellant. E. D. Edwards and J. P. Meux, for respondent.

HENSHAW, J. Appeals from the judgment and from the order denying plaintiff a new trial. The action was for the recovery of certain property, or for the value thereof, levied upon and sold by the defendant, the sheriff of Fresno county, under a judgment obtained by the Sussex Shoe Company, a corporation, against Henry Bruck. The judgment in favor of defendant, Scott, was rendered under and in accordance with the verdict of the jury.

Plaintiff claimed as owner. Defendant's contention was that the property belonged to Henry Bruck, that plaintiff's claim of ownership was simulated and invalid, and that, in any event, his claim of title was void against the Sussex Shoe Company, an attaching creditor of Henry Bruck, for that any sale of the property by which plaintiff obtained title thereto was not followed by an immediate and continued change of possession thereof, but that Bruck, the original owner, continued in possession and control of the same. Appellant claims that the verdict of the jury is against the law and the evidence, and that the evidence, uncontradicted, shows that he was the bona fide owner of the property. After a painstaking and careful review of the evidence, we have been unable to discern anything upon which the verdict of the jury may be legally supported. It is quite true that evidences of fraud are not left lying patent in the sunlight, that fraud itself is always concealed, and that the truth is to be discovered

more often from circumstances, from the interests of the parties, and from the irregularities of the transaction, coupled with injury worked to an innocent party, rather than from direct and primary evidence of the fraudulent contrivance itself. Nevertheless, the evidence of these matters, facts, and circumstances, taken together, must amount to proof of fraud, and not to a mere suspicion thereof; for the presumption of the law, except where confidential relations are involved, is always in favor of the fair dealing of the parties. So, in this case, while there are circumstances, in and of themselves unusual, or perhaps in their nature suspicious,—circumstances upon which respondent builds a somewhat plausible "theory" of collusion and fraud,—these circumstances comport equally with the theory of honesty and fair dealing, and there is nothing in them inconsistent with the claim that the transactions of plaintiff, from beginning to end, were upright and honorable.

The following are the facts: Henry Bruck was a retail boot and shoe dealer in the city of Fresno. His business affairs becoming involved, A. L. Bryan, president of the A. L. Bryan Shoe Company, a corporation engaged in the manufacture and sale of boots and shoes at San Francisco, went to Fresno, and demanded of Bruck that he pay to said company the sum of about \$1,000, then owing by Bruck to that corporation. This was in November, 1893. Bruck was unable to satisfy the claim, and Bryan demanded and received from him a bill of sale of the shoe store. Bruck, upon executing the bill of sale, left the store, and went to San Francisco; Bryan taking charge of it through his own agents and employes. Here some point is made as to the character of the paper executed by Bruck to Bryan. It is unnecessary to discuss its character, for, as will hereafter appear, whatever interest or title was by it conveyed by Bruck was thereafter by Bryan reconveyed to him. Upon Bryan's return to San Francisco, or shortly thereafter, he learned that the Board of Trade of San Francisco, to protect the interest of some of its members, who were also creditors of Bruck, had caused to be levied an attachment upon the store and goods. To avoid litigation, an arrangement was effected whereby Bryan reconveyed to Bruck, and Bruck, in consideration of a release and discharge by his San Francisco creditors of their claims against him, made to Mr. Marvin, representing the Board of Trade, a bill of sale of his property in the store. So soon as this sale was effected, Marvin and Bryan notified Seabury and Ostreicher, the two clerks who had been by Bryan put in charge of the business, that they were to continue in possession of the store as the agents and clerks of Marvin, and the attachment upon the property was released. Bryan's possession continued for about a week, being subordinate, however, during a part of that time, to the possession of the sheriff under attachment. Ostreicher

had been Bruck's former clerk. His employment was continued, and his services during that time were paid for by Bryan. Seabury, who was in charge, was a salesman of the Bryan Shoe Company. He was continued in charge by Marvin, with Ostreicher as clerk, and the signs in and about the store were changed, to indicate that Marvin was the owner. Marvin's ownership thus continued for about a week, during which time he was endeavoring to find a purchaser for the business. This he at last succeeded in doing, in the person of Levy, the plaintiff. Levy was not a shoe merchant, nor familiar with the shoe business, but he had an intimate friend in one Frank, who was skilled in the trade, and who had been a former partner of Bruck in the business. Frank, at that time, was in business in Oakland. Levy's business was in San Francisco. Levy was induced to make the purchase upon the representations of Frank that the business could be made profitable, and that Levy could have the advantage of his knowledge and experience in the purchase of supplies. Levy bought, taking an assignment of the bill of sale to Marvin, and paying for his purchase the amount which the Board of Trade of San Francisco had agreed to accept, viz. 50 per cent. of the face value of the creditor's claims. He paid for his purchase in indorsed promissory notes, the obligations of which he afterwards met. As soon as Levy's purchase was effected, Marvin telephoned to Seabury that he had sold the store to Levy, and that Levy would come to Fresno, or send somebody there the next day, to take possession. This, in fact, Levy did. He sent one Williams, a shoe salesman, from San Francisco to Fresno the next day, and himself followed Williams to that city. Upon their arrival Seabury left. Levy then entered into the actual custody and possession of the property, and put Williams and Ostreicher to work for him. New signs were painted, with his name thereon as owner. One of them was hung upon the sidewalk, the other placed within the store. The insurance policies were assigned to him. He took out a trader's license for the conduct of the business, and gave his clerks instructions for the management thereof. Levy remained in Fresno no longer than was necessary to transact this business and effect these changes, seemingly not more than a day, when he returned to San Francisco. Williams continued working in the store for about ten days or two weeks, when he was discharged by Levy. During all of this time Bruck was not in or about the store, nor, indeed, did Levy even know him. About this time Levy and Frank, who had gone to an auction house to look over a stock of boots and shoes, there met Bruck, who was at that time living in San Francisco. Frank, knowing Bruck, having been a former partner of his, made him acquainted with Levy. Levy asked Bruck about the kind and character of the business

done by the store when owned by him, and, upon Bruck's reply, stated that the volume and character of the business then being done were not up to his expectations, nor equal to that done by Bruck, and told Bruck, who was then out of employment, that, if he found nothing to do, and was willing to go back to Fresno, he would employ him. This resulted in the employment of Bruck by Levy, and he was sent down to take, and did take, the place of Williams. Bruck stated to Ostreicher, upon entering the store, that he had been employed by Levy in the place of Williams. Thereafter the business was conducted by Bruck and by Ostreicher, from December, 1893, until July, 1894. In July, 1894, differences arose between Bruck and Ostreicher, and upon Ostreicher's representations to Levy as to the conduct of Bruck in relation to the business, Bruck was discharged by Levy, who wrote, under cover to Ostreicher, directions to Bruck to turn over the business to Ostreicher, who, by the same communication, was put in charge thereof. Bruck, on being discharged, went to San Francisco for the twofold purpose of seeking another situation, and of learning from Levy the reason of his discharge. He was there about a week. His explanations seem to have satisfied Levy that Ostreicher, and not himself, was in the wrong, and the result was that Ostreicher was in turn discharged by Levy, and Bruck reinstated in the management of affairs. To assist Bruck in the management of the business, a new clerk, one Smith, was likewise employed by Levy. The business then continued under this management until the 8th of the following month, when the Sussex Shoe Company, a creditor of Bruck, made execution levy upon the store and the stock, upon a judgment against Bruck given the 16th of July, 1894, and under this execution the property was sold as the property of Bruck. During all of these months, therefore, Levy continued in the uninterrupted possession of the property. The clerks and managers of the store at Fresno would notify Levy, or his agent, Frank, of the goods required in the business, and these goods would be purchased either by Frank or by Levy. It is uncontradicted that, during this time, Levy purchased and paid for goods to a large amount, buying of the merchants in San Francisco, and personally paying them therefor. The purchases so made and paid for by Levy amounted to between \$5,000 and \$6,000. The property was assessed to Levy, and the taxes paid by him out of the proceeds of the sales of the business. Statements as to the condition of the business were made, sometimes to Frank, and sometimes to Levy, by both Bruck and Ostreicher. The Sussex Shoe Company's claim was for \$914.72. At the time Levy purchased the store it contained goods which had been purchased from the Sussex Shoe Company to the amount of \$244.80. At the time of the levy there were in the store goods to

the amount of \$848.75 which had been purchased by Levy subsequent to the sale by Marvin to him, and which had never belonged to Bruck.

The first claim of respondent is that the evidence shows that the purchase by Levy was pretended; that, in truth, Levy merely advanced moneys to Bruck, which Bruck used, in the name of Levy, to repurchase his business from the Board of Trade; and that thus Bruck was, during all of the time, the real owner of the property. It is next claimed that the evidence shows that the sale to Levy, even if it be held to be a sale, was not followed by the immediate and continued change of possession necessary to validate the sale against an attaching creditor of Bruck. The unusual or suspicious circumstances to which we have adverted, and upon which alone the first contention can be based, are found in the following facts: Levy did not go to Fresno after his first visit, but allowed the business to be conducted by his clerks and by Bruck, without giving it immediate personal supervision. But that he did this is not proof of fraud, and is not even surprising, in view of the further fact that his business was not that of a shoe dealer; that he had no personal knowledge of such business; that he bought, as it were, upon speculation, and upon the recommendation of his friend, Frank; that Frank was familiar with the shoe business, and was his trusted agent in the conduct of the business affairs. Moreover, it appears that Levy was engaged in another and entirely different business in San Francisco. It is not easy, under the circumstances, to see what good his presence could have worked if he had repeatedly gone to Fresno, and it is not surprising, therefore, that he did not go. There is also found in the evidence a statement by Ostreicher, when asked who was in charge of the store, to the following effect: "Then I guess Bruck was in charge of the store, the way it seems to me." But, whatever effect is to be given to the guess of the witness, it is entirely overcome by his further statements and explanations. He says that, when Bruck came, he stated that he had made arrangements with Mr. Levy to go to work for him in that store, to manage it for him; that he himself, as well as Bruck, were both employed and discharged by Levy; that Levy's signs were put up, and the insurance changed; that the bills that came to the store were made out for the most part against Levy; that those not made out against Levy were made out against the name of Frank, the purchasing agent of Levy; that it was recognized in the wholesale shoe trade that Frank was conducting the business for Levy as his personal agent. The friendship between Frank and Bruck is urged as a suspicious circumstance to support the theory that the sale to Levy was but colorable, and in the interest of Bruck and Frank. But to this it need only be said that there is not the

slightest evidence in support of it, while there is overwhelming evidence that Levy put into the business, besides the purchase price, large sums of money of his own, and no money belonging to any one else.

From what has been said, it results that there is no evidence in the case impeaching the purchase by Levy as colorable merely, or showing that by collusion and secret contrivance Bruck was the real owner. Nor does the further claim, that the purchase by Levy is void because not followed by an immediate and continuous change of possession, find any better support. That the change of possession in this case was immediate is incontestably and indisputably shown. The continuous change which the statute contemplates does not demand, at the peril of avoiding the sale, that the vendor shall never again, at any time or under any circumstances, be found in the possession of the property sold. It does, however, require an unequivocal and substantial change of possession, so long continued as to give notice to the world that ownership has been parted with. As is said in *Stevens v. Irwin*, 15 Cal. 503: "The possession must be continuous; not taken to be surrendered back again; not formal, but substantial. But it need not necessarily continue indefinitely when it is bona fide and openly done, and is kept for such a length of time as to give general advertisement to the status of the property, and the claim to it by the vendee." The cases of *Godchaux v. Mulford*, 26 Cal. 316, *Ford v. Chambers*, 28 Cal. 13, and *Porter v. Bucher*, 98 Cal. 454, 33 Pac. 335, are to the same effect. In the present case we think that the change was fully sufficient to satisfy the requirements of the statute. Neither Bruck nor Levy had dealt with the *Sussex Shoe Company* from the time when Levy purchased the business, and no part of the claim of the *Sussex Shoe Company* against Levy, for which it procured judgment, was for purchases made after Levy acquired ownership of the business. It cannot be claimed, therefore, that the corporation was deceived into giving credit by the fact that during part of the time Bruck managed the business for Levy.

Some attempt is made to attack the sale by Bruck to Marvin, and the claim is made that the sale was not a sale, but was a mere assignment to Marvin for the benefit of creditors. The transaction, however, was not an assignment. It was an absolute sale. It is true that, as between Marvin and the creditors whom he represented, and who had to him assigned their claims, Marvin was a trustee, and accountable to them for the disposition of the money which he might receive by a subsequent sale of the business; but, as between Marvin and Bruck, the transaction was a simple sale, Bruck selling out all his property and interest in the business, and receiving therefor a release of the claims of all of the creditors whom Marvin represented. If Marvin, then, representing the San Fran-

cisco creditors of Bruck, obtained from Bruck an unimpeachable title, as, under the evidence, he clearly did, Levy in turn succeeded to that title. The transfers from Bruck to Marvin, and from Marvin to Levy, are both supported by full and valuable consideration paid.

In contemplation of a new trial, it should be added that the court erred in refusing to allow plaintiff to prove what it would cost to purchase in open market and replace the property levied upon by the sheriff and sold. Civ. Code, § 3336; *Cassin v. Marshall*, 18 Cal. 689; *Angell v. Hopkins*, 79 Cal. 181, 21 Pac. 729. The court should also have permitted the plaintiff to explain the custom of the Board of Trade in demanding indorsed notes, and all matters connected with his purchase and payment of the property. The exclusion of this evidence, under the circumstances, tended unjustly to place the defendant in a false position before the jury. We think the foregoing will remove any difficulties which may be experienced upon a new trial of the cause. Other alleged errors presented for consideration by plaintiff have not, therefore, been considered; but, for the foregoing reasons, the judgment and order are reversed, and the cause remanded for a new trial.

We concur: **McFARLAND, J.; TEMPLE, J.**

PEOPLE v. TARBOX. (Cr. 179.)

(Supreme Court of California. Nov. 24, 1896.)

CRIMINAL LAW—FILING OF INFORMATION—COMMITMENT BY MAGISTRATE—WAIVER OF PUBLIC EXAMINATION—EVIDENCE—RAPE—SUFFICIENCY OF EVIDENCE.

1. A judgment of conviction will not be reversed because of an order denying a motion to set aside the information on the ground that it was filed before the record of the preliminary examination or order of commitment had been filed, where the order of commitment had been in fact made and entered of record by the magistrate.

2. Under Pen. Code, § 995, providing that an information must be set aside where the defendant had not been legally committed by a magistrate before the filing thereof, the making of an order of commitment, and its entry on the docket of the magistrate, are sufficient to constitute a legal commitment, which will support an information, though such order is not indorsed on the depositions returned into court by the magistrate.

3. The constitutional guaranty of a speedy and public trial to one charged with crime (Const. art. 1, § 13) does not prevent the defendant from waiving his right to a public examination before a magistrate; and he cannot complain of an order excluding the public, made on his request, as required by Pen. Code, § 868.

4. Proof of the corpus delicti, to authorize the admission in evidence of statements made by a defendant, need not in any manner connect him with the commission of the offense.

5. In a prosecution for the rape of a girl under the age of consent, where the only evidence of the corpus delicti was the fact of the girl's pregnancy, and the evidence offered to connect the defendant with the commission of the offense went only to the extent of showing his

possible opportunity, without showing any act of impropriety on his part, or excluding equal opportunity of others, the additional testimony of the examining magistrate as to a statement made by defendant, after his arrest, to the effect that, "if the girl went back on him, he would have to take his medicine; there was no use denying it,"—the witness being unable to remember the language, or what qualifying words were used,—is insufficient to sustain a conviction.

Commissioners' decision. Department 2. Appeal from superior court, Ventura county; B. T. Williams, Judge.

George Tarbox was convicted of rape, and appeals from the judgment and an order denying a new trial. Reversed.

Blackstock & Ewing, for appellant. Atty. Gen. Fitzgerald, for the People.

HAYNES, C. The defendant was prosecuted upon an information for the crime of rape, alleged to have been committed, at the county of Ventura, on September 23, 1895, upon the person of Sena Crane, a female under the age of 14 years, was found guilty by the jury, and was sentenced to imprisonment in the state's prison for the term of seven years. From that judgment, and from an order denying his motion for a new trial, he appeals.

The information upon which he was tried was filed in the superior court on March 9, 1896, and the depositions, transcript, and order of commitment were not returned to the superior court by the examining magistrate until March 10, 1896. Upon his arraignment the defendant moved to set aside the information, upon the ground that it was filed before any commitment, deposition, or other record showing that he had had a preliminary examination, had been returned or filed in said court, and upon the further ground that no order of commitment was indorsed upon the depositions afterwards returned. Said motion was denied, and the defendant excepted. Good practice requires that the return of the examining magistrate should be made and filed before the information is filed, but we are not prepared to say that the filing of the information after the examination was had, and the order holding the defendant to answer was in fact made, was more than an irregularity, which would not justify a reversal of the judgment where it does not appear that it affected any substantial right of the defendant. Section 1258 of the Penal Code provides: "After hearing the appeal, the court must give judgment without regard to technical errors or defects, or to exceptions, which do not affect the substantial rights of the parties."

Section 995 of the Penal Code specifies two grounds upon which an information must be set aside upon the defendant's motion: "(1) That before the filing thereof the defendant had not been legally committed by a magistrate. (2) That it was not subscribed by the district attorney of the county." The question arising under the first subdivision above stated is, when is the defendant legally com-

mitted? We think that occurs when the magistrate has acted judicially, and has made and signed the order of commitment. His judicial functions then cease, and the return of the depositions and order of commitment is a mere ministerial duty. In *People v. Wallace*, 94 Cal. 499, 29 Pac. 950, it was said: "It is doubtless true that the order holding to answer must be in writing; but when, as a result of an examination, such an order has in fact been made and entered upon the docket of the justice, it would seem that no further action on his part is necessary to authorize the district attorney to file an information against the defendant for the offense named in the order." In that case—as in the case at bar—the order holding the defendant to answer before the superior court was entered upon the justice's docket, but was not indorsed upon the complaint or depositions.

It was also specified, as an additional ground of said motion, that the defendant was not accorded his right to a public examination before the magistrate, because the examination was held with closed doors, all persons being excluded except the defendant, his attorneys, the prosecuting attorney, the reporter, and the witness under examination. The order of exclusion was made at defendant's request. Section 868 of the Penal Code provides: "The magistrate must also, upon the request of the defendant, exclude from the examination every person except his clerk, the prosecutor and his counsel, the attorney general, the district attorney of the county, the defendant and his counsel, and the officer having the defendant in custody." It is argued, however, that the defendant had no power to waive the provisions of section 13, of article 1, of the constitution, which provides: "In criminal prosecutions, in any court whatever, the party accused shall have the right to a speedy and public trial." In *People v. Swafford*, 65 Cal. 223, 3 Pac. 809, an order of exclusion was sustained. The record being silent, it was assumed that the defendant assented to or demanded the order. That cause was reviewed and materially qualified in *People v. Hartman*, 103 Cal. 245, 37 Pac. 153, and upon that case appellant relies to sustain his contention. But *People v. Hartman* is not in point. Not only was the order of exclusion in that case made against the objection of the defendant, but, as was there held, there is no provision of the Code relating to or authorizing such exclusion during the trial in the superior court. There can be no question that a defendant has the "right" to a public examination before the committing magistrate; but, under the provisions of the Penal Code above quoted, he may waive that right whenever he deems it to his interest to do so.

Appellant further contends that the court erred in receiving the testimony of Frank Hobart, the committing magistrate, touching statements alleged to have been made by the defendant after his arrest and before his examination. The objection to this testimony

was that the corpus delicti had not been shown at the time it was received, or at all. The testimony of the medical witness was that on March 6, 1896, he made an examination of Sena Crane, that he believed her to be then pregnant, and that she was then advanced in pregnancy about 4½ months; and it was shown by the testimony of her father and mother that she became 14 years of age on February 3, 1896. As the pregnancy had its inception before she had attained the age of consent, the fact that the crime of rape had been committed by some one was shown, and defendant's objection was therefore not well taken. Proof of the corpus delicti need not in any manner connect the defendant with its commission.

It is specified, among the grounds of defendant's motion for a new trial, that the verdict is contrary to the evidence in several particulars: (1) That it was not shown that the offense was committed within the county of Ventura. (2) That it was not shown that Sena was not the wife of the defendant at the time of the commission of the alleged offense. (3) That it was not shown that the defendant committed the alleged offense. The evidence upon the first and second points was far from being satisfactory; but, if no other ground existed for granting a new trial, it should have been granted upon the ground last stated. The only evidence that a rape had been committed upon the person of Sena Crane was the fact of her pregnancy; and the only evidence, aside from the alleged admission of defendant, testified to by the examining magistrate, tending to connect the defendant with its commission was the fact that for about a year he had been in partnership with Sena's father in the butchering business; that during that time he lived with Crane's family, which consisted of Mr. and Mrs. Crane and their six children and Mrs. Crane's father; that Sena sometimes rode with the defendant on the wagon used in his business, and sometimes attended social gatherings with the defendant; but no act of impropriety was at any time discovered in defendant's conduct. Thus far the evidence only showed a possible opportunity for the commission of the offense by the defendant, but did not exclude similar opportunities by others. If the evidence had stopped there, it is clear that there could have been no conviction; for the opportunity to commit an offense can have no weight, apart from other circumstances, unless it excludes all reasonable opportunity for its commission by another, and, standing alone, is insufficient to sustain a conviction. In this state of the evidence the prosecution called Frank Hobart, the justice of the peace before whom the defendant was brought upon being arrested, and asked him whether the defendant made any statements to him, and the witness replied as follows: "He wanted to know if I could give him an order to see the girl. I told him, 'No.' He said, if the girl went back on him, he would have to take his medicine; there was

no use denying it. And just what one he used to qualify, just what he meant, is more than I can remember,—whether it was to deny the case, deny the charge, deny the act, or what the word was.” The district attorney: “State what was said,—not what you remember. A. It is no use denying it.” Upon cross-examination he was asked: “You say, ‘No use to deny it.’ You say you don’t know what he meant then? A. I don’t know; I know the impression made upon my mind.” The constable, Frank Tryce, was present during said conversation, and was examined by the prosecution, and testified, in substance, that he heard the defendant ask for an order to see the girl; that defendant said something else, but he could not state it; that the other part he could not remember, “only by Judge Hobart bringing it to my mind, speaking about it.” Upon cross-examination he testified, in substance, that Hobart wanted to know if the witness understood it as he did; that they did not understand it alike; that nothing was said by the defendant with reference to his guilt or innocence; that defendant did not intimate that he was guilty; that Hobart asked witness how he understood the conversation with defendant, and the witness replied: “I told him as I understood it. Q. What was the occasion when he said whatever he did say? A. Yes; he said something. He said he didn’t believe that the girl had sworn to that complaint until he had seen it. Q. That was the reason he wanted to see it? A. Yes, sir.” The girl, Sena, refused to be sworn, and no other evidence was given tending to show defendant’s guilt. The defendant offered no evidence.

The testimony in chief of the witness Hobart, as well as the testimony of Tryce, shows that he (Hobart) failed to remember some material part of the defendant’s statement. He could not tell “whether it was to deny the case, deny the charge, deny the act, or what the word was.” It is well settled that the witness may testify to a part of an entire conversation, if he heard only a part, and such part appears to be complete and intelligible; but if the witness is unable to state what he heard, and especially where the witness states that the word or the part he fails to remember was used to qualify something, or was essential to an understanding of the meaning of the part given, such testimony is not sufficient to justify a verdict of guilty. The witness said: “And just what one he used to qualify, just what he meant, is more than I can remember.” He could only arrive at the meaning of the defendant from the words he used, and if, from a consciousness that some word or expression which formed part of the statement had escaped his recollection, he felt bound to declare that “just what he meant is more than I can remember,” it was obviously impossible for the jury to supply his want of recollection, and ascertain what the defendant in fact said or meant. “With respect to all verbal admis-

sions, it may be observed that they ought to be received with great caution.” 1 Greenl. Ev. § 200. “In the proof of confessions, as in the case of admissions in civil cases, the whole of what the prisoner said on the subject at the time of making the confession should be taken together. This rule is the dictate of reason as well as humanity.” Id. § 218. In *People v. Gelabert*, 39 Cal. 663, the alleged confession was made partly in Spanish, and partly in broken English, and the witness stated that he did not understand all that the prisoner said in Spanish. He was permitted to testify to the alleged confession against defendant’s objection. Upon appeal the judgment was reversed, the court, by Wallace, J., saying: “Here it is certain that to some extent the witness failed to comprehend all that the prisoner said. How important the portion not understood may have been we cannot know. It might have, if correctly and fully detailed, relieved the prisoner from the serious contradiction which, as here given, it fixed upon him.” In *People v. Keith*, 50 Cal. 139, it was said: “The witness Rosenberg testified to only a portion of the conversation in which the defendant admitted the homicide; and, standing alone, the evidence of a part of the conversation would have been inadmissible.”

No objection was made to the introduction of the evidence here under consideration, nor was any motion made to strike it out; and whether such objection or motion should have been sustained, if it had been made, need not be considered or decided, inasmuch as, upon another trial, such other or additional evidence may be produced as to make its consideration unnecessary. What we now decide is that the evidence, consisting of the alleged admissions of the defendant, is not sufficient to overcome the presumption of the defendant’s innocence, and therefore insufficient to justify the verdict of the jury. The judgment and order appealed from should be reversed, and a new trial granted.

We concur: SEARLS, C.; BRITT, C.

PER OURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and a new trial granted.

McFARLAND, J. I concur in the judgment of reversal, although I am not as entirely clear that it is correct as I would like to be. I am the more inclined to concur because it seems likely that the jury erroneously based their verdict more upon the circumstance that neither the prosecuting witness nor the appellant testified than upon the sufficiency of the evidence actually introduced. The girl may have refused to testify because she could not truthfully incriminate the appellant; and, as to a de-

defendant in a criminal action, under the Code, "his neglect or refusal to be a witness cannot in any manner prejudice him nor be used against him on the trial or proceeding."

THOMAS v. PACIFIC BEACH CO. (L. A. 111.)

(Supreme Court of California. Nov. 30, 1896.)

LIMITATION OF ACTIONS—BREACH OF CONTRACT TO CONVEY—IMPLIED PROMISE—DEMAND FOR DEED—ACCRUAL OF CAUSE OF ACTION.

1. An action by a vendee of land, to recover the purchase price on the ground of the failure of the vendor to convey, is not, in the absence of any stipulation in the contract for repayment, an action founded on contract in writing, within the meaning of Code Civ. Proc. § 337, providing that such actions may be brought in four years.

2. Such action must be regarded as an action of implied assumpsit upon the breach of the contract to convey, within the provisions of Code Civ. Proc. § 339, subd. 1, requiring actions founded on contracts not in writing to be brought within two years.

3. Plaintiff contracted for the purchase of real estate on a part cash payment and balance on time, the last payment being due in December, 1888. It was stipulated that, upon such payments being made, the defendant would convey on demand. Subsequently, before the last payment became due, defendant offered to accept a certain sum in full of all demands for principal and interest. *Held* that, as the modification thus made in the contract entitled plaintiff to his deed upon the payment of the sum agreed upon without demand, his cause of action for the failure of defendant to convey must be regarded as accruing at that time.

In bank. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by R. A. Thomas against the Pacific Beach Company. A demurrer to the complaint having been overruled, the defendant appeals. Reversed.

McDonald & McDonald, for appellant. Hunsaker & Stevens and Henry J. Stevens, for respondent.

VAN FLEET, J. The single question involved in this appeal is whether the action is barred by the statute of limitations, and the question arises upon the face of the complaint under the demurrer interposed. The action, which was commenced September 24, 1894, is to recover back, with interest, the purchase money paid by plaintiff to defendant under five several contracts of even date for the conveyance of land. Each contract covers a separate parcel or lot of land, and each is counted upon in a separate count. The five counts are identical in averment, excepting only in the description of the lot and price to be paid, and the first will serve as a type of all. Its substance is: That on the 12th day of December, 1887, plaintiff and defendant entered into a written contract, by the terms of which defendant agreed to sell to plaintiff lot 11, in block 358, of Pacific Beach, for \$500, with interest on deferred payments at 10 per cent.

per annum, payable, \$167 at the date of agreement, \$168 and interest June 12, 1888, and \$167 and interest December 12, 1888; and that in consideration of the making of such payments the defendant would execute to plaintiff, upon his demand, a grant deed conveying the land described. That plaintiff made the first two payments as stipulated. That thereafter, on or about October 10, 1888, defendant agreed with plaintiff, in consideration of the payment by the latter on that date, and before the maturity of the third and last payment under the contract, of the sum of \$171.60, to accept such sum in full discharge of said third payment, principal and interest, "and in full performance by plaintiff of his part of said contract first set forth; and thereupon, pursuant to said subsequent agreement, plaintiff paid to defendant said sum of \$171.60, and defendant accepted the same in full payment and performance by plaintiff of his part of said contract." That thereafter, in September, 1891, plaintiff demanded a deed according to the terms of the contract, which defendant has failed, neglected, and refused to make; and that on the 7th day of October, 1893, plaintiff demanded of defendant the repayment of the amount paid under the contract, and offered to restore to defendant everything of value received thereunder, which offer defendant refused; and that no part of said sum or the interest has been repaid. The position of respondent is that the action is one in the nature of special assumpsit upon a "contract, obligation or liability founded upon an instrument in writing, executed in this state," within section 337, Code Civ. Proc., and could be brought any time within the four years' limitation therein prescribed after the right accrued. Appellant's contention, on the other hand, is that the action is not one founded upon the writing within the last section, but is implied assumpsit upon the defendant's breach of the written contract to convey, for recovery of the purchase money paid, and is subject to the bar of subdivision 1 of section 339 of said Code, which requires the action to be brought within two years.

Is the action upon an obligation founded upon an instrument in writing, within the intent of section 337? The language of this section has been construed as having reference to actions to recover upon an obligation or liability created by some express promise or stipulation in the written instrument, and not to actions on such objections as merely spring from or grow out thereof in some less immediate way. The meaning of the statute was first considered by this court in *Chipman v. Morrill*, 20 Cal. 130. That was an action for contribution by one of three makers of a joint promissory note, who had paid the whole of a judgment recovered thereon. The action was brought upon the theory that it was within the four-

years limitation, as being upon a liability founded upon the written instrument,—the note. This theory was held to be erroneous, the court saying: "The statute provides that 'an action upon any contract, obligation or liability founded upon an instrument of writing,' except in certain designated cases, shall be commenced within four years, and an action upon a contract, obligation, or liability not thus founded, with certain exceptions, shall be commenced within two years. The question is whether the present action is, in the meaning of the statute, 'founded upon an instrument of writing.' Our conclusion is that it is not thus founded; that the statute, by the language in question, refers to contracts, obligations, or liabilities resting in or growing out of written contracts, not remotely or ultimately, but immediately,—that is, to such contracts, obligations, or liabilities as arise from instruments of writing, executed by the parties who are sought to be charged, in favor of those who seek to enforce the contracts, obligations, or liabilities. The construction would be the same if the word 'founded' were omitted, and the statute read, 'upon any contract, obligation or liability upon an instrument in writing.'" In the recent case of *McCarthy v. Water Co.* (Cal.) 43 Pac. 956, 959, an action was brought against a corporation by one of its directors for services rendered by him as superintendent, under a resolution of the board of directors, which provided for his appointment, but did not fix any compensation. It was contended that the resolution constituted an instrument in writing, and that the action, being upon a liability growing out of and founded thereon, was within the four-years limitation. "But," say the court in that case, "a cause of action is not upon a contract founded upon an instrument in writing, within the meaning of the Code, merely because it is in some way remotely or indirectly connected with such an instrument, or because the instrument would be a link in the chain of evidence establishing the cause of action. In order to be founded upon an instrument in writing, the instrument must itself contain a contract to do the thing for the non-performance of which the action is brought." And the court cite with approval the case of *Chipman v. Morrill*, *supra*. See, also, *Latin v. Gillette*, 95 Cal. 317, 30 Pac. 545. Applying this construction in the present case, and we are of opinion that the action cannot be said to be founded upon the written contract, within the meaning of the statute. There is in this contract no express stipulation or agreement to do the thing which the action seeks to enforce. The contract was to convey the title upon payment of the price, but there is no agreement to repay in default of such conveyance. The action is to recover the money so paid, by reason of a refusal to convey, and is necessarily based upon the implied promise of the gran-

tor that it would so repay the money in default of making title. In *Turner v. Reynolds*, 81 Cal. 214, 22 Pac. 548, cited by respondent, there was an express promise to pay back the money should the title prove bad. Had there been such promise in the present contract, the action would present an instance of an action upon a "contract, obligation or liability founded upon an instrument in writing." Actions of the character of the one at bar have been uniformly treated as actions resting in implied assumption as for money had and received (*Joyce v. Shafer*, 97 Cal. 335, 32 Pac. 320; *Shively v. Water Co.*, 99 Cal. 259, 33 Pac. 848); and, under the facts alleged, we think this case must be so regarded and as governed by the two-years limitation prescribed by subdivision 1 of section 339.

Such being the nature of the action, it remains to be determined when the plaintiff's right accrued. It was held in *Chatfield v. Williams*, 85 Cal. 518, 24 Pac. 839, that, under a contract to convey land, no demand for a deed or for the return of the purchase money is necessary to perfect the right of the vendee to sue for the recovery of the money for default in making the conveyance. It would follow, then, that the right of action would accrue at the date of the last payment, and the statute of limitations would run from that time. Respondent contends, however, that this case is not within the rule there announced, for the reason that there was not in the contract there sued upon the express stipulation for a demand found in the contract in suit; that under this agreement a demand was thus made a condition precedent, and, the suit having been commenced within due time after the making of such demand, the action is not barred. But while the original contract did contain such provision, it is alleged in the complaint that by a subsequent agreement between the parties the plaintiff paid, and defendant received, the sum of \$170.60, "in full performance by plaintiff of his part of said contract." It was competent for the parties to thus alter their original agreement, and we think the effect of such modification was to entitle plaintiff to his deed immediately upon payment and receipt of the money so stipulated to be received, without further act or demand on his part. Conceding, therefore, that the contract as originally entered into would not be within the doctrine of *Chatfield v. Williams*, the plaintiff, under the facts alleged, is in no better situation.

But moreover, assuming, as contended by respondent, that the modification in question did not obviate the necessity of demand, and we must yet hold the action too late. Where a party's right to sue depends for its perfection solely upon the necessity of a demand by him to put his adversary in default, he cannot indefinitely and unnecessarily extend the bar of the statute by de-

ferring such demand, but must make it within a reasonable time. *Palmer v. Palmer*, 38 Mich. 494; *Hintrager v. Traut*, 69 Iowa, 746, 27 N. W. 807; *Steele's Adm'r v. Steele*, 25 Pa. St. 154; *Bills v. Mining Co.*, 106 Cal. 9, 89 Pac. 43. What is deemed a reasonable time has been uniformly held to be a period coincident with that provided in the statute of limitations for barring the action. See cases above cited; *Busw. Lim.* § 159; *Wood, Lim.* § 125; *Ang. Lim.* § 96. As we have seen, the action is governed by the two-years limitation, and the demand was not made until more than that time had elapsed, and therefore too late to conserve plaintiff's right. The demurrer should, therefore, have been sustained. Judgment and order reversed, and cause remanded, with directions to sustain the demurrer to the complaint.

We concur: GAROUTTE, J.; HARRISON, J.; McFARLAND, J.

I dissent: TEMPLE, J.

GUILD GOLD-MIN. CO. v. MASON. (Sac. 119.)

(Supreme Court of California. Nov. 27, 1896.)

CONTRACT—REDUCTION OF ORE.

Where the contract for reducing mineral ores does not require any specific percentage of the assay value of the ore to be extracted, the person by whom the ore is to be reduced is not, in the absence of negligence, liable for the amount of mineral left in the tailings.

Commissioners' decision. Department 2. Appeal from superior court, Tuolumne county; G. W. Nicol, Judge.

Action by the Guild Gold-Mining Company against Lysander Mason. There was a judgment for defendant, and plaintiff appeals. Affirmed.

F. P. Otis, C. E. Arnold, and J. W. Wiley, for appellant. Goodwin & Goodwin, for respondent.

HAYNES, C. Appellant is the owner of a gold mine in Tuolumne county, and respondent owns and operates chlorination works in that county. This action was brought by the plaintiff upon an alleged contract made by it with the defendant, whereby the defendant was to work and reduce for the plaintiff certain sulphurets for the price or compensation of \$17 per ton, and to return to plaintiff at least 90 per cent. of the assay value thereof. The sulphurets were worked by the defendant, and the gold bullion obtained therefrom was returned to plaintiff; but, if the contract was as the plaintiff alleged it to be, the defendant should have returned \$720.95 more than was actually returned to the plaintiff. The defendant alleged the contract to be, in effect, that he would work the sulphurets for \$17 per ton, and return the "bar,"—

that is, the total amount of bullion obtained from the sulphurets; in other words, that he did not agree to obtain and account for at least 90 per cent. of the assay value, but that he would only account for so much gold as he obtained from the sulphurets, less his working charges of \$17 per ton. The cause was tried by a jury, and a verdict returned for the defendant. Plaintiff's motion for a new trial was denied, and it appeals from the judgment and from the order denying said motion.

Counsel for appellant concedes that there is a conflict in the evidence as to what the agreement was between the parties, and that therefore the defendant's version of it, having been adopted by the jury, is conclusive upon appeal; but insists that it appears from the testimony of the defendant himself that he did not return to plaintiff all the gold obtained by him from the sulphurets he worked for the plaintiff. This contention cannot be sustained. The defendant testified, in substance, that he did deliver all the gold he obtained, and we find no testimony to the contrary. But we understand counsel's contention in this regard to be that defendant should have obtained 90 per cent. of the assay value of the sulphurets, and that he failed to do so; and he makes the estimate that there is in the tailings retained by the defendant, and which he never offered in return, \$530, which the assay of the tailings shows remained therein, and was not extracted by the defendant. The evidence shows that after the defendant had worked part of the sulphurets he was dissatisfied with the result, and communicated that fact to the plaintiff. He also admits that he stated to the plaintiff, at the time the contract or agreement was originally made, that he ought to obtain 90 per cent. of the assay value of the sulphurets. If, from fraud, lack of skill, or from carelessness or negligence in working the sulphurets, a large amount was lost in the tailings, it might be that the plaintiff would have had a cause of action for negligence or want of skill, and the assay of the tailings would have shown approximately the amount of damages. But there is no allegation in the complaint of a character tending to sustain such a cause of action, but the cause of action is based upon an agreement that he would obtain and return, or return, whether obtained or not, at least 90 per cent. of the assay value of the sulphurets delivered to him, and more if more should be obtained. Nor is there any allegation or evidence of any custom or agreement that the tailings should belong to or be delivered to the plaintiff. The evidence tends to show that the sulphurets were rebellious and difficult to work, but there is no evidence tending to show that the defendant did not honestly and faithfully work them, nor that he did not return to plaintiff all the gold obtained. Some alleged errors of law occurring upon the trial are specified in the statement, but none of these are noticed

or commented upon in appellant's brief. We have examined these exceptions, however, but find no error justifying a reversal of the judgment. The judgment and order appealed from should be affirmed.

We concur: BELCHER, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

RAUER v. WOLF et al. (S. F. 441.)
(Supreme Court of California. Nov. 27, 1896.)

DISMISSAL—SETTING ASIDE—DISCRETION.

It is not an abuse of discretion to refuse to set aside a dismissal for failure to file an amended complaint within the required time, where the affidavits of the attorneys, as to the existence of an oral stipulation for the extension of the time to file the complaint, are contradictory.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by J. J. Rauer against J. Wolf and others. There was a judgment for defendants, and plaintiff appeals. Affirmed.

G. H. Perry, for appellant. Wal. J. Tuska, for respondents.

BELCHER, C. The plaintiff brought this action to recover damages for the alleged breach of a written contract entered into by the defendants, of San Francisco, with H. Brunhild & Co., of the city of New York, relative to the sale on the Pacific coast of a certain brand of champagne. The contract was dated February 5, 1891, and was to run for five years. The complaint was filed May 20, 1895, and alleged that, prior to the commencement of the action, H. Brunhild & Co. transferred and assigned to the plaintiff all their right, title, and interest in and to their claim and demand against defendants for damages under the contract. A general and special demurrer to the complaint was interposed and sustained, and plaintiff was allowed 10 days to amend. No amended complaint was filed, and on October 16, 1895, judgment was entered dismissing the action, and awarding costs to defendants. On November 8, 1895, the plaintiff, pursuant to previous notice, moved the court to set aside the said judgment, upon the ground that it was taken against him through his inadvertence and excusable neglect. In support of the motion, plaintiff read his own affidavit and the affidavit of one J. I. Macks, and his proposed amended complaint; and, in opposition thereto, the defendants read the affidavit of their attorney, Wal. J. Tuska, and the deposition of Henry Brunhild, taken in the city of New York. The court denied the motion, and from that order the plaintiff appeals.

Section 478 of the Code of Civil Procedure

provides that the court may, "upon such terms as may be just, relieve a party or his legal representatives from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect." It is well settled, however, that applications for relief in such cases are addressed to the sound legal discretion of the trial court, and that its action in granting or refusing such an application will not be disturbed on appeal unless it clearly appears that the court abused its discretion. *Woodward v. Backus*, 20 Cal. 137; *Watson v. Railroad Co.*, 41 Cal. 17; *Dougherty v. Bank*, 68 Cal. 275, 9 Pac. 112; *Buell v. Emerich*, 85 Cal. 116, 24 Pac. 644. The question, then, is, does it appear that the court below abused its discretion in denying the plaintiff's application?

Plaintiff's affidavit read in support of the motion simply stated that the court had made an order requiring plaintiff to exhibit to defendants' attorney the assignment from L. Froman under and by which he commenced said action; that, upon making search for said assignment he discovered that it had been lost or mislaid; that his assignors resided in the city of New York, and that he wrote to them for a new assignment; that the assignors delayed sending the new assignment, and the same did not reach him until October 21, 1895; "that, as deponent is informed and verily believes, defendants' attorney, understanding that said assignment had been lost or mislaid, and understanding that a new one had been sent for, promised and agreed to extend the time to file an amended complaint until such time as said assignment should arrive." In his affidavit, Macks stated that he was acquainted with Tuska, defendants' attorney, and that he fully explained to Tuska the facts connected with the loss of the assignment first obtained, and had written and sent for another assignment; that Tuska promised and agreed to extend the time for filing an amended complaint until a new assignment was obtained; that on October 15, 1895, he presented to Tuska a stipulation extending plaintiff's time to file an amended complaint, and at the same time informed Tuska that he expected the assignment in a few days, but that Tuska, contrary to and in violation of his promise, refused to sign said stipulation or to grant further time; that on the next day he again saw Tuska, and again requested more time, but Tuska refused and stated that a default had already been entered. The proposed amended complaint was verified on the day of the hearing, November 8, 1895, and, as to the assignment, averred in the same language as in the original complaint that it was made to plaintiff by H. Brunhild & Co. Mr. Tuska, in his affidavit, stated: That until the 16th day of October, 1895, he never knew Mr. Macks to be in any wise connected with the said cause, and that before that day he never had any interview or conversation with him about the cause or

about the assignment in his affidavit referred to, or about any extension or extensions of time to be given or granted to the plaintiff to file an amended complaint, or for any other purpose. That he was never informed by Macks, or by any person connected with the plaintiff's cause, that plaintiff had an assignment from H. Brunhild & Co., or that the same had been lost, or that Macks or the plaintiff had written or sent for another assignment; and that he did not promise or agree to extend the time for filing an amended complaint until a new assignment was obtained. That the only person whom he ever knew or spoke to on behalf of or representing the plaintiff in the cause, until the 16th of October, was Mr. Perry, plaintiff's attorney of record. That on August 30th a motion made by him on behalf of defendants for an exhibition and inspection of the assignment alleged in the complaint to have been made by H. Brunhild & Co. to plaintiff was granted, but no such exhibition or inspection was ever made or granted. That on the same day, August 30th, the defendants' demurrer was argued before the court, and sustained; and, at the request of Mr. Perry, he consented that plaintiff might have 20 days' further time within which to file an amended complaint. That the 20 days expired on the 19th of September, and on the 21st day thereafter Mr. Perry requested him to grant 10 days' further time, which he did. That on September 30th Mr. Perry again requested a further extension of 10 days, and he complied with this request. That the last extension expired October 10th, and that about 9 o'clock of that night Mr. Perry's clerk came to his room, and asked for a further extension of time to file an amended complaint, saying that Mr. Perry's time had been so engrossed that he could not find the necessary time to prepare an amended complaint. That he did not wish to take advantage of Mr. Perry, and so consented to a further extension of 5 days, and at the same time told the clerk that he would grant no further extensions. That the last extension expired on October 15th, and no amended complaint was served or filed on that day, and no application was made for any further extension. That on the morning of October 16th he directed the clerk of the court to enter the default of plaintiff, and to enter judgment thereon in favor of defendants for costs. That on the 16th of October, after the default was entered, Mr. Macks called at his office, introduced himself, and asked him to grant a further extension of time to file an amended complaint. That "this was the first appearance of Mr. J. I. Macks on the scene; the first knowledge I had of his existence or his connection with the cause. I declined to set aside the default, or to grant the requested time. My refusal was absolute and unqualified." That he had read the affidavit of the plaintiff, and that he never had an understanding with him or with any one connected with his office, and never promised

or agreed to extend the time to file an amended complaint until such time as the assignment referred to should arrive. "Mr. Perry, the only person with whom I dealt in this cause representing the plaintiff, never requested of me such an indefinite and unlimited extension, but always limited the time in the stipulations prepared by him for the periods as I have already stated above, except the last extension, which I reduced from ten to five days." Mr. Brunhild, in his deposition, stated that his firm was engaged in the liquor-importing business in the city of New York, from July, 1890, to August 23, 1893; that the firm became insolvent, and on the last-named day its business was sold out to Leopold Froman, and the firm went out of existence. He did not, however, state that his firm ever sold or assigned to Froman any contract it may have had with defendants, or that it ever sold or assigned to the plaintiff any claim for damages it may have had against defendants.

It will be observed that it does not appear from his affidavit or otherwise that Mr. Macks had any connection with the case, or any authority to ask for an extension of time to file an amended complaint. It will also be observed that the statements of Mr. Tuska as to the extensions of time granted, and the circumstances under which they were granted, were in no way controverted or denied. Under the showing made, it cannot, therefore, in our opinion, be said that the court below abused its discretion in denying the plaintiff's motion. The order should be affirmed.

We concur: SEARLS, O.; BRITT, O.

PER CURIAM. For the reasons given in the foregoing opinion, the order is affirmed.

KENNEDY & SHAW LUMBER CO. et al. v. PRIET et al. (S. F. 452.)

(Supreme Court of California. Nov. 27, 1896.)

MECHANICS' LIENS — MATERIAL MEN — PERSONAL JUDGMENT AGAINST OWNER — VALIDITY.

In consolidated actions by several material men to foreclose their respective liens the contractor made default, and the owner answered that he was ready to pay to the persons claiming to be lienholders the balance due to the contractor, "whenever the respective amount due to each lienholder is determined." It was found that A. and B. had no liens. It was further adjudged that, after paying the claims of the lienholders, the balance of the amount admitted to be due to the contractor should be paid by the owner to A. and B. in proportion to their claims. *Held*, that the owner's offer did not run to A. or B., and that the personal judgment in their favor against him was void.

Department 2. Appeal from superior court, city and county of San Francisco; Eugene R. Garber, Judge.

Consolidated actions by the Kennedy & Shaw Lumber Company and others against Pierre Priet and others to foreclose mechanics' liens. From a personal judgment in fa-

vor of two of plaintiffs, defendant Priet appeals. Reversed.

D. H. Whittemore, for appellant. W. H. Jordan, for respondents.

HENSHAW, J. The Kennedy & Shaw Lumber Company, the Depew Planing-Mill Company, and others commenced their actions to foreclose mechanics' and material men's liens upon the property of appellant, Priet. The actions were consolidated. Fletcher, the contractor, suffered default. Priet, the owner, answered, setting up a contract with Fletcher, and naming the sum due and unpaid thereon. He averred that he was "ready to pay said sum of \$5,884.50 so due to said Fletcher to the said persons so claiming to be lien holders in proportion to their respective claims, whenever the respective amount due to each lienholder is determined." The court held the contract between Priet and Fletcher to be void. It decreed liens to all of the other plaintiffs excepting the respondents herein. It was held that they had no liens. A judgment was awarded the lienholders for the sale of the property, and the court, then subtracting the aggregate amount due the lien holders from the \$5,884.50 above mentioned, adjudged that Priet should pay the difference, amounting to \$1,700, to these respondents. It was intimated upon a former appeal in the case that this portion of the judgment (which is the portion here appealed from) was erroneous. *Lumber Co. v. Priet*, 45 Pac. 336. Respondents' arguments have not modified our views. The judgment is a somewhat curious attempt to treat the action as a creditors' bill. Respondents, not being lienholders, could neither have any recourse against the owner's property nor any personal judgment against him. *Lumber Co. v. Schmitt*, 74 Cal. 625, 16 Pac. 516; *Lumber Co. v. Williams* (Cal.) 31 Pac. 1128. Yet a personal judgment was what was given them. No support can be found for this judgment in the offer of the answer above quoted. Not being lienholders, the offer did not run to them. The portion of the judgment appealed from is ordered vacated and annulled.

We concur: TEMPLE, J.; McFARLAND, J.

KAUFMAN v. SUPERIOR COURT. (S. F. 438.)

(Supreme Court of California. Nov. 30, 1896.)

DISMISSAL—RIGHT OF PLAINTIFF TO DIRECT—FAILURE OF CLERK TO ENTER ORDER—ERRONEOUS ENTRY.

1. An order of dismissal having been erroneously entered, the defendants moved to correct the entry. Pending the motion, the plaintiff filed a dismissal of the action, entering directions therefor in the clerk's order book, and paying the fees. There was no demand for affirmative relief on the part of defendants on file at the time, but the clerk refused to enter the judgment, on the ground that the cause had been already dismissed. On hearing the mo-

tion the former order of dismissal was set aside, and immediately thereafter the defendant filed an answer and cross complaint setting up an affirmative demand. *Held*, that under Code Civ. Proc. § 581, providing that an action may be dismissed by the plaintiff at any time before trial, on payment of costs, where affirmative relief has not been sought by the defendant, the plaintiff was entitled to a dismissal in accordance with his directions to the clerk.

2. The failure of the clerk to comply with plaintiff's directions, and the subsequent filing of a cross complaint by defendant, could not defeat plaintiff's right to have the action dismissed.

3. The plaintiff's right to dismiss was not affected by the fact that there was already on the record an erroneous and invalid entry of dismissal.

In bank.

Application by O. H. Kaufman for a writ of prohibition against the superior court of San Francisco county. Writ granted.

Frank Shea, for petitioner.

HENSHAW, J. This is an application for a writ of prohibition to restrain the superior court, and William T. Wallace, judge thereof, from proceeding further in the action commenced in said court by O. H. Kaufman against Joseph E. Shain and others. The following facts are pertinent to this consideration: In 1889, Kaufman, who, as receiver of the estate of one Mackenzie, an insolvent, had in possession the sum of \$5,769.52 belonging to his said estate, commenced an action in interpleader against the creditors of Mackenzie, rival claimants of the fund. He paid the money into court, and obtained an order thereof restraining the defendants from proceeding against him and harassing him with litigation concerning it. Certain of the defendants demurred to the complaint, and the demurrers, coming on for hearing, were sustained in the absence of plaintiff and his attorney. A minute entry was made by the clerk to the effect that the court ordered the action dismissed. Thereafter, upon August 18, 1891, said Kaufman, believing the action to have been dismissed, in which belief the judge seems to have shared, sought and obtained an order permitting him to withdraw the money deposited by him, and, in pursuance of the order, did withdraw it. A judgment of dismissal had not at that time been entered, but such judgment was entered and recorded by the clerk upon March 14, 1894. Upon May 2, 1894, the attorney for Davis, another of the defendants, gave notice that he would move to correct the minute entry above referred to, and to vacate the judgment of March 14th. Notice was likewise served that an order would be sought compelling Kaufman to return into court the money so by him withdrawn. These motions were argued and submitted for decision upon May 25, 1894. Upon May 28, 1894, while the motions were under submission, Kaufman, by his attorney, filed with the clerk of the court a dismissal of the

action, and wrote an order on the clerk's order book, according to custom, directing entry of judgment of dismissal of the action, and at the same time paid the legal fees for entering such judgment, taking a receipt therefor. At this time there was not on file on the part of any of the defendants to the action any cross complaint, counterclaim, or claim of affirmative relief whatsoever. The clerk did not enter this judgment as directed, justifying his refusal to do so upon the fact that a judgment of dismissal (that of March 14th) was already of record. The demand for a judgment of dismissal was, however, filed, as appears by the affidavit of the deputy clerk who filed it. The dismissal was entered in the clerk's register. The time of its entry is in dispute; but it is an immaterial matter, which need not be determined. Upon August 20, 1894, the court made its order correcting the minute entry by striking therefrom the order of dismissal of the action, and at the same time set aside the judgment entered upon March 14, 1894. Immediately thereafter, and on said day, defendant Davis filed an answer and cross complaint. Kaufman appealed from this last order, but his appeal was not sustained. *Kaufman v. Shain*, 111 Cal. 16, 43 Pac. 393. Upon February 19, 1896, the remittitur was filed in the matter of this last appeal, and defendant Davis gave notice that he would apply to the court for an order compelling Kaufman to repay the moneys into court. Upon the following day, the clerk, at the request of plaintiff's attorney, entered the judgment of dismissal demanded upon May 28, 1894. Kaufman is still assignee of the estate of the insolvent, and in another department of the said court his accounts as assignee have been presented for and are awaiting settlement. He insists that the order which the court is about to make, compelling him to repay the moneys into court, and all other and further threatened proceedings in said action, will be in excess of jurisdiction, and void; and he bases this upon the contention that he had a right to dismiss the action upon May 28, 1894, and that the action was legally dismissed upon said date.

Under section 581 of the Code of Civil Procedure an action may be dismissed by the plaintiff at any time before trial, upon payment of costs, provided a counterclaim has not been made, or affirmative relief sought, by the cross complaint or answer of the defendant. This language is general. The article "an" is equivalent to "any," and the provisions of the section are applicable to an action in interpleader such as this, as well as to other forms and causes of action. The plaintiff, Kaufman, then, had the legal right to dismiss his action before the filing, upon the part of any of the defendants therein, of an answer seeking affirmative relief. Upon May 28, 1894, he took every affirmative step required by the statute for this purpose. He

filed with the clerk of the court a dismissal. He wrote an order therefor in the clerk's order book, and paid the legal fees for entering such a judgment. At that time none of the defendants had made answer. There was on file, neither by answer nor by cross-complaint, any claim to the fund or for affirmative relief. If plaintiff was at that time entitled to dismiss his action, the failure of the clerk to perform his ministerial duties by entering the dismissal in the register, and causing a proper judgment of dismissal to be entered in his judgment book, should not and cannot be allowed to affect the substantial rights of the parties; in other words, if plaintiff at that time had the right to dismiss his action, and had taken all the proper steps to that end, that right could not be impaired or lost by the refusal of the clerk to perform a plain duty, or by the subsequent filing of a cross complaint by one of the defendants, or by both of these circumstances. The judgment afterwards entered by the clerk upon February 20, 1896, will be considered, in determining the respective rights of the parties, as having been entered upon May 28, 1894, if, as has been said, it was the duty of the clerk at that time to have entered it. And that this was the clerk's plain duty there can be no doubt. Plaintiff's right to dismiss his action with legal form and effect could not be impaired by the fact that a judgment of dismissal, improvidently, irregularly, and illegally entered, was upon the books. This irregular judgment of March 14, 1894, was not of the procurement of the plaintiff. He, as well as the judge of the court, accepted it, for a time at least, as being regular and legal. That it proved not to be did not deprive him of his statutory right to dismiss the action of his own motion. He took all proper steps to this end before any answer or cross complaint upon the part of any of the defendants was sought to be filed, and at a time when his right to dismiss was absolute. In *Hinkel v. Donohue*, 90 Cal. 389, 27 Pac. 301, a not dissimilar state of facts was presented. Plaintiff filed a dismissal of his action, but judgment of dismissal thereon was not entered. Thereafter defendant appeared and filed an answer, whereupon plaintiff gave notice that he would upon a later date move the court to strike out the answer, and to enter a judgment of dismissal in the action nunc pro tunc. Defendant, before the date of the hearing of the motion, filed a cross complaint, and contended that the action was not dismissed until judgment of dismissal had been entered, and that, by the filing of his cross complaint, the right of plaintiff to dismiss the action was lost. It was held that the plaintiff had the right to have the action dismissed at any time before trial, upon the mere filing of the dismissal, and to have judgment entered thereon accordingly, and that the judgment so entered is to be regarded as having been made at the date of the notice of the motion. So, here, to preserve the substantial rights of the parties, the judgment

entered upon February 20, 1896, will be held to relate to the date of the demand for the dismissal of the action. Let the writ issue as prayed for.

We concur: McFARLAND, J.; TEMPLE, J.; HARRISON, J.; VAN FLEET, J.

EVANS v. JOHNSTON. (Sac. 78.)
(Supreme Court of California. Dec. 2, 1896.)
DISMISSAL—WHEN EFFECTIVE—ABATEMENT—
EVIDENCE.

1. An action is pending, and constitutes good ground for a plea in abatement in a second action for the same cause, until a judgment of dismissal is entered therein, though an order for its dismissal has been made and entered on the minutes of the court.

2. Incompetent testimony will not be stricken out on motion, where given without objection.

Department 2. Appeal from superior court, Lassen county; W. T. Masten, Judge.

Action by J. F. Evans against Robert Johnston, administrator. Judgment for plaintiff, and defendant appeals. Reversed.

Spencer & Raker, F. C. Spencer, and A. L. Shinn, for appellant. Goodwin & Goodwin, for respondent.

TEMPLE, J. This action was brought to foreclose a mortgage of real estate, executed by one Joseph Sivley, in favor of plaintiff, on the 12th day of June, 1885. Said Sivley died December 10, 1886, and was owner of the real estate at the time of his death. The mortgage was given to secure the payment of a note for \$400 and interest. It became due June 12, 1886. This suit was commenced June 23, 1894. Defendant, Johnston, was appointed administrator of the estate of Joseph Sivley June 10, 1887, and is still such administrator. July 19, 1887, plaintiff commenced an action in the superior court of Lassen county to foreclose this mortgage, and caused summons to be issued on the same day. Nothing further was done in the case until January 20, 1894, when an order dismissing the case without prejudice to a new action was made by the court, and entered in its minutes. On the 28th day of July, 1887, and within the time allowed by law for the presentation of claims against the estate, plaintiff presented to the administrator his claim upon the note, duly verified, and the same was then allowed by the administrator. It is found that the mortgage was also presented as a part of the plaintiff's claim, but this finding is challenged as one not supported by the evidence. According to the transcript, a copy of the mortgage was not attached to and presented with the claim, nor was it described or reference made to the date, volume, or page of its recordation. The mortgage was, therefore, not presented. The answer contains denials of the presentation of the claim and of nearly all the allegations contained in the complaint, and sets up several defenses, to wit: (1) Payment; (2) a former action for same cause; (3) pend-

ing of another action between the same parties on the same cause of action; and (4) statute of limitations. The points presented on the appeal arise upon certain specifications of the insufficiency of the evidence to support the findings. The appeal was taken within 60 days after rendition of judgment.

First, in regard to the plea in abatement. It was shown or admitted that the cause of action in the former case was the same as in this, and the parties are also substantially the same. As already stated, that action was dismissed, on motion of the plaintiff, by the court, and an order to the effect duly entered in the minutes of the court. Again, after this action was commenced, and the plea on abatement had been interposed, the court again, on motion of the plaintiff, ordered the former action dismissed as of January 20, 1894. According to the rule laid down in *Moore v. Hopkins*, 83 Cal. 270, 23 Pac. 318, a dismissal then was a sufficient answer to the plea in abatement. But unfortunately, so far as the record shows, on neither occasion was there a judgment of dismissal entered. Counsel for respondent says that a judgment in due form was entered by the clerk. If so, since the finding was challenged as not being sustained in this respect by the evidence, it was the duty of the respondent to see that the bill of exceptions as settled contained the evidence showing the fact. As the bill does not contain such evidence, we must presume that there was none. Several cases are cited in which this court has held that, until a judgment of dismissal is entered, the action is still pending. *Brady v. Times-Mirror Co.*, 106 Cal. 56, 39 Pac. 209; *Page v. Page*, 77 Cal. 83, 19 Pac. 183; *Page v. Superior Court*, 76 Cal. 373, 18 Pac. 385; *Barnes v. Barnes*, 95 Cal. 173, 30 Pac. 298. It is true that, after an order dismissing the case has been entered in the minutes, a defendant could not then prevent a dismissal by filing an answer containing a counterclaim before the actual entry of judgment. The plaintiff, who in a proper case has himself ordered it to be dismissed, or has obtained an order of dismissal from the court, cannot thus be defeated. Judgment will be entered nunc pro tunc. *Kaufman v. Superior Court* (filed November 30th) 46 Pac. 904. But until judgment the court has not lost jurisdiction; nor could the defendant appeal from the judgment of dismissal; and if, notwithstanding the order of dismissal, an answer is filed, and the court proceeds with the trial, and judgment is entered, such judgment cannot be attacked, even in a direct proceeding. *Barnes v. Barnes*, supra. It follows that the plea in abatement should be sustained.

2. The motion to strike out the evidence given by the plaintiff in regard to matters which occurred before the death of Sivley was properly denied. The evidence was admitted without objection.

3. The objection to the finding that the plaintiff presented for allowance his said mortgage or a claim secured thereby, that the same is not supported by the evidence, must be sus-

tained. This has already been sufficiently discussed.

No question is made on this appeal in regard to the statute of limitations. Several other points are made, but they are all such as may not arise upon another trial, or will be differently presented. Judgment reversed.

We concur: McFARLAND, J.; HARRISON, J.

PEOPLE v. THOMPSON. (Cr. 159.)
(Supreme Court of California. Nov. 30, 1896.)

CRIMINAL LAW—APPEALABLE ORDERS.

An appeal from an order fixing the day for the execution of a sentence of death will be dismissed where it appears that the day so fixed has long since passed.

In bank. Appeal from superior court, Los Angeles county; B. N. Smith, Judge.

W. H. Thompson was convicted of a crime, and sentenced to death. From an order fixing the time of execution, the defendant appeals. Dismissed.

Ben. Goodrich, D. K. Trask, and Wm. A. Harris, for appellant. Atty. Gen. Fitzgerald, for the People.

PER CURIAM. This is an appeal from an order appointing a day for the execution of the judgment of death pronounced against the defendant. At the time the day was so appointed an appeal was pending from an order refusing a new trial, and the point made here (if it can be said that any point was made) was that it was error to execute the judgment pending that appeal. The time for execution of the judgment was fixed for May 22, 1896. As that time has long since passed this appeal is of no further interest, and is therefore dismissed.

UNION TRANSP. CO. v. BASSETT et al.
(No. 15,899.)¹

(Supreme Court of California. Oct. 15, 1896.)

STATE HARBOR COMMISSIONERS—REASONABLENESS OF REGULATIONS—QUESTION OF LAW—INJUNCTION—HEARSAY EVIDENCE—HARMLESS ERROR.

1. Under Pol. Code, § 2524, authorizing the state harbor commissioners to make "reasonable" regulations concerning the management of the property intrusted to them, and to assign suitable wharves for the exclusive use of vessels, the courts may review the regulations of said commissioners, and declare them invalid, if unreasonable.

2. Whether a regulation of the board of state harbor commissioners changing the docking place of a steamboat company, and requiring it to land its passengers and freight at a different wharf from that to which it had previously been assigned, is unreasonable, is a conclusion of law, to be deduced by the court from the facts proved.

3. In an action to enjoin the state harbor commissioners from enforcing a resolution requiring plaintiff steamboat company to change its landing place from the C. wharf to the M.

wharf, 400 yards distant, it appeared that nearly all the freight carried by plaintiff and its competitors consisted of wheat and flour, which the shippers generally required should be delivered at the B and C. wharves, near which the market for produce of this kind had been established for more than ten years; that, as there was no sale for such produce at or near the M. wharf, carriers could not procure it as freight to be delivered there; that there was active competition for freight between plaintiff and another carrier, which had a landing place at the B. wharf; that said order, if executed, would discriminate against plaintiff, to its great detriment, and compel it to suspend business as a carrier of freight on that route; and that, though the C. wharf was overcrowded, there were boats, other than plaintiff's, which might be removed without prejudice to their interests. *Held*, that the resolution was unreasonable, and its execution would be enjoined.

4. In an action to restrain the state harbor commissioners from enforcing a resolution requiring plaintiff steamboat company to change its landing place, the testimony of plaintiff's secretary as to a conversation with one K., in which the latter suggested that he could, for a consideration, effect a compromise, was inadmissible; there being nothing to show that K. was in any way connected with defendants, or that they authorized or knew of his proposal to plaintiff.

5. In an action to restrain the state harbor commissioners from enforcing an order requiring plaintiff steamboat company to change its landing place, the admission of hearsay evidence tending to impugn defendants' good faith in passing the order of removal is harmless, if the court finds that the order is unreasonable, since such finding warrants the relief sought, irrespective of the motives of defendants.

Commissioners' decision. Department 1.
Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Action by the Union Transportation Company against Charles Bassett and others, composing the board of state harbor commissioners, to enforce the execution of a resolution passed by said board. From a decree for plaintiff, and from an order denying a motion for a new trial, defendants appeal. Affirmed.

F. S. Stratton and Tiley L. Ford, for appellants. Reddy, Campbell & Metson, for respondent.

VANCLIEF, C. The plaintiff is a corporation organized under the laws of this state for the purpose of carrying passengers and freight on steamboats to be run upon the navigable waters of this state, and especially between the cities of Stockton and San Francisco. In February, 1892, plaintiff applied to the defendants for a suitable berth for their boats at some one of the wharves under their control or supervision at the water front of the city of San Francisco. Thereafter, on June 8, 1892, the defendants assigned and set apart berth room for plaintiff's boats at and upon Clay street wharf, which plaintiff thereafter occupied and used as a landing place for its boats, and by discharging freight thereon and receiving passengers and freight therefrom daily, until the commencement of this action. On August 2, 1892, the board of harbor commis-

¹ Rehearing granted.

sioners adopted a resolution by which their former order assigning berths to the steamers of the plaintiff at Clay street wharf was rescinded, and berths were assigned to them on Mission street wharf, to be selected by an agent of the plaintiff and the chief wharfinger. This order was opposed and protested against by the plaintiff on the ground stated in the complaint, and was immediately followed by a protest, signed by about 40 firms of produce and commission merchants, as follows: "Gentlemen: We, the undersigned, produce and commission merchants of San Francisco, learning that steps are being taken to remove the steamers of the Union Transportation Company from Clay street wharf to Mission street wharf, most earnestly protest against such change, for the following reasons: First. The center of the produce and commission business in San Francisco is, and has been for many years, on Jackson, Washington, and Clay street wharves, and it would be injurious to such business to have steamers bringing produce to land as far away as Mission street. Second. It is for the interest of the general public, as well as ourselves, to have a competing line of steamers on the San Joaquin river; and, if the Union Transportation Company's line of steamers should be compelled to go to Mission street wharf, it would preclude the possibility of our having produce shipped by that line, as we would be unable to dispose of it at Mission street wharf. Third. From actual experience, it has been proven that to undertake to transfer the produce business to Mission street wharf results in destroying that business. Wherefore, we most respectfully ask that the steamers Captain Weber and Dauntless be permitted to land at Clay street pier, as heretofore." On August 25th the board passed another resolution relating to the same matter, as follows: "On motion of Mr. Alexander, seconded by Mr. Brown, the following resolutions were adopted: Resolved, that any use heretofore permitted of the Clay street wharf, on the harbor front of city and county of San Francisco, by the Union Transportation Company, a corporation, for the docking of its vessels at said wharf, and the use thereof by said company of any portion of said wharf for wharfage or other purposes, be, and the same is hereby terminated. This resolution to take effect, and such use terminate, on Tuesday, the 27th day of September, 1892. Resolved, further, that said company be notified at least thirty days prior to said September 27th of said notice and resolution, and termination on that day, and of such use; that on said day such further proceedings, by resolutions or otherwise, will be taken to render effectual the termination of any use by said company. Also, that a copy of this resolution be served by the chief wharfinger, or secretary or assistant secretary of this board, on the president,

secretary, manager, or other officer or agent in charge of said company's affairs in this city and county; and that a copy be forthwith addressed by mail to said company, at Stockton, California. Resolved, further, that the chief wharfinger be, and he is hereby, instructed to execute the purposes of this resolution, and of any further resolutions hereafter passed in the premises. Resolved, that, after September 27th next, said company be assigned to the use of Mission street wharf, at such berth or place to be mutually agreed upon by the chief wharfinger and agent of said company: provided, however, that nothing in the resolution contained shall be intended or construed as giving or granting to said company any right to the use of said wharf other than that they may now have, or may have already had, by operation of law."

On October 5, 1892, this action was commenced to enjoin the defendants from enforcing said resolutions and orders; and such injunction pendente lite, or until the further order of the court, was then issued and served on defendants. The grounds for the injunction are stated in the complaint as follows: "That the character of the freight carried by plaintiff is of that nature as to absolutely require its delivery and receipt upon or at the Clay street wharf (or the Washington street wharf, which is the next adjacent wharf thereto), and that those for and from whom it is possible for plaintiff to get freight to carry on said steamers cannot and will not furnish or give any goods, produce, or substance to plaintiff, or any one else engaged in the same or other business, who cannot or will not deliver and receive the same at either of the wharves above named; and it has been the custom for more than ten years last past to receive goods and produce of the character carried by plaintiff at said wharves. That plaintiff, relying upon said order of defendants giving it berth room at said Clay street wharf, made and entered into a large number of freight contracts and agreements with other persons to hereafter carry to and from, and receive and deliver upon, said Clay street wharf, large quantities of freight, for the carriage of which it is to receive large sums of money from said patrons. That during the times herein mentioned the plaintiff has been, and now is, actually engaged in sharp and active competition with other corporations and persons who have had, and now have, berth room at the wharves above mentioned, and who are now engaged in the same business as plaintiff. That said defendants have unreasonably, arbitrarily, and without any cause or reason whatever, save for the purpose of discriminating against plaintiff, and giving to its competitors an advantage over it, made an order and passed a resolution changing the berth and landing place of plaintiff's said steamers from said Clay street wharf to Mission street wharf, which said last-mentioned wharf is distant quite a long way southerly

from said Clay street wharf, and is entirely outside of the district within which plaintiff can get any freight or passengers to carry on or continue its business with said patrons, as the said Mission street wharf is so situated that neither passengers, nor persons shipping the character of freight that plaintiff carries, will patronize any vessels landing at the same. And plaintiff further alleges that the going to and coming from said Mission street wharf will be attended with great danger to life and property. And, upon information and belief, plaintiff alleges that said order was made by said defendants arbitrarily, and for the purpose of injuring and damaging plaintiff, and for the purpose of discriminating against plaintiff in the conducting and carrying on its said business, and to prevent it from carrying on the said business, and to prevent plaintiff from exercising its rights as a common carrier, and to prevent it from carrying freight and passengers from and to the city of San Francisco, and to utterly ruin and destroy its business, and render its property useless and of no value, in order that its competitors in said business aforesaid should thus obtain advantage over plaintiff, and that plaintiff should be driven entirely out of business. Plaintiff further alleges that said defendants have notified plaintiff that it must immediately cease landing at said Clay street wharf, and that it must hereafter land at and receive and unload freight from its said steamers at the said Mission street wharf, and not elsewhere. Plaintiff further alleges that the effect of said order, if enforced, will be to drive plaintiff out of the business entirely, and will also make it liable to be proceeded against for breach of contract by the various persons with whom it has contracted to receive, deliver, and carry freight from and to said Clay street wharf for a failure to do so, and that said order is unjust, unreasonable, and unfair, and was not made for the convenience of the public, but will kill and prevent all competition in the future, and will compel plaintiff to hang up its boats and vessels, if the said order is carried into effect." The answer of defendants denies the allegations of the complaint relating to the grounds upon which the injunction was asked.

The court, without a jury, found the facts and conclusion of law as follows:

"Finding of Facts. All and singular the allegations contained and set forth in the complaint, and in the amendment to the complaint, at the trial, are true in point of fact, and were true at the commencement of the action. The order made by the defendants in the month of August, 1892, purporting to change the docking place and berth room of the plaintiff's boats from Clay street, where they then were, was arbitrary, and was made without any just cause, and without any reason or motive therefor on the part of the defendants, other than that of injuring and damaging the plaintiff in its transportation business, and to assist others, its rivals and com-

petitors in the business, in forcing the plaintiff to discontinue the running of its said boats. The orders and action of the defendants in and about the removal of the plaintiff's said boats from said Clay street wharf were not made or taken by the defendants for any reason or upon any ground or with any intent such as they have alleged in their answer therein, but were made only with the intent and for the purpose on their part as is alleged in the complaint in their behalf.

"Conclusion of Law. There must be a decree for the plaintiff as prayed in the complaint, and it is so ordered."

A final decree was entered in accordance with these findings. The defendants' motion for a new trial having been denied, they have appealed from the final decree, and also from the order denying their motion for a new trial.

Appellants contend that none of the findings of fact from which the conclusion of law was drawn are justified by the evidence. The evidence is voluminous, occupying 270 pages of the printed transcript. Then there are 26 specifications of insufficiency of evidence, occupying 9 pages, and consisting principally of statements of "what the evidence fails to show." Eleven of these specifications apply to issues tendered by the affirmative allegations in the answer of the defendant; and these specifications are "that the evidence fails to show" that any one of such affirmative allegations in the answer is true, and that none of such allegations are justified by the evidence. All this, however, is in perfect accord with the findings of the court. Perhaps the attorney for defendants did not intend what he plainly said in these so-called specifications, and they are here referred to only for the purpose of calling attention to the incoherency, indefiniteness, and tiresome prolixity of the statement on motion for new trial. Then there are 49 specifications of errors in law, occupying 15 pages. The principal specification of insufficiency of evidence urged here is that the evidence is insufficient to justify the finding that the order for the removal of plaintiff's boats was unreasonable and unjust. This, however, is not a fact, but, in cases of this kind, is a conclusion of law, deduced by the court from the facts and circumstances proved. Dill. Mun. Corp. (4th Ed.) § 327; Ex parte Frank, 52 Cal. 610. The facts and circumstances found by the court surely support the conclusion of law that the order of the board removing plaintiff's boats was unreasonable and unjust. What were the findings of fact which support this conclusion of law? And were such findings justified by the evidence? The material substance of these findings is as follows: That nearly all the freight carried to San Francisco by plaintiff and its competitors consists of that kind of produce of land, exclusive of wheat and flour, which is customarily landed and delivered at the Clay street and Washington street wharves, and which is generally, by

the shippers thereof, required to be delivered at those wharves, for the reason that the market place for such produce, for more than 10 years, has been concentrated and established at and near those wharves, and that carriers could not procure such produce as freight, to be delivered at Mission street wharf, because it is 400 yards south of Clay street wharf, where such produce is seldom delivered, sold, or called for; that, from the time plaintiff commenced to run its boats (June 8, 1892) until it was ordered to remove from Clay street to Mission street, there was an active and sharp competition for freight between plaintiff and another line of boats on the same route, and having a landing place at Washington street wharf, to wit, the California Navigation & Improvement Company; that the order of removal unfairly and unnecessarily discriminated between plaintiff and said California Navigation & Improvement Company, to the great detriment of the former and advantage of the latter, and that said order was arbitrarily made, without just cause, and for the purpose of thus discriminating against plaintiff and in favor of its competitor, and not for the purpose or with the intent alleged in the answer of the defendants; and that, if executed, the order for removal would compel plaintiff to suspend the carrying business on said route, to its great and irreparable injury. I think these findings are supported by a considerable preponderance of evidence, except in so far as they may tend to impute dishonest motives to the commissioners, but that, independently of the motives of the commissioners, the findings support the judgment.

The powers of the commissioners are defined, and their duties prescribed, so far as they relate to the subject of this action, by section 2524 of the Political Code, as follows: "The commissioners shall have possession and control of that portion of the Bay of San Francisco [described], together with all the improvements, rights, privileges, easements and appurtenances connected therewith, or in any-wise appertaining thereto, for the purposes in this article provided. * * * The commissioners shall have power to make reasonable rules and regulations concerning the control and management of the property of the state which is intrusted to them by virtue of this article; * * * [shall] set apart and assign suitable wharves, berths or landings for the exclusive use of vessels." "Where the legislature, in terms, confers upon a municipal corporation the power to pass ordinances of a specified and defined character, if the power thus delegated be not in conflict with the constitution, an ordinance passed pursuant thereto cannot be impeached as invalid because it would have been regarded as unreasonable if it had been passed under the incidental power of the corporation, or under a grant of power general in its nature. In other words, what the legislature distinctly says may be done cannot be set aside by the courts because they may deem it to be unreasonable, or

against sound policy. But where the power to legislate on a given subject is conferred, and the mode of its exercise is not prescribed, then the ordinance passed in pursuance thereof must be a reasonable exercise of the power, or it will be pronounced invalid." *Dill. Mun. Corp.* § 328. Under the rule thus expressed by Judge Dillon, even if the power to make regulations and to assign berths and landing places to vessels had been given to the harbor commissioners without any express qualification, it would nevertheless have been subject to the limitation that such regulations and orders assigning berths, etc., must be reasonable, otherwise invalid. The legislature, however, did not leave this limitation upon the power of harbor commissioners dependent on implication, but expressly limited it to the making of reasonable regulations, and to the setting apart of suitable wharves, berths, etc., to vessels. Therefore it cannot be doubted that the courts may review the regulations and orders of the harbor commissioners in respect to the requisite attribute of reasonableness, and pronounce them invalid if found to be unreasonable. As applicable to this point, see, also, *Ex parte Frank*, 52 Cal. 606; *Ex parte Kearny*, 55 Cal. 225; *Spring Valley Waterworks v. City of San Francisco*, 82 Cal. 283, 22 Pac. 910, 1046; *Mayor, etc., of Baltimore v. Radecke*, 49 Md. 217; *Tugman v. Chicago*, 78 Ill. 405; *Dill. Mun. Corp.* § 319 et seq., and notes.

It is urged by the defendants that the slip between Clay street wharf and Washington street wharf, in which plaintiff's boats were first assigned a berth, was overcrowded, and for that reason it was absolutely necessary that some of the boats should be removed therefrom to some other wharf. Conceding this, it does not appear that it was necessary to remove plaintiff's boats to another wharf which was unsuitable to its business. On the contrary, it appears that at least two other boats that occupied berths in said slip, to wit, the *General McDowell*, a government boat, and the steamer *Humboldt*, might have been removed to other wharves suitable to their business, and without prejudice to their interests. When asked why they determined to remove plaintiff's boats, rather than one of the other lines, Mr. Alexander, a member of the board, answered: "To move the other vessels would not accomplish what we wanted to accomplish particularly. The *Humboldt* had already been moved once. She had been moved from her place at Clay street to Washington, and, even if it accomplished the object, I don't think the board would be inclined to move her from pillar to post." No reason was given why the *General McDowell* could not have been removed. What object the board "wanted to accomplish particularly," other than to relieve the crowded condition of Clay street wharf, appears only by the further testimony of Mr. Alexander, who said: "The condition of that part of the city was

becoming so crowded, we recognized the fact it was necessary to distribute this line of business [produce business] all over the city. To concentrate it for the next twenty years is out of the question." Yet the policy of the law creating and governing the harbor commission seems to favor the concentration of each kind of business, and it is obvious that the public would be better accommodated by such concentration. One who desires to buy a particular kind of goods, say lumber, coal, fish, or farm produce, must find it very inconvenient to travel two or three miles along the water front to ascertain where he can buy to the best advantage. Therefore I think the court properly found against the plea of necessity.

It is urged that the courts will not declare an order or regulation of the governing board of a municipal corporation void, except in a plain case of abuse of authority. Conceding this, it does not follow that the courts are powerless to give relief in all cases where the evidence is conflicting, though it may be admitted that the appellate court should scrutinize the evidence more closely in cases of this kind than in ordinary cases, and require the record to show a satisfactory preponderance of the evidence in favor of the findings of the trial court. In other words, the findings of fact from which the unreasonableness of the order, regulation, or by-law is deduced should clearly appear to be justified by the evidence, and the facts found should clearly warrant the conclusion of unreasonableness; and such, I think, are the conditions shown by the record in this case. Indeed, there is no substantial conflict of evidence, except upon the issues as to the necessity of the order of removal above considered, and as to the extent of the injury to plaintiff. Speaking of the injurious effect of the order of removal on the business of plaintiff, Mr. Alexander said, "The opinion of the board was—and my individual opinion—that at first it might be something of a hardship upon them to move, but we believed in time they could build up a business." And it was not denied that the effect of the removal might be such as alleged in the complaint and found by the court.

Of the 49 specified errors in law, the only one urged here is that the court erred in admitting certain hearsay evidence. C. M. Keniston, a witness for plaintiff, was permitted to testify to a conversation he had with a Mr. Knapp after the final order of removal was made. The testimony was objected to on the ground that it was irrelevant, immaterial, and mere hearsay. The objectionable testimony was, in substance: That Knapp said to Keniston, who was the secretary of the plaintiff corporation, that he (Knapp) believed it possible that all the factions could be compromised so that plaintiff could be allowed to remain at Clay street wharf; that he knew more about the case,

probably, than any one else; that he thought he was in a position to compromise the matter, but, of course, it would require money to do it,—he thought, about \$2,000; parties would have to be fixed up in order to allow plaintiff to remain at Clay street wharf. That Knapp repeated the substance of the above to Mr. Gillis, the president of the plaintiff, and that witness and Mr. Gillis declined to pay any sum for the purpose of effecting a compromise. It appeared that Knapp had acted as the private detective for the California Navigation & Improvement Company about two years immediately preceding this conversation with Keniston, and that he had assisted in procuring the order removing plaintiff from Clay street wharf; but there is nothing in the evidence tending to prove that he was in any wise connected with the defendants, nor that any one of the defendants authorized, or even knew of, his proposals to Keniston or Gillis. That this testimony of Keniston was not only mere hearsay, but irrelevant and immaterial, and for these reasons should have been rejected, admits of no doubt, but that defendants were not injured thereby seems quite as clear. The only possible effect it could have had was to cast a mere suspicion upon the motives and good faith of the defendants; but, as above remarked, the judgment rests firmly on the finding that the order of removal was unreasonable and unjust, independently of the motives or good faith of the commissioners, and must have been the same whether their motives were good or bad. The relief asked and given may be regarded as indivisible, and such as must have been wholly given or entirely denied, and could not have been diminished or affected by proof of good faith of defendants. The following cases were cited to the point that the hearsay evidence was harmless, and that the judgment should not be reversed for the error of admitting it: *Norwood v. Kenfield*, 30 Cal. 394; *Kisling v. Shaw*, 33 Cal. 425; *Mott v. Reyes*, 45 Cal. 380; *De La Guerra v. Newhall*, 55 Cal. 21; *Silvarer v. Hansen*, 77 Cal. 579, 20 Pac. 136; *Jones v. Tallant*, 90 Cal. 386, 27 Pac. 305; *Clavey v. Lord*, 87 Cal. 413, 25 Pac. 493.

The decree enjoins the board from enforcing the order of removal to Mission street, "and from unlawfully requiring plaintiff to dock its boats elsewhere than at said Clay street wharf." Appellants contend that this gives the plaintiff a perpetual vested right to dock at Clay street wharf and enjoins defendants from interfering therewith for any cause. But such is not the meaning of the decree. The board is not enjoined from removing plaintiff's boats from Clay street wharf for any lawful cause, nor from making any reasonable regulation or order. I think the judgment and order appealed from should be affirmed.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

PEOPLE v. THOMPSON. (Cr. 121.)
(Supreme Court of California. Nov. 30, 1896.)
TRAIN WRECKING — DENIAL OF NEW TRIAL — APPEAL — ERRONEOUS INSTRUCTIONS.

1. Under Pen. Code, § 1176, which provides that the instructions given or refused, with the indorsements thereon, form a part of the record, and the rulings may be reviewed on appeal as though embodied in a bill of exceptions; and section 1237, which provides for an appeal from the judgment of conviction, and from an order refusing a new trial,—defendant may prosecute both appeals, and can have alleged error in the giving of instructions considered on either of them, but not on both.

2. Under Pen. Code, § 1172, which provides for an exception to an order denying a new trial, such order may be reviewed on an appeal from the judgment on a proper record; and there is no necessity for a separate appeal from the order, though both are provided for by section 1237.

3. Under Pen. Code, § 218 (St. 1891, p. 283), making it a felony to throw a switch, etc., with intent to derail any train, or board any train with intent to rob it, etc., where the indictment charges defendant with throwing a switch with intent to derail a passenger train, "and" boarding a passenger train with intent to rob the same, it charges the single offense of train wrecking; and it is error to charge that the jury must convict defendant if they find that he boarded an express car, and, by putting in fear the messenger in charge, stole anything in the custody of the messenger, where the evidence shows that, if defendant entered the car, it was after it had been derailed.

4. There was no evidence to show that defendant's accomplice boarded the train with intent to rob it, and that, in the perpetration of that offense, the train was ditched; hence it was error to further charge that if an accomplice threw a switch with intent to derail a train, and if he unlawfully boarded the train with intent to rob the same, and defendant aided and abetted, the jury must find defendant guilty, since the instruction assumed the existence of evidence which had not been given, and because it was not applicable to any fact in the case.

McFarland, J., dissenting.

In bank. Appeal from superior court, of Los Angeles county; B. N. Smith, Judge.

W. H. Thompson was convicted of train wrecking, and, from an order denying him a new trial, appeals. Reversed.

For former report, see 43 Pac. 748, 111 Cal. 242.

Ben Goodrich, D. K. Trask, and Wm. A. Harris, for appellant. Atty. Gen. Fitzgerald, for the People.

TEMPLE, J. The defendant was convicted upon a charge of derailing a railroad train, and unlawfully boarding a train with intent to rob the same. This appeal is from an order refusing a new trial, and the only points made are that the court erred in giving certain instructions. An appeal from the judgment was separately taken, and, there being no bill of exceptions to be settled,—as the points arose upon

the demurrer,—that appeal reached here first, and was long since decided. 111 Cal. 242, 43 Pac. 748. On the former appeal from the judgment no points were made with reference to the instructions, and, as there was no bill of exceptions, such points could not have been presented to the best advantage. Still the defendant might have had a bill of exceptions on the appeal from the judgment, in which so much of the evidence as was necessary to illustrate his points could have been set out. The Code expressly provides (section 1176, Pen. Code) that the instructions given or refused, whether in writing or taken down by the reporter, with the indorsements thereon (showing whether given or not), constituted a part of the record, and the rulings may be reviewed on appeal as though embodied in a bill of exceptions. In criminal cases, if a motion for a new trial is made, it must be denied before judgment is entered against the defendant. Section 1172, Pen. Code, provides for an exception to an order denying a new trial. The order denying a new trial is therefore an order made before judgment, and may be reviewed on an appeal from the judgment. There is therefore no real necessity for an appeal from an order denying a new trial. Still, the Code provides for an appeal from the judgment and from an order denying a new trial. Pen. Code, § 1237. Now, it is suggested that because there has been an appeal from the judgment, upon which the alleged errors in giving the instructions might have been considered, they cannot be considered on this appeal; that is to say, a defendant is at liberty to present such questions either upon an appeal from the judgment or upon an appeal from an order refusing a new trial, but he cannot do both. Furthermore, it is contended an affirmance of the judgment on appeal is final as to questions which were or might have been presented on that appeal. It would therefore follow that if he could have had a record which would have presented his point, and did not, he has lost his right to be heard. Such, as I understand the suggestions, are the reasons urged for refusing to consider the exceptions on this appeal, in reference to which it may be said that both methods are provided by the statute. The motion for a new trial is an independent proceeding in the case, and it often happens in civil cases that a judgment is set aside on a motion for a new trial after it has been affirmed on appeal. It could not be so vacated by the trial court in a criminal case, simply because the judgment cannot be entered until the motion for a new trial has been disposed of. But, as there may be an appeal from the judgment, and afterwards an appeal from the order refusing a new trial, the judgment might be affirmed here on an appeal from the judgment, and afterwards set aside on an appeal from an order denying a new trial as in civil cases. It is entirely a matter of statutory control, and, since both appeals have been provided, I can see no reason why the court should refuse to hear either. It would be going beyond any case within my knowledge

to hold that a determination of an appeal is conclusive upon all questions which might have been raised upon any record which, under the rules of practice, might have been made. If conclusive as to the instructions, it would be equally conclusive as to every question which might be made on a motion for a new trial; for, as already stated, every point made on a motion for a new trial could be considered on an appeal from the judgment with a proper record. The true rule, in my opinion, is that defendant may prosecute both appeals, but can have but one decision of the same point.

This precise question has, I think, been decided by this court after most mature consideration in *Sharon v. Sharon*, 79 Cal. 633, 22 Pac. 26, 32, 131. That was a civil case, but, so far as affects this question, I see no difference in principle. The reasoning there adopted applies with at least equal force here. The court said: "The law of this state permits two appeals in the same case,—one from the judgment, and the other from the order denying a new trial. Both of these appeals have a direct effect on the judgment, and, if successful, may vacate it entirely or modify it, as the court may determine. These appeals may both be prosecuted and be pending in this court at the same time, as was the case here until the appeal from the judgment was disposed of. The fact that this court has declared a rule of law in deciding the appeal first reached for decision, and upon which no action has or can be taken until the second appeal is also disposed of, cannot, by reason of the rule invoked by the respondent, prevent the court from fully investigating and deciding the second appeal to the extent of modifying or wholly changing its former decision, if it be satisfied that an error has been committed. The case must be regarded as within the control of this court until both appeals are determined."

The questions now raised as to the instructions were not presented on the appeal from the judgment, and as to one instruction, at least, could not have been fully presented without a bill of exceptions. On the appeal from the judgment it was decided that the information, in charging that the defendant willfully, unlawfully, and feloniously threw out a switch with intent to derail a passenger train, and "did then and there willfully, unlawfully, and feloniously board a passenger train, * * * with intent then and there to rob said passenger train," did not charge two offenses. The act under which the prosecution was had was an act adding one section to the Penal Code. It was said by the court on the former appeal that "this act arose from the necessity of the times, and was created for the purpose of stopping train wrecking and punishing train wreckers. The act so declared its purpose in terms, and, aside from one clause thereof, such purpose is patent upon the most casual inspection of its provisions." Again, speaking of this one clause in which the purpose was less manifest, the court said: "The whole tenor and purpose of

the act is directed against train wrecking, and this is true as to subdivision 2 equally with all other subdivisions. At first glance that clause would seem to be directed towards the suppression of the crime of robbery; but the offense of robbery is only incidentally involved, and the prevention of the wrecking of the train, and the consequent and natural results following of injury and death to the passengers, is its prime purpose. Whatever else the clause imports, it means acts of violence upon the train. It imports to a more or less degree the subjection of the employés to the robbers, the menace and duress of the employés, a loss of the control of the train by them, fright upon their part, and even death. These things being so, the probabilities of destruction to the train and passengers follow nearly as necessarily as such probabilities would follow from the misplacing of a switch or the removal of a rail. Hence we say that every part and clause of the act is directed towards the suppression of train wrecking." To charge, then, displacing a switch with intent to derail a train, and to board the same with intent to rob the same, is to charge but a single offense, because the probable, or at least the possible, effect of each act, is to wreck the train. The one offense charged is train wrecking. Furthermore, the act is not designed to prevent or punish robbery, save when that is an incident in train wrecking. We also derive from this a definition of the phrase "robbing a train." It is to take from the persons having charge of the train, by violence and intimidation, the control and management thereof, with intent to take from it, or from a person upon it, something of value. Train wrecking must be such a destruction of a train as will endanger human life. It must be of an operative train,—one being used.

Upon the former appeal the court was considering the demurrer alone, and, of course, understood the information to charge that the defendant boarded such a train. The evidence discloses, however, without conflict, that the defendant did not board, or attempt to board, the train until after it had been wrecked. At that time the train was not an operating train, and could not have been wrecked. Therefore, when the defendant boarded the train with the intent to rob it,—if he can be said to have done so,—the act could not by any possibility have contributed towards wrecking the train. This would not necessarily have prevented the conviction of the defendant. He could still have been convicted and punished for throwing out a switch for the purpose of wrecking the train. The evidence was sufficient to sustain a conviction upon that ground; but, unfortunately, the jury was instructed by the court as follows: "If the jury believes from the evidence that the defendant, W. H. Thompson, with Alva Johnson, at the county of Los Angeles, in the state of California, on the 15th day of February, 1894, boarded an express car in a passenger train, on the Southern Pacific

Railroad, at Roscoe Station, in said county, and by force and violence, or by putting in fear of some injury to the person of the messenger in charge of said car, did rob, steal, and carry away any money of any value then in the custody or under the care or in the control of said messenger, then the jury should find the defendant guilty." Under the opinion rendered upon the former appeal, boarding a train under such circumstances as the evidence in this case tends to prove could not constitute the crime of train wrecking. The jury were told that they must convict the defendant of the offense of train wrecking if they found that he boarded an express car, which without conflict the evidence shows was not then, when the evidence tends to show he boarded it, a part of a train which could have been operated or wrecked, and, by putting in fear the messenger in charge of the car,—not of the train,—did rob or steal anything of value in the custody of the messenger; that is to say, although they should find that defendant did not derail the train, and had not interfered with it until after it had been wrecked, still they must find him guilty of this offense if, after the train had been wrecked, he robbed the express messenger while on the car. The so-called "train" was not then in reality a train. It had no engine, and could not have been operated or wrecked. The express car did not then constitute a part of a train. Judged by the opinion rendered on the former appeal, as well as by general rules of law, the above instruction is wrong.

There are additional objections to the third instruction. In it the jury were told that if Alva Johnson threw out a switch with the intent to derail a train, and if he unlawfully boarded the train with intent to rob the same, and, in the perpetration of such offense, one Masters was killed, and defendant aided and abetted, they must find the defendant guilty. Evidence of the killing of Masters was objected to at the trial, and admitted over defendant's objection. By this instruction the attention of the jury is called to it as a material circumstance tending to show the guilt of the defendant. The jury were told that if Johnson boarded the train with the intent to rob it, and the train was thereby ditched, and Masters killed, defendant, if he aided and abetted, was guilty. There was no evidence which tended to show that Johnson boarded the train with intent to rob it, and that, in the perpetration of that offense, the train was ditched. On the contrary, the evidence shows without contradiction that Johnson did not board or attempt to board the train until after it had been ditched. The instruction was therefore erroneous, in that it assumed the existence of evidence which had not been given, and because it was not applicable to any fact in the case.

For these reasons, the judgment is reversed, and a new trial ordered.

I concur: HENSHAW, J.

I dissent: McFARLAND, J.

BEATTY, C. J. I concur in the judgment, and generally in the opinion of Justice TEMPLE, but I think a word should be added with reference to the novel practice pursued in this case, of bringing up the appeals from the judgment and from the order denying a new trial separately and upon different records. This case fully illustrates the proposition that such practice is productive of delay and unnecessary expense, and that it is as inconvenient as it is unusual. For the purpose of preventing such proceedings in the future, I would suggest that this may easily be done by following the directions contained in section 1246 of the Penal Code, which impose upon the county clerk the duty of printing and transmitting the record in criminal cases. The Penal Code (sections 1170-1173) provides for various bills of exceptions to be settled before, during, and after the trial, all or any of which may be used in support of an appeal from the judgment; but "the bill of exceptions" especially referred to in section 1246 is that provided for in section 1171, viz. the bill of the exceptions taken at the trial, and which must be presented for settlement within 10 days after the judgment. If no such bill of exceptions has been settled when the appeal is taken, and the time for its presentation has not elapsed, the clerk should wait till it has been settled, or until the right to have it settled has been lost or waived, before printing the record; and, when he does print it, he should, as the almost universal practice is, and as I think the statute clearly intends, print the entire record, including all bills of exception, in one record for both appeals.

HARRISON, J. (concurring). On the appeal from the judgment against the defendant (111 Cal. 242, 43 Pac. 749), the instructions to the jury were not considered or passed upon by this court. The sufficiency of the information, as tested by the demurrer, was the only matter of law then considered or determined. In the prevailing opinion it was said: "A demurrer to the information was overruled, and the reversal or affirmance of this judgment is dependent upon the legal soundness of the action of the trial court in that behalf." And Mr. Justice Henshaw said, in his dissenting opinion: "This hearing is on demurrer only." It follows that only the propositions of law then determined fall within the rules governing the "law of the case." These rules rest upon the principles of an estoppel, and it is evident that, as the action of the trial court which is now under review was had anterior to the decision of this court upon the appeal from the judgment, none of the elements of an estoppel can be invoked for the

purpose of preventing a review of its action. The "law of the case" is properly invoked when, upon a former appeal in the same action, this court has declared the rule of law governing the rights of the litigants in that action. But, as the judgment of this court upon the other appeal was rendered without determining or even considering the directions to the jury, and would not have even the force of a precedent in another case involving the correctness of the same instructions, much less can it be held conclusive in the same case, when their correctness is for the first time directly challenged.

The court erred in giving to the jury the third instruction, but, in my opinion, for a different reason from that assigned by Mr. Justice TEMPLE. This instruction is as follows: "If the jury finds from the evidence that Alva Johnson, at the county of Los Angeles, state of California, on the 15th day of February, 1894, did willfully, unlawfully, and feloniously throw out a switch, at Roscoe Station, on the Southern Pacific Railroad, in said county, with intent then and there to derail a passenger train, and did then and there willfully, unlawfully, and feloniously board said passenger train, with intent then and there to rob the same, and, in the perpetration of said offense, said train was ditched, and one Masters was killed, and that the defendant, W. H. Thompson, was present then and there, aiding, abetting, and counseling said Johnson in the perpetration of said offense, then you will find the defendant guilty, as charged in the information." The instruction follows the language of the information, and, as it was held on the appeal from the judgment that the facts set out in the information charged the defendant with but a single offense, that portion of the instruction which refers to the ditching of the train and the killing of Masters, "in the perpetration of said offense," was authorized by the evidence connecting the defendant with the ditching of the train; and the "offense" referred to in the instruction must have been understood by the jury as including both the throwing out of the switch, as well as boarding the train. The fact that the train had been ditched before the defendant boarded the express car was immaterial, if the two acts were part of a single transaction, and done in pursuance of an original purpose; and, if the defendant threw out the switch for the purpose of enabling him the more readily to board the train for the purpose of robbing it, it was immaterial that the train had been brought to a standstill before he actually got upon the car. Neither would a temporary purpose of abandoning the original plan, after the train had been brought to a stop, change the character of the offense if such original plan was resumed and carried into effect. The instruction assumes that there was evidence that Johnson threw out the switch, and that the defendant was

merely present, aiding, abetting, and counseling him in the perpetration of the offense, whereas the only evidence in reference thereto was that of Johnson himself, who testified that the switch was thrown out by the defendant. This portion of the instruction could not, however, have prejudiced the defendant; but the former portion was clearly prejudicial to him, in presenting to the jury the fact that Masters was killed, and thus indirectly charging him with a homicide. No charge of this nature was made in the information, and, although evidence of the killing of Masters was introduced before the jury against the objections of the defendant, there was no issue upon that fact which he was called upon to meet, and the jury should not have been allowed to consider that fact for the purpose of determining his guilt. The order denying a new trial should be reversed, and a new trial granted.

PEOPLE v. RATZ. (Cr. 186.)

(Supreme Court of California. Nov. 30, 1896.)

RAPE—AGE OF PROSECUTRIX—EVIDENCE—UNDER AGE OF CONSENT—BELIEF OF GREATER AGE NO DEFENSE.

1. On a trial for rape, where the prosecutrix was under the age of consent, she may testify to her age, though her knowledge of it is derived from statements of the parents or from family reputation.

2. The Family Bible record is admissible in evidence to show a child's age, when it is proved that the book is the Family Bible, and the handwriting or authorship of the entries need not be proved.

3. On a trial for rape, where the prosecutrix was under the age of consent when the crime was committed, defendant cannot, as against the evidence, urge as a defense that he had reason to believe, and did believe, that she was over that age.

Department 2. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Philip Ratz was convicted of rape, and appeals. Affirmed.

Geo. Hayford, for appellant. Atty. Gen. Fitzgerald, for the State.

HENSHAW, J. The defendant was convicted of the crime of rape, in having had carnal intercourse with a female child under the age of 14 years, and not his wife. The intercourse was admitted. The age of the child was a question in dispute. It was conceded that the intercourse was not had through force or violence, so that if, at the time thereof, the child was over the age of 14 years, the crime of rape was not committed. The child herself testified to her age, as well as to the date of the intercourse. Her evidence went to show that at the time when Ratz carnally knew her she was under the age of 14. The evidence of the child was admissible. A person's age may be proved by his own testimony, and the

fact that knowledge of that age is derived from statements of the parents or from family reputation does not render it inadmissible. *Hill v. Eldridge*, 126 Mass. 234; *Cherry v. State*, 68 Ala. 29; *Bain v. State*, 61 Ala. 75; *Rosc. Cr. Ev.* *272. The testimony of the mother of the child also went to prove the fact that at the date in question she was under the age of 14. The mother, when on the witness stand, was shown a book, and testified that it was hers, and that it was her Family Bible; that it contained the record of her family. This book contained, among other entries, the name of the child, and the date of her birth. The mother testified that it was correct. Objection was made to the introduction of the record by defendant, upon the ground that it appeared that the record was in English; that the mother did not know how to read or write English, and could not tell whether or not the record was correct. The admissibility of the book did not depend upon proof of handwriting or authorship of the entries. It depended upon proof of the fact that it was the Family Bible, which evidence was afforded by the testimony of the mother. As is well said in *Hubbard v. Lees*, L. R. 1 Exch. 255: "To require evidence of the handwriting or authorship of the entries [in a Family Bible] is to mistake the distinctive character of the evidence, for it derives its weight, not from the fact that the entries are made by any particular person, but that, being in that place, they are to be taken as assented to by those in whose custody the book has been."

Appellant contends that, even though the child be shown to have been under the age of 14 years, yet that, if the defendant had reason to believe, and did believe, that she was over the age of 14 years, then there was an absence of the necessary intent to constitute a crime, and that he should be acquitted. He asked the court to give an instruction to the jury embodying this as a proposition of law. The proposed instruction was refused. The refusal is assigned as error. The claim here made is not a new one. It has frequently been pressed upon the attention of courts, but in no case, so far as our examination goes, has it met with favor. The object and purpose of the law are too plain to need comment, the crime too infamous to bear discussion. The protection of society, of the family, and of the infant, demand that one who has carnal intercourse under such circumstances shall do so in peril of the fact, and he will not be heard against the evidence to urge his belief that the victim of his outrage had passed the period which would make his act a crime. In *People v. Fowler*, 88 Cal. 136, 25 Pac. 1110, the defendant was charged with placing a girl under the age of 18 years in a house of prostitution. The same claim here made was there urged, but it was said that one who violates the section

acts at his peril, and cannot defend himself on the plea of ignorance as to the age of the child. The same principle was reannounced in *People v. Dolan*, 96 Cal. 315, 31 Pac. 107, where, under a similar charge, a like claim met with the same response. The whole question is learnedly and elaborately discussed in *Reg. v. Prince*, L. R. 2 Crown Cas. 154. It was there proved that the defendant did take the girl, and that at the time of her abduction she was under 16 years of age; but it was likewise proved that the defendant bona fide believed, and had reasonable ground for believing, that she was over 16. The bench of 16 judges, with but one dissenting voice, held that neither defendant's honest belief, nor the reasonable grounds afforded him for such belief, relieved him from the consequences of his act. The judgment and order appealed from are affirmed.

We concur: **McFARLAND, J.; TEMPLE, J.**

DONNELLY v. ADAMS et al. (S. F. 182.)
(Supreme Court of California. Nov. 27, 1896.)
BUILDING CONTRACT—REFERENCE TO PLANS—IDENTIFICATION—PAROL EVIDENCE.

Where a building contract refers for a description of the buildings to be erected to certain plans and specifications of an architect, "which are signed by the parties hereto," such plans are an essential part of the contract, without which it is incomplete, and cannot form the basis of a recovery; and where there are no plans "signed by the parties" the contract cannot be completed by parol evidence to identify others as the ones referred to.

Department 2. Appeal from superior court, city and county of San Francisco; *J. C. B. Hebbard*, Judge.

Action by Thomas Donnelly against Frank P. Adams and others. From the judgment both parties appeal. Reversed on defendants' appeal.

Gale & Peery, Chas. S. Peery, and R. Percy Wright, for appellants. Stafford & Stafford, for respondent.

HENSHAW, J. These are cross appeals by plaintiff and defendants. The action was by the assignor of an original contractor to foreclose a lien under a building contract. The court adjudged plaintiff to have a lien, and decreed foreclosure thereof.

Defendants' claim that the contract between the parties is void first invites attention. The contract provided that the contractor should furnish the necessary labor and materials to erect a certain building "and other works shown and described in and by and in conformity with the plans, drawings, and specifications for the same, made by B. E. Henriksen, the authorized architect employed by the owner, and which are signed by the parties hereto, and are to be kept and remain in the office of said architect, subject to the inspection of the parties hereto and others concerned in said erection." What

purported to be the plans and specifications were admitted in evidence over the objection of defendants. They were not signed by the parties to the contract. In *Worden v. Hammond*, 37 Cal. 64, the contract was to build a barn "agreeable to the draft, plan, and explanation hereto annexed, marked 'A.'" No plan or specifications were attached, but an unsigned paper was produced, which plaintiffs testified contained the specifications referred to. The paper was admitted, and this court said: "The specifications are an essential part of the contract, and are as material as the price of the work or the terms of payment; for the contract price was not to be paid until the barn was completed according to the specifications. It is not indispensable that the specifications be signed by the party to be charged, but it will be sufficient if they are referred to with certainty. But, where the reference is false, it cannot be helped out by oral evidence. Here the specifications were referred to as annexed to the contract; and when the plaintiffs were permitted to introduce in evidence, as the specifications referred to, a paper which they admitted was never attached to the contract, if they did not thereby contradict the written contract, they added to its terms by oral evidence. The two instruments, taken together, contain all the necessary terms of the contract; and, if the written contract had contained a reference to the specifications in such a manner that their connection would be apparent upon their production, it would be regarded as a sufficient compliance with the statute. But this could not be established by parol evidence without a violation of the statute requiring the contract to be in writing, and signed by the party to be charged thereby. *Boydell v. Drummond*, 11 East, 157." In *Willamette Steam Mills Lumbering & Manuf'g Co. v. Los Angeles College Co.*, 94 Cal. 229, 29 Pac. 629, the same question again arose. There the contract provided that the work should be done "conformable to the drawings and specifications made by R. B. Young, architect, and signed by the parties, and hereto annexed." It did not appear in that case whether or not the drawings and specifications were in fact signed, but it did appear that they were not attached; and it is said: "The insertion of this clause in the contract made the drawings and specifications an essential part thereof, as material as was the price of the work or the terms of payment; and until they were 'annexed' to the contract, so that its entire terms could be ascertained by mere inspection, and without oral testimony, the contract was only inchoate, and not complete, and could not form the basis of a recovery. *Worden v. Hammond*, 37 Cal. 63." The only distinction between the contract in the case at bar and those considered in the cases cited lies in the fact that in the present instance the reference is to specifications "signed"; in the other it was to specifications "attached." But the one reference is no less significant and essential than the other. If the specifications be not signed, or if they be not attached, in either case there is a false

reference in a written contract which cannot be aided by parol evidence. In both cases the contract was left "inchoate, and not complete, and could not form the basis of a recovery." It follows that the judgment must be reversed upon defendants' appeal. We cannot, therefore, discuss the more interesting point presented by both appeals, namely, the conclusiveness or inconclusiveness of the architect's certificate to the effect that the work had been done according to contract. The contract being void, it is void as to all of its terms and conditions. The architect's certificate, deriving whatever force it may possess from the contract itself, is deprived of all efficacy, and whatever discussion might be had upon the question would be merely obiter, and without binding force. The consideration is thus eliminated from the case, and must be reserved until it is presented upon proper occasion. The modification of the judgment asked for on plaintiff's appeal is denied. Upon defendants' appeal the judgment is reversed, and the cause remanded.

We concur: MCFARLAND, J.; TEMPLE, J.

LASSEROT v. GAMBLE. (S. F. 483.)
(Supreme Court of California. Oct. 15, 1896.)
FORCIBLE DETAINER — WHAT CONSTITUTES — EVIDENCE.

1. A lease provided that on failure of the lessee to perform certain covenants the lessor might recover possession without notice or demand. After the lessee had been in peaceable possession for several months, the lessor, claiming a violation of the lessee's covenants, ordered him to leave the premises, but did not give the written notice required by Code Civ. Proc. §§ 1161, 1162. On the lessee's refusal to leave, the lessor had him arrested on a warrant charging a public offense, and during his absence took possession, without the consent of the employé in charge, and refused to surrender possession to the lessee for more than five days after demand therefor. Code Civ. Proc. § 1160, provides that a person who, during the absence of the occupant, unlawfully enters on real property which for more than five days prior thereto has been in the peaceable possession of such occupant, and refuses to surrender for five days after demand therefor, is guilty of forcible detainer. *Held*, that defendant was liable under said act.

2. In an action against said lessor by the lessee for forcible detainer it was competent to show that plaintiff was arrested at defendant's instance, for the purpose of getting him away from the premises, so that defendant might enter and take possession thereof.

3. In forcible detainer, under Code Civ. Proc. § 1160, evidence of title in defendant is inadmissible.

Commissioners' decision. Department 1. Appeal from superior court, Santa Cruz county; J. H. Logan, Judge.

Action by Peter Lasserot against A. W. Gamble for the forcible detention of certain lands. From a judgment for defendant, and from an order refusing a new trial, plaintiff appeals. Reversed.

Charles B. Younger and Spalsbury & Burke, for appellant. W. D. Storey, for respondent.

given plaintiff three days' notice in writing, as provided in sections 1161, 1162, Code Civ. Proc. Under these circumstances the verdict should have been for the plaintiff, and the judgment and order appealed from should be reversed, and the cause remanded.

We concur: SEARLS, O.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and the cause remanded.

HORTON v. JACK. (L. A. 140.)

(Supreme Court of California. Nov. 19, 1896.)

EXECUTORS—VALIDITY OF SALE BY—ACTION FOR CONVERSION—DEFENSE—APPEAL—SETTLEMENT OF BILL OF EXCEPTIONS.

1. A sale of property of a deceased person by his executrix passes no title unless it is confirmed by the probate court (Code Civ. Proc. § 1517), and a subsequent administrator can recover from the purchaser for its conversion.

2. While an executrix may be credited, under Code Civ. Proc. § 1632, with the payment of a debt of the estate which has not been presented and allowed, such credit can only be given by the probate court as therein provided, and it cannot be pleaded by a purchaser of property from an executrix by a sale which was not confirmed, as a defense to an action for conversion by a subsequent administrator, that the proceeds, for which the executrix never asked or received credit, were applied in payment of a debt of the estate which was never presented for allowance.

3. An objection that a bill of exceptions was not served within the required time, where the appellee proposed amendments, but made no objection in the court below, cannot be raised on appeal.

4. Where a proposed bill of exceptions and amendments were delivered to the clerk, and by him to the judge, who thereafter settled the same in open court, when attorneys for both parties were present, without objection being made, the objection that no notice of the time for settlement of the bill was given cannot be thereafter made.

Department 1. Appeal from superior court, San Luis Obispo county; V. A. Gregg, Judge.

Action by Joseph Horton, administrator with the will annexed of James A. Brown, against R. E. Jack. Judgment for defendant, and plaintiff appeals. Reversed.

M. C. Hester and Graves & Graves, for appellant. Wilcoxon & Bouldin and J. M. Wilcoxon, for respondent.

VAN FLEET, J. This is the second appeal in this case. On the first appeal the cause was remanded for a new trial as between the plaintiff and the defendant, Jack. The opinion on that appeal will be found in 87 Pac. 652, where the facts are fully stated. The second trial resulted in a verdict and judgment for defendant, and plaintiff appeals from the judgment and from an order denying his motion for a new trial.

It is contended by appellant (and this is the

only question which need be considered) that the facts disclosed on the second trial are substantially the same as on the first trial, and that the decision on the former appeal is, therefore, the law of the case, and requires a reversal of the judgment. Respondent claims that the evidence is now substantially different, in that it shows that the debt to pay which the property in controversy was sold was the debt of the deceased, and not that of Catherine J. Brown; that the executrix had the right to pay that debt from the funds of the estate, although it was not formally presented against the estate, and although such payment was not approved by the probate court; and that the taking of the property to pay that debt did not amount to a conversion.

1. The facts as to the debt in question, as proved on the second trial, did not differ from those disclosed on the first trial. It appeared then, as it does now, that the deceased, in his lifetime, guarantied the payment by Kenney of such sums as should be advanced to him by the bank of which the defendant, Jack, was president; that some such advances were made during the lifetime of the deceased; that after his death his widow, Catherine J., made a new guaranty. In her own name, of the like character; and that all the subsequent advances were made under the latter guaranty. It was not then shown, nor is it shown now, what was the amount of the advances made before Brown's death, further than that it was "between two and three thousand dollars." It was admitted by the answer that the defendant, Jack, received of the proceeds of the sale in question \$4,213.10, which he turned over to the bank, and that there still remained unsold a portion of the property of the value of \$367.80. Mr. Jack testified on the second trial that upon the death of Mr. Brown, Mrs. Brown "assumed whatever indebtedness there was, and it became her indebtedness," and that after Mr. Brown's death he "treated it as her individual indebtedness." It also appears, as it did before, that no claim against the estate for any portion of this indebtedness was ever presented to the executrix. Under these circumstances the statement of Mr. Jack that the proceeds of this sale were used to wipe out the indebtedness of the deceased, James A. Brown, was merely a statement of the conclusion of the witness, not supported by the facts to which he testified. Moreover, the answer (which was not amended in that respect) expressly alleges that the proceeds of the sale were applied and credited upon an indebtedness of Catherine J. Brown to the bank, and that it was originally agreed that they should be so applied; and no mention is made of any indebtedness of the estate. We are, therefore, unable to perceive that the facts on the second trial differ at all from those on which our former opinion was predicated; and the propositions of law there decided are, therefore, decisive of the case on

this appeal. *Benson v. Shotwell*, 103 Cal. 163, 37 Pac. 147.

2. No sale of any property of the estate of a deceased person passes any title unless it is confirmed by the probate court (Code Civ. Proc. § 1517); and although, under section 1632, the executrix might be credited with the amount of a debt of the estate paid by her without the affidavit and allowance prescribed by law, that credit could be allowed only by the probate court, and upon the evidence prescribed by that section. It follows that, even if this property had been sold by the executrix to pay a debt of the estate, that sale would not pass the title to the property without confirmation by the probate court; and the appropriation of the proceeds of the property by Jack to the use of the bank would be unlawful. The order of sale, upon which alone the authority of the executrix to sell this property could be based, was made upon the petition of the executrix, which recited that no claims had been presented, and that she knew of no debts or claims against the estate; and the order itself recites that, with the exception of two claims for small amounts, filed subsequent to the petition, there were no debts or claims against the estate except the cost of administration thereof. In her return of sales under this order the executrix reported that she had sold this property to satisfy her individual liability to the bank, and on this showing the court refused to confirm the sale. She also filed an account of the proceedings in the administration, in which she treated this property as still on hand, and did not ask or receive any credit for the payment of any debt of the estate. Whether or not, then, this sale was in fact made to satisfy a debt of the estate, it is clear that neither the sale nor the supposed payment was sanctioned by the probate court, and that, therefore, the title to the property remained in the estate; and under the decision on the former appeal the administrator was entitled to treat the property as converted by Jack, and to recover its value from him. Whatever equities the defendant may have against Mrs. Brown may be asserted upon distribution or in some other appropriate proceeding, but they constitute no valid defense to this action.

3. Respondent further contends that it now appears that there are no debts outstanding against the estate, and that notice to creditors was duly given, and that there was sufficient money in the hands of the executrix to pay all expenses of administration. It also appears, however, that none of this money has come into the hands of the present administrator, and that he has no funds for the payment of expenses of administration. But, furthermore, it was distinctly decided upon the former appeal that until distribution the administrator is absolutely entitled to the possession of all personal property of the estate, that any interference with that property by any person which has the effect of depriving the adminis-

trator of the possession is a conversion, and that he is entitled to recover therefor without proving an indebtedness to satisfy which the property is necessary.

4. Respondent objects to the consideration of the bill of exceptions on the ground that it was served more than 10 days after the service of the notice of intention to move for a new trial, and on the ground that "It was not settled until sixteen days after the amendments had been proposed, and then without any notice and over objection." The former objection was not taken in any way in the court below, though defendant proposed amendments, and, therefore, it cannot be considered here. *Hayne*, New Trial & App. § 145; *Id.* § 146, subd. 3; *Patrick v. Morse*, 64 Cal. 462, 2 Pac. 49. As to the latter objection, it appears that on June 27th defendant served his proposed amendments to plaintiff's bill, and that on the same day the bill and amendments were delivered by plaintiff to the clerk for the judge. They were delivered by the clerk to the judge on the same day. On "law day"—July 13th—the judge, without previous notice, settled the bill, the attorneys for both parties being present, and directed the bill to be engrossed by plaintiff within 10 days. No objection on any ground appears to have been interposed at that time. The engrossed bill was delivered to the judge within the 10 days allowed. On August 31st the judge, at the request of plaintiff, amended the engrossed bill by inserting certain instructions, defendant objecting on the ground that they were "not part of the bill as settled." Thereupon, for the first time, defendant "objected to the settlement of the bill because no notice was given of the settlement." This objection came too late; certainly so as to all of the bill except the three instructions inserted on that day. The settlement of the bill took place on July 13th, and no objection was made at that time. The bill having been delivered to the clerk, no notice of settlement was required from plaintiff. *Mellor v. Crouch*, 76 Cal. 594, 18 Pac. 685. If the failure of the judge to fix a time for the settlement and give previous notice thereof, under section 650, can ever invalidate the settlement of a bill when the attorneys for both parties are actually present, it certainly cannot have that effect unless at the time objection be made on that ground. As the statute only requires the judge to "designate the time at which he will settle the bill," and the clerk to "immediately notify the parties of such designation," it would seem that the judge, while holding court, and both parties being present, might designate that very time for the settlement of the bill. Such a designation, in the absence of anything showing an abuse of discretion, must be held sufficient. No objection having been taken at the time, it must be presumed that the defendant had an ample opportunity to be heard upon the settlement. We think, therefore, that the objections are not well taken, and that appellant is entitled to have

the bill of exceptions considered upon this appeal. The judgment and order are reversed, and the cause remanded for a new trial.

We concur: HARRISON, J.; GAROUTTE, J.

TAYLOR v. HILL, Sheriff, et al. (L. A. 60.)
(Supreme Court of California. Nov. 30, 1896.)
EXECUTION SALE—APPLICATION OF PROCEEDS—
PREFERRED CLAIM FOR WAGES—NOTICE
TO DEBTOR.

1. In an action under Code Civ. Proc. § 1206, to compel the application of the proceeds of a sale under execution to a claim for wages owed by the execution debtor, as a preferred claim, the complaint must allege that notice of the claim was given to the execution debtor, since, without such notice, there would be a taking of the debtor's property without due process of law; and the requirement is clearly implied in section 1207, which provides that, if the debtor disputes such claim, he must, "within ten days after receiving notice," file a verified statement, etc. 44 Pac. 336, reversed.

2. Under Act April 16, 1880, § 6, which makes the sheriff, as receiver of an insolvent, a mere custodian for safe-keeping of the tangible property pending the appointment of the assignee, he does not represent the insolvent in litigated matters, and notice to the sheriff is not notice to the insolvent.

In bank. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

For opinion in division, see 44 Pac. 336. Reversed.

V. E. Shaw, for appellants. Collier & Collier and D. L. Murdock, for respondent.

BEATTY, C. J. In the former opinion delivered in this case (44 Pac. 336) it was erroneously held that there was no appeal from the judgment, and accordingly the only questions considered were those presented by the appeal from the order denying a new trial. For this reason alone a rehearing was ordered, and, in disposing of the only question raised by the appeal from the judgment, we readopt the former opinion as to matters therein discussed. The question now to be determined arises upon the demurrer to the complaint which fails to allege that any notice of the claims of plaintiff and his assignors was given to the defendants in the attachment suit of *West v. Palmer & Co.* The statute (Code Civ. Proc. §§ 1206, 1207) does not expressly require service of notice of claims for wages upon the attachment or execution debtor, but it clearly implies that he is to have notice, for it expressly provides (section 1207) that if he disputes the claim he must, within 10 days after receiving notice, serve upon the claimant and the officer executing the writ a verified statement in writing, setting forth that no part, or not more than a specific portion, of said claim is justly due. The plain intention of the legislature is, therefore, that the debtor as well as the creditor shall have notice of the claim, and an opportunity to dispute it. And this, in-

deed, is essential to the constitutionality of the act, which would otherwise deprive the debtor of his property without due process of law. *Coscia v. Kyle*, 15 Nev. 394. It is claimed, however, on behalf of respondent, that, although no notice was given to the execution debtors, it was given to their legal representative. The complaint shows that on March 7, 1894, they were adjudged to be insolvent debtors, and the defendant herein, B. P. Hill, as sheriff, was appointed receiver of their several estates; and that after this date—on March 24, 1894—notice of the claim for wages was served upon him. But the sheriff, as receiver of an insolvent under the insolvent act, does not represent him for the purpose of defending actions, unless invested with a special authority in addition to that conferred by law. The statute makes him a mere custodian for safe-keeping of the tangible property, deeds, vouchers, etc., of the insolvent pending the appointment of the assignee, who alone has authority to represent the insolvent in litigated matters. Act April 16, 1880, § 6. The court erred in overruling the demurrer, and its judgment is for that reason reversed, and the cause remanded, with leave to plaintiff to amend his complaint.

We concur: VAN FLEET, J.; TEMPLE, J.; HENSHAW, J.

PEOPLE v. LARRABEE. (Cr. 153.)
(Supreme Court of California. Nov. 30, 1896.)
HOMICIDE—INSANITY AS A DEFENSE—PROVINCE OF
JURY—INSTRUCTIONS.

1. Upon a defense of insanity, where the evidence of the expert witnesses was conflicting, the finding of the jury as to the sanity or insanity of the defendant is conclusive.

2. An instruction that the defense of insanity is often resorted to when other means of escaping punishment is hopeless, and that though, when satisfactorily established, it must commend itself to the justice of the jury, they must examine it with care, lest a mere counterfeit of mental infirmity furnish immunity from guilt, was not improper.

In bank. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Frank H. Larrabee was convicted of murder, and appeals. Affirmed.

Geo. Hayford, for appellant. Atty. Gen. Fitzgerald, for the People.

HENSHAW, J. The defendant was tried and convicted of murder, the jury fixing the penalty at imprisonment for life. He prosecutes this appeal from the judgment. The killing was admitted. The defense was insanity. Appellant claims that the atrocity of the murder, the lack of motive for the crime, together with the other evidence in the case, established insanity by a clear preponderance. But, if circumstances of inhumanity and barbarity were to be held sufficient to prove the irresponsibility of

the perpetrator of a homicide, it would be but an invitation to the evil-minded to increase the number of their victims, and to make their crimes blacker, more horrible, and more infamous. Such circumstances may be evidence of insanity, but they may equally owe their existence to the promptings of a brutal and malignant spirit. In the present case no lack of motive appears. A jealous rage seems to have been the moving cause. Defendant cut the throat of his mistress, who, after tricking and deceiving him, and wheedling him out of his money, carried this and her favors to the arms of another lover. Upon the general question of insanity the evidence of experts was, as usual, conflicting, and the jury must be left as sole arbiters of the question.

The only other point which appellant presses upon our consideration is the alleged error of the trial court in giving the following instruction: "The defense of insanity is one which may be, and sometimes is, resorted to in cases in which the proof of the overt act is so full and complete that any other means of avoiding conviction and escaping punishment seems hopeless. While, therefore, this is a defense to be weighed fully, fairly, and justly, and, when satisfactorily established, must commend itself to the sense of humanity and justice of the jury, they must examine it with care lest a mere counterfeit of this mental infirmity shall furnish immunity to guilt." This is, in all essentials, identical with the instruction approved in *People v. Pico*, 62 Cal. 50. In *People v. Dennis*, 39 Cal. 625, and in *People v. Bumberger*, 45 Cal. 650, it was held to be proper for the trial court to instruct the jury to view the evidence upon the defense of insanity with care, lest feigned insanity might shield a defendant from the just consequences of his guilt. We have not observed that the defense of insanity has been employed since the decisions of these cases in a manner to make the caution less needful. The judgment appealed from is affirmed.

We concur: McFARLAND, J.; TEMPLE, J.; HARRISON, J.; VAN FLEET, J.

CITY OF SAN DIEGO v. HIGGINS et al. (L. A. 31.)

(Supreme Court of California. Dec. 1, 1896.)

LIMITATION OF ACTION—TAXES—ACTION TO ENFORCE.

An action to recover a personal judgment for taxes, and to enforce the tax lien on the land, is an action "upon a liability created by statute" (Code Civ. Proc. § 338, subd. 1), and must, therefore, be brought within three years, though Pol. Code, § 3716 et seq., gives taxes the effect of judgments. Temple, J., dissenting.

In bank. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Action by the city of San Diego against T. J. Higgins and others. There was a judgment for defendants, and plaintiff appeals. Affirmed.

William H. Fuller and Clarence L. Barber, for appellant. McDonald & McDonald, for respondents.

HENSHAW, J. The action was for the recovery of \$483.46, being the amount of municipal taxes levied by the plaintiff upon the property of defendant Higgins for the year 1887, with interest at the rate of 2 per cent. a month from January 1, 1888. A personal judgment against the defendant Higgins is asked, and it is also sought to subject the property to the lien of the taxes, principal, interest, penalties, and costs. The complaint was filed December 12, 1894. Of the several grounds of demurrer urged against the complaint, that which presents the question whether or not the action is barred by the statute of limitations is the only one which need be considered. On behalf of the demurrant it is claimed that plaintiff's right of action is barred by section 338 of the Code of Civil Procedure. For the complainant it is insisted that sections 3716-3718 of the Political Code, together with section 312 of the Code of Civil Procedure, provide a limitation for the commencement of actions such as this other and different from that contemplated by section 338 of the Code of Civil Procedure. Under the latter section this action, having been commenced more than three years after the right of action accrued, is clearly barred. Under appellant's claim there is no limitation of time fixed for the commencement of such an action, and it may therefore be prosecuted after the lapse of any number of years. This latter contention derives some support from the language of *Lewis v. Rothchild*, 92 Cal. 625, 28 Pac. 805, where it is said: "We think a different limitation is prescribed by section 3716 of the Political Code, as to liens created by title 9 of that Code, from that prescribed anywhere in title 2 of the Code of Civil Procedure." But this language is to be read in the light of the facts of the case. The action was to recover a deposit made upon the purchase price of a piece of land. The contract of purchase and sale provided for a return of the deposit and a vacation of the contract if a valid lien was found to exist upon the property, and was not removed by the vendor within a designated time. The lien in controversy was one for unpaid taxes, delinquent more than four years before the date of the agreement. This court was only called upon to declare whether or not such a lien was still a valid subsisting lien, and it held that it was, under the terms of section 3716 of the Political Code. The question of the enforcement of such a lien after the lapse of three years was not before the court at all. It might be, as suggested in *San Francisco v. Luning*, 73 Cal. 610, 15 Pac. 311, that the lien existed "without any provision for its enforcement, in which case it is simply a right without a remedy." In the latter case the action was brought to recover a

personal judgment only against defendant, it being pleaded that he "was indebted to plaintiff" in a certain sum for taxes. The opinion, therefore, properly holds that the action is not one upon a judgment, or to enforce a lien, and that, being a suit for the recovery of a personal judgment, the right of action was barred by the statute of limitations. The opinion, however, cites and considers with approval the case of *Nevada v. Yellow Jacket Silver Min. Co.*, 14 Nev. 220, which was an action identical with the one at bar in seeking to foreclose tax liens upon assessed property. The difference between our statutes and those of Nevada lies in the single fact that it is not declared by the Nevada law that a tax has the effect of a judgment. While recognizing this distinction, it is held in *San Francisco v. Luning* that the difference does not render the principles laid down in the Nevada case inapplicable under the laws of this state. In *Nevada v. Yellow Jacket Silver Min. Co.*, supra, the court said: "All that can be claimed under the statute is that the lien created continues indefinitely, or until the tax is paid, or the property is sold under tax sale. Does that fact establish what is claimed,—that the remedy to enforce collection by suit is barred?" After elaborate consideration, the conclusion arrived at is thus succinctly stated: "This, then, is our case upon the question under discussion: A statutory lien is created, which still exists, but which cannot be enforced, nor can judgment be obtained against either of the defendants without this or a similar action, which is barred by the statute." The case of *City and County of San Francisco v. Jones*, 20 Fed. 188, was an action to recover a personal judgment for taxes, but the language of *Sawyer, J.*, in discussing the question of a lien, is of value in this consideration. After citing the provisions of our Political Code, the court says: "Under these and other provisions of the Political Code no action is necessary to collect a valid tax. But it is claimed that these provisions take the case of an action under the statute to recover a tax out of the statute of limitations. In the case already cited the supreme court of Nevada, on a similar statute, decided otherwise, and we think correctly. * * * The lien is but an incident to the tax,—the money due,—and, like the case of a mortgage, when an action to recover the debt is barred, the suit to enforce the lien is also barred. This has long been the settled doctrine in this state in relation to a mortgage. Neither the debt nor the lien is extinguished in the case of a mortgage in any other sense than in the case of a tax, and the statutory lien incident to it. The remedy by action is barred, whatever the case may be as to other remedies. * * *

We see no good reason, at this day, and under our laws for the levy and collection of taxes, for allowing the state to vex parties with suits for taxes after the lapse of many

years, that is not equally applicable to private parties. The state has officers specially appointed to attend to these particular duties, and no others, and if they neglect their duties the state, which appoints them, if any one, should be the party to suffer. To permit the state, after a lapse of many years, to recover by suit taxes allowed to run uncollected, with five per cent. penalty, and, in the language of Mr. Justice Swayne, the 'most devouring rate' of two per cent. per month interest, would be to inflict unendurable oppression." *County of Los Angeles v. Ballerino*, 99 Cal. 593, 32 Pac. 581, and 34 Pac. 329, was an action identical in nature with the one at bar. It was sought to recover from defendant taxes levied and assessed upon his property, and to enforce a lien upon that property for their payment. The action was brought more than two years, but less than three years, after the right of action had accrued. Defendant urged that it was barred by subdivision 1 of section 339 of the Code of Civil Procedure. The court said: "This, however, is not such an action, but is one which arises upon a liability created by statute, other than a penalty or forfeiture, within the meaning of section 338 of the same Code;" citing *San Francisco v. Luning*, *City and County of San Francisco v. Jones*, *Lewis v. Rothchild*, and *Nevada v. Yellow Jacket Silver Min. Co.*

It is true that in none of these cases, saving that from Nevada, has the question under consideration been the subject of direct adjudication, but it is none the less clear that this court has repeatedly expressed its approval of the reasoning and conclusion reached in *Nevada v. Yellow Jacket Silver Min. Co.*, and *City and County of San Francisco v. Jones*. But in *People v. Hulbert*, 71 Cal. 72, 12 Pac. 43, a question identical in principle, though not in form, was decided by this court in accordance with the foregoing views, and upon the authority of the above-named cases. The action was to foreclose a lien upon defendant's land under an assessment by a district for the reclamation of swamp and overflowed lands. The defendant demurred upon the ground that the cause of action was barred by subdivision 1 of section 338, Code Civ. Proc. The reclamation act provided (Pol. Code, § 3463), that from and after the filing of the list, or certified copy thereof, the charges assessed upon any tract of land within the county constitute a lien thereon. There is, however, no vital distinction between this language and that employed in section 3716 of the Political Code, which declares that the lien is not removed until payment of the tax; for, as is said in *Nevada v. Yellow Jacket Silver Min. Co.*: "Had the statute created the lien without providing for its continuance until the tax should be paid, the result would be the same,—the lien would have continued, when once created, until payment, or until the repeal of the statute creating it." This would be true in

the absence of a statute to the contrary. Civ. Code, § 2911. In sustaining the demurrer this court declared that the cause of action was barred by section 338, subd. 1, of the Code of Civil Procedure. As to the single feature in which our code provisions differ from the Nevada law, namely, in providing that every tax has the effect of a judgment against the person, which shall not be satisfied until the tax is paid, it may be said that this action does not purport to be one upon a judgment. Conceding (though not deciding) that an action under section 3716 of the Political Code might be commenced as upon a judgment, and that this complaint is a sufficient pleading of such a cause of action, still this proceeding could not be maintained, for it was commenced more than five years after the right accrued. Code Civ. Proc. § 336, subd. 1. In the case of every judgment where no action is commenced upon it within five years, the judgment is not thereby satisfied, but the right to enforce its satisfaction by suit is barred.

It has been assumed throughout this discussion that the provisions of the Political Code relating to the lien of taxes (Pol. Code, §§ 3716-3718), are applicable to those levied for municipal purposes. Whether or not this be so is not here decided. The point is not presented by counsel, and it is unnecessary to this decision. For clearly, if those provisions be not applicable to municipal taxes, appellant's cause of action is barred. It follows, therefore, that the cause of action sought to be prosecuted is barred by section 338, subd. 1, of the Code of Civil Procedure, and that the demurrer thereto was properly sustained. The judgment is affirmed.

We concur: McFARLAND, J.; GAROUTTE, J.; VAN FLEET, J.; HARRISON, J.

TEMPLE, J. (dissenting). I do not agree with the conclusion reached by the court in this case. The action is for the recovery of a municipal tax. It is sought to recover a personal judgment, and to subject the property of the defendant to a lien for the recovery of the tax. It seems to be admitted that the action is well brought unless the right of action is barred by section 338 of the Code of Civil Procedure. The court holds that such right is barred because the action was not commenced within three years. Section 3716, Pol. Code, reads as follows: "Every tax has the effect of a judgment against the person, and every lien created by this title has the force and effect of an execution duly levied against all property of the delinquent; and the judgment is not satisfied nor the lien removed until the taxes are paid or the property sold for the payment thereof." It is decided that, not only has the statute run against the right to maintain a personal action, but against the right to foreclose the lien as well. At the same time the code provision is construed to mean

that the lien continues until the taxes are paid, or the property has been sold for the payment thereof. It is held that the statutory lien continues, and will never become barred, but that there is now no mode in which the tax can be collected, or the lien foreclosed. The lien is said to constitute a right without a remedy. It is not that the law has not provided a mode for the foreclosure of the lien, but that by reason of the bar of the statute the tax cannot be collected at all, through a sale of the property upon which it constitutes a lien or otherwise. What is meant, under such circumstances, by saying that the lien continues after the right to collect the tax from the property in any mode has ceased, I am unable to comprehend. A lien is necessarily an incident to an obligation, and the purpose is to secure performance. When it ceases to be security for such performance, it has ceased to exist. If it could continue, it would not be a right without a remedy, but a remedy without a right,—redress when there was nothing to redress. Of course, as it is always an incident, it must fall with the principal, although the converse does not follow.

As an example of a right without a remedy, reference has been made to cases in which the right to a personal action is barred while there is still a right to foreclose a lien given to secure it. An unfortunate reference for the point in all such cases is that the obligation may be enforced by foreclosing the lien. It is also said that the bar of the statute does not extinguish the debt, but only bars the remedy. This, too, is error. As a legal obligation, a debt is extinguished by the bar of the statute. It continues to exist only as a moral obligation, which is sufficient consideration for a new contract. In the cases above alluded to in which it was held that a suit would lie to foreclose a mortgage, although the note was barred, the note and mortgage were regarded as distinct obligations or agreements to pay the same debt. The doctrine was sometimes based upon the fact that the mortgage was under seal and the note was not, and different periods of limitation were prescribed, and sometimes on the claim that the limitation did not apply to courts of equity. Sometimes, too, it may be, because title passed by the mortgage to the mortgagee, and courts would not enforce a right to redeem until the debt was paid, on the principle that he who seeks equity must do equity. On the same principle this court has refused to compel the satisfaction of a mortgage by a mortgagee after the mortgage had become barred,—not that there is a subsisting lien, but because the court will not grant affirmative relief in violation of the maxim above alluded to. At common law a lien was simply a right to retain possession until an obligation was performed. In equity a lien might be a right to sell certain property for the payment of a debt, or an amount falling due upon the nonperformance of an obliga-

tion. The lien could exist without possession, and be enforced by foreclosure and sale. A lien may arise in various ways. It is always a charge upon property, and when there ceases to be a charge there can be no lien. See section 1180, Code Civ. Proc. It is security for the performance of an obligation, and, when the obligation ceases to be, it is a contradiction in terms to say that the lien exists. Therefore, if it be conceded, as it is in the leading opinion, that the effect of the section of the Code above recited is that the lien is never barred, it must follow that the obligation to pay the tax is not barred. What is the lien of a tax? It is the right to collect the amount of the tax from the property. This right does not merely result from the lien; it is the lien. To say that the lien continues, but cannot be enforced in any mode, is to say that the right to collect the tax from the property continues, and is not barred, yet the right to collect the tax from the property is wholly barred. It is a contradiction in terms. What I have said is upon the theory that section 3716 is correctly construed as providing that the lien shall never be barred by the statute. That section makes the lien a judgment lien, and, I think, plainly the judgment and lien go together. If the section is to be understood as providing that the lien continues without regard to limitation until the tax is paid, it must also be understood as providing that the judgment continues. It as emphatically declares that the judgment is not satisfied as it does that the lien is not removed. Perhaps it was merely intended to say that no change in the property or its ownership should affect the lien, and no officer or board could satisfy the judgment or remove the lien. It might mean all this, and have no reference to any limitation. If it be material to hold that the action is based upon the judgment, I think it should be held this action is an action upon the judgment. When facts are averred which show the existence of a tax, it also shows a judgment, for that is the judgment.

IVEY v. KERN COUNTY LAND CO. (L. A. 171.)

(Supreme Court of California. Dec. 8, 1896.)

VENUE — ACTION AGAINST CORPORATION — PLACE WHERE CONTRACT MADE AND BREACH OCCURS.

1. In an action against a corporation for breach of contract it appeared that defendant's principal place of business was in S. county, but that it had an office in K. county, where the contract was prepared, and was signed in duplicate by plaintiff, and forwarded by defendant's agent to the main office for approval and signature; and that, after it was signed by defendant, said contract was returned to the agent in K. county, and by him delivered to plaintiff. *Held*, that the contract was made in K. county, within Const. art. 12, § 16, allowing a corporation to be sued in the county where the contract is made.

2. In an action against a corporation for breach of contract to convey land on full payment of the price, it appeared that defendant's principal place of business was in S. county, but

that it had an office in K. county, and that payments were to be made at the latter place. *Held*, that the breach occurred in K. county, within Const. art. 12, § 16, allowing a corporation to be sued in the county where the breach occurs.

Commissioners' decision. Department 2. Appeal from superior court, Kern county; A. R. Conklin, Judge.

Action by James M. Ivey against the Kern County Land Company to recover for breach of a contract to convey land. From an order granting a motion to change the place of trial, plaintiff appeals. Reversed.

C. E. Arnold and J. W. Wiley, for appellant.
E. J. McCutchen, for respondent.

HAYNES, O. Plaintiff brought this action in the county of Kern for damages for breach of a certain contract whereby the defendant agreed to sell and convey to the plaintiff certain lands situate in said county of Kern. The defendant filed a demurrer to the complaint, and also a notice of motion, and a demand for a change of the place of trial from said county to the superior court of the city and county of San Francisco. Said motion was granted, and the plaintiff appeals from the order granting said motion.

The grounds upon which said motion was based are as follows: "(1) That the contract sued upon in this action was made in said city and county of San Francisco, and was to be performed therein. (2) That the obligation or liability of defendant, if any, arose in said city and county of San Francisco, and the breach thereof, if any, by defendant, occurred therein. (3) That the principal office and place of business of defendant is in the said city and county of San Francisco." The agreement, for the breach of which the action was brought, was executed in duplicate. It recites that said corporation has its principal place of business in the city and county of San Francisco. It describes the land which is the subject of the agreement as being situated in the county of Kern. It provided that all money to be paid to the party of the first part should be paid at its office in the city and county of San Francisco, or at such other place as the party of the first part should, on reasonable notice to the party of the second part, direct; and, upon receiving all such payments, to execute and deliver to the second party a good and sufficient deed of said premises. An affidavit filed on the part of the defendant in support of its motion was made by the secretary of the corporation. It states, in substance, that the principal office and place of business of the defendant is in the city and county of San Francisco; that he, as secretary, signed the said contract at said city and county; that, so far as said contract imposes any obligation upon the defendant, it was to be performed in said city and county; that no agreement had been made upon the part of the defendant to perform said contract in any other place; that the obligation or li-

bility of said corporation, if any there be, arose from said contract, and therefore arose in said city and county of San Francisco; that the breach of said obligation alleged in the complaint was its failure to execute a deed for said premises, and that there was no agreement to execute the deed at any place but in the said city and county. The affidavit of the plaintiff in opposition to said motion shows that he is a resident of said county of Kern; that at the time of the making of said contract, and ever since, the defendant has had a place of business, and now maintains its principal office for the transaction of business, at Bakersfield, in said county of Kern; that all negotiations prior to and up to the time of the execution and delivery of said contract in relation thereto were had with the defendant at its said office in Bakersfield; that said contract was there drafted in duplicate by the defendant, and the same was presented to the plaintiff at Bakersfield for his approval, acceptance, and signature; that he there signed in duplicate the said contract, and that after it had been executed by the defendant it was delivered to him at defendant's said office in Bakersfield; that he was instructed in writing by the defendant to make, and did make, all payments at its office in said county of Kern; and also averred that the obligations imposed upon the defendant by the contract were to be performed at said county of Kern, and that the breach of said contract on the part of defendant occurred there.

The constitution of this state provides as follows: "A corporation or association may be sued (1) in the county where the contract is made (2) or is to be performed, (3) or where the obligation or liability arises, (4) or the breach occurs, (5) or in the county where the principal place of business of such corporation is situated, subject to the power of the court to change the place of trial as in other cases." Article 12, § 16. If the foregoing provisions of the constitution did not authorize the transfer of the cause for trial from the county of Kern to the city and county of San Francisco, the order must be reversed; if it did, the order must be affirmed. If either one of the said several provisions of said section authorized the plaintiff to bring and have his action tried in the county of Kern, it is immaterial whether either of the other provisions required it to be brought in San Francisco. Most of the cases upon the subject of the place where the contract is made arose in cases where the contract was made in one state, and was to be performed in another, and where the law affecting the contract was different in each of the states; but the principles there involved apply here. The defendant's principal place of business is the city and county of San Francisco, where it had an office, and where its principal executive officers, the president and secretary, reside. It also has an office, or agency, in Bakersfield, in Kern county, where the contract set out in the complaint was prepared and was signed in

duplicate by the plaintiff, and forwarded by defendant's agent to its office in San Francisco for approval and signature, respondent contending that said agent did not have authority to bind the corporation by contract. If we regard the draft of the contract when signed by the plaintiff as an offer or proposal to purchase upon the terms and conditions therein stated, it would seem to be precisely analogous to a proposed contract transmitted by mail, and governed by the law controlling such contracts so far as the place of making it is concerned, and as to such contracts it seems to be well settled that when the proposal is unconditionally accepted by a letter deposited in the mail, properly addressed to the proposer, the contract is complete. *Clark v. Dales*, 20 Barb. 42; *Vassar v. Camp*, 14 Barb. 354; *Mactier's Adm'rs v. Frith*, 6 Wend. 103; *Minnesota Linseed Oil Co. v. Collier White-Lead Co.*, 4 Dill. 431, Fed. Cas. No. 9,635. See, also, note to *Ford v. Insurance Co.*, 99 Am. Dec. 668, and text and notes, 3 Am. & Eng. Enc. Law, p. 856. In the first of the cases above cited it was held that, as soon as the acceptance had gone beyond the control of the party accepting, the contract thus formed became mutually obligatory upon the parties. A deposit of such acceptance in the post-office, addressed to the other party, places it beyond his control; and in some cases it has been held that such contract is deemed to have been made at the place where the acceptance was mailed; but whether that is true as a general proposition, or only in exceptional cases, need not be considered. In the case before us the proposed contract, after it was signed by the defendant, was not sent by mail to the plaintiff, but was sent to defendant's agent in charge of their branch office or agency at Bakersfield, and was by its agency delivered to the plaintiff at that place; so that until its actual delivery to the plaintiff it was in the power and under the control of the defendant, and the acceptance and execution of the proposed contract was not complete until such delivery; and the place of delivery, being the place where the last act is performed which is necessary to render the contract obligatory, is the place where the contract is made. *Ford v. Insurance Co.*, 6 Bush, 133; *Milliken v. Pratt*, 125 Mass. 375; *Ames v. McCamber*, 124 Mass. 85; *Insurance Co. v. Tuttle*, 40 N. J. Law, 476; *Shuenfeldt v. Junkermann*, 20 Fed. 357; *Whiston v. Stodder*, 8 Mart. (La.) 95, 13 Am. Dec. 281; *Scudder v. Bank*, 91 U. S. 406. An instrument executed in duplicate is, in effect, one instrument. *Kennedy v. Gloster*, 98 Cal. 143, 32 Pac. 941. The delivery of the duplicate to the plaintiff at Bakersfield was, therefore, the delivery of the contract, and the execution of a written instrument includes its delivery. *Clark v. Child*, 66 Cal. 87, 4 Pac. 1058. "A contract in writing takes effect upon its delivery to the party in whose favor it was made, or to his agent." Civ. Code, § 1626. The contract involved in this action was, therefore, made in

Kern county, and the action was properly brought in said county, and is triable therein.

The case of *Shuenfeldt v. Junkermann*, 20 Fed. 357, cited and relied upon by respondent, supports our conclusion. The difference between that case and this lies in the fact that in that case the contract was not in writing, and the plaintiff's assent to the proposed contract, which was the last act in its completion, was made in Chicago; while here the last act, and the one necessary to the completion of the contract, was its delivery to the plaintiff, and that act was performed at Bakersfield. If our conclusion as to the place where the contract was made were doubtful, we think it clear that the place where the breach of the contract by the defendant was committed was also at Kern county. The plaintiff was directed to make his payments at that place. The full payment of the purchase money and the delivery of the deed were concurrent acts, and, upon full payment being made by the plaintiff at Bakersfield, he was entitled to have delivered to him, at that place, and at the time of payment, a deed conveying the land to him. Suppose the plaintiff had failed to make his payments, and the defendant had desired to put him in default; it would have been necessary to tender the deed and demand payment at the place where payment was required to be made. The defendant could not put the plaintiff in default by demanding payment at Bakersfield, and saying to him, "When you have paid your money, come to our principal place of business in San Francisco, and get your deed." The order appealed from should be reversed.

We concur: BELCHER, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is reversed.

ANDOLA et al. v. PICOTT et al.

(Supreme Court of Idaho. Nov. 18, 1896.)

EJECTMENT—EQUITABLE DEFENSE—EVIDENCE.

1. In an action of ejectment, where the defense is the fraudulent procurement of the conveyance, and defendant seeks, by way of affirmative relief, to have the conveyance annulled, and makes tender of the consideration paid, and, on acceptance of such offer by plaintiff, withdraws the tender, it is not error for the trial court, on motion of plaintiff, to strike from the answer of defendant so much thereof as sets up an equitable defense.

2. Testimony in this case considered, and held not to sustain defense set up in answer.

(Syllabus by the Court.)

Appeal from district court, Ada county; J. H. Richards, Judge.

Action by A. R. Andola and others against Mary D. Picott and others. Judgment for plaintiffs. Defendants appeal. Affirmed.

L. Vineyard and N. M. Ruick, for appellants. Hawley & Puckett and Hays & Johnson, for respondents.

HUSTON, J. This is an appeal from a judgment of the district court for Ada county in an action of ejectment. The facts as shown by the record are about as follows: On the 11th day of April, 1891, the defendant Mary D. Picott, a married woman, was the owner and in possession of certain real estate situate in Ada county, about 2½ miles from Boise City, in what is known as "Cottonwood Gulch," the same being her separate property, and being about — acres in extent. This property the defendant Mary D. Picott had owned and occupied for nearly 20 years prior to said 11th day of April, 1891. On said 11th day of April, 1891, said Mary D. Picott, by warranty deed, conveyed said premises to the plaintiff A. R. Andola, for the expressed consideration in the deed of \$6,000. It appears from the record that the actual consideration paid by the grantee was \$1,500. It appears that, at the time of the execution of such deed by the defendant Mary D. Picott, her husband, Joseph H. Picott, was not in the country. Mary D. Picott received the consideration of \$1,500. On the 6th day of July, 1891, Joseph H. Picott signed and acknowledged the deed, executed and delivered by his wife, to plaintiff Andola, on the 11th of April, 1891, and received therefor from the plaintiff Andola a consideration of \$100. On the same day, the plaintiff gave to said Joseph H. Picott a lease of said premises for six months from the 1st day of July, 1891. On the 22d day of January, 1892, plaintiff brought action in the probate court for Ada county to recover possession of said premises. There seem to have been a number of actions, motions, dismissals, and other proceedings before the probate court, but, as they cut no figure in the consideration of the question before us, we shall not notice them. The cause was finally heard before the district court of Ada county on the 21st of March, 1896, with a jury, and resulted in a verdict and judgment for plaintiffs.

The specifications of error, as the same appear in the transcript, are as follows: "(1) Insufficiency of the evidence to justify the verdict, and excepted to on the trial, in this: That the evidence is insufficient to show or prove that the deed (Exhibit No. 1) is in any sense a legal and valid deed of conveyance to the land in question by the defendant Mary D. Picott, the evidence showing at the time that she was a married woman, and that the land in question was her separate property at the time of said alleged conveyance by her; and, further, that the same was at said time occupied by her as a homestead. That the evidence shows without dispute that said Exhibit No. 1 was signed by her, and acknowledged and delivered by her to the plaintiff Andola on the 11th day of April, 1891, and was thereafter, to wit, on the 6th day of July, 1891, altered at the instance of the plaintiff Andola, and signed by Joseph H. Picott, and at said time acknowledged by him without the knowledge or consent of said Mary D. Picott, the grantor named in said Exhibit No. 1. That there is no evidence that tends to show or prove that the plaintiff is the owner

or entitled to the possession of the premises in question. Errors in law occurring at the trial, and excepted to by the defendants at the time: First. That the verdict is against law. Second. That the court erred in striking out defendants' separate defense from their answer, and rejecting their evidence thereunder. Third. The court erred in giving plaintiffs' said instruction to the jury, as asked for, over the defendants' exception. Fourth. The court erred in refusing to give to the jury defendants' said requests, marked Nos. 1 and 2, and to which refusal to so instruct the defendants excepted. Fifth. The court erred in refusing to permit the questions sought to be asked by defendants' counsel to the witnesses Mary D. Picott, W. E. Borah, and J. B. Lyon, as set forth, and to which refusal exceptions were then and there taken. Sixth. The court erred in striking out all the testimony of the defendant Mary D. Picott, to the effect that Exhibit No. 1 was given by her to secure the payment of \$1,500 on town lots, and to which defendants then and there excepted. The above and foregoing statement on motion for a new trial, presented by the defendants' counsel, is hereby settled and allowed by me in accordance with the stipulation extending the time therefor under the statute, now on file in the above-entitled action. Settlement made over plaintiffs' objection as to form and sufficiency of statement."

These are the specifications of error as they appear in the transcript. Upon the argument before this court, and in their brief, counsel for appellants have not followed very closely either the one or the other. However, we will endeavor to get at the points made by appellants, and pass upon them. In their answer to plaintiffs' complaint, defendants set up various defenses. All the material allegations of the complaint are denied. Then follows an elaborate and extensive series of allegations, which may be summarized as follows: The defendant Mary D. Picott avers that on or about April 11, 1891, the plaintiff Andola, "for the purpose of deceiving, overreaching, and defrauding the said defendant Mary D. Picott out of the ownership and possession of said property, etc., solicited said Mary D. Picott to accept a loan for the sum of \$1,500 from said plaintiff Andola," for a reasonable period of time, the period of time not being mentioned. The said plaintiff then and there falsely and fraudulently represented to the said defendant Mary D. Picott that she could pay said money back whenever it suited her convenience so to do. The said plaintiff then and there falsely and fraudulently stated to the defendant Mary D. Picott that all he wanted was the said defendants' mortgage on certain town lots, which she owned in Boise City, to secure its payment. This defense is elongated and elaborated over 10 or 12 closely-printed pages of the transcript. In the answer, the defendants offer to repay to plaintiff the \$1,500 alleged to be the true consideration for the deed aforesaid, together with interest thereon. There-

upon the plaintiffs file their written acceptance of such offer, and the defendants decline and refuse to make good the offer or tender set up in their answer. The plaintiffs thereupon move the court to strike out so much of the answer of defendants as sets up an affirmative defense by way of allegations of fraud in the procurement of said deed, which motion was granted by the court. And this is the first error alleged.

There was no error in granting this motion. The refusal of defendants to stand by and make good their offer made on their answer was a palpable admission of the utter want of bona fides or equity in their contention. Under the rules of practice recognized in this jurisdiction, defendants had set up an equitable defense to the action of ejectment. To say nothing of the incredible character of the statements of defendants, by which they seek not only to change a deed absolute on its face into a mortgage, but to also change the location and character of the real estate claimed to have been incumbered, the order of the court was proper.

It is claimed that Joseph H. Picott was induced to sign the deed while in a state of intoxication; but nothing of this kind is claimed or intimated on the part of the defendant Mary D. Picott. On the contrary, it is made apparent from the record that Mary D. is far more than ordinarily sharp in matters of business. It is an elementary rule of equity that a party seeking relief in a court of equity must come with clean hands, and this rule is particularly applicable to a case where one seeks to set aside his solemn deed by parol testimony. But, evidently, the defendants or their counsel intended to meet this rule by making a tender of the amount they had received, or a part of it; but when the same (although a less amount than what was shown to have been paid by plaintiff) was accepted by plaintiffs, and the defendants positively refused to make their offer good, then it was the duty of the court not only to strike out the equitable defense, but the whole answer. The right of defendants to set up this defense—this equitable defense—to an action of ejectment must be conceded; but a condition precedent to any relief either at law or in equity is the restoration of the consideration. This principle is so elementary that it is surprising that it should have been overlooked by counsel for defendants.

The multitudinous character of the defenses set up in this case would almost persuade us that counsel are seeking to entertain the court with an exhibition of skill in the art of Isaac Walton.

It is claimed, in the first instance, that the deed from the defendant Mary D. Picott is void, because it was not signed at the time of its execution and delivery by her husband. This assumption is not supported by any principle of law, equity, or common honesty. It appears from the record that on the 11th day of April, 1891, the defendant Mary D.

Picott sold and conveyed to the plaintiff Andola the property in dispute, for a consideration of \$1,500, the receipt of which at the time is acknowledged, and is not now denied. At the time of the sale, the defendant Joseph H. Picott, the husband of Mary D., was not in the country, as appears from the record. That it was the intention and understanding of the parties that on his return he should perfect the conveyance by signing the deed of Mary D., his wife, is justly and fairly inferable. That he should have exacted from the plaintiff an obolus of \$100 is characteristic of and in keeping with all of the proceedings of the defendants in this case. In the face of this record, to claim that the deed of Mary D. Picott was void ab initio is an assumption that lacks the support of any rule of law or equity or any principle of common honesty.

In the second place, it is claimed that the deed was given and intended to operate as a mortgage, not upon the premises described therein, but upon certain town lots in Boise City. This contention is unsupported by any evidence except the testimony of the defendant Mary D. Picott, and is contradicted, not only by its own absurdity, but by the testimony of various witnesses besides the record of the acknowledgment by said Mary D. Besides, while it is permissible to show by parol that a deed absolute on its face was given and intended to operate as a mortgage, we have not been shown, nor do we think it exists outside the imagination of counsel, a case where it has been held permissible for the court to not only change the character of the conveyance by incorporating therein a defeasance, but to also change the location and character of the property. The tergiversations of the defendant Joseph H. Picott in trying to deny his signature, without incurring the pains and penalties of perjury, are as suggestive of the want of bona fides in this defense as they are repellent to moral sense. "He who asks equity must do equity." The equity presented by the defendants, as shown in their answer, is to the effect that they should have a return of the property they honestly and fairly sold and conveyed to plaintiff, and at the same time retain the consideration they admit having received therefor; and this upon their unsupported testimony to a state of facts too utterly absurd, even were they not overwhelmingly contradicted, to entitle them to any serious consideration.

The only error the district court committed, in our opinion, was in not striking out the whole answer, and giving plaintiff judgment on the pleadings. As this was not moved by plaintiff, the court was, of course, excusable for not suggesting it. The judgment of the district court is affirmed, with costs.

MORGAN, C. J., and SULLIVAN, J., concur.

PEOPLE ex rel. HODGES v. McGAFFEY,
Secretary of State.

(Supreme Court of Colorado. Oct. 14, 1896.)

ELECTIONS — CERTIFICATION OF NOMINATIONS — POWERS OF SECRETARY OF STATE — MANDAMUS — ADEQUATE REMEDY AT LAW.

1. The Silver Republican party in Colorado met in convention, adopted an emblem, and made nominations, which were duly certified to the secretary of state. Subsequently, the Republican convention was held, adopted the emblem formerly used by the party, and made nominations, which were also duly certified. Both parties had state organizations. *Held*, that the secretary of state had no authority to exclude the nominations of the Republican party from the official ballot on the ground that it had been superseded by the Silver Republican party. *People v. District Court*, 31 Pac. 339, 18 Colo. 26, followed.

2. The powers and duties of the secretary of state relative to the certification of nominations were not enlarged or extended by the act of 1894, amending the Australian ballot law, and providing that, when controversies arise between any official charged with a duty under the law and the representatives of any political party, the district court, or judge thereof, shall have jurisdiction to determine the same.

3. Where the secretary of state refused to certify the nominations of a de facto political party as entitled to a place on the official ballot, mandamus will lie to compel such certification if it appears that, owing to the shortness of the time intervening before the election, the remedy provided by Act 1894, declaring that, when any controversy shall arise between an officer charged with a duty under the election laws and the representatives of any political party, the district court shall have jurisdiction to determine the same on petition, is inadequate.

Application by James L. Hodges for a writ of mandamus against Albert B. McGaffey, secretary of state. Writ granted.

J. L. Hodges, pro se, Gruley Whitford, A. B. Seaman, and B. M. Malone, for petitioner. Milton Smith, A. M. Stevenson, and John R. Smith, for respondent.

PER CURIAM. This is a contest, waged under the Australian ballot law, between two organizations, viz. the Republican party and the Silver Republican party. As in the preceding case of *People v. District Court* (Colo. Sup.) 46 Pac. 631, this controversy arose before the secretary of state with reference to his duties as to certifying the official ballots for the approaching election. The parties in this cause have selected different emblems. The Silver Republican party first held its convention and selected its candidates, and filed its list of nominations with the secretary of state. To the certifying of this list a protest was filed by the present relator, James L. Hodges. This protest was overruled by the secretary of state, and there this matter was allowed to rest. Later, and on the 30th day of September, 1896, the organization known as the "Republican Party" assembled in the city Colorado Springs, and put in nomination a full set of candidates, and selected for its emblem the device theretofore used in this state by the Republican party, to wit, the

eagle. To this latter set of nominations Mr. Richard Broad, Jr., chairman of the Silver Republican organization, filed a protest. Upon a hearing, this latter protest was sustained by the secretary of state, he holding that the set of nominations made at the Colorado Springs convention was not entitled to a place upon the official ballots. The petitioner, claiming that the secretary of state had no jurisdiction to decide the controversy, instituted this original proceeding for the purpose of compelling that officer to certify the list of nominations by the Colorado Springs convention to the various county clerks, in order that the same may be printed upon the official ballots; the claim advanced being that this is a plain duty enjoined by law, about which the secretary of state has no discretion. Upon the filing of the petition the court ordered the alternative writ of mandamus to issue. Upon the return day the secretary of state appeared, and filed his answer, whereupon the petitioner filed a motion for judgment upon the pleadings. The pleadings are very voluminous, and, although nearly every allegation of the petition is denied by the answer, it is admitted by the pleadings that there were two conventions, called by rival factions of the Republican party, each faction having a state central committee, and a full complement of officers, and each claiming recognition,—one as the Republican party, and the other as the successor of the Republican party. In other words, it sufficiently appears that the rivals are *de facto* parties. The question presented is upon the jurisdiction of the secretary of state to pass upon the claims of these rival parties, and in refusing to certify one list of nominations.

The case made is almost identical with that of *People v. District Court*, 18 Colo. 23, 31 Pac. 339. In that case two sets of nominations were made, and different devices or emblems selected by conventions representing different factions of the same political party, each certificate being in apparent conformity with the law. Protests having been filed, it was held that the secretary of state, under the law as it then existed, had no power to decide between the two, but that it was his duty to certify both tickets to the county clerks, to the end that both should be printed upon the official ballots. The doctrine of that case is approved in *State v. Allen*, 43 Neb. 651, 62 N. W. 35; *Phelps v. Piper* (Neb.) 67 N. W. 755; *Shields v. Jacob*, 88 Mich. 164, 50 N. W. 105; and in the case of *People v. District Court* (decided at this term) 46 Pac. 681. We do not understand that the doctrine announced in 18 Colo. and 31 Pac. is controverted in this case, but authority for respondent's action is claimed by reason of an amendment to the Australian ballot law, passed since that decision was announced. Sess. Laws 1894, pp. 64, 65. This amendment will be found in full in *People v. District Court* (Colo. Sup.)

46 Pac. 681. An examination will show that it in no way enlarges the duties or extends the powers of the secretary of state, or purports to do so. In these circumstances, the opinion in 18 Colo. and 31 Pac. must control, and the duty of the secretary of state to certify both sets of nominations is clear.

It is claimed, however—First, that this court has no jurisdiction by mandamus, because the amendment of 1894 gives the relator a plain, speedy, and adequate remedy at law; second, that, this being an appellate court, it should, in the exercise of a wise discretion, refuse to take original jurisdiction of this controversy. While it is settled that the remedy by mandamus is not available where there is a plain, speedy, and adequate remedy at law, it is equally as well established that such legal remedy must be adequate; and we are satisfied from an examination of the act of 1894 that the remedy therein provided is not adequate to afford relief in the present emergency. The statute relied upon to defeat this proceeding does not purport to make the judgment of the district court final, and for this reason the remedy is inadequate, as only 20 days now remain between this and the day of election, during which period these tickets must be certified to each county clerk in the state, and by that officer recertified to the printers, and printed upon the official ballots. In some instances the county seats of these counties are remote from, and not connected with, the state capital by rail, while in only a few counties are the printing facilities adequate. The time is so short that the remedy provided by statute is not available in this case. It is well understood that this court, in common with all other appellate tribunals, will refuse to take original jurisdiction of any case unless the necessity for so doing is urgent. This rule arises from the necessity of giving appellate business the preference; otherwise, the time given to original proceedings would be to the exclusion of the primary business of an appellate court, viz. to review the decisions of inferior tribunals. All courts are reluctant to take jurisdiction of political controversies, such as the one before us, particularly during a heated campaign; but, notwithstanding this reluctance, where the urgency is great, they will do so in order that a miscarriage of justice may be prevented. The importance of the question at issue in this proceeding cannot well be overestimated. One of the great political parties now struggling for control of the national as well as of the state government will, if the decision of the secretary of state prevails, be deprived of the opportunity of placing its ticket before the people of the state of Colorado for their suffrages at the approaching election, and the people will, to that extent, be disfranchised. Petitioners are contending for a right to have a ticket on the official ballot,

not to keep one off; a right to place before the voters another ticket, and not to deprive any other party of its name, emblem, or any other right. The court cannot refuse to entertain jurisdiction of such a controversy, although we are not unmindful of the force of the objection urged by counsel, that the precedent will furnish some excuse for like applications in the future in other controversies growing out of the election law. We trust, however, that the court will be able to protect itself and its appellate business from the flood of original litigation which counsel predicts. Every application must be determined upon the circumstances peculiar to it. A question of national importance, like the one before us, will not often be presented, and it is hardly probable that other parties will be compelled to resort to this court in order that the provisions of any statute, as interpreted by the highest judicial tribunal of the state, shall be given effect by a ministerial officer. Under the decision in 18 Colo. and 31 Pac. it is the plain duty of the secretary of state to certify to the various county clerks the ticket known as the "McKinley Republican Ticket." Let the peremptory writ issue. Peremptory writ ordered.

BURCHINELL, Sheriff, v. KOON.¹

(Court of Appeals of Colorado. Oct. 12, 1896.)

PARTNERSHIP—POWERS OF SURVIVING PARTNER—CHattel MORTGAGE—EVIDENCE—CONVERSION.

1. A surviving member of a partnership has full power to control and dispose of the firm assets for the purpose of winding up its affairs, and may execute a mortgage thereon to secure a firm creditor; and such a mortgage is not rendered invalid by the fact that it also secures money borrowed by the surviving member after the death of his partner, which was used in payment of partnership debts.

2. That a mortgage executed by a surviving partner covers the entire stock of goods of the firm does not render it, in effect, a general assignment.

3. For the purpose of establishing the value of a stock of merchandise, an inventory, with the value of each item stated thereon, shown by the testimony of two witnesses to have been made by one of the witnesses as the items and value were called off to him by the other witness, who was an expert, on a personal examination and appraisal of the stock in detail, is admissible in evidence.

4. A mortgagee of personal property in possession under a valid mortgage can recover in conversion against an officer who seizes it under attachments against the mortgagor.

Appeal from district court, Arapahoe county.

Action by Charlotte O. Koon against William K. Burchinell, sheriff. Judgment for plaintiff, and defendant appeals. Affirmed.

T. J. O'Donnell, W. S. Decker, Milton Smith, and Rogers, Cuthbert & Ellis, for appellant. R. D. Thompson and B. B. Lindsey, for appellee.

¹ Rehearing denied Nov. 9, 1896.

BISSELL, J. The only inquiry of any considerable difficulty suggested by this record respects the right of the surviving partner of an insolvent firm to execute a mortgage to secure the payment of a firm debt. It is presented on this state of facts: For some years prior to 1891, A. B. and F. W. Jefferay did business as a firm both in Kansas and in Colorado. While in Kansas their business was of a banking character, but in Colorado, to which they removed prior to 1891, they were carrying on business as merchants and dealers in furnishing goods. This firm first started in that line in Pueblo, where in November, 1891, one of the brothers, A. B., died. F. W. continued the business as before, and under the same general firm designation, and removed to Denver in the summer of 1893. The original loan which was made by Mrs. Koon, the sister of the members of the firm, amounted to \$1,800. Later, and in July, 1893, about the time of the panic, she loaned the survivor the further sum of \$600. The two loans, with the accumulated interest, amounted, on the 31st day of July, 1893, to \$2,575, for which sum F. W. Jefferay, as surviving partner of the firm, gave a note promising to pay that sum to Mrs. Koon on demand, with interest at the rate named. To secure the payment of this note, F. W. executed a chattel mortgage on the stock, and delivered it to his sister. Mrs. Koon thereupon took possession of the stock, and proceeded to close it out through her agents. It was seized by the appellant, Burchinell, as sheriff, under divers writs of attachment issued in favor of various creditors of the firm. The sheriff took the goods out of the mortgagee's possession, removed them for sale, and applied the proceeds to the satisfaction of the attaching creditors' claims. Mrs. Koon then brought suit for the conversion, alleging the value, and praying judgment. The sheriff took issue on the complaint; set up the indebtedness to the attaching creditors, the issuance and levy of the writs, the subsequent confirmation of the attachments by judgment; and attacked the mortgage by allegations of fraud; contested the value of the goods as laid; and insisted on the trial that the mortgage was without validity because of the want of power in the surviving partner to execute the security.

The powers of a surviving partner to deal with the firm assets have been established by a long line of adjudications. His right to sell, mortgage, and dispose of those assets, and apply them according to his own discretion and judgment in the payment of debts, has been repeatedly recognized. *Williams v. Whedon*, 109 N. Y. 333, 16 N. E. 365; *Fitzpatrick v. Flannagan*, 106 U. S. 643, 1 Sup. Ct. 369; *Emerson v. Senter*, 118 U. S. 3, 6 Sup. Ct. 981; *Durant v. Pierson*, 124 N. Y. 444, 26 N. E. 1095; *Patton v. Leftwich*, 86 Va. 421, 10 S. E. 636; *Bank v. Parsons*, 128 Ind. 147, 27 N. E. 436; *Krueger v. Speith*, 8 Mont. 482, 20 Pac. 664; *Smith v. Phelan*, 40 Neb. 765, 59 N. W. 562; *Roach v. Brannon*, 57 Miss. 490; *Johnson v. Berlitzheimer*, 84 Ill. 54. Accord-

ing to the doctrine of all these authorities,—and there are practically none to the contrary,—the surviving partner is entitled to the possession and control of the joint property of the firm for the purposes of winding up the affairs of the co-partnership. To accomplish this end he has a right, according to the settled principles of the law of partnership, to administer the firm affairs and to dispose of its assets. This power is broad enough to cover the right of sale, and includes the power to mortgage, or to deliver property in payment. No limit seems to be put on the power of the partner except that he is required to devote the assets to the liquidation of outstanding obligations. Some of the cases go so far as to hold that, if he devotes those assets to the payment of his individual debts, it is not a matter of which the general creditors can complain; that, where the transaction is completed, it cannot be impeached by subsequent proceedings. We express no opinion on this matter. This illustrates the tendency of the decisions. The specific question of the power to mortgage has arisen in many cases. Where it has been exercised in good faith, it has been universally upheld. We thus experience no difficulty in deciding that the surviving partner had full power to execute this mortgage, and that thereby Mrs. Koon acquired a valid lien which could not be divested by the levy of the attachment writs.

It has been sometimes held, and has been frequently stated by both judges and text writers, that the surviving partner is a trustee for the benefit of the firm creditors, and that he holds the assets in trust for the payment of the firm debts. This is sometimes measurably true. There are cases where creditors have reduced their debts to judgment, and come into equity for the purpose of compelling a specific application of the assets. The courts have then enforced the equities of the partnership creditors as against those having claims only on the individual members of the firm. The great trouble, however, is that the surviving partner is in no exact sense a trustee. This matter received very elaborate consideration in a somewhat recent case in the house of lords, wherein Lord Westbury, in a very felicitous way, analyzed the use of the word "trustee," and, as we view it, properly defined and limited it. The distinguished jurist said: "Another source of error in this matter is the looseness in which the word 'trustee' is frequently used. The surviving partner is often called a 'trustee,' but the term is used inaccurately. He is not a trustee, either expressly or by implication. On the death of a partner the law confers on his representative certain rights as against the surviving partner, and imposes upon the latter correspondent obligations. The surviving partner may be called, so far as these obligations extend, a 'trustee for the deceased partner'; but when these obligations have been fulfilled, or are discharged, or terminat-

ed by law, the supposed trust is at an end. The advantage of correcting by familiar practice an inaccurate use of a word, although that use may be found in treatises of reputation, I remember to have seen singularly illustrated in a case that occurred some years ago in a court of law, where the court of law was told that in an agreement for the sale of a house the vendor was trustee for the purchaser, and the judges were called upon to apply a rule which is quite right as between a complete trustee by declaration and the cestui que trust, but quite wrong when the vendor is called a 'trustee' only by a metaphor, and by an improper use of the term; and it required some trouble to convince them that, though the vendor might be called a 'trustee,' he was a trustee only to the extent of his obligation to perform the agreement between himself and the purchaser. * * * The application to a man who is improperly, and by metaphor only, called a 'trustee,' of all the consequences which would follow if he were a trustee by express declaration,—in other words, a complete trustee,—holding the property exclusively for the benefit of the cestui que trust, well illustrates the remark made by Lord Mansfield, that nothing in law is so apt to mislead as a metaphor." *Knox v. Gye*, L. R. 5 H. L. 656. It has therefore many times happened that the rules laid down in cases where courts of equity have seized upon the firm assets to distribute them according to the rights of the creditors and the debtors, or where estates have come into courts to be wound up by proceedings analogous to those in bankruptcy jurisdictions, the courts have treated the surviving partner as a trustee, and have administered the estate according to the equitable rights of the parties. The rule has not been applied in cases where the surviving partner has undertaken, in the exercise of his power as survivor, to apply the assets to the liquidation of debts, nor have payments been successfully attacked by a creditor who has put his claim into judgment, and come into a court to compel a different distribution of the firm funds after the rights of other persons have been fixed and settled by the acts of the parties. We therefore have no hesitation in holding that the surviving partner had the right, as was plainly declared in one of the cases cited, to mortgage these assets for the payment of this debt. We do not regard the case as at all affected by the fact that a portion of the fund represented by the note was advanced to the survivor after the death of the other member of the firm. The money went into the general firm account, was for the benefit of the estate as controlled by the survivor, and was applied to the liquidation of outstanding firm obligations. The principle was undoubtedly recognized in the *Durant Case*, cited *supra*. The only difficulty we have had with the case at all in this aspect of it proceeds from a decision of the supreme court

which is relied on by the appellant. *Salsbury v. Ellison*, 7 Colo. 167, 303, 2 Pac. 906, and 3 Pac. 485. We do not undertake to differ with that case, and upon the same facts, and under the same conditions, we should undoubtedly follow it as the law of the state, for we have no disposition to either criticize or disagree with it. The distinguished court holds that a survivor may not execute a general assignment for the benefit of creditors. That is the law in this jurisdiction, and we should unhesitatingly follow it, if in this case the survivor had made such an assignment. It is also true the learned writer of the opinion calls the surviving partner a "trustee," without expressing the limitations which are undoubtedly essential when a different case is presented. Used in a general way, it is unobjectionable, but as in the argument of counsel it is open to misconstruction. In *Sickman v. Abernathy*, 14 Colo. 174, 23 Pac. 417, the learned court substantially stated the doctrine as we have now expressed it. Therein the rule was approved which permits the surviving partner to control and dispose of the firm assets. What is said in the *Abernathy* Case seems to us to be entirely germane to the questions then under consideration, and the analysis of the learned commissioner, and the citations from the authorities, are relevant to the matter at issue, and in no sense obiter, as contended.

We have thus disposed of practically the only question involved. There are many other subordinate matters called to our attention, which we will briefly touch upon, that it may not be said they have escaped our notice. That the mortgage covered the whole stock owned by the firm does not permit us to call it a "general assignment," nor treat it as such for the purpose of this litigation. This was the rule that prevailed in the federal courts for a long time. It has been settled by an authoritative decision of the supreme court of the United States. *Union Bank of Chicago v. Kansas City Bank*, 136 U. S. 223, 10 Sup. Ct. 1013. This court, following in the same line, squarely adjudged that a mortgage may not be construed to be a general assignment for the benefit of creditors, when the instrument is not in that form, and such was not the evident intention of the parties. *Grocer Co. v. Garrison*, 5 Colo. App. 60, 37 Pac. 31.

It is likewise insisted the matter is controlled by statute. We do not understand the statute to operate as a limitation on the powers of the survivor. This has been a matter of direct adjudication in other states. *Havens v. Harris*, 140 Ind. 387, 39 N. E. 49.

During the progress of the trial, the plaintiff introduced proof tending to show the extent, character, and value of the property which had been taken by the sheriff. She produced witnesses whose evidence, taken together and summarized in the book which was produced, tended in that direction. By the method pursued, an expert was called,

who testified substantially that he went through the stock of goods, and examined each package and item where the package was broken, and the packages as a whole where they were in entirety, and called off the description and the value of the goods to another witness, who, when produced, testified that he wrote in the book the items as called off, and recorded them accurately, with the prices which were then given to him. The book which contained the items thus written down by the two witnesses was offered in evidence, and the appellant objected to the proof. It seems to us entirely satisfactory. While the book itself was not perhaps strictly evidence, it was legitimately introduced for the purpose of showing the extent and character of the various items recorded. There is no other method by which a stock can be taken, and by which parties can testify and intelligently lay before the jury a description of the goods, of the amounts, and of the values. Few men can retain in their memory, and state, item by item, a stock of goods which they have examined, even though the purpose of the examination was to ascertain the value of it. The present practice has been approved by a court accustomed to deal with commercial questions. *Howard v. McDonough*, 77 N. Y. 502.

The status of the parties with respect to the property is a corollary from the establishment of the main proposition. The plaintiff was a mortgagee who had taken possession by virtue of a valid instrument. Under the decisions of our supreme court the attaching creditors could not interfere with this possession, and, when they proceeded illegally to take the goods, the mortgagee could maintain an action to recover the value. *Metzler v. James*, 12 Colo. 322, 19 Pac. 885; *Stevenson v. Lord*, 15 Colo. 131, 25 Pac. 313.

This disposes of all the matters except the appellant's contention that the instructions are irreconcilable and inconsistent. We do not intend to enter into a discussion of this matter, nor defend the trial court, and establish, by illustration and argument, the accuracy of its statements to the jury. It is undoubtedly true the jury were told the plaintiff would be entirely unaffected by any fraudulent purpose entertained by the survivor, if she was without knowledge of it, and took her mortgage in good faith, and to secure a then-existing bona fide indebtedness. The jury were subsequently told there was no proof in the case which tended to establish a direct fraud on the part of the surviving partner. The instructions may seem inconsistent, but, even if this should be conceded (which we do not admit), it is an inconsistency which does not compel us to disturb the verdict. The last instruction is undoubtedly correct as applied to this record. There was no evidence of an intent to defraud; the declarations which the surviving partner made were not inconsistent with his subsequent conduct, nor with the exact situation; and we are of the opinion the defendant failed to produce evi-

dence which tended to show the surviving partner was guilty of any active or passive fraud with reference to his vendors or his other creditors. The other instructions were of themselves accurate statements of the law, and, even if they were to a certain extent inapplicable, this does not constitute error which compels us to disturb the verdict. Errors which have not affected the substantial rights of the parties do not suffice as a basis of reversal. So far as we are able to see, substantial justice was done between the parties; the plaintiff was entitled to the judgment which she obtained, and, since the conclusion of the trial court is in accord with these views, its judgment will be affirmed. Affirmed.

SCATTERGOOD v. JOHNS et al.

ELLIS v. MARTIN et al.

(Supreme Court of Kansas. Dec. 5, 1896.)

APPEAL—REVIEW—ERRONEOUS THEORY—DECISION.

1. Where the judgment rendered by the trial court is supported by the undisputed evidence in the case, and must necessarily have been rendered under the law, on the facts presented, it will not be reversed because the trial court adopted a wrong theory of the law, and based its judgment on such erroneous theory.

2. Plaintiff was the owner by assignment in blank of a mortgage executed to a mortgage company. An action was brought by another mortgagee of the same property, making the mortgage company and many other persons claiming interests in and liens upon the property defendants, of which action the plaintiff had no notice, and to which he was not made a party. Afterwards he brought this suit against most of the parties to the prior action to foreclose his mortgage. The trial court erroneously held that the judgment in the prior action was conclusive and binding on the plaintiff, but the evidence in this case shows that the liens of the defendants are prior to that of the plaintiff, and the judgment rendered is such as ought to have been rendered on the uncontradicted testimony introduced. *Held*, that the judgment will not be reversed merely because a wrong reason was given for its rendition.

(Syllabus by the Court.)

Error from district court, Rice county; W. G. Eastland, Judge.

Action by George Scattergood against Emanuel Johns and others, and by Charles E. Ellis against A. B. Martin and others, to foreclose mortgages. From judgments declaring certain liens on the property prior to the mortgages, plaintiffs separately bring error. Affirmed.

Ivan D. Rogers, for plaintiffs in error. G. F. Foley and Sam Jones, for defendants in error.

ALLEN, J. Two cases are submitted together. Both were cases to foreclose mortgages executed by Emanuel Johns and wife to the Southern Kansas Mortgage Company. Each mortgage was for \$2,500. The one under which Ellis claims covers lot 8, and the one sued on by Scattergood covers lot 9, in block 3, in the city of Lyons. Both plain-

tiffs claim under assignments executed in blank by the Southern Kansas Mortgage Company. The controversy in this court is between these plaintiffs in error, who were plaintiffs below, and certain persons who claimed mechanics' liens on both lots. The petitions allege the execution of negotiable bonds and mortgages securing the same by Johns and wife to the Southern Kansas Mortgage Company, and the indorsement and delivery thereof to the plaintiffs, and that the defendants claim liens on the property which are inferior to those of the plaintiffs. The defendants answered, in substance, that an action had been brought by the Bank of Lyons against the mortgagors and divers other parties claiming an interest in the land under them, the Southern Kansas Mortgage Company, Isaac L. Miller, Colliday & Hartley, and the answering defendants; that answers were filed in said action in behalf of Miller, claiming to hold one of said mortgages by assignment from the Southern Kansas Mortgage Company, and by Colliday & Hartley, claiming under the other; that a judgment was rendered in that action in favor of these defendants establishing the validity of their liens, and adjudging them prior to the lien of the mortgages of plaintiffs in these cases. On the trial the record mentioned in the answers was introduced in evidence, and the court held that the judgment rendered in the action brought by the Bank of Lyons was conclusive on the plaintiffs. The theory of the court seems to have been that, as no assignment of the mortgages had been recorded, the holder was bound by a judgment in an action to which the original mortgagee was a party. The brief on behalf of the plaintiffs in error is devoted to showing the fallacy of this position, and to proving that the owner of the mortgage had the right at any time before actual sale of the land under the prior judgment to bring his action against all persons interested, and establish the priority of his lien, notwithstanding the former judgment. It appears from the record that in the prior suit the defendants in error claimed liens on both lots under the mechanic's lien law, that a building was constructed by the owners of the land covering both lots, and that their claims for such liens were prosecuted to final judgment in that action. The record of the judgment, as well as the pleadings on which it was based, were put in evidence in this case, and no attack is made on the validity of the judgments as against the owners of the property. The only question raised was and is as to their priority. The mortgage under which the plaintiff claims is dated June 1st, but was not acknowledged till June 14, 1887. There was evidence introduced at the trial showing that work on the building on account of the construction of which the defendants claim liens was commenced between the 1st and 20th days of May pre-

ceding. Several witnesses testified to this effect, and we are unable to find any evidence in the record contradicting them. This matter is not mentioned in the brief for plaintiff in error, and no one has appeared in this court for the defendants in error. Conceding that the court erred in holding the prior judgment conclusive and binding on the plaintiff, it yet appears from all the evidence in the case that the defendants had valid liens on the property, which they had duly prosecuted to judgment within the time prescribed by the statute; and it also appears that their liens were prior and superior to that of the plaintiff under his mortgage. The judgment therefore seems to be right, although the reason for rendering it may be wrong. As the plaintiff was given judgment against the mortgagors, and for a foreclosure of his mortgage subject to the prior liens of the defendants, we do not perceive that he has any just ground for complaint. The judgments in both cases are affirmed. All the justices concurring.

FERGUSON v. WILLIG.

(Supreme Court of Kansas. Dec. 5, 1896.)

CANCELLATION OF CONTRACT—FRAUD—BURDEN OF PROOF—REVIEW ON APPEAL.

1. In an action to rescind a contract exchanging a farm and some personal property thereon for city property, the plaintiff alleged that the defendant made false and fraudulent statements and representations to him as to the amount and character of a mortgage upon the property conveyed to plaintiff, and that he did not know of the existence of such mortgage, which was then a matter of public record, and the existence of which was shown by an abstract of title furnished by the defendant to plaintiff when the exchange was made, until shortly before the action was brought. *Held*, that the burden of showing the deception, and that he was without knowledge of the mortgage, rested upon the plaintiff.

2. Unless it affirmatively appears from a fair construction of the record that all the testimony is preserved, the question of whether the findings and judgment are sustained by the testimony is not open for consideration.

(Syllabus by the Court.)

Error from district court, Russell county; W. G. Eastman, Judge.

Action by Frederick Willig against Winfield S. Ferguson. Judgment for plaintiff. Defendant brings error. Reversed.

On October 23, 1890, a contract was made by which Frederick Willig exchanged 480 acres of land in Russell county, subject to a \$600 mortgage, together with the personal property thereon, consisting of cattle, horses, mules, implements, etc., with W. S. Ferguson and H. H. Housley, for a large number of lots in the city of Wyandotte. All the lots were incumbered except two, upon which there were buildings and other improvements. Soon after the contract for the exchange was made, deeds were executed, and in the deed for the city lots in controversy it was covenanted by the grantors that they were "free

and clear of all incumbrances, excepting a certain mortgage to the amount of \$1,216.65, at 7 per cent., which grantee assumes, and is a part of the consideration of this deed." At the time of the transaction the lots were incumbered with a large number of others by a mortgage dated January 1, 1890, for \$17,000, to secure five notes, one of which fell due on the 1st day of January of each year from 1891 until 1895. The mortgage was executed to L. H. Wood, and had been assigned to the Lombard Investment Company. It contained a clause providing for the release of any of the lots upon payment of a proportion of the mortgage debt, as follows: "And the said party of the second part hereby agrees with the party of the first part that, in the event that any payment of \$500, or multiple thereof, at any interest-paying time, shall be paid on account of any of the within-described notes as therein specified, then said second party shall, at the request of said first party, cause to be released so much of such portion of lots, tracts, or parcels hereinbefore described and set forth as one-third of the appraised value of said lots shall be equal to the amounts so paid. For example, suppose a particular lot should be appraised at \$1,500, then, upon payment of \$500, according to the tenor of said notes, said first party may request that said lot be released by said second party. The appraised value shall be determined by the written appraisal of the above-described lots, which written appraisal was signed by R. J. Camp and H. H. Housley, and hereto attached, and made a part hereof." Attached to the mortgage was an appraisal, which showed that the amount required to release the lots in controversy was \$1,216.65, being one-third of their appraised valuation. On January 1, 1891, Willig, claiming that false representations were made to him with respect to the incumbrances upon the lots, undertook to rescind and to tender back conveyances of the lots, demanding the transfer to him of the property in Russell county which he had traded for the lots. There was an error in the description of the lots so tendered back, and the conveyances tendered did not include all of the lots. The two lots which Willig received without incumbrance had been mortgaged by him before the tender was made for the sum of \$500. At the same time he also demanded damages in the amount of \$834.46. The demand was refused, and this action was begun. A trial was had with a jury, which returned a general verdict in favor of Willig, finding that the plaintiff was entitled to a rescission of the contract. The following special findings of fact were also returned with the verdict: "(1) Did Willig offer to pay to the Lombard Investment Company, the holder of the \$17,000 mortgage, the sum of \$1,216.65, or any other sum, as a consideration for the release of the lots in London Heights second subdivision? Ans. No. (2) What, if anything, did Willig do towards getting the lots in London Heights released from

the lien of the \$17,000 mortgage? Ans. He went to see about it, and found he could do nothing. (3) When did Willig first learn of the existence of the \$17,000 mortgage? Ans. About the last of March or first of April, 1891. (4) Could Willig have had the lots in the London Heights second subdivision released from the lien of the \$17,000 mortgage on payment of the sum of \$1,216.65 and interest thereon at the rate of 7 per cent.? Ans. No. (5) Prior to commencing the suit, did Willig incur for \$500 certain lots received from defendants clear of incumbrances? Ans. Yes. (6) Was Willig damaged by reason of any difference between the covenants of the contract and deeds and the actual facts in regard to the \$17,000, and, if so, how much damage did he suffer, and what are they? Ans. First. Yes. Second. Don't know to what extent. (7) Did Willig agree to pay \$1,216.65 as a part of the consideration for the six lots in London Heights second subdivision? Ans. Yes, according to the contract. (8) If you answer the above in the affirmative, has he paid or offered to pay it to the holder of the mortgage? Ans. No." Motions were made by Ferguson for judgment upon the special findings, and for judgment upon the evidence notwithstanding the verdict and special findings, but they were overruled, and judgment was awarded in favor of Willig. Ferguson brings the proceedings here for review.

Sutton & Dollison, for plaintiff in error. Dall & Bird and Harry L. Prestana, for defendant in error.

JOHNSTON, J. (after stating the facts). It is earnestly contended that the testimony does not sustain the verdict and judgment, but, as the record fails to affirmatively show that all the testimony is preserved, that question is not open for examination. No statement is found in the case-made to the effect that it contains all the evidence, and, although it is claimed that the recitals at the opening and closing of the testimony for each party furnished an equivalent of the statement, there are several breaks in the continuity of the testimony; so we cannot say that other witnesses were not examined, or other testimony may not have been received. It cannot be presumed that all the evidence is preserved. That fact must affirmatively appear from a fair construction of the record. *Moody v. Arthur*, 16 Kan. 419; *Greenwood v. Bean*, 20 Kan. 240; *Winstead v. Standeford*, 21 Kan. 270. Willig testified that he was not informed about the \$17,000 mortgage, and had no knowledge of its existence, until he went to the Lombard Investment Company, in the early part of April, 1891. He states that he went there with a view of making an interest payment on the mortgage debt against the lots, and that he was then told of the existence of the mortgage, and that payments could only be made as the mortgage stipulated. He did not then, or at any time afterwards, offer to pay the \$1,216.65 mortgage

debt that was mentioned in the deed, and which he had assumed as a part of the consideration of the lots. On the other hand, Ferguson testifies that he explained to him the character of the incumbrance, and the manner in which a lot could be released by paying a proportionate share of the mortgage debt, substantially as the release in the mortgage provides. The contract for the exchange of properties provided that Ferguson should furnish to Willig an abstract of title. This was furnished, and upon its face it showed the \$17,000 mortgage. Other witnesses testified that Willig examined the abstract, spoke of the \$17,000 mortgage, and the manner in which lots could be released from its obligation. The mortgage itself was of record, containing the release clause, and appended to the mortgage was the appraisal of the property, by which it appears that the proportionate share of the mortgage debt against the lots in controversy was exactly the amount of mortgage debt assumed by Willig, and mentioned in the conveyance to him. There was testimony, too, from the managers of the Lombard Investment Company, that Willig had never proposed to pay his share of the mortgage debt; and that, if he had tendered the same, it would have been accepted, and the lots would have been released from the mortgage. In this state of testimony, an instruction was given that "the burden of proof is upon the plaintiff in this action, and he must make out his case by the preponderance of the evidence; but, where the defendant attempts to show knowledge by plaintiff of the existence of the \$17,000 mortgage, he must show this by the greater weight or preponderance of the evidence." In this, we think, there was error. The plaintiff asked a rescission on account of misrepresentation and concealment concerning the \$17,000 mortgage. It was the principal fact in the case, and the burden of proving it was upon him. He avers and insists that the character and amount of the mortgage were misstated to or withheld from him by the defendant below. If he was correctly informed,—as much of the evidence tends to show,—he has failed to support the main fact in the case, and the one which is essential to a recovery. The alleged fraud depended upon whether he was informed or misinformed about this mortgage, and this fact was necessarily involved in the issue which he tendered. He held the affirmative of the issue, and, if no proof had been offered to sustain it, his action must have failed. He who alleges that a transaction is fraudulent takes upon himself the burden of proving every necessary element of the fraud. If the defendant conceded the misrepresentation, and claimed that the plaintiff had full knowledge of the fraud, and had, therefore, acquiesced in or waived it, it might well be argued that the burden of showing the knowledge would rest upon the defendant. In this case, however, the misrepresentations constitute the fraud relied upon by the plaintiff, and the matter of whether he was misinformed and deceived is an essential feature of his case. The mortgage itself was

a matter of public record, and revealed its own character. He had possession of an abstract which pointed out the existence of the mortgage, and, in view of the nature of the action and the issue which he tendered, the burden of showing the deception, or that he was without knowledge of the mortgage, was upon him.

Other objections are argued, some of which might be deemed to be serious if we could say that all the evidence in the case was before us, but, owing to the condition of the record, we will not undertake to consider or decide them. For the error mentioned, the judgment of the district court will be reversed, and the cause remanded for a new trial. All the justices concurring.

**SOUTHERN KANSAS RY. CO. v.
MICHAELS.**

(Supreme Court of Kansas. Dec. 5, 1896.)

RAILROADS—ERRECTIONS NEAR TRACK—NEGLIGENCE—INJURIES TO EMPLOYEES—CONTRIBUTORY NEGLIGENCE—TRIAL—PHYSICAL EXAMINATION—EVIDENCE—INSTRUCTIONS.

1. The placing and maintenance of a switch stand on the top of which there is an arrow or spear 17 inches long, and which, when turned towards the track, is so close as to knock trainmen from the ladder on the side of the cars, when engaged in the performance of their duties, is negligence on the part of the railroad company, and, under the circumstances of this case, warranted the submission of the question to the jury whether or not it was a case of gross negligence.

2. While a trainman ordinarily cannot recover for injuries arising from perils that are obvious, yet the mere fact that the switchman had seen and handled the switch does not necessarily show that he had such information as would charge him with knowledge of the dangerous proximity of the same when the spear on the top of the switch was turned towards the track, and is not conclusive evidence of contributory negligence.

3. The court may, in the exercise of a sound judicial discretion, require a plaintiff seeking to recover for personal injuries to submit to a physical examination; but where the application is not made until after the close of plaintiff's evidence, and no reason is shown for the delay in making the application, nor any showing as to the necessity for such an examination, it will not be error to refuse the application.

4. The refusal of a motion to require the court to strike out all of the testimony of a witness, the greater part of which is unobjectionable, cannot be regarded as error.

5. An error in the instructions which the findings of the jury show to be immaterial is not ground for reversal.

6. The testimony examined, and held to be sufficient to sustain the findings and verdict.

(Syllabus by the Court.)

Error from district court, Sumner county; L. Nebeker, Judge pro tem.

Action by O. P. Michaels against the Southern Kansas Railway Company. From a judgment for plaintiff, defendant brings error. Affirmed.

A. A. Hurd, O. J. Wood, and W. Littlefield, for plaintiff in error. J. E. Halsell and James A. Ray, for defendant in error.

JOHNSTON, J. O. P. Michaels brought this action against the Southern Kansas Railway Company to recover for personal injuries received while acting as head brakeman on a freight train running from Cheryvale to Wellington. The distance between the points was more than 100 miles, and Longton was among the stations on the route. A branch road connected with the line at that point, and there were a number of side tracks and switches in the yards. Michaels was an experienced brakeman, and was employed by the company in that capacity in October, 1885, and continued in its service until May, 1893. He re-entered the employment of the company in February, 1887, and was employed on the run mentioned until April 7, 1887. While engaged in switching in the Longton yards on that day, he was hanging to the ladder on the side of a car, with his foot in the stirrup; and while signaling to the rear brakeman he was struck on the back by a switch target, which is alleged to have been too close to the track, knocked down, and severely injured. The switch stand was midway between two tracks, and the center of the same was only 4 feet and 3 inches from the outside rail of either track. It was about 7 feet high, and on top there was a spear or arrow head which projected about 17 inches from the staff, used to indicate the direction in which the switch was turned. The cars of the company projected about 25 inches over the rail, and, when the 17-inch spear was turned, it would leave a space of about 9 inches between the switch target and the side of the car. It is customary and proper for the brakeman to hold to the ladder on the side of the car while switching about the yards, and, at the time of the injury, Michaels was engaged in the performance of his duty, and was giving directions to the rear brakeman with reference to a switch on another track which required adjustment. The train was moving west, while the brakeman with whom Michaels was communicating was east of him, and therefore his back was towards the switch stand, the target of which knocked him off. He was familiar with the yards, and had previously used the switch stand, but states that he had never observed that it was so close to the track as to make it dangerous for those who were upon the side of cars passing over the track. There have been two trials of the case, and in each Michaels has been successful in obtaining a verdict. The first judgment was reversed on account of error committed in the admission of testimony, and because the findings of the jury were unsupported by the testimony, and inconsistent with each other. *Railway Co. v. Michaels*, 49 Kan. 388, 30 Pac. 408. In the second trial he recovered a judgment for \$6,860, and the company bring the case here again, insisting that prejudicial errors were committed in the course of the trial.

We are not favorably impressed with the contention that the testimony is insufficient to support the verdict and judgment. The maintenance of a switch stand so near to the track as to knock trainmen from the cars when regularly engaged in the performance of their duties is a plain case of negligence, and one, too, which warranted the court in submitting to the jury the question whether or not it was gross negligence. Michaels was using the ladder in the ordinary way, and for a proper purpose. He was pursuing the usual course when he gave signals, or directions to the rear brakeman to proceed and adjust another switch. For the time being, his whole attention was engaged, and his duty required him to look towards the rear of the train, instead of in the direction in which they were moving, and where the target was. If he had been looking ahead, he would probably have observed that the switch target was so close to the car as to be dangerous, but his duties appeared to require him to look in a different direction in order to accomplish his work in a proper manner.

It is contended that the plaintiff was aware of the location of the switch stand, and did not exercise due care for his own safety. His own statement, however, is that while he had run through the yards many times, and had previously handled the switch, he never noticed how close the switch target came to the passing cars when it was turned towards them. It is easy to understand how he might pass and repass the switch when the 17-inch spear was not turned towards the cars, without observing that it would be dangerously close when turned towards them, and also that while upon the ground setting the switch, he might fail to observe how near the spear was to the passing cars. In *Rouse v. Ledbetter*, 56 Kan. 348, 43 Pac. 249, an injury to a switchman resulted from a defective structure in the yard, and one that he might have seen by the reasonable use of his eyesight. It was held, however, that the fact that he was working in that part of the yard, and might have seen it if his attention had been called to it, was not conclusive evidence of contributory negligence. It was said that: "The faculty of close observation of objects is largely a gift. Some persons may walk once along a street, and be able, without any special effort, to describe every prominent object upon, and every projection into, the street, while others might go up and down the same street for a year, who could not describe such objects and projections. * * * Many dangers necessarily attend the performance of the duties of a yard switchman, but the master is not allowed to increase the hazards of his service by placing pitfalls, obstructions, traps, or inclines in his path, whereby he may lose his footing and be mangled or killed." Testimony was introduced that Michaels knew of the dangerous

proximity of the switch to the track, and it appears that he had heard some one say a short time before that one of the switches at Longton was dangerous; but he positively asserted that he had never observed that the switch which swept him from the car was so close to the track, and had no knowledge of its dangerous proximity. The mere fact that he had seen and handled the switch does not necessarily show that he had such information as would charge him with knowledge of the distance between the target on the top of the switch and the ladder on the side of the car. The switch stand had been there from the time he was re-employed by the company, a period of about 55 days, but his work was not confined to that yard. On his trip between Cherryvale and Wellington, he passed through many stations and yards, and necessarily had to do with numerous switches. He may be said to have assumed the general danger from structures and erections near to the tracks, but it does not appear that there were any others dangerously near to the tracks; and from his testimony, and the finding of the jury, we must assume that he had no actual knowledge of this danger. It is not to be expected that he would observe or keep in mind the relation of all these switch stands to the tracks, their distance and danger. In reason, there can be no necessity for maintaining switch stands so close to the tracks as to make it unsafe for trainmen to perform the duties required of them; and, in the absence of notice of the danger, they have the right to assume that the company will make adequate provision that no dangers other than those naturally incident to the business should befall them while in the performance of their duties. In a somewhat similar case, where an employé was knocked from a train by the overhead timbers of a bridge, it was said: "When he entered the service of the company, he assumed the ordinary risks incident to the service; and if he enters or continues in the service with a knowledge of the risk or danger, and without objection, he must abide the consequences. * * * The law, however, does not require that an employé shall know of all defects or obstructions that may exist on the road, or in the service in which he is engaged." *Railroad Co. v. Irwin*, 37 Kan. 701, 16 Pac. 146. See, also, *Railroad Co. v. Rowan*, 55 Kan. 270, 30 Pac. 1010. In the present case the danger was not so obvious that it can be said, as a matter of law, that Michaels was bound to know and appreciate the danger. Although he did know of the existence of the switch, he may not have had such knowledge of its dangerous character as to charge him with the assumption of all risk arising from it. It was fairly a question for the jury, and has been decided in favor of the defendant in error.

Error is assigned on the refusal of an application to require Michaels to submit him

self to a medical examination. The application was not made until the trial had commenced, and after the plaintiff had closed his testimony. The company then applied to have the plaintiff submit to an examination by a single physician, who was named. No reason was given for the examination, nor any showing of necessity for the same. It has been held that the power to compel the physical examination of one seeking to recover for personal injuries exists, in proper cases. *Railroad Co. v. Thul*, 29 Kan. 460. As it trenches closely upon an invasion of the private rights of the person, it should be exercised with great caution, and only where it is necessary to effect the ends of justice. In the *Thul* Case it was said that upon such application the court should exercise a sound judicial discretion, and the order for the examination should be made upon a proper application, and upon a proper showing. When such an examination is necessary, a timely application should be made; and it should be conducted under the control and direction of the court, by competent physicians or surgeons, selected by the court. There was no showing made that an examination was essential to a full understanding of the injuries, nor was the application made in proper time. If an examination was required, the application should have been made a sufficient time before the trial commenced, in order that it might have been deliberately and carefully made, and so as not to interfere with the progress of the trial.

There are several objections to the testimony, and especially to that given by Dr. Forbes, who had examined the plaintiff below, and who testified concerning the permanency of the injury. At the time he made the examination the history of the case was given to him by Michaels, and he also had the written statements of Drs. Spitler and Hamilton, who had formerly examined Michaels. At the end of his testimony the company requested the court to withdraw from the consideration of the jury all of the testimony of the witness as to the condition of Michaels, and the character of the injury. Most of the testimony given by the witness was free from objection, and was based upon the personal examination which he had made. Of course, statements of the result of examinations made by other physicians could not legally be introduced in evidence. It was proper that he should be informed, however, of the injury, and the time of its infliction, and, generally, of the history of the case, and this appears to have been the only use that was made by him of the statements of the other physicians. However, he appears to have been a competent physician and surgeon, and as nearly all of his testimony rested upon a personal examination, and was therefore unobjectionable, the motion to strike out the whole of his testimony was properly overruled.

We have examined the instructions refused and given, and find no cause for reversal. Most of the controlling principles of law in the instructions requested were embodied in the charge that was given, and what has already been said as to the merits of the case disposes of several objections to the instructions. One of the instructions given may have been somewhat inaccurate, in stating that a recovery might be had by the plaintiff, even though he was not free from negligence, if the company was guilty of gross negligence; and, in a certain sense, the negligence of the two was compared. If there was error in this respect, however, it must be regarded as harmless, as the jury, in answer to a special question, found that the plaintiff was in the exercise of ordinary care, and, in answer to another, that he was not guilty of any negligence.

In our view, there is testimony to sustain the material findings in the case, and they support the verdict which was rendered. We have carefully examined all of the questions discussed by counsel, some of which it is not deemed necessary to mention, and find that the record presents no prejudicial error. The judgment of the district court will therefore be affirmed. All the justices concurring.

CONVERSE v. BARTELS et ux.

(Supreme Court of Kansas. Dec. 5, 1896.)

MORTGAGES—ASSIGNMENT.

A bona fide indorsee of a bond and mortgage negotiable in form, and the genuineness of the signatures to which is admitted by the makers, is not affected by alleged fraudulent representations, made by the original payee to the maker thereof.

Error from district court, Kingman county; W. O. Bashore, Judge.

Action by Elisha S. Converse against John H. Bartels and wife. Judgment for defendants. Plaintiff brings error. Reversed.

Huston & McColloch, for plaintiff in error. O. W. Fairchild and L. M. Conkling & Son, for defendants in error.

PER OURIAM. This action was brought on a bond for \$2,000 executed by Deltrich Bartels and Anna Bartels, and to foreclose a mortgage securing the same. Anna Bartels answered that the mortgage was procured by fraud; that the agent of the Farmers' Loan & Trust Company, to whose order the papers were payable, fraudulently represented to her that the mortgage presented for her signature was for but \$1,000, and that she was induced to sign it under the belief that it was for \$1,000 only. When the case was called for trial, the plaintiff's attorney was absent, and the defendants proceeded to introduce testimony. Afterwards, on the same day, the attorney for plaintiff appeared, and introduced evidence for the plaintiff. After the conclusion of the

testimony the court found in favor of the defendants that the signature of Anna Bartels to the bond and mortgage was obtained by fraud, and entered a judgment for their cancellation. We have examined the testimony in the case, and find that it does not support the judgment. The evidence shows that the plaintiff holds the bond and mortgage by indorsement from the Farmers' Loan & Trust Company. There is not a particle of evidence indicating that he had notice of any infirmity in the paper, which is negotiable in form, and the genuineness of the signatures to which are admitted by the defendants; nor is there any evidence showing that the person who obtained the signature of Anna Bartels, and took her acknowledgment to the mortgage, was the agent of the Farmers' Loan & Trust Company. There is no evidence whatever connecting the payee with any fraudulent representation or transaction. It is extremely doubtful whether the testimony shows such fraud, even if the payee and plaintiff had been parties to the transaction, as would altogether vitiate the securities. According to her own testimony, Mrs. Bartels can read German. Two thousand dollars in figures appear very plainly on the face of the bond, and also in the body of the mortgage. There is no pretense that the paper was concealed from her, or that it was misread to her. She says she relied on the statements of the notary that it was a mortgage for \$1,000 only. She expected and intended to execute a mortgage for \$1,000, yet the court has relieved her and her husband from making any payment whatever. She was at least very negligent in failing to notice the figures on the paper. There is no evidence showing that the plaintiff is guilty of any wrongdoing or neglect, and, on the testimony introduced, he was entitled to judgment for the full amount of his mortgage; but the record is not in such condition that we are authorized to direct a judgment in his favor. The case will therefore be reversed, with directions to grant a new trial.

ATCHISON, T. & S. F. R. CO. v. SLATTERY.
(Supreme Court of Kansas. Dec. 5, 1896.)

RAILROADS—ENGINEER—SECTIONMEN—NEGLIGENCE—DISOBEDIENCE OF RULES.

1. An ordinary push car was carried by the employes of a railroad company a safe distance from the track, and there blocked in the ordinary way to prevent it from drifting towards the track. Afterwards six or eight boys, not connected with the railroad company, took it from the position in which it was left, and attempted to put it upon the track, but, before doing so, they were interrupted, and ran away, leaving it dangerously close to the track. Shortly afterwards a switch engine, upon which a yard clerk was riding, came along, and collided with the push car, and injured the yard clerk. In an action to recover for the injury, it is held that the company was not negligent in leaving the push car as it did, and without other locks or guards.

2. Upon the evidence in the case, it is held that there is testimony tending to show that those in charge of the switch engine failed to exercise due care in keeping a lookout along the track for obstructions, and in controlling the engine, so as to prevent the collision and injury.

3. Ordinarily, the willful disobedience of a rule which is operative should be held as negligence on the part of an employe of a railroad company; but where the rule is habitually disregarded, and a different practice has long been followed by the employes, with the knowledge and approval of the managing officers of the company, the rule must be regarded as inoperative.

(Syllabus by the Court.)

Error from district court, Sedgwick county; C. Reed, Judge.

Action by M. Frank Slattery against the Atchison, Topeka & Santa Fé Railroad Company. From a judgment for plaintiff, defendant brings error. Affirmed.

A. A. Hurd, O. J. Wood, and W. Littlefield, for plaintiff in error. J. D. Houston and J. F. Craig, for defendant in error.

JOHNSTON, J. This action was brought by M. Frank Slattery against the railroad company to recover for personal injuries sustained by him in a collision between a switch engine, upon which he was riding, and a push car, in the yards of the railroad company at Wichita. He was employed by the company as a yard clerk, and his duties consisted mostly of ascertaining the numbers of freight cars upon their arrival in the yards, making a list of them, and marking their points of destination. He received a list of the cars in each train from the conductors of the trains as they arrived, and from such list personally examined the cars mentioned therein; and, for such purpose, he was obliged to visit all parts of the yards, which were about two miles in length. On account of the length of the yards, he frequently rode on the switch engine from one part of the yards to another. On April 5, 1891, he had occasion to go to the southern part of the yards, for the purpose of ascertaining the numbers of the cars, and marking the same. He boarded the switch engine, which was backing south, pushing three or four cars. There was a footboard around the tank of the switch engine, and he took a position on it, on the east side of the tank, and near the rear end. The engine then proceeded southward, stopping to place some of the cars on different tracks; and, when going at about the rate of 10 miles an hour, it came in contact with a push car, which was upon the side of the track, and a portion of which projected over so far that it caught Slattery's foot, and injured it, so that amputation of a portion of it was necessary. The push car had been left in the yards two days before, carried a safe distance from the track, where it was blocked so that it could not run onto the track. On the day of the accident, and about 15 minutes before it occurred, 6 or 8 boys, ranging from 9 to 13 years of age, who were in no way connected with the railroad com-

pany, took the car from its position, and attempted to put it upon the track, but, being discovered, left it close to the track, and ran away. It was an ordinary push car, without propelling force, with two handles at each end, extending out therefrom so that it could be put on and off the track. The engineer saw the push car a short time before the engine collided with it, but states that he did not observe that it was so close to the track as to be dangerous. At the same time, a switchman named Wagner was standing near the end of the tender, one of whose duties it was to keep a lookout for obstructions on the track. The engineer testified that Slaterry and Wagner were between him and the push car, and to some extent obstructed his view. The jury found that the company was guilty of culpable negligence: "First, leaving push car unlocked; second, negligence on the part of the engineer in not stopping engine after observing push car; third, negligence on the part of Mark Wagner in failing to see push car in the performance of his duties." The jury returned a verdict in favor of Slaterry for \$3,000, and from the special findings it appears that \$250 was allowed for the pain suffered, and \$2,750 was allowed for permanent injuries.

In our view, the first ground of negligence is not sustained. The push car was not in itself a dangerous thing. It was placed at a safe distance from the track, and was fastened and blocked in the usual way that such cars are secured. It was a cumbersome, heavy thing, weighing from 500 to 1,000 pounds, not easily moved; and, not having any propelling appliances, children would not naturally be attracted by it, any more than they would by a mowing machine, a road wagon, or other wheeled implement that a farmer would leave near the roadside without thought of risk or liability. It has never been regarded as necessary to house or lock them up, and the railroad company had exercised that degree of care respecting this one that is ordinarily exercised in caring for such cars when not in use. The company cannot be held responsible for the unlawful acts of third parties in placing obstructions upon their track without its knowledge or consent, unless it should be where its negligence had in some way induced the placing of obstructions upon the track. In the nature of things, the company had no reason to anticipate that the push car would be moved by third parties upon or dangerously close to the track, and, in the absence of other negligence, it would not be liable for injuries resulting from such removal. *Robinson v. Railway Co. (Utah)* 27 Pac. 689.

It cannot be said, however, that the company was free from negligence in failing to stop the engine before the collision occurred. It was the duty of the engineer, as well as the switchman, who was riding near the end of the tender, to keep a lookout for obstructions upon the track. Whether the engineer and the switchman, in the discharge of their duties, should have observed the obstruction

in time to have stopped the engine and avoided the injury, was a matter for the determination of the jury. The engineer testified that he saw the push car before they reached it, and that he could have stopped the engine in time to have prevented the injury if he had known that it was dangerously close. He admits that he saw it when 40 or 50 feet away, and that he could have stopped is shown by his statement that he only ran 30 feet after striking the push car. As an excuse for not observing the dangerous proximity of the push car, he states that his view was obstructed to some extent by the plaintiff and Wagner, who were standing on the footboard of the tender, in front of him. It appears, however, that the engineer, from his higher position, did see the push car; and it cannot be said, as a matter of law, that he should not have observed that it was too close to the track to permit the engine to pass. Wagner, who occupied a front position on the hind end of the tender as it advanced, was in a position to see the obstruction, and it was his duty to keep a lookout for the same. He gave no signal to the engineer, and probably he failed to observe the danger until the collision occurred. Other duties devolved on him which may have engaged his attention at the moment, but whether he was in the exercise of reasonable care in keeping an outlook was a question for the jury. The obstruction, however, was actually seen by the engineer in ample time to have stopped the engine with the appliances at hand. Could he, by ordinary care, have seen and appreciated the danger, and could he, by due attention and prompt action, have avoided the injury? Men of reasonable minds might draw different inferences from the testimony, so that, according to the conclusion of fact reached by one, there would be culpable negligence, while that reached by another would be that reasonable care had been exercised. In such a case the question of fact is for the jury. *Beaver v. Railroad Co.*, 56 Kan. 514, 43 Pac. 1136.

It is contended that, from the position Slaterry occupied, there was nothing to prevent him from seeing that the push car was close to the track, and that, as he was familiar with the signals used in the yards, it was his duty to signal the engineer in time to avoid the collision and injury. It appears, however, that his duties required him to be on the lookout for cars as he passed down the yards; and he states that he was engaged in looking for cars all the time while he was on the engine, that he had no opportunity to look ahead, and that he did not know anything of the push car until they came in contact with it. If his duties required him to look in another direction, and he was so engaged at the time, it cannot be said that he was negligent in not observing the car.

It is further contended that Slaterry assumed an obviously dangerous position on the footboard of the switch engine, and that he was riding there in violation of one of the rules of

the company. The rule is: "No person will be permitted to ride on an engine excepting the engineman, fireman, and other designated employes in the discharge of their duty, without a written order from the proper authority." While he appears to have had no written authority to ride, he, doubtless, was warranted in doing so by the well-established custom of the yards, and by the sanction and approval of those in charge of them. In fact, in the present instance, he was directed by the foreman to step upon the engine, and ride down to the end of the yards, for the purpose of finding and marking certain cars. For several years he had ridden back and forth upon the engine, and the yard master, his superior officer, had directed him to go upon the engine whenever it would take him to his work faster than he could get there by walking. He had ridden on the engine in the presence of the superintendent, and apparently with his sanction and approval. Ordinarily, the willful disobedience of a rule should be held to constitute negligence; but where the rule is habitually disregarded, and a different course has long been pursued by employes, with the knowledge and approval of the managing officers of the company, the rule must be regarded as inoperative. *Railroad Co. v. Kier*, 41 Kan. 662, 21 Pac. 770; *Railway Co. v. Springsteen*, 41 Kan. 724, 21 Pac. 774. We cannot hold, as a matter of law, from the testimony, that Slattery was guilty of contributory negligence.

The charge of the court fairly presented the case to the jury, and none of the questions upon the instructions or findings of the jury seem to require special attention. The judgment of the district court will be affirmed. All the justices concurring.

KELLEY et al. v. STEVENS et al.
(Supreme Court of Kansas. Dec. 5, 1896.)

APPEAL—CASE-MADE—SIGNATURE OF JUDGE.

Everything intended to be incorporated in a case-made for the consideration of this court should precede the signature of the judge who settles it. And *held* that, on the record presented in this case, a general finding of the trial court in favor of the defendants must be affirmed.

(Syllabus by the Court.)

Error from district court, Finney county; A. J. Abbott, Judge.

Action by A. P. Kelley and others against J. H. Stevens and others. Judgment for defendants. Plaintiffs bring error. Affirmed.

B. W. Lemert and Milton Brown, for plaintiffs in error. J. B. Johnson, for defendants in error.

ALLEN, J. This action was brought to set aside a deed made by James H. Stevens and wife to Lillias H. Thompson, Charles B. Thompson, and Lillian E. Thompson, and to subject the property therein described to the

payment of a judgment in favor of the plaintiffs in error against J. H. Stevens and C. L. Thompson, the husband of Lillias H. Thompson. There are 15 assignments of error. We have examined and overruled all of them. The brief seems to lay most stress on the proposition that the property conveyed to Mrs. Thompson was partnership property, and therefore, it is contended, subject to the payment of partnership debts before any part of it can be applied to the payment of a debt of an individual member of the firm. Mr. and Mrs. Thompson claim that the conveyance to her was in payment of a debt due her from her husband. We fail to find a copy of the judgment in favor of the plaintiffs. There are two recitals in the record concerning a judgment. One of them is of a judgment in favor of A. P. and W. E. Kelley against Stevens and Thompson for \$2,899.53. The other is of a judgment for the same amount in favor of the same persons against Stevens and Thompson and C. J. Jones. This judgment appears to have been rendered on four promissory notes signed by J. H. Stevens, C. L. Thompson, and C. J. Jones, secured by a mortgage on certain lots, executed by C. J. Jones and wife. So far as the evidence goes, it shows liability as individuals rather than as partners. The trial court made a general finding in favor of the defendants. Several assignments of error are predicated on the deposition of C. L. Thompson. We find attached to the case-made, after the signature of the judge, a stipulation with reference to a deposition, followed by what purports to be a deposition of C. L. Thompson in the caption and body of it, but which is unsigned. Another assignment of error is in excluding a plat of Stevens and Thompson's addition to Garden City, which it is claimed was offered in evidence. We find folded in the purported deposition an unauthenticated copy of what appears to be a plat of such addition, wholly detached from the case-made. In the body of the case it is said that it contains all the evidence, yet counsel refer to the deposition of Thompson as a part of the evidence in the case. This is not the way to prepare a case-made. Everything which it is intended to embody in a case should precede the signature of the judge. On such a record we cannot say that the trial court erred in finding generally for the defendants. The judgment is affirmed. All the justices concurring.

GARRETT v. STRUBLE.

(Supreme Court of Kansas. Dec. 5, 1896.)

SERVICE BY PUBLICATION—COLLATERAL ATTACK.

In obtaining service by publication, if there is a total failure to state in the notice any material matter required by section 74 of the Civil Code, the service is void, and subject to a collateral attack; but where there is not such an entire omission of a material matter from the notice, and it is inferentially or insuffi-

ciently set forth therein, the service is merely voidable, and can be successfully attacked only in a direct proceeding.

(Syllabus by the Court.)

Error from district court, Stafford county; J. H. Bailey, Judge.

Action by W. J. Struble against W. H. Garrett and others. Judgment for plaintiff, and defendant Garrett brings error. Reversed.

J. W. Rose, for plaintiff in error. Moseley & Dixon, for defendant in error.

MARTIN, C. J. On August 11, 1887, Garrett commenced an action in said court against Struble as indorser of three promissory notes, and caused to be attached a section of land in said county to satisfy any judgment that might be obtained. The only service was by publication, and the body of the notice was as follows: "William J. Struble, a nonresident of the state of Kansas, will take notice that the said William Garrett, plaintiff, did, on the 11th day of August, 1887, file his petition in said district court within and for the county of Stafford, in the state of Kansas, against the said William J. Struble, defendant, and that said defendant must answer said petition, filed as aforesaid, on or before the 10th day of October, 1887, or said petition will be taken as true, and judgment rendered in said action against said defendant, William J. Struble, for the sum of eight hundred and twenty-eight and $\frac{64}{100}$ dollars, with interest thereon at the rate of 7 per cent. per annum from the 23d day of July, 1887, and for the sale of certain real property attached in this action." A judgment quite informal in character was rendered in the case November 4, 1887, for the sum of \$842, and it was ordered and adjudged that the real property attached, or so much thereof as necessary, be sold to pay said judgment. The finding of the court was that said sum was due from the plaintiff to the defendant, which was evidently a clerical error. The land was sold by the sheriff, and bid in by Garrett. The sale was confirmed, and a sheriff's deed was executed to him. Garrett and wife afterwards conveyed the land to Joseph R. Thomas. Thomas and wife conveyed the same to Richard Clayton, Clayton conveyed to William J. Harbert, Harbert and wife conveyed to Margaret C. Hunt, and she and her husband conveyed to William Atkinson. On March 18, 1891, Struble commenced his action against Garrett and wife and said several grantees down to Atkinson to set aside said judgment, the sheriff's deed based thereon, and the several conveyances thereafter, alleging all to be fraudulent and void as against him. Service was obtained by publication, and at May term, 1891, Struble recovered a judgment by default against all the defendants. Afterwards, at October term, 1891, Garrett made application to the court to open up said judgment, and that he be let in to defend. He was allowed to do so, and he

filed an answer, to which Struble replied. The action was tried at May term, 1892. The court found that the publication notice in the case of Garrett against Struble was void, because it contained neither a description of the land attached nor a statement that it belonged to the defendant, Struble, and that, in consequence thereof, the judgment rendered in the case was void. All the other issues were found in favor of Garrett, but judgment was rendered against him.

The only question which we deem necessary to consider is whether said notice was void or not. It was complete in all respects except those pointed out by the trial court. In these it was irregular, defective, and at least voidable. It could not have withstood a direct attack, because it did not sufficiently state the nature of the judgment which would be rendered upon default of answer. It indicated the amount of the judgment that would be taken, and that certain real property attached in the action would be sold, but it did not describe the land. As against a direct attack, the notice was insufficient under the authority of *Cohen v. Trowbridge*, 6 Kan. 385, and *Cackley v. Smith*, 38 Kan. 450, 17 Pac. 156. This court has frequently considered the validity of service by publication, but most of the cases have involved the sufficiency of the affidavit for publication, and generally the attacks upon the service have been direct, and not collateral. The following are some of the cases: *Repine v. McPherson*, 2 Kan. 340; *Shields v. Miller*, 9 Kan. 390; *Foreman v. Carter*, Id. 674; *Deltrich v. Lang*, 11 Kan. 636; *Claypoole v. Houston*, 12 Kan. 324; *Pierce v. Butters*, 21 Kan. 124; *Gillespie v. Thomas*, 23 Kan. 138; *Rapp v. Kyle*, 26 Kan. 89; *Harris v. Clafin*, 36 Kan. 543, 13 Pac. 830; *Grouch v. Martin*, 47 Kan. 313, 27 Pac. 985. In *Harris v. Clafin*, supra, it was held that, if there is a total want of evidence upon a vital point in the affidavit for publication, the court acquires no jurisdiction by publication of the summons; but, where there is not an entire omission to state some material fact, but it is inferentially or insufficiently set forth, the proceedings are merely voidable. The same principle, as nearly as may be, should be applied as the test of the sufficiency of a publication notice. If there is a total failure to state in the notice any material matter required by section 74 of the Civil Code, the service is void; but, if there is not an entire omission of such material matter, and it is inferentially or insufficiently set forth, the notice is merely voidable, and not void. Following this rule, we hold that the notice in the case of Garrett against Struble was irregular, defective, and voidable, but that it was not void, and therefore must be held sufficient as against a collateral attack. The judgment will be reversed, and the court below ordered to render judgment in favor of the plaintiff in error, who was defendant below. All the justices concurring.

**PITTSBURG ELECTRIC RY. CO. v.
KELLY.**

(Supreme Court of Kansas. Dec. 5, 1896.)

CONFLICTING GENERAL AND SPECIAL VERDICT —
JUDGMENT FOR DEFENDANT.

In an action against a street-railway company by a person engaged in grading the street for a paving contractor, to recover for injuries received while working between the rails, where it is uncertain, under all the testimony, and findings of the jury based thereon, whether he was guilty of culpable negligence contributing to his injury or not, and where the jury were erroneously instructed by the court that, in order to recover, the plaintiff must show that the defendant was guilty of gross and wanton negligence. A finding as follows: "Question. Was the plaintiff guilty of negligence which contributed to his injury? Answer. Yes; to some extent,"—is insufficient, when opposed to a general verdict in favor of the plaintiff, to require that judgment be entered for the defendant. There being doubt whether the jury meant to do more than find the plaintiff guilty of slight negligence, instead of directing judgment on the special findings, a new trial will be ordered.

(Syllabus by the Court.)

Error from district court, Crawford county; J. S. West, Judge.

Action by Thomas F. Kelly against the Pittsburg Electric Railway Company. Judgment for plaintiff. Defendant brings error. Reversed.

This was an action brought by Thomas F. Kelly against the Pittsburg Electric Railway Company, to recover damages for injuries sustained by him while working as an employé of the Vitrified Brick Company, which was engaged in paving Broadway, in the city of Pittsburg. At the time of the injury, the plaintiff was engaged in removing dirt from between the rails of the street railroad, and while so engaged, with his back towards an approaching car, was run over and seriously injured. The petition alleges gross and wanton negligence on the part of the motorman in operating the car. After the conclusion of the testimony, the following, with other instructions, were given to the jury: "(2) In order for the plaintiff to recover, the burden of proof is upon him to show by a preponderance of the testimony that his injury was caused by the gross and wanton negligence of the defendant, which means such negligence upon the part of the motorman who was operating the car for the defendant. This is the vital question in the case. (3) Ordinary care is such as men of ordinary intelligence and carefulness would use under like circumstances as those in question, and slight care is such as men of less than ordinary care and prudence would thus use; and the failure to use slight care under such circumstances as to show a reckless indifference whether an injury is done to another or not, when there is known danger of injury, is gross negligence, amounting to wantonness; and, whether or not the plaintiff was to blame for not getting out of the way of the car, the de-

fendant had not the right to wantonly run over and injure him, and, if it did, it would be liable in damages." The defendant requested that 45 questions be submitted to the jury. Part were submitted, and part refused. The forty-fifth question, which is as follows: "Did the motorman Moore know that the man on the track was the plaintiff, Kelly?" was refused. The jury rendered a general verdict in favor of the plaintiff for \$3,000, and answered the special questions submitted, as follows: (1) Had plaintiff been working on Broadway in Pittsburg, and in between the street-railway tracks, for from thirty to sixty days prior to the accident? Answer. Yes. (2) Did plaintiff know at about what intervals the street cars were passing up and down the street? Answer. Yes. (3) Did the street cars, during the time the plaintiff was working on the streets, pass up and down by the plaintiff at intervals of about one-half hour? Answer. Yes. (4) Did the plaintiff know this to be the fact? Answer. Yes. (5) Were there other men working with the plaintiff? Answer. Yes. (6) Were all the men who were working on the street, including plaintiff, when working in between the rails, in the habit of stepping out from between the rails as the car approached, to let the car pass? Answer. Yes. (7) Had the plaintiff done this a number of times almost every day for from thirty to sixty days immediately prior to the accident? Answer. Yes. (8) Did the plaintiff see the car approaching at the time of the accident? Answer. No. (9) If you state No. 8 in the negative, state why plaintiff did not see the car. Answer. Had back to approaching car. (10) Did the plaintiff hear the car as it was approaching at the time of the accident? Answer. No. (11) If he did not hear the car, state why? Answer. He was hard of hearing, and wind was blowing from south, while the car approached from north. (12) Could plaintiff have seen the car approach if he had looked? Answer. Yes. (13) Was plaintiff deaf? Answer. No; he was a little hard of hearing. (14) Was there anything to prevent plaintiff from seeing the car as it approached but his failure or refusal to look? Answer. No; but there is no evidence that plaintiff refused to look. (15) Did the motorman Moore expect that plaintiff would get off of the track with the other men when the car approached? Answer. Yes. (16) Did the motorman Moore ring the bell and shout as he approached the men working between the tracks? Answer. Yes; but too late to stop car before passing place where men were at work. (17) Did the plaintiff hear the motorman shout, or hear the bell ring, as the car approached? Answer. No. * * * (19) Could the plaintiff have gotten out of the way of the car if he had looked or watched for its approach? Answer. Yes. * * * (21) Could the plaintiff have gotten out of the way of

the car if he could have heard the car approaching? Answer. Yes; if he had heard in time. * * * (25) Was the defendant guilty of negligence, causing the injury to plaintiff? Answer. Yes. (25½) If you answer No. 25, 'Yea,' state fully in what such negligence consisted. Answer. In not keeping car under his control, so he could stop it quickly. * * * (28) Was the plaintiff guilty of negligence which contributed to his injury? Answer. Yes; to some extent. (29) Why didn't plaintiff get out from between the rails as the car approached, at the time this accident occurred? Answer. Didn't hear car approach. * * * (31) Could plaintiff have seen the car approach for the distance of a block from the place of the injury, if he had looked? Answer. Yes. (32) Was plaintiff's injury caused or occasioned by his defect in hearing? Answer. No. * * * (35) Was there any obstruction to prevent plaintiff from seeing the car as it approached at the time of the accident? Answer. No. * * * (38) Did the motorman Moore know that the men were in the habit of stepping out from between the rails to let the cars pass? Answer. Yes. (39) Did the motorman Moore try his best to stop the car when he saw that plaintiff was not going to get out of the way? Answer. Yes; but too late to stop the car. * * * (41) Did the other men who were working between the rails with plaintiff at the time of the accident get out of the way without being injured? Answer. Yes. (42) Did the motorman Moore purposely and intentionally run the car over plaintiff? Answer. No. (43) Was the conduct of the men, including plaintiff, who were working between the rails of the track in stepping aside to let the cars pass as they approached, such as to reasonably cause and induce the motorman Moore to believe that they would continue to step aside for the cars to pass as they approached, and that the plaintiff in this case would step aside at the time of the accident? Answer. Yes. (44) Is it a fact that the plaintiff, Kelly, was not thinking about or looking for the car at and before the time of the accident? Answer. Yes. The defendant moved for a judgment on the special findings, and also for a new trial. Both motions were overruled, and judgment entered in favor of the plaintiff for the amount of the verdict. The defendant brings the case here for review.

Morris Cliggett, for plaintiff in error. T. W. Cogswell and Fuller & Randolph, for defendant in error.

ALLEN, J. (after stating the facts). In the trial of this case, the court seems to have considered that ordinary negligence on the part of the plaintiff was conclusively established, and, in the second instruction, told the jury that, in order to recover, the plaintiff must show that his injury was caused

by the gross and wanton negligence of the motorman. This instruction was not warranted by the evidence in the case. It was an open question, which should have been left to the jury to determine, whether the plaintiff was chargeable with ordinary negligence contributing to his injury. The findings of the jury in answer to special questions submitted exonerate the motorman Moore from purposely injuring the plaintiff, and also from gross and wanton negligence. It is even doubtful whether they do not exonerate him from any culpable negligence. We think the court erred in refusing to submit the forty-fifth question. If the motorman Moore knew that Kelly's hearing was defective, and knew that the man on the track was Kelly, it would materially affect the question as to what would be reasonable care on his part in propelling his car towards him. We have little difficulty in reaching the conclusion that the judgment must be reversed.

The instructions were erroneous, in that they require proof of gross and wanton negligence on the part of the defendant. This error was prejudicial to the rights of the plaintiff. The special findings of the jury clearly negatived the idea of wanton or intentional injury. The most difficult question for us to determine is whether or not the findings compel a judgment in favor of the defendant. The twenty-eighth question and answer are as follows: "Question. Was the plaintiff guilty of negligence which contributed to his injury? Answer. Yes; to some extent." If the case had been submitted under proper instructions, and the other findings had, as in this case, negatived wanton or willful injury, it would seem that such a finding would require that judgment be entered for the defendant. But the jury here were given to understand by the court that the plaintiff might recover notwithstanding his own negligence contributed to the injury, and that the vital question in the case was whether or not the negligence of the motorman was gross and wanton. The answer to the question, though in the affirmative, is qualified by the words "to some extent." Juries cannot be expected to select words with that nice discrimination and technical accuracy that may fairly be required of judges and counsel learned in the law. It does not seem a great stretch of language to say, when all the findings and all the evidence on which they are based are considered, that the jury meant merely to find that the plaintiff was guilty of slight negligence in failing to look to see whether a car was approaching at that particular time. His attention generally was very properly directed to the performance of the work in which he was engaged. While it was incumbent on him to take reasonable precautions for his own safety, the jury may have thought that he could not reasonably be expected to be at all times thinking about

approaching cars, and watching for them. Although it is found that the men working on the track were accustomed to get out of the way of approaching cars, it was the duty of the motorman to observe the track ahead of him, to regulate the movements of his car, and to look out for the safety of passengers he might be carrying, and persons and property on the roadway. Whether he exercised reasonable care in propelling his car towards the gang of men working on the track, even though they were accustomed to step out of his way, was a matter within the province of the jury to determine. On the whole record, we seriously doubt whether the jury, by this answer, intended to find that the plaintiff was guilty of culpable negligence contributing to his injury. A judgment on the special findings ought not to be directed by this court unless they are reasonably clear and unequivocal. We should be reasonably certain that we are not construing into the language employed by the jury a meaning they never intended. The judgment will be reversed, and a new trial ordered.

MARTIN, C. J., concurring.

JOHNSTON, J. I concur in the judgment of reversal, but, in my view, the plaintiff in error is entitled to judgment on the special findings. The jury found that Kelly was guilty of negligence, and that it contributed to his injury. This fact defeats a recovery, and should end the controversy.

STATE v. BAKER.

(Supreme Court of Kansas. Dec. 5, 1896.)

CRIMINAL LAW — WARRANT — SUFFICIENCY OF CHARGE—ARRAIGNMENT AND PLEA—REMARKS OF PROSECUTING ATTORNEY.

1. In charging a public offense it is not necessary that there should be the same fullness of statement in the warrant or preliminary papers that is required in the information.

2. In charging the offense of obtaining property under false pretenses, and where a check was given which was only a step in the transaction or an incident of the offense, a particular description of the check is not indispensable.

3. In a prosecution the defendant should be arraigned, and required to plead to the charge made against him. Until a plea is entered, or something that is equivalent thereto, there is no issue for the jury to try; and the placing of a defendant on trial for felony without arraignment or plea, and when there had been no waiver of the same, is error.

4. Where the county attorney, in his closing argument to the jury, repeatedly uses abusive and improper language calculated to create prejudice against the defendant, and the court, after objection made, fails to check him, or to instruct the jury to disregard his remarks, the defendant is entitled to a new trial.

(Syllabus by the Court.)

Appeal from district court, Jewell county; Cyrus Heren, Judge.

J. H. Baker was convicted of obtaining property by false pretenses, and appeals. Reversed.

T. S. Kirkpatrick and R. W. Turner, for appellant. F. B. Dawes, Atty. Gen., M. R. Sutherland, and E. P. Hotchkiss, for the State.

JOHNSTON, J. J. H. Baker was convicted of obtaining property by means of false pretenses. In the information it was alleged, in substance, that Baker obtained from H. H. Huntsinger 33 cases of eggs, worth \$3.80 per case, of the total value of \$125.40, by falsely representing and pretending that he had money on deposit in the bank at Burr Oak subject to his check, whereas he had no money on deposit there, and had no arrangement with the bank to cash his checks when presented. It is averred that Huntsinger, relying on the representations so made, did sell and deliver the eggs, and took in payment therefor Baker's check, which was of no value whatever; and that by means of the false pretenses, and with the intent to cheat and defraud Huntsinger, he obtained property to the amount and value of \$125.40. The defendant filed a plea in abatement upon the ground that he had not had a preliminary examination for the offense charged, or, rather, that he was not advised by the one had of the offense set out in the information. A preliminary examination was had, and upon an examination of the preliminary papers it is clear that he could not have misapprehended the character and nature of the charge made against him. It is not necessary that there should be the same fullness of statement in the warrant or preliminary papers that is required in the information. We think no error was committed in overruling the plea in abatement. *State v. Tennison*, 39 Kan. 726, 18 Pac. 948; *State v. Smith*, 50 Kan. 69, 31 Pac. 784; *State v. Myers*, 54 Kan. 206, 33 Pac. 296.

The sufficiency of the information was questioned by a motion to quash upon the ground that the check was not particularly set out in the information, with an averment of its delivery and acceptance. The check was only a step in the transaction, or an incident of the offense, and a particular description of the same was unnecessary. The amount for which the eggs were sold is alleged, and it is also stated that a check was taken by Huntsinger in payment of the purchase price. We think the information was sufficient, and that the motion to quash was properly overruled.

The next complaint is that the court erred in compelling the defendant to go to trial without arraignment. After the motion to quash had been overruled, "the court, without further plea by the defendant, and without objecting or assenting thereto other than his silence, and without the waiver of the defendant to further plead, and without said defendant announcing that he was ready for trial, directed the county attorney to proceed with the examination of the regular panel of jurors," etc., and the jury were then im-

paneled, and the trial proceeded to the end. In *State v. Cassady*, 12 Kan. 550, it was decided that the failure to arraign the defendant, and to have a formal plea of "not guilty" entered, is not prejudicial error, where it appears that the defendant announced himself ready for trial upon the charge, and submitted the question of guilt to the determination of the jury. In the present case, however, the defendant did not announce that he was ready for trial, and there was no waiver of arraignment or plea. Until a plea is entered, there is no issue to try. It is an established rule of the criminal law that the defendant shall be arraigned, and called upon to plead to the charge against him. In some cases a formal arraignment may not be indispensable, but in every case there must be a plea, or the equivalent of one. In *State v. Cassady*, supra, the announcement by the defendant that he was ready for trial upon the information was treated as a denial of guilt and an informal plea. Here, the defendant not only did not plead, but the opportunity for pleading was never extended to him, although he was charged with felony. So wide a departure from the established rules of criminal procedure cannot be approved, and we think the defendant has cause to complain of the irregularity. *State v. Wilson*, 42 Kan. 587, 22 Pac. 622.

Another objection of a more serious character arises upon the argument of the county attorney. In his closing address to the jury he referred to the defendant in the following language: "He is a sharper, a villian, and a knave." The attention of the court was called to the abusive language, and it was asked to instruct the jury to disregard it; but without admonishing him against the use of the language, or instructing the jury to disregard it, the court directed the county attorney to proceed. The county attorney proceeded, and, among other things, said: "If the evidence is not sufficient to convict this man of obtaining property under false pretenses, then, gentlemen of the jury, I want to say to you that it is useless for me to try to enforce the laws in Jewell county." Another objection was made, but it was unheeded by the court. The county attorney again proceeded with his address, and made use of the following language: "Gentlemen of the jury, this man Baker is a first-class scoundrel; he is a knave and cheat; he is a bad man and a dangerous man; and it is your duty, gentlemen of the jury, to see that he is not turned loose on the community. You should convict him. Sharpers cannot ply their calling in Jewell county." An objection was made to this language by the defendant. He moved the court to instruct the jury to disregard it, and to reprimand the county attorney for its use. The court remarked that the county attorney should confine his remarks to the evidence, but did not condemn the misconduct, nor admonish the jury to disregard the offensive language. There is no justification in

the use of this language. It was personal abuse, rather than argument, and was well calculated to prejudice the defendant, who was entitled to a fair and impartial trial. The noninterference of the court, when its attention was challenged to the abusive language, may have led the jury to think that the court indorsed the statements of the county attorney, and thus enhanced the prejudice. In *State v. Comstock*, 20 Kan. 653, it was said: "Courts ought to confine counsel strictly within the facts of the case, and, if counsel persistently go outside of the facts in their argument to the jury, then the court should punish them by fine and imprisonment; and, if they should obtain a verdict by this means, then the court should set such verdict aside." In *State v. Gutekunst*, 24 Kan. 252, it was said: "It is the duty of the district courts to interfere, of their own motion, in all cases where counsel, in argument in jury trials, state pertinent facts not before the jury, or use vituperation and abuse predicated upon alleged facts not in evidence, calculated to create prejudice against the prisoner." In *Huckell v. McCoy*, 38 Kan. 53, 15 Pac. 870, it was held: "Certainly, where counsel in his closing argument to the jury repeatedly makes improper remarks prejudicial to the interests of the adverse party, and over the objection of the adverse party, and the verdict is afterwards rendered in favor of said counsel's client, and may have been procured by reason of such remarks, a new trial should be granted." We think the court committed prejudicial error in allowing the county attorney to use the abusive language, over the objection of the defendant, without admonishing him to desist, or instructing the jury to disregard such language.

Other objections were made to the rulings upon the testimony and instructions, but they are not deemed to be erroneous, or to afford ground for reversal. For the errors mentioned, the judgment will be reversed, and the cause remanded for a new trial. All the justices concurring.

SCANNELL v. FELTON et al.

(Supreme Court of Kansas. Dec. 5, 1896.)

APPEAL—PARTIES.

A receiver of an insolvent bank, duly appointed to take charge of the assets under the banking law, is a necessary party to a proceeding in error in this court to reverse a judgment rendered in favor of the bank prior to his appointment.

(Syllabus by the Court.)

Error from district court, Republic county; F. W. Sturges, Trial Judge.

Action by S. K. Felton and others against Richard Scannell. Judgment for plaintiffs, and defendant brings error. Dismissed.

Caldwell & Ellis and A. H. Ellis, for plaintiff in error. W. T. Dillon and J. W. Sheafor, for defendants in error.

ALLEN, J. This is a proceeding to reverse a judgment of the district court of Republic county rendered in favor of S. C. Stover and C. Perry against Richard Scannell for \$5,500, on a contract assigned to them by S. K. Felton, under which Felton had partially constructed the foundation for a Catholic college building at Belleville. The defendant, Scannell, was bishop of the diocese, and the land on which the foundation was built had been deeded to him. A motion to dismiss the proceeding in this court is interposed. It appears that Stover and Perry were engaged in the business of banking, as partners, at Belleville; that on the 23d day of August, 1893, which was after the petition in error was filed in this court, on the application of the attorney general, C. P. Carstensen was duly appointed receiver to take charge of the effects of their bank; that in a few days thereafter he qualified and took possession, and has ever since continued in the possession, of the assets of the partnership. It also appears that C. Perry, one of the partners, died in July, 1895; that he left a will, which was duly probated, but that the executrix named therein never qualified, nor has any other executor or administrator ever been appointed in her stead. On the 7th of October, 1896, the plaintiff in error filed in this court a motion suggesting the death of Mr. Perry, and asking that it be stated on the record, and that the cause proceed against S. C. Stover, as surviving partner. Counsel for the plaintiff in error contend that, under the circumstances stated above, the surviving partner has full power to represent the interest of the deceased partner, as well as his own; that all parties necessary to a determination of the controversy are now in court; and that no formal revivor against Stover, as surviving partner, is really necessary, he being here to speak for his own interests, and being in fact the survivor. On the other hand, it is urged that a revivor against Stover, as surviving partner, was necessary, and that more than one year after it might first have been had, elapsed before the motion to revive was filed. It is also contended that the receiver is a necessary party in this court. Without undertaking to pass on the necessity for a revivor against the surviving partner, we are of the opinion that it was necessary to revive against the receiver; that he is not only a necessary party, but that he is the only party authorized to speak for the partnership estate of Stover & Perry. It appears from the proof now presented that the firm of Stover & Perry became insolvent, and that whatever assets remain belong to the creditors of the firm, rather than to them. The receiver appointed under the banking law stands as the representative of the creditors, and is required to protect their interests. No suit in which the right to assets of the estate is involved can proceed without his being made a party. *Talmage v. Pell*, 9 Paige, 410. Under the facts disclosed, Stover is not authorized to represent any substan-

tial interest, for the judgment, if collected, must be paid into the hands of the receiver, and be by him appropriated to the payment of the debts of the insolvent bank. There being no one here authorized to represent the judgment creditors, the petition in error must be dismissed. All the justices concurring.

CITY OF CALDWELL v. PRUNELLE.

(Supreme Court of Kansas. Dec. 5, 1896.)

CITY LICENSES—VALIDITY—FALSE IMPRISONMENT—LIABILITY OF CITY.

1. A city of the second class may impose a license tax on photographers, and the fact that a larger tax is required from a traveling or non-resident photographer than from a resident regularly engaged in the business does not render the ordinance invalid.

2. Cities are not liable in an action for false imprisonment for the acts of their officers while enforcing invalid ordinances, or for other illegal or unauthorized acts.

3. Nor is a city liable for the manner in which its officers exercise their powers and perform their duties in the enforcement of a police regulation.

(Syllabus by the Court.)

Error from district court, Sumner county; James A. Ray, Judge.

Action by H. J. Prunelle against the city of Caldwell. From an order overruling a demurrer to the petition, the city brings error. Reversed.

James Lawrence, for plaintiff in error. Haughey & McBride, for defendant in error.

JOHNSTON, J. This was an action for false imprisonment, brought by H. J. Prunelle against the city of Caldwell, in which he alleged that he was a traveling photographer, and undertook to do business in Caldwell. Under an ordinance of that city, a demand was made that he should pay a license tax of \$5 per day, which he refused to do. He offered to pay the occupation tax imposed on resident photographers, which was \$10 per year; and upon his refusal to make the required payment he was arrested by the city marshal, taken before the police judge, and, after a trial, was adjudged to pay a fine of \$5 and costs, and stand committed to jail until payment was made. Upon refusal to pay the fine and costs, he was committed to the city prison, and held there for seven days, when a writ of habeas corpus was sued out, which was resisted by the attorneys and officers of the city, and he was discharged. A demurrer to the petition was overruled by the court, and the city elected to stand upon the demurrer, and presents the case for review.

Caldwell is a city of the second class, and such cities are expressly empowered to levy and collect license taxes upon occupations; and, among others, photographers are named in the statute. Gen. St. 1889, par. 804. The fact that a larger tax is levied upon the transient and traveling photographers than upon

on those resident in the city will not invalidate the ordinance. *Fretwell v. City of Troy*, 18 Kan. 271; *Tulloss v. City of Sedan*, 31 Kan. 165, 1 Pac. 285; *City of Cherokee v. Fox*, 34 Kan. 16, 7 Pac. 625. It is not alleged that Prunelle was a citizen of a state other than Kansas, and hence no question arises as to the distinction between residents and nonresidents being in violation of the federal constitution. If the ordinance was invalid, it would not aid the plaintiff below. It is well settled that cities are not liable in an action for false imprisonment for the acts of their officers while enforcing invalid ordinances, or for other illegal or unauthorized acts. The provision in question is a police regulation, and the officers, in enforcing the same, were exercising a public and governmental function. For the manner in which they exercise their powers and duties in this respect the city is not liable. *Peters v. City of Lindsborg*, 40 Kan. 654, 20 Pac. 490, and cases cited. See, also, *Trescott v. City of Waterloo*, 26 Fed. 592; *Ball v. Town of Woodbine (Iowa)* 15 N. W. 846; *Grumblin v. Mayor, etc.*, 2 MacArthur, 578. The petition failed to state a cause of action against the city, and hence the judgment of the district court will be reversed, and the cause remanded, with direction to sustain the demurrer thereto. All the justices concurring.

ARKANSAS CITY BANK v. SWIFT et al.

(Supreme Court of Kansas. Dec. 5, 1896.)

FOREIGN LAW—PRESUMPTION—CHATTEL MORTGAGE—POSSESSION—FRAUD—EVIDENCE.

1. Since the act of congress of March 1, 1889, establishing a court for the Indian Territory which administers the common law in the absence of proof of any other, this court will also presume that system to be in force there when there is no showing to the contrary.

2. The rule of the common law is that a mortgage of personal property, unaccompanied by possession, is prima facie void as to creditors and subsequent purchasers and mortgagees in good faith; yet the presumption of fraud arising from continued possession of the mortgagor may be rebutted by explanations showing the transaction to be fair and honest, and giving a reasonable account of the retention of possession.

3. The evidence examined, and held, that the chattel mortgage was not strengthened by the absolute bills of sale upon the same property; but further held, that there was some evidence of possession by the plaintiff in error for the consideration of the jury.

(Syllabus by the Court.)

Error from court of common pleas, Wyandotte county; T. P. Anderson, Judge.

Conversion by the Arkansas City Bank against Swift & Co. From a judgment for defendants, plaintiff brings error. Reversed.

The original action was commenced by the Arkansas City Bank against Swift & Co., December 13, 1890, to recover the sum of \$6,000 as damages for the wrongful conversion of 229 head of cattle. On October 12, 1892, the court, having heard the evidence on behalf of

the plaintiff, sustained a demurrer thereto, and rendered judgment in favor of the defendant. A new trial being refused, the plaintiff prosecutes its petition in error to this court.

The evidence tended to show the following facts: Warren & Irby, of Weatherford, Tex., owned a herd of about 1,230 cattle, which, in the winter of 1888 and 1889, they brought to that part of the Cherokee Strip known as the "Kaw Indian Reservation," a few miles south of Arkansas City, for pasturage and feeding. The cattle were placed in an inclosure called the "Oil Pasture." In August, 1889, Irby, who was in charge of the cattle, employed J. P. Holloway to find a purchaser. Beach & Feagans owned a ranch on the reservation, not far away, and they were brought into communication with Irby through Holloway, and they agreed to purchase 1,000 head at \$20.50 each, and they paid \$1,000 thereon, which they borrowed from the First National Bank in Arkansas City. The cattle so contracted for were then branded with a D, which was the ranch brand of Beach & Feagans, but the cattle remained in the oil pasture. After considerable effort, Beach & Feagans failed to obtain the necessary money to complete the purchase, and they so notified Irby, and told him that he was welcome to the \$1,000 which had been paid. In their efforts to borrow the money, of which Irby had knowledge, they offered to certain banks security, not only upon the cattle to be purchased, but also upon 300 head of cattle, 300 head of hogs, 400 tons of millet, 1,500 tons of prairie hay, and 200 acres of corn, which they owned on their ranch. Irby then proposed that, if Beach & Feagans would take the remainder of their cattle, then numbering 225, at \$15 per head, in addition to the 1,000 at \$20.50 per head, and would give them the same security they had offered in negotiations with the banks, the firm of Warren & Irby would carry the paper for eight months. This proposition was accepted, and the cattle were driven to the ranch of Beach & Feagans. The parties then went to Arkansas City to have the papers drawn up. Going into the Arkansas City Bank on October 22, 1889, where the transaction was explained to the president and the cashier, it was arranged that the bank should take and discount the paper, and instruments were drawn up as follows: Four promissory notes of \$5,000 each and one for \$6,040, payable to the order of Warren & Irby, each due in eight months, with 10 per cent. interest after maturity; a chattel mortgage from Beach & Feagans to Warren & Irby, to secure said indebtedness, on all the cattle, hogs, and feed above described, including the Warren & Irby cattle on Beach & Feagans' ranch on the Kaw reservation in the Indian Territory; an absolute bill of sale from Warren & Irby to J. H. Hartman, cashier, for the 1,225 head of cattle, and another absolute bill of sale from Beach & Feagans to J. H. Hartman, cashier, for all the property described in the chattel mortgage. The notes were drawn to

include interest for eight months at 12 per cent per annum on the purchase price of the cattle, which was to be treated as a discount on the purchase of the notes from Warren & Irby, who indorsed the same. Before any money was paid, however, James L. Britton, the president of the bank, went with the parties to the ranch of Beach & Feagans, where he saw the cattle, and accepted them as satisfactory. After his return, the purchase price of the 1,225 head of cattle was paid to Irby for his firm, less \$1,000 to be paid to the First National Bank for Beach & Feagans, it being agreed that said indebtedness of Beach & Feagans to the bank should be a part of the purchase money. Notwithstanding the execution of said absolute bills of sale, it was the understanding of all parties that, when the notes should be fully paid, the remainder of the property or of the proceeds thereof should belong to Beach & Feagans. The cattle and the hogs remained on the ranch, the bank and Warren & Irby at different times having men to inform them with reference thereto, Warren & Irby being anxious to protect their indorsement of the notes. The chattel mortgage was filed and entered in the office of the register of deeds of Cowley county, Kan., February 26, 1890, but it does not appear that any renewal affidavit was ever filed. On June 23, 1890, Britton shipped to Kansas City and sold some of the cattle, and in July, August, and September other shipments were made, the cattle in all numbering about 826 head, the net proceeds thereof being \$17,295.99. Britton supervised these shipments personally for the bank. About November 1st the officers of the bank informed Beach that they would send a man named Beeks down there, to represent them, to gather in the cattle, feed them, and see that everything was ready so that the cattle might be shipped from the 5th to the 10th of December. On November 12th, Hartman, the cashier, went to the ranch in company with Beeks, and they met both Beach and Feagans, who were informed by Hartman that Beeks was a good man, capable of doing anything, and that he would help to gather in the cattle and feed them. Hartman then counted the cattle in the pasture, the number being about 391. He remained over night at the ranch, and returned to Arkansas City the next day. Beeks assisted other men in the employ of Beach & Feagans in rounding up the cattle that were out on the range, and also in feeding those in the pasture, Beach & Feagans giving him and the other men directions what to do. The cattle brought in from the range each evening were turned into the pasture with the others. On Sunday morning, November 23d, 10 car loads of these cattle were shipped from a station on the Atchison, Topeka & Santa Fe Railroad in the name of D. McDowell. Feagans was present at the time of the shipment. Beeks testified that he did not know that the cattle were taken out of the pasture until about a week afterwards. McDowell went

with the cattle to Kansas City, where he was known as a shipper, and there he employed C. H. Means, a commission merchant, to sell them on November 24th, and on that day Means sold in open market, to Swift & Co., 228 head of the cattle at \$2.45 per hundred, that being the market price, and the net proceeds being \$4,956.12; and he sold the remaining 21 head to other parties. The evidence does not disclose what became of the remainder of the cattle, the hogs, and the feed not included in the several shipments by the bank and by McDowell, but the bank received nothing except from its several shipments; and C. H. Means, the commission merchant, and Swift & Co., as purchasers, acted in entire good faith, and without any knowledge of the claim of the bank upon the cattle; and those sold to Swift & Co. were of the Warren & Irby herd. The plaintiff introduced in evidence the act of the legislature of Missouri Territory approved January 19, 1816, entitled "An act declaring what laws shall be in force in this country," showing the adoption of the common law of England as the rule of action and decision in the territory, as far as applicable, and when not repugnant to or inconsistent with the statutes of the territory, etc. The plaintiff also offered in evidence certain decisions of the federal courts, and the act of congress of March 1, 1889, establishing a court in the Indian Territory.

Hutchings & Keplinger and R. E. Ball, for plaintiff in error. Warner, Dean, Gibson & McLeod, for defendants in error.

MARTIN, C. J. (after stating the facts). 1. What code or system of laws must furnish a rule of decision as between these parties as to this property, is the first question suggested. The territory of Missouri was carved out of the vast expanse known as "Louisiana," which was ceded to the United States by France in 1803, and which had been alternately under the sovereignty of France and Spain. The country known as the "Indian Territory" and "Oklahoma" was part of the Missouri Territory, and therefore the common law was extended over it in 1816 by the act of the territorial legislature; and so the former laws, whether of France or Spain, were abrogated. It may be that, when the state of Missouri was admitted into the Union with its western boundary extending only as far as "a meridian line passing through the middle of the mouth of the Kansas river where the same empties into the Missouri," the territorial laws ceased to operate in the outlying region west of that meridian (*Railway Co. v. O'Loughlin*, 1 C. C. A. 311, 49 Fed. 440); but this is not entirely clear (*O'Ferrall v. Simplot*, 4 Iowa, 381, 389, 400). However this may be, the act of congress of March 1, 18-9, established a court for the Indian Territory having jurisdiction in all civil cases between citizens of the United States, residents of the Indian Territory, or between citizens of the United States or of any state or territory therein, and any citizen of

or person or persons residing or found in the Indian Territory, when the value of the thing in controversy or damages or money claimed should amount to \$100 or more, the code of procedure to conform as near as might be to that existing in the state of Arkansas. 25 Stat. 783; and in *Pyeatt v. Powell*, 2 C. C. A. 367, 51 Fed. 551, it was held that, in an action in the federal court established by that act, the rule of decision, in the absence of statute, or of proof of the laws, rules, or customs prevailing in the territory, is the common law. It is true that the court says the *lex fori* is applicable, and that in the federal courts, in the absence of statutes repealing or modifying it, the common law is the rule of decision and guide of action; and from this the learned counsel for the defendant argue that a Kansas court should presume, in the absence of proof to the contrary, that the law of the place where these cattle were kept was the same as our own, and that the court below was justified in applying the law of the forum. This position cannot be maintained. In this state the rights of a chattel mortgagee not in possession as to subsequent purchasers and mortgagees in good faith depend upon our statute, which makes registration a necessity. But we must take judicial notice of the fact that no such statute could exist in the Indian Territory when this transaction took place, for no legislative body except congress existed, having any control in that region from the admission of Missouri into the Union, in 1820, until the organic act of Oklahoma Territory, which took effect May 2, 1890. 26 Stat. 81. In saying this we do not take into account the acts and doings of the legislative bodies organized or constituted by the Indians to prescribe rules for their own government, for these do not extend to citizens of the United States having no relation to the several tribes. There could be no registry act as to chattel mortgages in a country having no legislative body, and we think that since the act of congress of March 1, 1889, establishing a court for the Indian Territory which administers the common law in the absence of proof of any other, it is the duty of this court to recognize that system as in force there, when there is no showing to the contrary. In *McKennon v. Winn* (Okla.) 33 Pac. 582, 584, the supreme court of Oklahoma decided that the common law prevailed in that territory at the time of its first settlement, April 22, 1889, and until the adoption of its organic act. See, also, *Bank v. Kinner*, 1 Utah, 100, 106, 107; *Thomas v. Railroad Co.*, Id. 232, 234; *Thompson v. Rainwater*, 1 C. C. A. 304, 49 Fed. 406.

2. In *Pyeatt v. Powell*, supra, Judge Sanborn, delivering the opinion of the United States circuit court of appeals, thus succinctly states the principle that must control this case upon this point. He says: "The rule of the common law is that a mortgage of personal property, unaccompanied with possession, is *prima facie* void as to creditors of the mort-

gagor; yet the presumption of fraud arising from that circumstance may be rebutted by explanations showing the transaction to be fair and honest, and giving a reasonable account of the retention of possession." And it was accordingly held that a chattel mortgage executed in good faith at Coffeyville, Kan., July 18, 1888, upon certain mares and colts in the Indian Territory was valid, notwithstanding the mortgagor retained possession, and the mortgage was not recorded anywhere; and the rule so stated and its application in that case are well supported by the authorities therein cited and by others. The same rule applies to subsequent purchasers and mortgagees as to creditors. The evidence in this case tended to show that the transaction between the bank and the firms of Beach & Feagans and Warren & Irby was fair and honest, and it was error for the court to take the case from the jury, since our registry act is inapplicable to chattels owned and held in other states and territories where the common law prevails.

3. The chattel mortgage was not strengthened by the absolute bills of sale upon the same property, because it was fully understood that the transfer was intended only as a security for the indebtedness of Beach & Feagans, and that whatever surplus should remain of the mortgaged property, or of the proceeds of the same, after the satisfaction of the indebtedness, should belong to them; and therefore the papers, taken together, constituted only a chattel mortgage. We think, however, that there was some evidence tending to show the possession of the cattle by the bank, and that the court erred in taking that question from the jury. The judgment will therefore be reversed, and the case remanded for a new trial. All the justices concurring.

SIMS et al. v. DANIELS, County Clerk.

(Supreme Court of Kansas. Dec. 5, 1896.)

ELECTIONS—CONVENTIONS—OPPOSING FACTIONS—NOMINATIONS—CERTIFICATE—BALLOT.

1. Where a political party in a county divides into opposing factions, and each faction holds a convention, composed of a large number of delegates, and nominates a full set of candidates for the offices to be filled by the voters of the county, the county officers whose duty it is to consider objections to certificates of nomination and nomination papers have no power or authority to determine which of the two opposing factions is the true representative of the party, nor to exclude the candidates of either faction from the official ballot after the nomination of its candidates has been duly and regularly certified to the county clerk in the manner pointed out by the statute.

2. The officers so designated for the consideration of such objections have no power to consider and enforce written agreements made by the candidates and committees of opposing factions of a political party, providing for the settlement of their differences, and for a determination of the question as to which set of candidates is entitled to a place on the official ballot, and to the use of the party name. Agreements of candidates, even though in writing, to withdraw on the happening of a certain event

or contingency, cannot be considered or enforced by such special tribunal.

Johnston, J., dissenting.

(Syllabus by the Court.)

Mandamus on the application of John T. Sims and others to compel Leonard Daniels, county clerk, to place the names of applicants on an official ballot. Peremptory writ awarded.

An alternative writ of mandamus was issued in this case on the application of John T. Sims, who claims to have been nominated at a Republican county convention of Wyandotte county for the office of probate judge of that county, and other persons plaintiffs, claiming to have been also nominated at the same convention for various other county offices and representatives of the several legislative districts in that county, and also H. T. Carson, for himself and others, composing a delegate Republican convention in Wyandotte county, against Leonard Daniels, county clerk of Wyandotte county, commanding him to place the names of the plaintiffs on the official ballot under the head of the Republican party, or show cause before this court why he had not done so. To this writ the county clerk makes a long return, in which it is alleged, in substance, that in the year 1895, and for many years prior thereto, the supreme control of the Republican party in the state of Kansas, and in Wyandotte county, except when in convention assembled, has been vested in the Republican state central committee, composed of a representative from each senatorial district in the state, which has absolute and supervisory control over the party, and all subordinate Republican committees in the state, which power has always been claimed, many times exercised, and never questioned by the members of the Republican party; that on the 11th of April, 1896, there was in Wyandotte county a committee known as the "Republican County Central Committee," subordinate to the state central committee, which had charge and control of the political affairs of the Republican party in Wyandotte county; that a convention called by it to select delegates to a congressional convention was held on the 11th of April, 1896, which became involved in a bitter factional contest, and finally divided into two factions, and elected two sets of delegates; that other conventions for other purposes were thereafter called, and resulted in similar contentions and divisions, at one of which another Republican county central committee was elected, thereby making two Republican county committees claiming the right to act in Wyandotte county; that each of said committees called a convention to nominate candidates for state senator, the various county offices, and representatives in the state legislature; that two conventions were held on different days, and the plaintiffs were nominated at the convention called by the old committee, and a full

set of candidates was also nominated at the convention called by the other committee; that afterwards an agreement was made in writing, and signed by the chairman and secretary of each committee, and a majority of the members of each committee, and also by the various candidates, including the petitioners, by which it was agreed that each of said central committees should be dissolved; that said committees and said candidates should submit their differences, and the question as to which set of candidates should be the candidates of the Republican party, to a primary election of the Republican voters of the county to be called and held under the direction and supervision of the executive committee of the state central committee; that the candidates receiving the greater number of votes should be the candidates of the party, and the committeemen receiving the greater number of votes should be the committee; that pursuant to said agreement the state executive committee called a primary election to be held on the 12th day of September, 1896, in accordance with the terms of the written agreement; that said primary election was held on said 12th of September, and resulted in the nomination of the persons who had been nominated, and the committee who had represented the faction opposed to the plaintiffs. It is further stated that the plaintiffs, in violation of the terms of said written agreement, fraudulently procured nomination papers to be made, and filed in the office of the county clerk, purporting to nominate them for the various offices for which they claim to be candidates. It also appears that on the 19th of October, 1896, the candidates opposed to the plaintiffs filed written objections to the nomination papers of the plaintiffs with the defendant as county clerk; that the plaintiffs were notified thereof; and that on the 21st day of October said contest board met, organized, and, after hearing the evidence, sustained the objections to the nomination papers of the plaintiffs. The grounds stated in the written objections to the nomination papers are very long, and include: "(1) The pretended convention which nominated all of said persons, except H. A. Mendenhall, for said offices, was not a Republican convention. (2) Said convention was not called by any person or persons authorized to call a Republican convention. (3) The persons claiming to be and to act as delegates at said convention were not elected by the Republican voters of Wyandotte county, but were elected, if at all, by ballot-box stuffing, or ballot stealing, by the use of tissue ballots, and fraudulent means. (4) Said convention was not called or ordered by the Republican county central committee of Wyandotte county, Kansas, was not the Republican convention, the delegates were not elected as delegates to such convention, and said convention was called and held in violation of the established usages and customs of the Republican party

of Wyandotte county, Kansas." The fifth ground of objection states circumstantially and at great length the manner in which the Republican party of Wyandotte county became divided into factions, and the holding of the various conventions in that county, the agreement of the candidates and opposing committees to submit their differences to a primary election, the holding of the primary election and the result thereof, and the filing of certificates of nomination of E. S. W. Drought and others, opposed to the plaintiffs, for the various offices. It was shown at the hearing in this court that before the last primary election was held the plaintiffs published in certain papers in Wyandotte county a notice to the voters withdrawing from the contest at the primaries, announcing that they would not be bound thereby, and would insist on being candidates under their original nomination. The case in this court has been submitted by counsel on the return and certain statements of fact by counsel on both sides.

L. W. Keplinger, for plaintiffs. McGrew, Watson & Watson and A. L. Berger, for defendant.

ALLEN, J. (after stating the facts). Section 10 of chapter 78 of the Laws of 1893, known as the "Australian Ballot Law," provides: "The certificates of nomination, and nomination papers being so filed, and being in apparent conformity with the provision of this act, shall be deemed valid, unless objection thereto is duly made in writing. Such objections or other questions arising in relation thereto in the case of nomination of state officers, or officers to be elected by the voters of a division less than the state, and greater than a county, shall be considered by the secretary of state, auditor of state, and attorney general, and the decision of a majority of these officers shall be final. Such objections or questions arising in the case of nominations for officers to be elected by the voters of a county, or township, shall be considered by the county clerk, clerk of the district court, and county attorney, and the decision of a majority of said officers shall be final. In any case where objection is made, notice shall forthwith be given to the candidates affected thereby, addressed to their place of residence as given in the nomination papers, and setting the time and place, when and where such objections will be considered." The questions in this case are as to the extent of the inquiry which the county clerk, clerk of the district court, and county attorney may make under objections filed to certificates of nomination, and the force and finality of their determination. As to the extent to which the interests of the public, the parties to this case, or the political party to which they adhere will be affected by the determination of the controversy, we are not advised, but the question involved is of the utmost importance to the

people of the state. It relates to the freedom of expression at the ballot box of the will of the voters, and to the power of the special tribunal created by the statute to determine what nominations may and what may not be submitted through the instrumentality of the official ballot to the electors for their suffrages. The language of the statute is far from being clear or explicit. On the one hand, it is contended that, where objections are filed to nomination papers, the inquiry is limited to matters of form, and at most to questions as to the genuineness of the papers themselves. On the other hand, it is claimed that this tribunal has ample power to determine, not only all questions as to the regularity and genuineness of the certificates themselves, but that they may go behind the certificates, and inquire whether a convention was, in fact, held, whether it represented the political party it claimed to represent, and whether the action of a political convention has been subsequently abrogated and superseded by the lawfully constituted party committee or authority. The question is suggested at once whether the law contemplates that political parties are to be treated as well-defined divisions of the people, having the right not only to nominate candidates, but to enforce discipline among their members, prevent factional strife, and dictate as to the use of the party name. Authorities are cited, which, in some of the language used, if not in the decision of the cases, seem to recognize this view. In the case of *State v. Lesueur* (Mo. Sup.) 15 S. W. 539, it was said: "And, aside from testimony to that effect, it would seem inherently necessary in all party organizations that there should be some governing head, some controlling power, some common arbiter, which, if an emergency should arise therefor, can lay its hands on the heads of warring factions within the party, and compel the observance of wholesome regulations, conducive alike to efficient party organization, order, fair dealing, and good government. Certainly a court of justice could not look with unpropitious eye upon all proper rules which would protect every citizen in the untrammelled exercise of their choice in selecting those for whom they desire that their suffrages shall ultimately be cast. The same consideration which should induce courts of justice to maintain the purity of the ballot box when the final vote is taken should clearly operate, we think, to promote honesty and condemn fraud when the preliminary vote is taken, or the nominating convention held." There is language of somewhat similar import in the case of *In re Redmond* (Sup.) 25 N. Y. Supp. 381. In the case of *State v. Miller*, 39 N. E. 24, the supreme court of Ohio held valid and enforced the decision of the secretary of state as to certain nomination papers, without discussion of the broad question we are now considering. It will be observed that in the case under consideration no question is presented as to the regularity of the nomination

papers of the plaintiffs, as to the genuineness of the signatures attached thereto, nor yet as to the fact that a convention was held at the time and place stated therein, which nominated the plaintiffs as its candidates. There is not even a question presented as to the fact that this convention was called and held as a Republican convention. It is admitted in the return of the county clerk, and in the objections which were filed before the county officers, that the Republican party of Wyandotte county was divided into two factions, and that a convention for the nomination of county officers was held by each faction of the party, and a full list of nominations was made by each. The attack on the right of the plaintiffs to have their names appear on the official ballot is based on what has transpired subsequent to the convention. It is not claimed that the convention which placed plaintiffs in nomination has ever reconvened, and reversed its action, nor that the convention has ever taken any subsequent action in reference to the matter, nor that the plaintiffs have ever withdrawn from being candidates. But it is claimed and shown that an agreement was entered into between the rival candidates and committees to the effect that a primary election should be held under the primary election law, and the claims of the rival factions referred back to the Republican voters of the county. It is contended by the defendant that this was done, that the decision of the voters was against the plaintiffs, and that the board of county officers provided for in section 10 had a right to take cognizance of this agreement, and enforce it. On the part of the plaintiffs it is claimed that, before the primary election was held, influences were brought to bear by the state committee against them and in favor of the other faction, and that they thereupon, and before the election, withdrew from the arbitration, if it may be so termed, and advised their faction to take no part in the primary election. It is shown that a notice of this kind was published by the plaintiffs. The substantial question, then, is whether the special tribunal had power, under the law, to enter into an investigation of these matters, and determine the rights of the opposing factions, and to place the candidates of one of them on the official ballot, and exclude the other. If they have this power, it certainly is one of vast importance; for, if they might exclude the plaintiffs, they might equally, on like objections, have excluded the opposing faction, and placed the names of the plaintiffs on the ballot instead. If they have full and exclusive jurisdiction of all such controversies, as the statute makes their decision final, and no appeal is given to any court or tribunal, there would seem to be no limit whatever to their power to exclude the candidates of any convention or political party against whose nominations objections might be filed. The state board, under this construction of the law, might decide between opposing factions in the party to which they

owe their own election, or in the opposing party, and absolutely exclude from the ballot the opponent most dangerous to them. The fact that power is liable to abuse is not necessarily a valid objection to its existence. But the liability to such abuse may and ought to be taken into consideration in a case of doubt in determining whether or not the legislature intended to confer it. The court will take judicial notice of the fact that in a large percentage of elections the officers designated as tribunals to determine these controversies are themselves candidates before the people at the election, directly interested in the result, and therefore directly interested in the determination of the questions presented to them. It is to their interest to avoid factions within their own party, and to cause divisions and discord in the ranks of their opponents. Prior to the passage of the Australian ballot law, any faction of any party, or any citizen, or number of citizens, was at liberty to print and circulate tickets to be used at the election, containing whatever names the authors of the ticket saw fit to place thereon, subject only to punishment for the fraudulent use of party names or headings. Can it be supposed that the legislature, in passing this law, intended to strengthen party machinery, and the domination of party leaders and party committees over the members of their political organizations? Can the courts recognize, as was said in the case of *State v. Lesueur*, a supervisory control by party committees over the individual members of the party, when they are disposed to divide into factions? One of the great evils in our system, against which the better elements of all parties have cried out, is the domination of the party bosses, and the undue influence of what are termed "machine politicians." It seems to us that the courts, at least, should treat political parties as at all times purely voluntary associations of absolutely independent citizens, who are at perfect liberty to sever their connection with the political party to which they have adhered at any moment when they deem it right to do so; and that they may divide into groups as may please themselves, and that courts and tribunals created under the law are not authorized in any case to protect and enforce discipline upon the members of a political party at the call of committees, candidates, or any one else. In the exercise of his right to vote, the American citizen is an absolute sovereign. He owes no allegiance, save to his country and his fellow citizens. It is his unmixed duty to cast his ballot as he deems for the best interest of himself and those who are affected by the result of the election. In performing this duty, no partisan authority has rights over him. No official, high or low, may interfere with him. And in construing laws affecting the suffrage of the citizen, that construction should always obtain which affords the citizen the greater liberty and freedom of choice.

It is urged that frauds may be perpetrated

by placing on the official ballot the names of persons as candidates of a political party who are not such in fact, and that the voters may be thereby misled and deceived into casting their ballots in a manner which fails to express their real wishes. That there is force in this suggestion must be conceded. It is possible that the legislature may hereafter deem it wise to restrict in some manner the multiplication of candidates on the official ballot. But the question now presented is, where rival factions in a political party each put forward candidates, whether the board, which must act on objections within a very few days after they are filed, which is given none of the powers usually and necessarily conferred on courts of compelling the attendance of witnesses, the production of papers, and of enforcing obedience to its mandates, may finally and conclusively determine the rights of the opposing factions, place the candidates of one on the official ballot, and exclude those of the other, or whether the people themselves at the election have the sole and exclusive power to determine which is the false and which the genuine. This they certainly might have done under the law as it was before the passage of the act under consideration, and we do not think it was the purpose of the legislature to take this right away from them, or authorize any set of public officials to do so. Cases involving substantially the same question have been passed on by the courts of neighboring states. In the case of *Shields v. Jacob*, 88 Mich. 164, 50 N. W. 105, it was decided that: "When the call for a convention of the political party results in the holding of two nominating conventions, it is not the province of the board of election commissioners to determine which convention represented the regular nominating convention of the party, but it is their duty to place upon the ballot the names of the candidates certified to them by the committee of either branch of the party represented by the two conventions; and, if the name of a party shall be certified by each of the two committees, it is the duty of the commissioners to print the names so certified without further addition or distinctive designation than such as is contained in the certificate so furnished." And in the case of *State v. Allen*, 43 Neb. 652, 62 N. W. 35, it was held that: "Where two factions of a political party nominate candidates, and certify such nominations to the secretary of state in due form of law, the latter will not inquire into the regularity of the convention held by either faction, but will certify to the several county clerks the names of the candidates nominated by each, such practice being in harmony with the rule which requires courts, in case of doubt, to adopt that construction which affords the citizen the greater liberty in casting his ballot." And in the recent case of *Phelps v. Piper* (Neb.) 67 N. W. 755, in a carefully considered opin-

ion, it was said: "Political parties are voluntary associations for political purposes. They establish their own rules. They are governed by their own usages. Voters may form them, reorganize them, and dissolve them at their own will. The voters ultimately must determine every such question. The voters constituting a party are, indeed, the only body which can officially determine between contending factions or contending organizations. The question is one essentially political, and not judicial, in its character. It would be alike dangerous to the freedom of elections, the liberty of voters, and to the dignity and respect which should be entertained for judicial tribunals, for the courts to undertake in any case to investigate either the government, usages, or doctrines of political parties, and to exclude from the official ballots the names of candidates placed in nomination by an organization which a portion, or perhaps a large majority, of the voters professing allegiance to the particular party, believed to be the representatives of its political doctrines and its party government." In the case of *People v. District Ct. of Arapahoe Co.*, 18 Colo. 26, 31 Pac. 339, it was said in the syllabus that "it is not the province of either executive or judicial officers to give final sanction to the mere course, regularity, or genuineness of any political organization as such." These cases were decided under statutes substantially like ours, and fully sustain the proposition that no power is vested either in the special board provided by the Australian ballot law, or in the courts, to pass on the merits of the claims of rival factions of a political party; but that, where both hold conventions, and nominate candidates, both must be recognized, and given a place on the official ballot. The supreme court of Missouri, in the case first cited, holds that there was a valid agreement to arbitrate; that the award was made in accordance with that agreement, which was binding on the parties. We have very serious doubts whether the courts can take cognizance of and enforce such agreements with reference to controversies of this character. But, if the position of that court be sound, there was an express withdrawal by the plaintiffs from the submission in this case before the primaries were held, and the award made. The general rule is well established that an agreement to arbitrate may be revoked at any time before final submission. It seems to us, however, a matter of politics, rather than of contract. In conclusion, without attempting to lay down a definite fixed rule limiting the inquiry of the county officers named on objections to a certificate of nomination, we hold that they have no power to inquire into the rights of opposing factions of a political party, nor to enforce agreements with reference to the withdrawal of one or another set of candidates after their nomination by a convention, nor to

give effect to any supervisory power or control of party state committees over local party organizations; that, after the candidates have once been nominated by a convention held by a party or faction of a party, and genuine certificates in due form have been filed with the proper officer, the names must be printed on the official ballot, under the heading of the party which they claim to represent, unless such candidates withdraw in the manner indicated by the statute. A peremptory writ is awarded as prayed for.

MARTIN, C. J., concurs.

JOHNSTON, J. (dissenting). In my view, the plaintiffs are not entitled to the relief which they ask. While they had been named in a manner as the candidates of one of several conventions held in Wyandotte county, they had long before relinquished their claims as candidates, and agreed to a reorganization of the Republican party, and to the nomination of another ticket. Dissensions had arisen in the Republican party in that county. Two conventions had been held in the month of July, 1896, and two separate tickets had been brought out, each claiming to be the Republican ticket, and that the other was not entitled to recognition. The Republican state central committee, which has supreme control over the party and the subordinate organizations within the party, took cognizance of the dissensions, and through its intervention it was agreed that there should be a reorganization of the party in that county, that the central committees claiming to exercise local control should be then and there dissolved, and that a statutory primary election should be held under the supervision of the state central committee, the polls to remain open from 8 o'clock in the morning until 7 o'clock in the evening, at which a new central committee should be chosen, and also candidates for the local offices, who should be regarded as the Republican ticket for that county. The agreement was in writing, and was signed by the candidates and by the officers and members of the several committees, all of whom stipulated that they would unite in the earnest support of the ticket chosen at the primary election. September 12, 1896, was fixed as the time for holding the primary election. Due notice of the same was given, and the choice of a ticket was thus remitted to the Republican electors of the county. A ticket was chosen by an unquestioned majority over the plaintiffs who were voted for, and there is no claim of fraud in that election. The ticket then chosen has been recognized by the Republican state central committee as the Republican ticket of Wyandotte county, and entitled to a place upon the ballot as such. It appears that according to party usage and precedent the Republican state central committee had authority to intervene in the settlement of the dispute and in the reorganization

of the party. The plaintiffs submitted to the authority of that committee, and consented that they would relinquish their former claims, and abide the decision of the people at the primary election. Their agreement having been acted upon, the election held, and the ticket named, they should not now be allowed to repudiate their agreement, nor to defeat the choice made by the electors at the primary election. In a very similar case the supreme court of Missouri held that an agreement and submission by candidates under substantially similar circumstances as arose in the present case were binding on the candidates, and precluded them from thereafter insisting upon their former status or rights as candidates. Chief Justice Sherwood, who pronounced the judgment of the court, remarked that candidates could not claim the benefits of party organization, and at the same time deny the obligatory force of reasonable party regulations, and that the course pursued was in the interest of order, fair dealing, and good government. *State v. Lesueur*, 103 Mo. 253, 15 S. W. 539.

Another reason why the writ of mandamus should not issue is the fact that the tribunal provided by law for the decision of such questions has determined that the plaintiffs are not entitled to a place on the ballot as the nominees of the Republican party. The legislature recognized that questions would arise as to the regularity of party nominations, and as to which one of several tickets was entitled to use the party designation, and in the interest of order and fairness provided tribunals to determine these questions. Objections or questions in relation to state or district nominations are to be considered and decided by a tribunal composed of the secretary of state, auditor of state, and attorney general, and, as to county or township nominations, by a tribunal composed of the county clerk, clerk of the district court, and county attorney. In each of these tribunals there are officers authorized to administer oaths, and the statute provides that objections or questions to be raised shall only be heard upon notice which shall fix the time and place of the hearing. It is provided that their decisions, when made, shall be final. Laws 1893, c. 78, § 10. There can be little doubt that such a question as we have before us is included within the terms of the statute. In most of the states the inquiry of the tribunal is limited to objections, but, lest a too restricted view should be taken in this respect, our statute provides not only for objections to nominations, but for the consideration and decision of "other questions arising in relation thereto." In Ohio, tribunals have been created for a similar purpose, and their power has been broadened like our own, so that they consider and decide objections and other questions relating to nominations. Two conventions were there held by persons claiming to be representatives of the People's party, and two tickets had been nominated, each of

which asked for a place upon the ballot as the People's party's ticket. Objections being made, a hearing was had before the proper tribunal, where it was decided that one of the tickets was regularly nominated, and was entitled to be placed on the ballot as the People's party's ticket. The decision of the tribunal is final there, as well as here, but, notwithstanding the importance and finality of the decision, the supreme court of Ohio upheld the statute, and the exercise of such power by the statutory tribunal, and further held that when the decision is made by that tribunal the courts are powerless to interfere. *Chapman v. Miller*, 52 Ohio St. 166, 39 N. E. 24. See, also, *State v. Lesueur*, supra; *In re Redmond* (Sup.) 25 N. Y. Supp. 381. Our statute is plain, and it seems to me that the power is plainly conferred, and that in this instance it was rightfully exercised.

It was urged that the power was liable to be abused, because the officers designated as tribunals to determine these controversies are likely to be interested in the result of the election; but this consideration is entitled to very little weight. We cannot assume that they will act dishonestly, or abuse the power that is confided in them. The judges of the courts have political opinions, and are generally adherents of some of the political parties, but they are not, for that reason, relieved from the duty and responsibility of determining questions like these, however disagreeable the task may be. Questions of this character must be decided by some one, and it is for the legislature to determine where that power shall be vested. The courts need not be concerned about the wisdom or policy of the legislation. We cannot disregard the legislative declaration because it may appear to us not to be the best policy, nor because, as has been suggested, the managers of political parties may sometimes be actuated by selfish or sinister motives. It has also been suggested that the exercise of the power would tend to strengthen party machinery and the domination of party leaders; but this case does not afford an illustration of such peril, as the steps that were taken were to depose the existing managers and committees, and to submit to the Republican electors the question as to who should be their party leaders and candidates. All know that under our system of government the preliminary steps in elections and the choice of officers are carried on through the political parties, their organizations and representatives, and necessarily there must be rules and regulations for their guidance and control. The important part which they take in state affairs does not rest upon mere usage or acquiescence, but is recognized in numerous statutes, and especially in those providing for primary elections to nominate candidates (Laws 1891, c. 115), and in the Australian ballot law, which contains the provision which is now under consideration. The existence or control of political parties, however, does not necessarily interfere with the rights of the individual voter, who is at liberty to

sever his party relations at any time, and resume them again at will. New parties may be organized, and new associations formed, without limit. Besides, provision is made for the proposal of candidates and tickets by petitions, upon which only a few names are required. The ballot law contains some restrictions, but they are supposed and intended to be in the interest of a fair and honest expression of the will of the voters. It is true, as has been suggested, that before the enactment of that law any one might print and circulate as many kinds of ballots as he desired, but this policy was deemed to be unwise. It was sometimes used to mislead and defraud the voters, and hence the law was changed so that we have but a single ballot, prepared under the supervision of public officers, and as the law directs. Each political party is entitled to have its ticket placed upon that ballot under the party designation, so that its adherents may intelligently vote for their party candidates. While other tickets may be brought out by dissatisfied or independent elements in a party, such elements have no right to borrow or misappropriate the party designation, as that would necessarily tend to confuse and deceive the voters. The People's party nominated a state ticket in Kansas the present year, and the persons named have been certified as the candidates of that party, and are entitled to be placed upon the ballot under the heading of the People's party. Suppose another convention had been called by some of the same party in Northern Kansas, and another ticket had been named, and suppose another convention of the same party should be held in Southern Kansas, and another in Western Kansas, and still another state convention should be held in some remote county by a few members of the People's party, and that each of these conventions should nominate a state ticket, and ask to have it placed upon the ballot as the regular People's party ticket; would each ticket be entitled to a place on the ballot under the party designation, or could all be grouped together in one column, under a single heading? To prevent abuses of this character, the legislature, intending that each party should only make a single nomination, provided a tribunal to determine, among other things, disputed questions in relation to nominations; and that it has authority to determine which is the regular organization, and entitled to use the party designation, has heretofore been the accepted theory of the ballot law. It was so decided by the district court of Shawnee county in a controversy over a congressional nomination about two years ago, and the power has been repeatedly exercised by both state and county officers. If these tribunals cannot determine questions like these, it would seem that nothing remains for their decision beyond the mere question of the form or the genuineness of the certificates. But that this was not the legislative purpose is shown by the provision which leaves the matter of form to the officer with which they are filed. If the certificates are in apparent con-

formity with law, they are deemed to be valid, and the tribunal in question is only called when objections are made, or other questions are raised in relation to the nomination. Evidently it was not the intention of the legislature that this tribunal should be called to consider and decide mere matters of form, or as to the genuineness of the papers. In my view, it was intended that they should determine questions like the one before us, and the exercise of such power by them would tend to promote the purposes for which the ballot law has been enacted. The cases mentioned in the prevailing opinion, and which it is claimed hold to a different view, are not based upon statutes like our own. As has already been noted, the legislature, in conferring power upon the tribunal, has not confined it to mere objections, but has extended it to other questions in relation to the nominations. The power is lodged with important officers in each tribunal, and, recognizing that legal questions would arise for decision, it is provided that the attorney general shall be a member of the state tribunal, and the county attorney of the county tribunal. Instead of disposing of the questions arising in a summary way, which seems to be authorized by the statutes of some of the other states, these tribunals can only act upon the matters submitted to them after due notice has been given to the interested parties. These notices fix the time and place when a hearing will be had, and there is time for a full presentation and deliberate consideration of the facts in controversy.

MACLELLAN v. SEIM et al.

(Supreme Court of Kansas. Dec. 5, 1896.)

EQUITY—JURY TRIAL—REVIEW OF EVIDENCE.

1. While, in a case of an equitable character, neither party can demand a jury as a matter of right, and usually the better practice is for the court to try it alone, yet the court may, in its discretion, order any issue or issues of fact to be tried by a jury, and error will not lie, unless for an abuse of such discretion.

2. The evidence and the findings of the jury examined, and held that the latter are supported by the former; and, as they were approved by the trial court, the judgment based thereon will not be disturbed by this court.

(Syllabus by the Court.)

Error from district court, Morris county; James Humphrey, Judge.

Action by Conrad Seim against Thomas Maclellan and others. Judgment for plaintiff. Defendant Maclellan brings error. Affirmed.

Harrison & Adams, for plaintiff in error. J. K. Ownes, for defendants in error.

MARTIN, C. J. 1. The action in the court below was brought by Conrad Seim for the purpose of setting aside a deed to certain real estate in Parkerville, Morris county, alleged to have been forged, and enjoining the register of deeds from filing and recording any deed from Thomas Maclellan for said property. Maclellan filed an answer, setting up a right

to the real estate, and asking that his title be quieted, or that he be decreed to hold a first lien thereon for the sum of \$750 and interest, and also for \$38.01 for taxes paid on the property for the year 1889. The case was called for trial at March term, 1892, when the plaintiff below demanded a jury, to which the defendant objected, insisting that the case should be tried by the court. A jury was called, however, to try the issues, although no general verdict was returned. The plaintiff in error claims that it was error to try the issues by a jury. The cause was equitable in character, and might have been tried by the court alone, notwithstanding a demand for a jury by either party, as neither could demand it as a matter of right, and it is usually the better practice for the court to try such issues alone; but the court may, in its discretion, order any issue or issues of fact to be tried by a jury, and error will not lie, unless for an abuse of such discretion. Sections 266, 267, Civ. Code; *Hixon v. George*, 18 Kan. 253, 256; *Hunt v. Spencer*, 20 Kan. 126, 129; *Yeamans v. James*, 27 Kan. 195, 212; *Drinkwater v. Sauble*, 46 Kan. 170, 174, 26 Pac. 433, 434.

2. The plaintiff in error claimed that Seim and wife executed and delivered the deed to William Allaway, leaving a blank for the name of the grantee, which was, for the time being, filled in with the name of Allaway in pencil, with authority to him to insert the name of his grantee; that Allaway owed plaintiff in error \$750, and, as collateral security for the same, delivered said deed to him, and his name was inserted as grantee; that Allaway had never paid the debt, but plaintiff in error paid the taxes on the property for 1889, amounting to \$38.01. The jury found, however, in substance, that Seim, in pursuance of an agreement with William Allaway, deposited said blank deed with Maclellan, until Allaway should remove certain judgment liens from property traded to Seim by Allaway; that said liens were not removed, yet Maclellan, without authority from Seim, wrote his name as grantee in the deed, and caused the same to be recorded; that Seim did not authorize Allaway to insert the name of any other grantee; and that Maclellan did not receive said deed from Allaway in good faith, and for a valuable consideration. The evidence shows that Maclellan paid the taxes on the Parkerville property for 1889, amounting to \$38.01, and the testimony of Allaway and Burnett was strongly confirmatory of his own as to the transaction, while Seim was the only witness to it in his own behalf; but Maclellan and Burnett were both clerks in the real-estate office of Allaway, at Topeka, where the transaction occurred, and the jury had a right to accept Seim's testimony, although apparently overborne by that of the three other witnesses. There was evidence to support the findings, and, as they were approved by the trial court, it is not our duty to set them aside. Seim did not authorize Maclellan to pay the taxes of 1889, and, under the findings of the jury, the

payment must be regarded as voluntary, and Maclellan cannot recover the amount thereof. The right of the plaintiff to prove, under the pleadings, that Maclellan held the deed in escrow is challenged, but we think the general allegation of forgery was broad enough to cover the circumstances detailed in the evidence and in the findings of the jury. The judgment must therefore be affirmed. All the justices concurring.

BOARD OF COM'RS OF KINGMAN COUNTY v. LEONARD.

(Supreme Court of Kansas. Dec. 5, 1896.)

TAXATION—JUDGMENTS IN FAVOR OF NONRESIDENTS.

The statutes of this state do not provide for, nor authorize, the assessment and taxation of judgments rendered by the courts of this state in favor of, and owned by, citizens of other states.

(Syllabus by the Court.)

Error from district court, Kingman county; W. O. Bashore, Judge.

Action by William F. Leonard against the board of county commissioners of Kingman county. Judgment for plaintiff, and defendants bring error. Affirmed.

John T. Little, Atty. Gen., and C. W. Fairchild, for plaintiffs in error. P. B. Gillett and M. D. Libby, for defendant in error.

ALLEN, J. This action was brought by the defendant in error, as plaintiff below, to enjoin the collection of taxes on the unpaid balance of a judgment in his favor rendered by the district court of Kingman county. This judgment was rendered in an action to recover the amount of a promissory note, and to foreclose a mortgage given to secure the same. The mortgaged property was sold, and, after the application of the proceeds of the sale to the payment of the judgment, there remained a balance; and the balance remaining unpaid was assessed in the city of Kingman, the county seat of Kingman county, for taxation. The plaintiff is a resident of Missouri. The question presented for our consideration is whether judgments rendered by the courts in this state in favor of nonresident parties are taxable while they remain unsatisfied. There is no claim in this case that the party against whom the judgment was rendered is insolvent, or that the valuation placed on the judgment is excessive. Has the legislature assumed the power to and provided for the taxation of such judgments? Section 1, c. 107, of the General Statutes of 1889, reads: "Section 1. That all property in this state, real and personal, not expressly exempt therefrom, shall be subject to taxation in the manner prescribed by this act." In section 2 the term "personal property" is defined as follows: "The term 'personal property' shall include every tangible thing which is

the subject of ownership, not forming part or parcel of real property; also, all tax-sale certificates, judgments, notes, bonds and mortgages, and all evidences of debt secured by lien on real estate; also, the capital stock, undivided profits, and all other assets of every company, incorporated or unincorporated, and every share or interest in such stock, profit, or assets, by whatever name the same may be designated: provided, the same is not included in other personal property subject to taxation, or listed as the property of individuals; and also every share or interest in any vessel or boat used in navigating any of the waters within or bordering on this state, whether such vessel or boat shall be within the jurisdiction of the state or elsewhere; and also all 'property' owned, leased, used, occupied or employed by any railway or telegraph company, or corporation within this state, situate on the right of way of any railway." Section 7 of the same chapter provides where property shall be listed for taxation, and the part of the section material to this inquiry reads as follows: "Every person required to list property in behalf of others shall list such property in the same township, school district or city in which said property is located; but he shall list such property separate and apart from his own, specifying the name of the person, estate, company or corporation, to which the same may belong. All toll bridges shall be listed in the township or ward where the same are located; and if located in two wards or townships, then one-half in each of such wards or townships. And all personal property shall be listed and taxed each year in the township, school district, or city in which the property was located on the first day of March, but all moneys and credits not pertaining to a business located shall be listed in the township or city in which the owner resided on the first day of March." It will be observed that the provisions with reference to what property shall be subject to taxation are very sweeping, and that judgments, as well as other forms of intangible property, are not only included within the general terms used, but are specifically mentioned as included in the term "personal property." Sections 9 and 10 of the act require the owners of property subject to taxation to make lists thereof; and section 10a provides that the statement shall set forth the number of the school district or districts in which such property was situated on the 1st day of March. It is ably and earnestly argued that the common-law rule embodied in the maxim, "*Mobilia personam sequuntur*," applies with full force in this case, and that the situs of the intangible property evidenced by the judgment is at the domicile of the owner, and subject to taxation there only. This rule of law is subject to so many exceptions and limitations that it is quite as liable to mislead as to furnish a correct

guide, when considered alone. In the distribution of the estates of deceased persons, it is generally, if not universally, given full force and effect, both as to tangible and intangible property; and, from comity, nations foreign to each other generally recognize the law of the place of the owner's domicile as controlling in the distribution of the personal estate of the deceased owner. To questions of taxation the maxim has very little application. Every sovereignty asserts the right to levy taxes on persons and property within its protection, and the ground on which all taxation is justified is that it is a burden necessarily imposed by the sovereignty in order to enable it to perform its duty in protecting persons and property. 1 *Desty, Tax'n*, 59; *Cooley, Tax'n*, 19 et seq.; *Story, Confl. Laws*, 543, note A, and cases cited. We think it now quite well settled that choses in action belonging to a nonresident, in the hands of a managing agent within the state, are taxable. *City of New Albany v. Meekin*, 56 Am. Dec. 522, note page 530, and cases therein cited; 1 *Desty, Tax'n*, 64; *Finch v. York Co.*, 19 Neb. 50, 26 N. W. 589. The power to tax residents of the state on credits due from citizens of other states is often upheld. *Kirtland v. Hotchkiss*, 42 Conn. 426. And this even where it results in duplicate taxation. *Dyer v. Osborne*, 11 R. I. 321; note to *People v. Worthington*, 74 Am. Dec. 95, and cases cited. The cases upholding the power to tax promissory notes and other written securities held within the state, though owned by a nonresident, sometimes lay stress on the fact that the securities are, in a certain sense, property, and are subject to seizure for debt, and that a title may be made to the intangible debt by delivery of the written evidence of it.

We perceive no valid objection to the power of the legislature to tax all judgments by domestic courts, and remaining unsatisfied, whether owned by citizens of this state, or other states, or foreign countries, provided the rate of taxation be the same as that imposed on other forms of property belonging to citizens of this state. The question here, however, is whether the legislature has expressed a purpose to tax judgments in favor of a citizen of another state, rather than as to the power to do so. Judgments are included, by the express provision of section 2, in the term "personal property." Does this mean judgments owned by citizens of this state, or those rendered by courts within the state, without reference to ownership? In answering this question, some weight, at least, should be given to the rule that credits are generally regarded as residing with the creditor. The case of *Fisher v. Com'rs*, 19 Kan. 414, is an extreme one, and has been criticised. A resident of this state may undoubtedly be taxed on moneys due him from citizens of other states, and this would be equally true after the

claim is reduced to judgment in a foreign jurisdiction. Under the provisions of section 7, where the owner of a domestic judgment resides in this state, it seems clear that it must be taxed at the place of his residence, provided it does not pertain to a business located at some other place. Where the owner is a nonresident, if taxed at all, it must be taxed in the township, school district, or city in which it is located; and, to be taxable, it must be held to have a situs of its own. The authorities with reference to the situs of a judgment are not numerous, and no case is called to our attention where the precise point now under consideration has been decided in an action where the owner of the judgment resided out of the state. But, in cases where the owner resided in the state, it has been held that the situs of the judgment for purposes of taxation is at the residence of the judgment creditor. *Meyer v. Pleasant*, 41 La. Ann. 645, 6 South. 258; *People v. Eastman*, 25 Cal. 601.

When this case was first considered, the writer was strongly inclined to the opinion that a judgment should be held to have a situs of its own at the place where the record of the court rendering it is kept; but it seems quite clear that, if the owner be a resident of this state, its situs is with him, at his place of residence, and there is no purpose expressed by the legislature to give judgments in favor of nonresidents a situs for the purpose of taxation. If the legislature wishes to change the rule, and establish a situs for taxation for all judgments rendered by the courts of this state, it ought to employ language expressive of its purpose to do so. The natural implication from the language in fact employed would seem to be that, as to the situs of credits for taxation, the rules generally recognized were intended to be followed. The judgment is affirmed. All the justices concurring.

BANE et al. v. HARTZELL, Sheriff.

(Supreme Court of Kansas. Dec. 5, 1896.)

CHATTEL MORTGAGE—DESCRIPTION—FRAUD—EXCESSIVE SECURITY—FUTURE ADVANCES—INSOLVENCY—PREFERENCES.

1. The fact that the goods mortgaged are more than enough in value to secure the indebtedness does not, of itself, establish fraud, even if a badge thereof; but perhaps the security might be so excessive as to cast suspicion upon the transaction to the extent of requiring an explanation.

2. A chattel mortgage given in good faith for a greater sum than is owing by the mortgagor to the mortgagee, to secure both a present indebtedness and future advances to be made by the mortgagee, is not fraudulent in law as to creditors of the mortgagor, even though the mortgage does not express upon its face that the excess is for future advances, but recites the securing of promissory notes, which amount to the existing indebtedness and the contemplated future advances combined, as if all the notes were given for an existing indebtedness.

3. It is permissible for one bona fide creditor

or of a failing debtor to secure a preference over others by obtaining a chattel mortgage from such debtor, and filing it for record; and, unless such preferred creditor stands in some relation of confidence to the others, he is under no obligation to disclose to them what he has done, or what he intends to do, to protect his own interest.

4. Under a chattel mortgage upon "all the stock of clothing" and "furnishing goods" in a certain store building, no goods will pass which do not come within the description of "clothing" or "furnishing goods."

(Syllabus by the Court.)

Error from district court, Chautauqua county; Lucien Earle, Judge.

Replevin by Clement Bane & Co. against S. T. Hartzell, sheriff. From a judgment for defendant, plaintiffs bring error. Reversed.

The evidence tended to show that E. S. Latsbaugh was engaged in trade in his own building at Sedan. He became indebted to the Sedan National Bank upon promissory notes amounting to \$3,300, to secure which, on November 20, 1891, he executed a chattel mortgage on his entire stock of goods, but this mortgage was not filed for record until January 20, 1892. After the execution of said mortgage, Latsbaugh became further indebted to said bank in the sum of \$150, evidenced by two promissory notes of \$75 each. He was indebted to the Western Furnishing Goods Company in a sum between \$300 and \$400, which indebtedness was unsecured. He owed to Clement Bane & Co., of Chicago, on account for goods, \$3,197.45, and on a promissory note of date November 18, 1891, for \$400, payable in 90 days, with interest at 8 per cent. per annum from date, all of which indebtedness was unsecured. There was an incumbrance of \$1,000 on the store building, which was probably the greater part of its value, and an incumbrance of \$600 on a quarter section of land north of Sedan, which was more than half its value. He also owned a block in East Sedan, worth \$100 to \$200, unincumbered, and this was substantially all the property he owned outside of the stock of goods. On January 18, 1892, John T. Earhart, the traveling salesman and representative of Clement Bane & Co., called upon Latsbaugh, for the purpose of taking his order for goods for the spring trade, his sample trunks being in the store and open, ready for the examination of goods. Before anything had been done, however, in the way of selection, Latsbaugh told Earhart that he was owing a great deal of money. Earhart then said to Latsbaugh that he was owing Clement Bane & Co. a pretty large bill, and, before going any further, he would like to have security for the past indebtedness, and also for the goods ordered, and Latsbaugh agreed to this. Accordingly Earhart went to the law office of J. D. McBrian, and employed him to draw up a chattel mortgage on Latsbaugh's stock of goods. Earhart then went back to the store, and had Latsbaugh to accompany him to McBrian's office, where a chattel mortgage was drawn

to secure nine promissory notes of \$555.55 each, one being payable each month for the nine succeeding months. The description of the mortgaged property was as follows: "All the stock of clothing, furnishing goods, and fixtures now owned by E. S. Latsbaugh, and kept in the building situated on lot number five (5), in block number twenty-two (22), in the city of Sedan, Chautauqua county, Kansas, and all notes and book accounts pertaining to his business." Nothing was said to McBrian about the sum secured being greater than the existing indebtedness, and he knew nothing about the transaction, further than that he was instructed to draw the notes, and secure them by the chattel mortgage. Before the delivery of the papers, Earhart asked Latsbaugh if his stock was subject to any incumbrance, and Latsbaugh answered that he had given some kind of a document of like nature to secure the Sedan National Bank, but he did not know exactly what it was. It was agreed, at the same time, that Latsbaugh should continue to sell the goods as the agent of Clement Bane & Co., that he should deposit the proceeds of the sales in the First National Bank each day in his name, as such agent, and should remit the same, less expenses, weekly to Clement Bane & Co. The mortgage was then recorded, and thereafter, on the same day, a selection of spring goods was made, and a bill thereof transmitted to Clement Bane & Co., the amount of the order being \$1,823.49. Latsbaugh then gave Earhart a check on the Sedan National Bank for \$200, which was paid, leaving a balance of \$8 only to his credit. The \$200 payment was credited on one of the notes. No sign was put up at the store indicating that Latsbaugh was continuing business as the agent of Clement Bane & Co., and no change was made in the books of account, although some goods were sold on credit, and charged upon the books. On January 21, 1892, the Western Furnishing Goods Company and the Sedan National Bank commenced actions against Latsbaugh on their respective claims, and orders of attachment were issued therein, and S. T. Hartzell, the sheriff, levied said writs upon said stock of goods and fixtures and the books of account. The appraisement shows that the book accounts were appraised at \$530, and the goods and fixtures at \$6,056.19, making a total of \$6,586.19. About the time that the order for the bill of spring goods reached Clement Bane & Co., they received notice of the attachment suits, and the goods were never forwarded to Latsbaugh. On February 10, 1892, Clement Bane & Co. commenced their action of replevin against the sheriff, and said goods and fixtures and the account books were taken by the coroner from the sheriff, who gave a redelivery bond, and retained possession, and, by order of the court, he sold all the property on March 12, 1892, at public auction, to the Sedan National Bank for \$4,040. In the petition in the re-

plevin action, Clement Bane & Co. claimed a special ownership to the extent of \$3,403.05, besides interest, and they averred that the balance of the claim under their chattel mortgage was for goods bargained and sold, but not delivered, to Latsbaugh. After the chattel mortgage was given to Clement Bane & Co., Latsbaugh executed a mortgage on the store building to the Sedan National Bank, to secure one of the promissory notes held by it, and amounting to \$1,100, this being a second mortgage. A trial of the replevin action before the court without a jury resulted in a general finding and judgment in favor of the defendant on June 22, 1892, and Clement Bane & Co. bring the case here for review.

Dobbs & Stoker, for plaintiffs in error. H. E. Sadler and J. B. & W. E. Ziegler, for defendant in error.

MARTIN, C. J. (after stating the facts).
1. The finding of the court being general in favor of the defendant, the judgment based thereon must be affirmed, if there is any evidence in the record fairly tending to impeach the validity of the mortgage executed by Latsbaugh to Clement Bane & Co.; otherwise, it must be reversed. Counsel for the plaintiffs argue at length that the value of the property securing their claim was not excessive, and, even if so, the validity of their chattel mortgage would not be affected by reason thereof. Counsel for defendant say that the question of excessive security was considered by the trial court only incidentally, and they do not seem to rely upon this point. It appears to be well settled that a chattel mortgage is not rendered per se either void or voidable because it covers more property than enough to secure the debt. In the present case, Earhart supposed the value of the mortgaged property to be about double the amount of the past-due indebtedness upon the account and the promissory note just maturing, but, as the mortgage was intended also to secure the amount of the order for spring goods, placed at about \$1,800, it could scarcely be contended that the security was excessive. It is a matter of common knowledge that a stock of goods closed out at a mortgagee's or a sheriff's sale will not generally bring anything near its cost price, and, before the trial of this case, the goods had been sold presumably to the best advantage for \$1,040,—a sum not greatly in excess of the past-due indebtedness to Clement Bane & Co. after the payment of costs and expenses, and not nearly sufficient to secure them if the order for the spring goods had been filled, as contemplated, at the time the chattel mortgage was executed. In *Miller v. Krueger*, 38 Kan. 344, 348, 13 Pac. 641, 643, the mortgagee supposed that the value of the property mortgaged was about double the amount of the indebtedness secured thereby, although, on the trial, the

jury found the value of the property to be less than the amount of the debt, and it was held that the fact that the mortgagee overestimated the value of the property did not render the mortgage void. The mere fact that the security given is more than necessary does not, of itself, establish fraud. Some of the cases hold that it is not even a badge or indication of fraud, yet we are not prepared to say that the security might not be so excessive as to cast suspicion upon the good faith of the transaction to the extent of requiring an explanation. *Downs v. Kissam*, 10 How. 102, 108; *Banking Co. v. Costello*, 45 Neb. 119, 140, 63 N. W. 378, 382; *Dry-Goods Co. v. Strauss*, 45 Neb. 793, 64 N. W. 223.

2. It is said in the brief of the defendant's counsel that "the real contention by the defendant was that the giving of the mortgage for \$1,800 of debt which did not exist, the concealment of such fact from plaintiffs' own attorney, and from Richardson and Stallard, officers of the Sedan National Bank, in connection with many other material facts and circumstances surrounding the transaction, showed bad faith on the part of the parties to the mortgage, and proved that Latsbaugh and Earhart co-operated and conspired together to hinder, delay, and defraud the Sedan National Bank, and all other creditors of Latsbaugh."

The principal point relied on by the defendant is that the chattel mortgage was given for a sum about \$1,800 greater than the existing indebtedness. If the proof tended to show that the inclusion of this extra sum was fraudulent on the part of the plaintiff, and for the purpose of covering up Latsbaugh's property with a pretended claim, in order to hinder or delay other creditors, this would render the mortgage void as against him. *Wallach v. Wylie*, 28 Kan. 138, 152, 153; *Winstead v. Hulme*, 32 Kan. 568, 575, 4 Pac. 994, 999. We fail, however, to find in the record any evidence of such fraudulent intent. The spring goods appear to have been ordered in good faith, and presumably would have been forwarded soon, had it not been for the action of other creditors in pressing their claims. The fact that a mortgage given by an insolvent person secures a greater sum than is actually due is not conclusive evidence of fraud, but is subject to explanation (*Bush v. Bush*, 33 Kan. 556, 567, 6 Pac. 794, 801; *Corbin v. Kincaid*, 33 Kan. 649, 652, 7 Pac. 140, 147); and a chattel mortgage may be lawfully given to secure future advances (*Jones, Chat. Mortg.* § 94, and cases cited). It cannot be extended, as against a creditor of such mortgagor, to cover advances not contemplated at the time of its execution (*Sims v. Mead*, 29 Kan. 124); but a mortgage on a stock of goods for \$1,500 was sustained by this court, although the sum of \$1,000 only was advanced at the execution of the mortgage, the remainder being paid soon thereafter (*Mercantile Co. v. Burson*, 38 Kan. 278, 16 Pac. 684). And in

another case it was held by this court that the giving of a mortgage for a larger sum than was loaned thereon, and with a view of covering future loans up to the amount of the mortgage, is not conclusive evidence of fraud, but is open to explanation as to the good or bad faith of the parties to the transaction. *Allen v. Puget*, 42 Kan. 672, 22 Pac. 725. And where a chattel mortgage was made to secure in part a valid debt, and in part money advanced upon an illegal contract, this court held that it might be enforced to the extent of the valid debt, although void as to the residue, the illegal part being separable from that which was unobjectionable (*Rathbone v. Boyd*, 30 Kan. 485, 489, 2 Pac. 664, 667); and, this being so, we see no good reason against the securing of an existing debt and a contingent liability by the same chattel mortgage.

Considerations of much weight have been suggested against the validity of chattel mortgages given to secure future advances, without truly disclosing the nature of the transaction, or under an appearance of an existing indebtedness, as in this case. Doubtless, much trouble and litigation would be avoided if chattel mortgages were so drawn as to state fully and explicitly the nature of the obligations that they are given to secure; but the weight of authority appears to establish the doctrine that it is only necessary that the debts secured be described with such certainty as to enable creditors to ascertain, either from the condition of the mortgage, or by inquiry aliunde, the extent of the incumbrance, and that the mortgage may be in the form of a security for payment of a certain sum, leaving the true nature of the transaction to be shown by parol proof. *Jones, Chat. Mortg.* § 96, and authorities cited; *Berry v. O'Connor*, 33 Minn. 29, 21 N. W. 840; *Griffin v. Oil Co.*, 11 N. J. Eq. 49. The supreme court of California held in *Tully v. Harloe*, 35 Cal. 302, that a note and mortgage given in good faith for a greater sum than was due by the mortgagor to the mortgagee, to secure both a present indebtedness and future advances to be made by the mortgagee, is not fraudulent in law as to the creditors of the mortgagor, because given for a greater sum than was due, even though the mortgage did not express upon its face that the excess was for future advances, and that such mortgage need not express its object upon its face, although it would be better that it do so.

3. The knowledge of Earhart that Latsbaugh was largely indebted to the Sedan National Bank and others is imputable to the plaintiffs, but it was permissible for them to secure a preference over all other creditors, and this they did by obtaining a chattel mortgage, and having it filed for record. *Bank v. Ridenour*, 46 Kan. 718, 27 Pac. 150. They were under no obligation to disclose to their attorney anything more than was necessary for his information in drawing the

notes and the mortgage, nor to tell the officers of the Sedan National Bank what they had done, or what they were going to do. No relation whatever existed between the plaintiffs and the bank requiring any disclosure by the former to the latter. If the bank had relied upon its chattel mortgage, it may be that Earhart had sufficient notice of its existence to put him and the plaintiffs upon inquiry as to its terms, and thus cure its want of registry, and so the claim of the bank might have been entitled to priority over that of the plaintiffs; but the bank chose to rely upon an attachment lien of a later date than that conferred by the chattel mortgage of the plaintiffs, and we cannot consider what rights the bank might have obtained under its chattel mortgage.

This disposes of the only specific objections raised against the validity of the chattel mortgage given to the plaintiffs, and we need not consider any other. We will say, however, that the evidence affirmatively shows that the indebtedness of Latsbaugh to the plaintiffs was bona fide, the order taken for the spring goods was in the usual course of business, and we see nothing whatever indicating any other purpose on the part of the plaintiffs than to secure the past indebtedness, and that which would accrue by the filling of the order for spring goods.

4. The plaintiffs replevied, with the other goods, 437 pairs of men's, boys', women's and children's boots, shoes, slippers, rubbers, articles, and some other articles, perhaps not covered by the plaintiffs' chattel mortgage. Earhart testified that boots and shoes did not come within the description of clothing or furnishing goods. The description of the stock in the mortgage is restrictive, and the plaintiffs obtained no right to goods not within its terms. On another trial this branch of the case will no doubt receive the further consideration of the trial court.

The judgment must be reversed, and the case remanded for a new trial. All the justices concurring.

CARTER v. CHRISTIE et al.

(Supreme Court of Kansas. Dec. 5, 1896.)

PARTNERSHIP—BOND OF SURVIVOR—LIABILITY OF SURETIES—ANOTHER SUIT PENDING.

1. In case of a partnership estate, where the surviving partner had been cited before the probate court, and had given a bond, and undertaken the management and settlement of the partnership estate, and where the debts of the partnership had been paid, and the estate practically settled, except to make an accounting, and to divide the assets between the surviving partner and the sole heir of the deceased partner, the district court has jurisdiction in an action for accounting between them, although the matter is pending in the probate court, and no final settlement of the estate has been made therein.

2. The sureties upon the bond of the surviving partner cannot be held responsible for liabilities on transactions between the partners prior to the formation of the partnership, nor

for the individual liabilities of its members outside of the partnership business; nor can they be held liable for more than the amount of the partnership estate which was in the hands of the surviving partner when the bond was executed.

(Syllabus by the Court.)

Error from district court, Marion county; Lucien Earle, Judge.

Action by M. A. Carter, administratrix of S. F. Carter, deceased, against John S. Christie and others. From a judgment for defendants, plaintiff brings error. Reversed.

Jetmore & Jetmore, for plaintiff in error. Keller & Dean, for defendants in error.

JOHNSTON, J. This was an action upon the bond given by John S. Christie, as surviving partner of the late firm of Christie & Carter. The firm was engaged in the banking business from June, 1886, until July 8, 1887, when S. F. Carter, a member of the partnership, died, intestate. M. A. Carter, his widow and sole heir, was appointed administratrix of the estate, and John S. Christie, the surviving partner, was appointed and for a time acted as co-administrator, but he subsequently resigned, and M. A. Carter became sole administratrix of the estate. After the decease of Carter, Christie carried on the banking business under the same firm name, without giving a bond as surviving partner until some time in September, 1889, when M. A. Carter caused a citation to be issued from the probate court requiring Christie to execute a bond as surviving partner, and to proceed with the settlement of the partnership estate in accordance with law. In pursuance of the citation, a bond was executed by Christie, as surviving partner, which was approved on the 24th day of September, 1889. On December 26, 1889, M. A. Carter, as administratrix, brought an action against John S. Christie in the district court for an accounting of the banking business; and, in addition to the facts stated, she alleged that Christie had refused to disclose the status of the business, and had not since the giving of the bond made any report, either final or otherwise, as surviving partner, to the probate court; that, when the appraisement was made, he had failed to exhibit the assets of the partnership to the appraisers, or to aid them in making a correct appraisement of the property; that although S. F. Carter had been dead for over two years, and all the debts due from the firm had been paid, no steps were being taken by Christie to close up the partnership business, nor had he made payment of any portion of the amount due her as sole heir of the estate of S. F. Carter. It is alleged that there is no adequate remedy at law, and she therefore prays for an accounting of the business between her late husband and Christie, and for judgment for the amount found to be due to her. A referee was appointed, who heard the case, and found that Christie was indebted to the plaintiff; and upon the report made, and

on January 5, 1891, judgment was rendered in favor of the plaintiff for \$11,732. On October 29, 1891, the present action was brought upon the bond of the surviving partner, in which they asked a recovery of the amount of the judgment, together with interest thereon. In the answers filed by Christie and the sureties upon his bond, it was alleged that the judgment mentioned was void, in that the court rendering it had no jurisdiction; that the subject-matter of the action was of probate jurisdiction, and, as it was pending and undetermined in that court, the district court could not properly take cognizance of it, or render a judgment thereon.

At the trial, the proceedings and judgment, including the execution with the return of nulla bona, were introduced in evidence by the plaintiff; and, having rested, the defendants demurred to the evidence, which demurrer was sustained by the court. In support of that ruling, it is argued that the judgment against Christie in the accounting case is void, for the reason that the estate was in process of settlement in the probate court, and that that court had exclusive jurisdiction to settle and close up the partnership estate. Probate courts are invested with jurisdiction over such estates, and may proceed to settle the same as in cases of ordinary administration. It is true, as contended, that when the probate court has acquired jurisdiction over an unsettled estate, and that court can afford adequate relief, actions in other jurisdictions against the administrator will not be encouraged. It is a general rule, too, that, in cases where two courts have concurrent jurisdiction, the one that first takes cognizance of the case will retain it to the exclusion of the other. *Stratton v. McCandlees*, 27 Kan. 306; *Proctor v. Dicklow*, 57 Kan. —, 45 Pac. 86. The mere giving of jurisdiction, however, to one court, does not show that it must be exercised exclusively by that court. The district courts are invested with full chancery and common-law jurisdiction; and there being nothing in the act concerning the administration of estates which shows that the legislature intended to confer exclusive jurisdiction on the probate court in suits against estates, or to withhold it from the district court, the latter may exercise jurisdiction over estates, and over heirs, executors, and administrators, whenever the special circumstances bring the case under some recognized head of equity, or when adequate relief cannot be obtained in the probate court. *Shoemaker v. Brown*, 10 Kan. 383; *Johnson v. Cain*, 15 Kan. 532. In *Anderson v. Beebe*, 22 Kan. 768, a controversy arose as to an unsettled estate, and an arbitration was had, which was made a rule of the district court. It was contended that, as it was a matter arising in the settlement of an estate, it could only be adjudicated in the probate court. It was held, however, that, "if a controversy exists prima facie, the district court has jurisdiction of it. Controversies between a surviving partner and the administrator and heir of the de-

ceased partner—perhaps not all, but certainly some, and probably most, of them—are cognizable in that court.” In *Klemp v. Winter*, 23 Kan. 699, it was decided that, while the probate courts of the state have general jurisdiction over the estates of minors, there was nothing to indicate the taking away or limiting the jurisdiction of the district court in that class of cases; and, where a complete remedy cannot be obtained in the probate court, a party may rightfully invoke the jurisdiction of the district court. It was also held that, where there is a branch of the case which must necessarily be taken to the district court, that court will, for the purpose of avoiding a division of the subject-matter or a multiplicity of suits, take jurisdiction of the whole subject-matter, and dispose of the same as justice and equity require. The jurisdiction of the district court in such matters is an equitable one, and in its exercise that court will be governed by the rules of equity, one of which is that, as a general rule, it will only take jurisdiction where the plaintiff has no other adequate remedy by ordinary legal proceedings in the tribunal especially provided by statute. *Kothman v. Markson*, 34 Kan. 542, 9 Pac. 218; *Gafford v. Dickinson*, 37 Kan. 287, 15 Pac. 175; *McLean v. Webster*, 45 Kan. 44, 21 Pac. 10. In the case of *In re Hyde*, 47 Kan. 281, 27 Pac. 1002, it was held “to be settled law in this state, when certain facts exist growing out of the liabilities of a deceased person, or, it may be, arising out of the settlement of the estate of a deceased person, wherein the probate court, by reason of its limited jurisdiction and restricted authority, cannot protect and enforce the rights of all persons involved in the controversy, the equitable power of the district court may be invoked in their behalf.” The matter of taking an accounting comes within a recognized head of equity jurisdiction, and it is one in which a full measure of relief cannot always be obtained in the probate court. Especially is it true where, as in this case, the accounting appears to involve matters outside of the partnership business. The probate court could not take cognizance of an individual liability from Christie to Carter, nor of transactions occurring between them prior to the commencement of the partnership; and claims of this character are made. The debts of the partnership appear to have been discharged, and the estate appears to have been practically settled, before the commencement of the accounting action, except as to the division of the assets between Christie and the administratrix. It was in such a condition that all business matters of the late firm, as well as between its members and also between the surviving partner and M. A. Carter, the representative and sole heir of the deceased partner, could be determined. It is conceded that all of these matters might be determined in a general accounting, and it was therefore proper for the plaintiff to apply to a court which had complete jurisdiction to dispose of the

whole subject-matter in controversy between them. The district court could take jurisdiction of all accounts against Christie, and upon which he would be liable to M. A. Carter, and to dispose of them in a single case, as justice and equity required. *Klemp v. Winter*, supra. And, finally, when the case is ended, the district court could render a judgment against Christie for any liability, and enforce the same,—a power the probate court is not authorized to exercise. We conclude, therefore, that the district court was not without jurisdiction, and that the judgment in question rendered by it is not a nullity.

It does not follow, however, that the judgment rendered is conclusive against the sureties upon the bond of the surviving partner. The condition of the bond is that the surviving partner will use diligence and fidelity in closing up the partnership affairs, and, further, that he will account and pay over at the proper time to the administratrix the excess, if any there may be, beyond satisfying the partnership debts. Under this condition, the sureties would be liable for assets of the estate in his hands when the bond was executed. They cannot be held liable upon transactions not included within the partnership, nor upon the individual liabilities of its members outside of the partnership business. More than two years elapsed after the death of Carter before the bond of the surviving partner was given. A portion of that time M. A. Carter and Christie appear to have been co-administrators of the estate, and to have united in the control of the property. If there was any waste during that time, and prior to the giving of the bond, M. A. Carter may be responsible for the loss, and not in a position to insist upon a payment of the amount of the loss either from the surviving partner or his sureties. *Insley v. Shire*, 54 Kan. 793, 39 Pac. 713. As Christie is liable upon the judgment, and as the sureties are responsible for, at least, a portion of the indebtedness included in the judgment, there was error in sustaining a demurrer to the plaintiff's evidence, and in rendering a judgment against her. The judgment of the district court will be reversed, and the cause remanded for a new trial. All the justices concurring.

STATE v. McDONALD.

(Supreme Court of Kansas. Dec. 5, 1896.)

INFORMATION—AMENDMENT—WITNESS—INDORSEMENT OF NAME—EXAMINATION—REPUTATION OF DEFENDANT—ACCOMPLICE.

1. An information may be amended as to a Christian name or initial, with leave of court, after plea and before trial.

2. The court ought to require of the prosecuting officer the utmost good faith, and not permit him purposely to spring a surprise upon the defendant by indorsing on the information during the trial the names of witnesses whom he intended beforehand to call in chief; and where leave to indorse is granted under such circumstances it ought to be upon terms as to postponement, if requested by the defendant.

3. It is not generally permissible, after a witness has testified to the fair reputation of the defendant in a particular respect, to cross-examine as to specific acts, doings, or offenses of the defendant; but, as the general reputation of any person is established by the opinions of witnesses as to the general estimation of his character, it is allowable to call their attention to reports inconsistent with such good reputation, and thus to weaken or qualify the testimony of such witnesses.

4. Instructions treating of the testimony of an accomplice examined, and held, that there was no material error in that which was given, although the one requested and refused was in better form.

(Syllabus by the Court.)

Appeal from district court, Sedgwick county; C. Reed, Judge.

John McDonald was convicted of grand larceny, and appeals. Affirmed.

Adams & Adams, for appellant. F. B. Dawes, Atty. Gen., for the State.

MARTIN, C. J. 1. On April 13, 1895, the defendant was adjudged guilty of grand larceny by the stealing on August 19, 1894, of five head of neat cattle and one heifer, being the personal property of F. J. Granfield, and he was sentenced to confinement and hard labor in the penitentiary for the term of five years. The information, as originally filed, September 17, 1894, alleged that the property belonged to S. J. Granfield, and it was so when the defendant entered his plea of not guilty thereto, September 21, 1894. The trial resulting in the conviction of the defendant did not commence until January term, 1895. At some time after the entry of the plea, and before the commencement of this trial (the record not showing the date), the state was allowed to amend the information by changing the name of S. J. Granfield to F. J. Granfield, and the defendant claims that this was error, and he cites section 72 of the Criminal Code to support his contention. That section authorizes the amendment of an information before plea in matter of substance or form without leave, and in all matters of form at the discretion of the court on the trial, when the amendment can be made without prejudice to the rights of the defendant. We do not interpret the language of this section as a prohibition against such an amendment of a Christian name or initial with leave of the court, and before trial. *State v. Beatty*, 45 Kan. 492, 496, 498, 25 Pac. 899. As it was not shown that a postponement of the trial was necessary by reason of the amendment, we cannot say that any substantial right of the defendant was prejudiced thereby.

2. During the trial, and after the state had introduced the testimony of all the witnesses whose names were indorsed upon the information, leave was asked and granted to indorse the name of William Humphrey, and he was then called, and examined as a witness, over the objection of the defendant. Humphrey testified that he and the defendant committed the crime, and on his cross-examination it appeared that the county attorney had for sev-

eral days contemplated the calling of Humphrey as a witness for the state. Under these circumstances the trial should have been postponed, if the defendant had requested it. The court ought to require of the prosecuting officer the utmost good faith, and not permit him purposely to spring a surprise upon the defendant; but, as no postponement was asked, it cannot be held that the substantial rights of the defendant were prejudicially affected by the ruling of the court in this particular. *State v. Price*, 55 Kan. 606, 608, 40 Pac. 1,000.

3. Certain witnesses testified to the former fair reputation of the defendant for honesty and integrity, and in cross-examination they were asked whether they had not heard of the defendant being arrested once before for larceny, and they admitted that they had, although it would seem from their testimony that the case against him was dismissed. The defendant urges that it was error for the court to allow this particular circumstance to be brought up against him in cross-examination. It is not generally permissible, after a witness has testified to the fair reputation of a defendant in a particular respect, to cross-examine as to specific acts, doings, or offenses of the defendant; but, as the general reputation of any person is established by the opinions of witnesses as to the general estimation of his character, it is allowable to call their attention to reports inconsistent with such good reputation, and thus to weaken or qualify the testimony of such witnesses; and on this principle the court did not err in the latitude allowed in cross-examination in this respect. 3 Rice, Ev. § 376, and cases cited.

4. The defendant requested, and the court refused to give, the following instruction to the jury: "No. 16. The court instructs the jury that one William Humphrey, who is jointly charged with the defendant, John McDonald, in the information filed in this case, gave testimony tending to show that he and said McDonald committed the crime charged in the information. Such testimony, in law, is known as that of an accomplice, but you are not to convict the defendant, John McDonald, upon the testimony of said William Humphrey alone, unless his testimony is corroborated by other evidence as to some material fact." We see no fault in this instruction, and it was in better form than that given upon the same subject by the court, which, treating of the testimony of an accomplice, said that the law required that it should in some way, by some fact or circumstance, be corroborated to some extent, but that such a corroboration might be a circumstance or fact; that is, may be circumstantial or positive testimony. We think, however, that the meaning of this instruction is not substantially different from the other, and that the defendant was not prejudiced by the refusal of the former and the giving of the latter. See, further, as to the testimony of an accomplice, *State v. Kellerman*, 14 Kan. 135, 137, and *State v. Patterson*, 52 Kan. 335, 362, 34 Pac. 784, 790.

These being all the questions urged in the brief of counsel for the defendant, the judgment of the court below will be affirmed. All the justices concurring.

BRENEMAN v. BURR et al.¹

(Court of Appeals of Kansas, Southern Department, W. D. Dec. 1, 1896.)

APPEAL—PARTIES.

Where a judgment against several parties is brought into the court of appeals for review, and it is apparent that a reversal thereof will prejudicially affect other parties not made parties to the proceedings for review, the court cannot entertain the case, and it will be dismissed. *Bain v. Insurance Co.*, 40 Pac. 817, 3 Kan. App. 846.

(Syllabus by the Court.)

Error from district court, Stafford county; J. H. Bailey, Judge.

Action by George H. Burr and A. M. Gloyd against D. C. Breneman and others. Judgment for plaintiffs, and defendant Breneman brings error. Dismissed.

O. O. Jennings, Hardy Sayre, and Lucius M. Fall, for plaintiff in error. J. W. Rose, for defendants in error.

JOHNSON, P. J. This suit was commenced in the district court of Stafford county on the 31st day of December, 1890, by George S. Burr and A. M. Gloyd against C. S. Mace, Edward Wellep, and Madeline Wellep, to recover judgment on two certain promissory notes, and to foreclose a mortgage on real estate situated in Stafford county, Kan., executed by Edward Wellep to secure two notes given by C. S. Mace and Edward Wellep. The defendants were duly served with summons, and appeared to said action, and filed their demurrers to the first count in the petition and their answers to the second count. On the 12th day of February, 1891, plaintiffs confessed the demurrers to the first count of the petition, and asked leave to amend their petition generally, and to make additional parties defendants. Leave was granted plaintiffs to make additional parties defendants, and file their petition in 30 days. On the 14th day of March, 1891, plaintiffs filed an amended petition, and made the following persons defendants therein: O. S. Mace, Jennie L. Mace, Edward Wellep, Madeline Wellep, John Beethan, Abner Pyle, Thomas B. Brown, Margaret Wendel, and D. C. Breneman, and additional parties were duly served with summons and by publication notice in a newspaper. Edward Wellep filed his separate answer to the amended petition. D. C. Breneman appeared, and filed his separate answer and cross petition to the amended petition, and denied all the allegations of the amended petition, so far as it charges any indebtedness against Mace and Wellep, and set up a lien on the mortgaged premises by way of a judgment against C. S. Mace and Jennie L. Mace, rendered on the 13th day of Novem-

ber, 1888, in the district court of Stafford county, and that it was a first lien on the land described in the mortgage. On the 4th day of December, 1891, the plaintiffs below filed a reply to the answer and cross petition of Breneman, and denied the allegations of the cross petition. On the 18th day of February, 1892, this case came on regularly before the court for a trial on the issues joined, and plaintiffs, with the consent of the court, thereupon dismissed their action as against the defendants Edward Wellep and Madeline Wellep, and the defendants C. S. Mace and Jennie L. Mace withdrew their answers, and the court rendered a personal judgment against C. S. Mace for the sum of \$3,609.89, and entered up a decree of foreclosure of the mortgage, and ordered the mortgaged premises sold in satisfaction of said judgment, and decreed that the mortgage was a first lien on the premises, and that the judgment of D. C. Breneman was a second lien on the mortgaged premises. Breneman excepted to the judgment finding his judgment a second lien, and filed motion for a new trial, which was overruled, and he duly excepted, made case, and brings the matter to this court for review.

The petition in error filed in this court makes only George S. Burr and A. M. Gloyd defendants in error. The case-made was not served on any of the parties except the plaintiffs below, and none of the other parties are brought into this court. George S. Burr and A. M. Gloyd, defendants in error, appear in this court, file their motion, and ask the court to dismiss the case for the reason that some of the persons who are necessary parties to any proceedings to reverse the judgment are not made parties by bringing them into court either by service of summons or by their voluntary appearance herein; that more than one year has elapsed since the rendition of the judgment, and the parties cannot now be brought into this court. The plaintiff in error seeks to have the decree of the court foreclosing the mortgage and determining the priority of liens reversed, leaving the judgment stand against C. S. Mace and Jennie L. Mace without the benefit of the mortgaged property to satisfy the judgment. Mace and Mace were willing that judgment be rendered against them if they could have the mortgaged property sold to satisfy such judgment. A reversal of the decree of the court would materially affect the rights of Mace and Mace, and, they not being parties to the proceeding for a reversal of the judgment, this court cannot entertain jurisdiction of this proceeding. The supreme court of this state has held in a number of cases that the absence of a party to a judgment, who will necessarily be prejudicially affected by the reversal or modification of a judgment, defeats the jurisdiction of the court, and there can be no review of the judgment, or any part thereof, unless the parties to be prejudicially affected thereby are brought before the court. *Loan Co. v. Chicago Lumber Co.*, 53 Kan. 677, 37 Pac. 132; *McPherson*

¹ Rehearing pending.

v. Storch, 49 Kan. 313, 30 Pac. 480; Paper Co. v. Hentig, 31 Kan. 322, 1 Pac. 529; Paving Co. v. Botsford, 50 Kan. 331, 31 Pac. 1106; Bain v. Insurance Co., 3 Kan. App. 346, 40 Pac. 817. The failure to bring into this court all parties affected by this judgment compels us to allow the motion to dismiss. The case is dismissed, and the plaintiff adjudged to pay the costs in this court. All the judges concurring.

SOUTHERN KANSAS RY. CO. v. PAVEY.

(Supreme Court of Kansas. Dec. 5, 1896.)

STIPULATIONS—AVOIDANCE—DAMAGES—EVIDENCE—HUSBAND AND WIFE—LOSS OF SERVICES.

1. R. C. P., a married woman, obtained judgment against A., a corporation, in the district court of Franklin county, for damages for personal injuries, and A. sought a reversal of the judgment in this court. J. A. P., her husband, commenced another action against A. in the district court of Douglas county to recover damages for loss of the services of his wife, for medical attendance, etc. At November term, 1889, said case was continued by stipulation of the attorneys in open court, A.'s attorney acting without the express authority of A. or its general solicitor. The terms of the stipulation were that the case was not to be tried until the case of R. C. P. should be disposed of, and a final judgment in that case should be conclusive in this on the question of negligence, and, if final judgment should be obtained establishing the liability of A. in that case, then the question to try in this should thereafter be the amount of recovery. The judgment in favor of R. C. P. was affirmed by this court at January term, 1892, and A. paid and satisfied it. Afterwards A. filed a motion to set aside the stipulation, the case having been continued in the meantime, and on the hearing it was shown that on the next day after the stipulation was filed the attorney of A. who entered into it notified the general solicitor, who at once disapproved it, and the attorney of J. A. P. was so notified, but nothing was done by either party towards setting aside the stipulation, except as aforesaid. *Held*, that there was no error in overruling said motion and holding that A. was bound by it.

2. While it was competent, under the stipulation, to show that the judgment in favor of R. C. P. was affirmed, yet the court erred in admitting in evidence the syllabus and the opinion in that case, and this error was material, and perhaps prejudicial to A.

3. The petition of R. C. P., offered by A. for the purpose of showing that she claimed damages which were also included in the petition of J. A. P., was incompetent, and the court did not err in excluding it.

4. There being no intimation, either by pleading or proof, that R. C. P. pursued any vocation on her own account after her marriage, and it appearing from both that she was engaged in household work for her husband and family, J. A. P. may recover damages for the loss of her services.

(Syllabus by the Court.)

Error from district court, Douglas county; A. W. Benson, Judge.

Action by John A. Pavey against the Southern Kansas Railway Company for loss of services of his wife. From a judgment for plaintiff, defendant brings error. Reversed.

Rilla C. Pavey commenced an action against the Southern Kansas Railway Company in the district court of Franklin coun-

ty to recover a judgment for damages for personal injuries alleged to have been sustained by reason of the negligence of the railway company on October 8, 1887. She recovered a judgment in that court for \$6,000 and costs, and the judgment was brought to this court for review.

John A. Pavey, the husband of Rilla C. Pavey, commenced the original action in this case against the same company on March 8, 1889, in the district court of Douglas county, to recover damages for the loss of the services of his wife, for expenses, etc., on account of the injuries alleged to have been sustained by her as aforesaid. On April 2, 1889, the railway company filed a motion to strike out certain designated words from the petition. This motion was signed by George R. Peck, A. A. Hurd, and George J. Barker, as attorneys for the defendant. On June 20, 1889, the motion was sustained, and the plaintiff was given 10 days in which to amend his petition. The record recites that on November 26, 1889, a stipulation was made and entered into by and between the attorneys for the parties, the same being dictated to the stenographer by George J. Barker, Esq., attorney for the said defendant, in open court, and then transcribed by the stenographer, and filed with the clerk of said court, the body of the same being as follows: "It is stipulated by and between the parties hereto that this case shall be continued pending the litigation in the case of Rilla C. Pavey, now pending in the supreme court of the state of Kansas, and that a final judgment in that case shall be conclusive on the question of negligence in that case as well as in this. And if a final judgment in that case be obtained, establishing the liability of the defendant, then the question to try in this case shall thereafter be the amount of recovery. But it is distinctly understood that this case is not to be tried until that case is finally disposed of." At January term, 1892, the said judgment in favor of Rilla C. Pavey was affirmed by this court. 48 Kan. 452, 29 Pac. 593. Thereafter, on May 5, 1892, the railway company filed a motion to dismiss the action by reason of the failure of the plaintiff to obey the order of the court requiring the amendment of the petition by striking out certain words within 10 days. This motion was overruled, and at some time, the date not appearing, a substituted petition was filed, omitting the objectionable words. Leave was given to the defendant to plead within 20 days, and, the validity of said stipulation having been questioned, the court notified the defendant that if it desired to vacate the same, application therefor must be made at the then present May term, and on May 21, 1892, at said term, a motion was filed by the defendant to set aside said stipulation on the ground that George J. Barker was a local attorney only for the defendant, and had no authority to make such stipula-

tion, or to waive any question of fact in the case, or to compromise or settle the same or waive any defenses therein; and said stipulation was never approved by the defendant, nor any of its duly-authorized agents or attorneys; and that it had a valid and complete defense against the plaintiff's alleged cause of action. The affidavits of W. Littlefield, A. A. Hurd, and George J. Barker were filed in support of this motion, and they tended further to show that Barker told J. G. Waters, attorney for the plaintiff, before entering into the stipulation, that he thought he had no authority to do so, but that he would notify A. A. Hurd, the general solicitor of the defendant for Kansas, and see if it would be approved by him; that on the next day he wrote to Hurd, informing him of the stipulation, and saying that, if it was not satisfactory, to let him know as soon as possible, and he would notify Waters that it was repudiated, and would have the case set down for trial at the next term, that in a day or two thereafter he received a letter from Hurd, stating that the stipulation was disapproved, and he so notified Waters; but neither party took any action for the vacation of the stipulation, nor for having the case set down for trial, until after the Rilla C. Pavey case had been decided by this court. On June 4, 1889, said motion to set aside the stipulation was overruled. The defendant filed answer in due time, being a general denial. The case was called for trial, and a jury impaneled, on December 8, 1892. On the trial said stipulation was offered and received in evidence over the objection of the defendant, the court holding that it was conclusive upon all questions of negligence, and that the only matter remaining for trial was as to the amount of damages recoverable by the plaintiff. Evidence was given tending to show the nature of the injury to Rilla C. Pavey, the expenses of medical attention, care, and nursing, and the extent of loss by reason of her disability. The plaintiff then offered in evidence the syllabus and the opinion of this court in said Rilla C. Pavey case, over the objection of counsel for defendant, who admitted that said judgment had been affirmed by this court, and paid by the company, together with interest and costs, amounting in all to \$7,334; but, notwithstanding said admission, the court permitted the syllabus and opinion to be read in evidence. A demurrer to the plaintiff's evidence being overruled, the defendant offered testimony tending to impeach the validity of said stipulation, but this was excluded. Other evidence was admitted, relating to the injury to Mrs. Pavey, and the extent thereof, but the court excluded the amended petition of Rilla C. Pavey, which was offered for the purpose of showing that she had sued for damages which were also covered by the plaintiff's petition. The defendant requested certain instructions directed to the point that under

the petition and the evidence the plaintiff was not entitled to recover for the loss of his wife's services, but these were refused. The jury returned a general verdict in favor of the plaintiff for \$4,000, and the answers to particular questions of fact show that this was made up of the following items, to wit: Loss of services of the wife, \$3,640; medical attention, \$250; nursing and care, \$60; and medicines, \$50. The motions of the defendant for judgment in its favor and for new trial being overruled, judgment was entered upon the verdict for the amount thereof and costs, and the railway company now seeks a reversal of said judgment.

A. A. Hurd, O. J. Wood, and W. Littlefield, for plaintiff in error. J. G. Waters and A. H. Case, for defendant in error.

MARTIN, C. J. (after stating the facts). 1. The question most argued in this case respects the validity of the stipulation, and the authority of Mr. Barker to enter into it. A litigant corporation must necessarily be represented in court by some officer, agent, attorney, or solicitor, and it is conceded that Mr. Hurd, the general solicitor of the company for Kansas, might have bound his client by a like stipulation. So far as it appeared from the record, Mr. Barker was equal in authority with Mr. Hurd. He was an attorney of record, and perhaps the only one representing the company present at the time the agreement for continuance was made. The court had a right to presume that he had authority, either express or implied, to stipulate in open court for a continuance upon certain conditions, and his act remained unchallenged in court about two years and a half, and until after the decision of this court in Mrs. Pavey's case. It was then shown, however, that the general solicitor did not approve the stipulation, and Mr. Waters, one of the attorneys for the plaintiff, was so notified; but, as the representatives of the company knew that this stipulation was of record, and was being acted upon by the continuance of the case in the meantime, it was incumbent upon them to signify to the court that it was unauthorized, and that the company would not be bound by it. There is no claim that Mr. Barker was expressly directed by the company or its general solicitor to make this stipulation, and, if he had no implied authority as an attorney to do so, then it should be disregarded, unless the company ought to be held to it by reason of the acceptance of the benefit thereof, and the long delay in moving for its vacation. The authorities are not harmonious as to the extent of the implied authority of an attorney in the management of the litigation of his client. In *Marbourg v. Smith*, 11 Kan. 554, 562, where it was claimed that counsel for the defendant in a slander suit agreed without the consent of his client that a dismissal of that case should bar an action for the malicious prosecution thereof, it was held that, if counsel made such an agreement, they had exceeded their au-

thority. In *Herriman v. Shomon*, 24 Kan. 387, it was decided that an attorney employed to collect a note in the absence of special directions is authorized to receive money only in payment thereof. In *Jones v. Inness*, 32 Kan. 177, 4 Pac. 95, it was held that an attorney at law has no power, without express authority, to compromise or settle his client's claim. See, also, *Bounsaville v. Hazen*, 33 Kan. 71, 5 Pac. 422, and *Mayer v. Sparks* (Kan. App.) 45 Pac. 249. These cases, however, do not reach the point at issue here. In *Howe v. Lawrence*, 22 N. J. Law, 99, 104, 106, it was held that an agreement wanting in mutuality, and by which, without the consent of his client, an attorney has waived his client's substantial legal rights, will not be enforced; and this case has been cited as authority for the position that an attorney cannot waive any substantial legal right of his client, but the case does not warrant any such assumption, the main ground of the decision being that the stipulation was altogether one-sided and entirely wanting in mutuality; the court saying, "Kither the agreement must have been entered into by the counsel of the defendant under some misapprehension of its character, in which event it is not his agreement, or it must have been founded upon some corrupt consideration, in which event it is utterly void." It was an agreement (to use the words of Chief Justice Marshall, in *Holker v. Parker*, 7 Cranch, 436, 452) "so unreasonable in itself as to be exclaimed against by all, and to create an impression that the judgment of the attorney has been imposed on, or not fairly exercised, in the case." An agreement of such a character should, of course, be set aside by the court in the interest of justice. The agreement made by Mr. Barker does not belong in this class. It does not impress us as unreasonable or unusual. A case had been tried in the district court of Franklin county involving the negligence of the railway company and the contributory negligence of Mrs. Pavey in relation to the casualty whereby she received the personal injuries the subject of that action and of this. John A. Pavey was present with his wife at the time she was hurt. His contributory negligence perhaps would not defeat her right of action, while it might have that effect as to his own; but undoubtedly, on the trial, the attorney representing the railway company might have waived the defense of contributory negligence, even though raised by the pleadings. The stipulation was mutually advantageous. It saved each party the trouble and expense of taking the testimony as to the casualty without the risk of its loss by the death, removal, or absence of the witnesses. A final judgment in favor of the defendant in Mrs. Pavey's case would have ended this one, while an affirmance of the judgment already obtained was to be conclusive in this on the question of negligence, leaving for trial only the amount of the recovery. We regard the stipulation in the light of a waiver of proof on the question of negligence upon a certain condition not unreasonable in itself. Such waivers by attorneys are common, either before

or during the trial, without the express authority of the client, and they should usually be upheld unless in case of fraud, imposition, collusion, or mistake, when the court has ample authority to set them aside; but there is no suggestion of any of these in this case. This conclusion, in our opinion, finds support in the following authorities: *Halliday v. Stuart*, 151 U. S. 229, 235, 14 Sup. Ct. 302; *Cox v. Railroad Co.*, 63 N. Y. 414, 418; *Saleski v. Boyd*, 32 Ark. 74, 83; *Rogers v. Greenwood*, 14 Minn. 333 (Gil. 256); *Eldam v. Finnegan*, 48 Minn. 53, 50 N. W. 933; *Foster v. Wiley*, 27 Mich. 244, 248, 249; *Cheever v. Mirrick*, 2 N. H. 376, 379; *Moulton v. Bowker*, 115 Mass. 36, 40; 2 Whart. Ev. § 1184.

2. The court erred in admitting in evidence the syllabus and the opinion of this court in the *Rilla O. Pavey* case. Under the stipulation it was competent to prove that the judgment in that case had been affirmed, and this might have been done by the introduction in evidence of a certified copy of the judgment of affirmance, but neither the syllabus nor the opinion forms part of the judgment in a civil case. In *State v. Walt*, 44 Kan. 310, 24 Pac. 354, and in *Railroad Co. v. Dwelle*, 44 Kan. 394, 408, 24 Pac. 500, it was held error to allow counsel to read to the jury the opinion of this court in another case; and it could not be less prejudicial to introduce the same in evidence, for this would authorize any proper comment upon it in argument. We have had some doubt whether the error was sufficiently material and prejudicial to require a reversal of the judgment, but have resolved it in the affirmative. In order to establish liability in this case, it was only necessary to prove that the judgment in Mrs. Pavey's case had been affirmed; but to disclose the extent of Mrs. Pavey's disability, and the plaintiff's loss resulting therefrom, evidence was necessary, and even the record in another case between other parties would be incompetent. Some of the comments of the court, however appropriate in that case, were not applicable in this; and, as the verdict was, to say the least, very liberal for the loss of services, it may have been influenced to some extent by this incompetent evidence. Besides, counsel for defendant admitted in open court that the judgment in favor of Mrs. Pavey had been affirmed, and this was all the legitimate matter furnishing an excuse for the reading of the syllabus and the opinion. Perhaps the admission may be good upon a subsequent trial (*Railway Co. v. Shoup*, 28 Kan. 394); but, at all events, it was sufficient to obviate the necessity for the introduction of any further evidence in relation to Mrs. Pavey's case.

3. The court was right in excluding the amended petition in Mrs. Pavey's case even upon the assumption that she may have sought damages therein which were also claimed by the plaintiff in his petition. We must presume that she recovered in that action only the damages to which she was entitled, whatever her claim may have been; but, if her judgment

had been for more, this would be no sufficient reason for depriving the plaintiff of damages which he had sustained. There was no relation between the two cases as to the amount of damages which the respective plaintiffs were entitled to recover.

4. The instructions directed to the point that under the petition and the evidence the plaintiff was not entitled to recover for the loss of his wife's services were properly refused. There was no intimation, either by pleading or proof, that Mrs. Pavey pursued any vocation on her own account after her marriage, and it sufficiently appeared from both that she was engaged only in household work for her husband and family. The cases of *City of Wyandotte v. Agan*, 37 Kan. 528, 530, 15 Pac. 529, and *railroad Co. v. Dickey*, 1 Kan. App. 770, 41 Pac. 1070, are not inconsistent with a recovery in this case. The court carefully and correctly instructed the jury touching the kinds of damages recoverable by the plaintiff, and the findings show that the jury fully comprehended the instructions, and were governed thereby.

For the error in admitting in evidence the syllabus and the opinion in *Mrs. Pavey's* case the judgment must be reversed, and the case remanded for a new trial. All the justices concurring.

CROLL v. ATCHISON, T. & S. F. R. CO.
(Supreme Court of Kansas. Dec. 5, 1896.)

INJURY TO EMPLOYE—EVIDENCE.

An employé engaged in ditching the track of a railroad, who was at work about 10 feet from the track, was struck on the head by a chunk of coal, which fell from the tender of a passing engine, and severely injured. He alleged that it was the result of the negligence of the company, and in an action recovered damages. *Held*, that the testimony tends to show that the tender was overloaded, and that the injury was due to the negligence of the railroad company.

(Syllabus by the Court.)

Error from court of appeals, Southern department, Eastern division.

Action by Henry J. Croll against the Atchison, Topeka & Santa Fé Railroad Company. Judgment for plaintiff. On appeal to the court of appeals the judgment was reversed (45 Pac. 112), and plaintiff brings error. Reversed.

Robert C. Helzer, for plaintiff in error. A. A. Hurd, W. Littlefield, and O. J. Wood, for defendant in error.

JOHNSTON, J. On April 5, 1890, Henry J. Croll, an employé of the Atchison, Topeka & Santa Fé Railroad Company, was engaged in ditching along the railroad, and about 10 or 12 feet distant from the track. The track was well ballasted, and generally in good condition, but on account of recent rains, and the frost coming out of the ground, it had become somewhat soft and uneven. While a passenger train was passing the place where

Croll was at work, a lump of coal, weighing 12 or 15 pounds, rolled from the top of the tender to the ground, and, bounding from there, struck Croll on the head, seriously injuring his eye and face. He brought this action, charging that the company was negligent in overloading the tender, and in failing to keep its track in proper condition. At the trial there was testimony that the tender was very heavily loaded, that in the center of the tender the coal was heaped up two or three feet above the level of the top, and one witness states that it was piled above the flange which is on the outer edge of the tender. It appears not to be unusual to take a rounding load of coal, but it was shown—and, indeed, proof was hardly necessary—that it was not practicable or safe to heap it above the flange or edge of the tender. A demurrer to the evidence was interposed and overruled, but upon review the court of appeals held that there was no evidence tending to prove that the coal was negligently loaded, and ordered a reversal, with instructions to sustain the demurrer to the evidence. 3 Kan. App. 242, 45 Pac. 112. We are unable to concur in this view. There is little, if any, testimony of negligence as to the maintenance of the track, but we think there was evidence tending to show negligence in overloading the tender, and at least sufficient to take the case to the jury. It may be proper to carry a rounding load of coal, but certainly it is neither necessary nor safe to have it piled upon the flange or above the edge of the tender. It was contended that the testimony did not show that the coal was above the edge of the tender, but that given by Mayer will hardly bear that interpretation: "Question. State about what height the coal was piled up at the edge of the tender, if at all. Answer. I should judge between two and three feet. Q. You mean in the center? A. Yes, sir. Q. About how high was it at the outer edge of the tender where it came to the edge of the flange? A. It was above the edge of the flange. I cannot say how far." On this testimony the jury found that the coal was loaded over the flange of the tender. If it was loaded on the flange or above the edge of the tender, the top coal would not have sufficient support, and a slight jar would be likely to loosen and dislodge some of it. Some of the witnesses stated that the tender was loaded in the usual way, but there is testimony tending to show that it was an unusual load. The fireman stated that it was usually rounded up about a foot or a foot and a half in the middle of the tender, while the testimony in this case shows that it was heaped up from two to three feet high above the tender. In this respect it differs from the case of *Schultz v. Railway Co.*, 67 Wis. 616, 31 N. W. 321, and therefore cannot be regarded as a mere accident, for which there is no responsibility. In considering the demurrer, the evidence must be viewed in the light most favorable to the

plaintiff, and all reasonable inferences must be allowed in his favor, and, unless all the testimony offered fails to establish his case, or some material fact in issue, the demurrer should be overruled. *Beaver v. Railroad Co.*, 58 Kan. 516, 43 Pac. 1186; *Rogers v. Hodgson*, 46 Kan. 276, 28 Pac. 732; *Railroad Co. v. Foster*, 39 Kan. 329, 18 Pac. 285; *Railroad Co. v. Cravens*, 43 Kan. 650, 23 Pac. 1044. Measuring the testimony by the rule in these cases, it is clear that the case should have gone to the jury.

We are not impressed with the suggestion that Croll assumed the risks and dangers incident to the overloaded tender. It is true that he knew something of the condition of the track and roadbed, and was aware that the roughness of the track gave the engine a swinging motion, but there is nothing to show that he had reason to apprehend that the coal would be piled above the edge of the tender, nor that pieces of the same would be thrown so as to strike him when he was 10 or 12 feet away. He was at work in the place to which he was assigned, and we fail to see that he had any reason to apprehend the peril to which he was subjected by the overloading of the tender. He had never seen any coal fall off the tender of a passing train, and, while he may have seen pieces of coal lying along the track, there is nothing to show whether they fell from the tender of a passenger engine or from coal cars. In the view we take of the case, the matter of Croll's own negligence or knowledge is entitled to but little consideration. It would seem as if an ordinarily prudent man, in the position in which Croll was, would not have deemed himself in any danger from a passing train, and probably he would have been censured by the foreman if he had left his work, and gone further away from the track, because of the passing train. For this reason the objection to the first special finding, which relates to Croll's knowledge of the condition of the railroad, although somewhat inaccurate, is not deemed to be very material.

The testimony in the record does not indicate passion or prejudice on the part of the jury, and no good reason is seen why the verdict, which appears to have support in the testimony, should be set aside. The rulings complained of upon the testimony and the instructions are not deemed to be erroneous, nor such as require special comment. The judgment of the court of appeals will be reversed, and the judgment of the district court will be affirmed. All the justices concurring.

MARSHALL v. MURPHY.

(Court of Appeals of Kansas, Southern Department, W. D. Dec. 1, 1896.)

CONTRACT—ESTOPPEL.

Where Marshall, under a contract in writing between himself and Millard and Powell,

borrowed a certain sum of money, and gave his note to Millard for the same, and to secure the payment thereof executed a mortgage on certain property in the city of S., and thereafter Millard indorsed and delivered said note to Murphy, and on default in the payment of said note at maturity Murphy commenced suit to recover the amount due on said note, and for a decree of foreclosure of said mortgage; and in defense of such suit Marshall alleges that Murphy is not the real party in interest, for the reason that the money loaned him belonged to Haskell township, in Haskell county, Kan., and that the transaction for the loan was on behalf of the township, and was, therefore, unauthorized and void, and that plaintiff could not maintain a suit in his own name, and Marshall could not be held for the payment of said note and mortgage,—*held*, that the contract between Marshall and Millard and Powell for the loan of the money was a contract between individuals; that the parties contracted on their own account, and the giving of the note and mortgage to Millard for the money loaned was to Millard individually, and the indorsement and delivery of the note to Murphy passed all the right and interest of Millard to said note and mortgage to Murphy, and that Marshall cannot inquire into the source from which Millard and Powell received the money that was loaned. If Millard and Powell loaned the money belonging to the township, they are liable to the township for the money; but Marshall is estopped from denying that the money he received on the loan for which he gave his note was not the money of Millard.

(Syllabus by the Court.)

Error from district court, Haskell county; William Easton Hutchison, Judge.

Action by H. C. Murphy against F. S. Marshall on a note and a mortgage. From a judgment for plaintiff, defendant brings error. Affirmed.

Milton Brown, for plaintiff in error. A. J. Hoskinson, for defendant in error.

JOHNSON, P. J. This suit was on a promissory note executed on the 9th day of September, 1889, by F. S. Marshall, for the sum of \$800, due three years from date, payable to J. F. Millard or order, with interest at 8 per cent. per annum from date thereof. To secure the payment of the money to become due under the terms of this note, Marshall gave a mortgage on certain property situated in the city of Santa Fé, Haskell county, Kan. J. F. Millard transferred this note by indorsement thereon, and delivered the same, to H. C. Murphy. The note not being paid at maturity, Murphy commenced suit against Marshall to recover the amount due thereon, and to foreclose said mortgage. The petition sets out the execution of the note and mortgage, the transfer thereof by the payee to the plaintiff, and the nonpayment of the money according to the terms of the note. The answer of the defendant below admits the execution of the note and mortgage as set out in plaintiff's petition, but alleges that the plaintiff below was not the real party in interest; that the note and mortgage were given solely for and on account of an agreement in writing entered into by defendant below and the payee and mortgagee named in the note and mortgage as trustee and F. M. Powell, as clerk of Haskell township, in

Haskell county, Kan.; and that said note and mortgage were not purchased for value by plaintiff from Millard, or any other person, but were merely delivered by Millard to plaintiff as his successor in office, and that Millard merely wrote his name across the back of the note so that plaintiff might hold said note as said officer, and for no other consideration; and attaches a copy of the contract in writing to his answer, which is as follows: "Santa Fé, Kansas. We, the undersigned, of Santa Fé, Kansas, hereby agree with F. S. Marshall, of Dubuque, Iowa, to give him a cash bonus of one thousand dollars, and a suitable site, consisting of six lots in the city of Santa Fé, aforesaid, on which to erect a flour mill, and transport all said machinery, including engine and boiler, from the nearest R. R. station to Santa Fé. And further agree to loan him, or cause to be loaned him, one thousand dollars, if he so desires, at 8 per cent. interest, from one to three years' time; said one thousand dollars loaned to be secured by a first mortgage on said mill site, building, and all machinery situate therein; said machinery to be clear of any lien or debt whatsoever, and all the freight paid; the thousand dollars bonus to be paid to said Marshall as follows: Five hundred dollars when machinery is laid down at Santa Fé, including the boiler and engine; and five hundred dollars when the mill is in running order, and capable of turning out good, straight grade flour. Title of land to be given when building is completed, and ready to receive machinery,—for which said F. S. Marshall agrees to erect and operate a full roller flouring mill, capable of turning out from forty to fifty barrels of good, straight grade flour in 24 hours, and also put in a corn and feed mill. The said F. S. Marshall further agrees to commence the work of erecting said mill building within twenty days after receiving the contract at Dubuque, Iowa, and continue the erection and completion of said flour mill without cessation, unless delayed in getting machinery shipped; said thousand dollars to be deposited with the Haskell County Bank, at Santa Fé, with a copy of this contract, subject to the order of F. S. Marshall, upon his performing all the agreements set forth in said contract, and said contract to be O. K. by the parties of the first part, F. M. Powell and J. F. Millard. [Signed] J. F. Millard, Trustee. [Signed] F. M. Powell, Clerk. [Signed] F. S. Marshall. Signed June 17, 1889." The answer further alleges that the said sum was loaned "this defendant under said contract by said township, and said note was so given by this defendant, and without any other consideration whatever therefor, and plaintiff knew each and every of the above facts before said note and mortgage were delivered to him, the said plaintiff, by the said Millard; whereby this defendant has received no consideration for said note and mortgage by said payee named, or from said plaintiff; and that plaintiff received said note and mortgage without

having given any consideration therefor, or any part thereof, and with full knowledge of each and every of the foregoing facts, and received the same as trustee of said township, and as successor in office as such trustee to said Millard, and in no other way whatever." It is further alleged in said answer that "the township had no power, under the laws of Kansas, either to enter into said contract, note, or mortgage heretofore referred to in this answer, and that said officers of said township and this plaintiff at all times well knew it, or ought to have known it; and because of want of power aforesaid the said township sought and seeks, by having said note and mortgage delivered and indorsed as aforesaid to said plaintiff, to avoid the law, and to deprive this defendant from setting up his said defense to said note and mortgage, whereby plaintiff should take nothing by this action; and because of said illegality of consideration aforesaid this defendant should not be bound by either said note or mortgage, or the pretended transfer thereof to this plaintiff, and should go hence bareof with his costs."

It will be observed, from an examination of this contract in writing, that the parties did not contract on behalf of Haskell township, but contracted on their own behalf. While they signed their names as trustee and clerk to the instrument, the instrument itself is the obligation of the individuals signing it. They executed it as individuals, and the mere signing it as trustee and clerk is mere descriptive personam; and, if they used money belonging to the township, which was loaned to the defendant below, they were liable to the township for the mere misappropriation of this money; and the defendant, having received the money of them, and executed his note and mortgage in payment of the same, cannot escape liability on said note and mortgage for the reason that the money loaned to him belonged to Haskell township. They contracted with him as individuals, let him have the money as individuals, took his note and mortgage as an individual; and it is immaterial to him as to what consideration Murphy paid Millard for the assignment and transfer of said note. The indorsement of the note by Millard to Murphy passed the title to the note, and all rights that Millard had in or to the note, to Murphy. Marshall, having contracted for the loan of the money with the individuals signing the agreement, having received the money from them, and executed his note and mortgage to one of the parties furnishing him the money, cannot inquire into the source from which Millard received the money, and cannot avoid the payment of this note and mortgage for the simple reason that Millard and others loaned him money that they held in trust as officers, and loaned him as individuals. He did not give his note and mortgage to them as officers, but to Millard as an individual. The judgment of the district court must be affirmed. All the judges concurring.

LANDER v. POLLARD, Sheriff.

(Court of Appeals of Kansas, Southern Department, C. D. Dec. 3, 1896.)

APPEAL—RECORD—JURISDICTION.

Under section 542a of the Code of Civil Procedure of 1889, the record brought to this court must affirmatively show that this court has jurisdiction, or the case will be dismissed; and where the amount or value in controversy is less than \$100, and the case belongs to the excepted class, the jurisdiction may be shown by the certificate of the judge of the district court who tried the case.

(Syllabus by the Court.)

Error from district court, Harvey county; F. L. Martin, Judge.

Action by Philip Lander, as assignee of the Kansas Savings Bank of Newton, against E. E. Pollard, sheriff of Harvey county. Judgment for defendant, and plaintiff brings error. Dismissed.

Peters & Nicholson, for plaintiff in error. A. L. Greene, for defendant in error.

JOHNSON, P. J. On the 4th day of August, 1893, Philip Lander, as assignee of the Kansas Savings Bank of Newton, Kan., filed his petition in the district court of Harvey county, Kan., against E. E. Pollard, sheriff of Harvey county, alleging that as assignee he became the owner of the N. E. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of section 8, in township 22, of range 2, in Harvey county, Kan., and on the 21st day of November, 1890, as assignee, took possession of said premises, and has ever since remained in possession of the same, and on the 3d day of July, 1893, E. E. Pollard, as sheriff, caused to be published in a newspaper published in, and of general circulation in, Harvey county, Kan., a notice that in a certain action wherein Thomas B. Taylor was plaintiff, and the Arkansas Valley Loan & Land Company was defendant, he would on a certain day, at the front door of the courthouse in Newton, Harvey county, Kan., offer for sale, and sell to the highest bidder, for cash in hand, all the right, title, and interest of the Arkansas Valley Loan & Land Company in and to said lands and tenements; and attaches a copy of the notice of sale to his petition; and alleges that, if the sheriff is permitted to sell the premises, it will cast a cloud on his title, and that he will suffer great damage thereby in the sum of \$100; and prays judgment for \$100 damages by reason of the premises, and that the sheriff be forever enjoined from selling said lands. On the filing of this petition, and making an affidavit showing that the judge of the district court was absent from Harvey county, the probate judge granted a temporary injunction enjoining the sale of the land. On the 5th day of August, 1893, the clerk of the district court issued a summons directed to the coroner of Harvey county, commanding him to notify the defendant below that he had been sued by the plaintiff below, which summons was indorsed, "If defendant fail to answer, plaintiff will take judgment for \$100.00, with interest

at the rate of 6 per cent. per annum, injunction allowed." The defendant demurred to the petition for the reason that it did not state any grounds for equitable relief, and the petition showed on its face that the plaintiff had a complete and adequate remedy at law. This demurrer was sustained by the court, and the plaintiff below took leave to file an amended petition, and filed an amended petition, to which defendant made answer. When the case was called for trial, the plaintiff, with consent of court, withdrew his amended petition, and substituted his original petition, and, issue being joined thereon, the case was tried by the court. The court decided that the petition did not state facts sufficient to constitute a cause of action in favor of the plaintiff and against the defendant, and rendered a judgment in favor of the defendant below, denying a permanent injunction, and for cost of suit against the plaintiff, to which he duly excepted, filed motion for new trial, which was overruled, and exception taken, and plaintiff made case, and brings the case here for review.

The defendant in error appears, and moves the court to dismiss the petition in error for the reason that the record does not show that the amount or value, exclusive of cost, does not exceed \$100, and that there is no certificate of the judge before whom the case was tried, showing that it is one of the excepted cases.

Section 542a of the Code of Civil Procedure reads: "No appeal or proceeding in error shall be had or taken to the supreme court in any civil action unless the amount or value in controversy, exclusive of cost, shall exceed one hundred dollars except in cases involving the tax or revenue laws, or the title to real estate, or an action for damages in which slander, libel, malicious prosecution, or false imprisonment is declared upon, or the constitution of this state, or the constitution, laws or treaties of the United States, and when the judge of the district or superior court trying the case involving less than one hundred dollars shall certify to the supreme court that the case is one belonging to the excepted classes." Under this section the appellate court has no jurisdiction to review the judgment of the district court in any civil action unless the amount or value in controversy, exclusive of cost, shall exceed \$100, except in certain cases where the judge of the district court trying the case involving less than \$100 shall certify to the court that the case is one involving the excepted classes. The record must show affirmatively that the case is one in which the court has jurisdiction, or the petition must be dismissed. This record shows that the suit was to enjoin the sheriff from making a sale of certain property, without alleging any value thereof, and for \$100 damages. The record not showing that the amount or value in controversy, exclusive of cost, exceeds \$100, and it not appearing by the certificate of the trial judge that it belongs to the excepted classes, the petition in error is dismissed. All the judges concurring.

MISSOURI PAC. RY. CO. et al. v. HENRIE.
(Court of Appeals of Kansas, Southern Department, C. D. Dec. 3, 1896.)

RAILROADS — CONTRACT TO ISSUE LIFE PASSES —
OBLIGATION OF PURCHASER AT FORE-
CLOSURE SALE.

1. Where a railroad company, together with all of its rights and privileges, is sold on a foreclosure of a mortgage, the purchaser at such sale acquires only such rights to the property sold as the original company possessed.

2. Purchasers of a railroad and its franchises are liable for the unpaid condemnation money for such right of way as passes with the road, and for the nonpaid obligations of the original company for such right of way as it may have acquired by purchase, which passed with the sale of the road.

3. Purchasers of a railroad and its franchises are not liable to pay the value of life passes, to be given by the original company in consideration of a parol license to build and operate a road over his premises, where the purchasers had no knowledge of the parol contract at the time of purchase, or while using such premises, where they have in no manner ever ratified such contract, or assumed its obligation.

(Syllabus by the Court.)

Error from district court, Butler county; O. A. Leland, Judge.

Action by J. C. Henrie against the Missouri Pacific Railway Company, and the Ft. Scott, Wichita & Western Railway Company to recover the value of life passes agreed to be given plaintiff in consideration of a parol license to build and operate a railroad over his premises. From a judgment for plaintiff, defendants bring error. Reversed.

On the 28th day of June, 1890, J. C. Henrie commenced his suit in the district court of Butler county, Kan., against the Missouri Pacific Railway Company and the Ft. Scott, Wichita & Western Railway Company, and alleges as his cause of action: That he was the owner of a certain tract of land in said county, and that some time in the year of 1882 the St. Louis, Ft. Scott & Wichita Railroad Company entered upon and constructed a railroad track over and through his land, without having condemned said land, or without having, before or since the construction of said railroad through said land, obtained any title to said land used by the St. Louis, Ft. Scott & Wichita Railroad as a roadbed and right of way, and without having first or since paid the plaintiff for the same, and that said railroad company continued to use said roadbed as its pretended right of way over his lands, under a parol license made with him, in consideration for which license the St. Louis, Ft. Scott & Wichita Railroad Company were to furnish him and his wife with an annual pass, within the state of Kansas, over its road which it was then constructing, which passes were to entitle him and his wife to ride upon the cars and railroad operated by the St. Louis, Ft. Scott & Wichita Railroad Company, anywhere in the state, during their natural life, free of charge, which agreement was made

on behalf of the company by Francis Tierman, its president and agent. The St. Louis, Ft. Scott & Wichita Railroad Company continued to operate its road over and through his lands, under said license, until about the month of January, 1887, when said railroad was placed in the hands of J. H. Richards, receiver, in a foreclosure proceeding instituted in the United States circuit court for the district of Kansas against the St. Louis, Ft. Scott & Wichita Railroad Company, and that said Richards continued to operate said road as receiver, under orders and instructions from the court, and had exclusive control of the railroad upon and through the lands of the plaintiff, under said parol license, up to the 6th day of July, 1887, when the St. Louis, Ft. Scott & Wichita Railroad Company ceased to exist, and was succeeded by the Ft. Scott, Wichita & Western Railway Company, which then became the owner of said railroad, and succeeded to all the rights and properties of the St. Louis, Ft. Scott & Wichita Railroad Company, and subject to all the easements and duties resting upon the agreements made by the St. Louis, Ft. Scott & Wichita Railroad Company. That the said Ft. Scott, Wichita & Western Railway Company, together with the Missouri Pacific Railway Company, have continuously since the 6th day of July, 1887, owned and operated, and still are the owners and operating, the line of railroad over, upon, and through the lands of the plaintiff, and over the roadbed and the pretended right of way previously occupied by the St. Louis, Ft. Scott & Wichita Railroad Company. That ever since said Ft. Scott, Wichita & Western Railway Company and the Missouri Pacific Railway Company first commenced operating and running their cars over said roadbed and track, which was constructed and occupied by the St. Louis, Ft. Scott & Wichita Railroad Company over, upon, and through his lands, they have failed, neglected, and refused to furnish the plaintiff below, and his wife, with an annual pass, entitling them to ride over their said lines of road, and over the road constructed by the St. Louis, Ft. Scott & Wichita Railroad Company in the state of Kansas, although often demanded to furnish the same. That said defendants below, railroad companies, continuously operate their line of railroad upon the roadbed and right of way formerly occupied by the St. Louis, Ft. Scott & Wichita Railroad Company, over, upon, and through the lands of the said plaintiff below, and are now operating and running a line of railroad over, upon, and through his lands, and have converted said pretended right of way and roadbed formerly occupied by the St. Louis, Ft. Scott & Wichita Railroad Company over, upon, and through his lands to their own use, without his consent, and without making any compensation therefor to him, to his damage in the sum of \$5,000. That they are now occupying and threatening, and still continue to occupy, the

roadbed and right of way constructed and formerly used and occupied by the St. Louis, Ft. Scott & Wichita Railroad Company over and upon and through his lands, and will prevent him from the use and occupation of said lands so occupied by said defendants as a right of way, without making him any compensation therefor, unless restrained by the court. That the St. Louis, Ft. Scott & Wichita Railroad Company is insolvent and out of existence, and has ever since the 6th day of July, 1887, ceased to exist as a corporation, and has ceased to operate or own any railroad or any property in the state of Kansas. Plaintiff below demands judgment against the defendants below for the sum of \$5,000, and asks that the court may adjudge and find that the value of the right of way over and across his land was of the value of said passes so agreed upon, and which was the sum of \$5,000, and that if said sum is not paid within a reasonable time, to be fixed by the court, the railroad companies be enjoined and restrained from using said right of way. The St. Louis, Ft. Scott & Wichita Railway Company was not a party to this suit. The plaintiffs in error filed a motion to require the said petition to be made more definite and certain, which motion was overruled, and plaintiffs in error excepted. Separate demurrers were then filed by the Ft. Scott, Wichita & Western Railway Company and the Missouri Pacific Railway Company to the petition of the plaintiff below, each of which were overruled, and exceptions duly saved. Said railway companies then each filed their separate answers to the petition of the plaintiff below, and each denied every allegation in said petition, pleaded the statute of limitations, and alleged that the plaintiff below had been fully paid for the right of way in controversy. Plaintiff below filed a reply to each of the answers of each of the defendants below, and denied each and every allegation contained therein, and alleged that from the 1st day of January, 1887, until the 6th day of July, 1887, said railroad was in the hands of a receiver, and was finally sold, by virtue of a decree of the circuit court of the United States for the district of Kansas, on November 6, 1887; that owing to the pendency of said suit, and because of the fact that said railroad was in the hands of a receiver, the plaintiff below was unable to sue the St. Louis, Ft. Scott & Wichita Railroad Company.

On the issues joined, the case was tried before the court, with a jury, and a verdict rendered by the jury against the Missouri Pacific Railway Company for \$1,202. Afterwards \$162 of this amount was remitted by defendant in error, and judgment was rendered by the court against both of the defendants below for the sum of \$1,040, and costs of suit; and it was further ordered by the court that both of said railway companies be perpetually enjoined from using any

portion of said land unless the same was paid within 90 days from the rendition of the judgment. To all of the orders, judgments, and rulings, the defendants below, and each of them, duly excepted. Motions for new trial were duly filed and overruled, and exceptions duly taken.

The jury also returned with their general verdict the following special findings of fact: "(1) Did either of the defendants ever make a contract with the plaintiff whereby they, or either of them, agreed to give plaintiff and his wife passes over any railroad owned or operated by them, on account of right of way over his land? A. No. (2) Did any railroad company ever make with plaintiff the contract referred to in the last question? A. Yes. (3) If you answer the last question in the affirmative, state with what railroad company such contract was made with. A. St. Louis, Ft. Scott & Wichita. (4) If you answer question 2 in the affirmative, state whether said contract was in writing or verbal. A. Verbal. (5) When did the St. Louis, Ft. Scott & Wichita Railroad Company cease operating the railroad in question, if at all? A. About the month of January, 1887. (6) What is the name of the railroad company that owned the said railroad immediately after the St. Louis, Ft. Scott & Wichita Railroad Company owned it? A. Missouri Pacific Railway Company. (7) What railroad company is operating the railroad referred to? A. Missouri Pacific Railway Company. (8) When did the company mentioned in your last answer commence to operate said railroad? A. July, 1887. (9) (Stricken out by the court.) (10) For how long a time had the St. Louis, Ft. Scott & Wichita Railway Company been in possession of the right of way in controversy before it ceased to operate said railroad? A. About four years. (11) When was said road constructed over the land in controversy? A. 1883. (12) Does the evidence show that either of the defendants knew that the plaintiff had made any agreement with the St. Louis, Ft. Scott & Wichita Railway Company by which he was to secure passes over said road for himself and wife? A. Not at time of purchase. (13) If you answer the last question in the affirmative, state which of the defendants had such knowledge. A. ——. (14) If you answer question 12 in the affirmative, state how the fact mentioned in said question was communicated to the defendant named in your answer to question 13. A. ——. (15) If you find that the St. Louis, Ft. Scott & Wichita Railroad Company agreed to issue passes to the plaintiff in consideration for said right of way, state how long a time said company agreed to continue to issue said passes. A. As long as said railway was operated over said land. (16) How much, if anything, do you allow the plaintiff for failure of defendant to give his wife passes over said railroad for life? A. \$162 (one hundred and sixty-two dollars).

(17) How much, if anything, do you allow the plaintiff for the failure of defendants, or either of them, to issue to him passes over said railroad for life? A. \$1,202 (twelve hundred and two dollars). (18) Where is the strip of land used for said right of way located, with reference to the land described in plaintiff's petition? A. On north side." "(20) Is it true that plaintiff was willing that the St. Louis, Ft. Scott & Wichita Railway Company should take possession of the right of way across his land? A. Yes. (21) Is it true that plaintiff gave the St. Louis, Ft. Scott & Wichita Railway Company possession of the right of way across his land in consideration of the promise to issue passes to himself and wife? A. Yes. (22) How many miles per year would plaintiff likely ride over the railway in question, if passes had been issued to him as he claims should have been done? A. 1,333 $\frac{1}{3}$ miles. (23) Did plaintiff ever object to the use of his land as a right of way, and the operation of said railway thereon? A. No. (24) If you answer the last question 'Yes,' state when and to whom such objection was made. A. —. (25) How long do you find that plaintiff will live in the future? A. 26 years. (26) Was not plaintiff satisfied, at the time he claims he made the contract sued upon, to deliver the possession of his land to the St. Louis, Ft. Scott & Wichita Railway Company? A. Yes. (27) Did not plaintiff deliver possession of the land for the right of way upon the promise of the St. Louis, Ft. Scott & Wichita Railway Company to pay for the same in passes? A. Yes. (28) Was there an agreement between plaintiff and the St. Louis, Ft. Scott & Wichita Railway Company that, if said passes were not given, plaintiff was to have possession of the land used for right of way? A. No. (29) (Stricken out by the court, to which ruling each of defendants duly excepted.) (30) (Stricken out by the court, to which ruling each of defendants duly excepted.) (31) What is the name of the company that owned said railroad at the time of the commencement of this suit? A. Missouri Pacific Railway Company."

The railway companies moved for judgment against the plaintiff below on the special findings of facts, notwithstanding the general verdict, because the special findings of facts were inconsistent with the verdict. The motions were overruled, and the railway companies duly excepted, and filed motions for a new trial, which were overruled, and the railway companies duly excepted, and made case, and bring the case to this court, and ask for a reversal of the judgment.

J. H. Richards and O. E. Benton, for plaintiffs in error. Redden & Schumacher, for defendant in error.

JOHNSON, P. J. (after stating the facts). The plaintiffs in error make 10 separate as-

signments of error in their brief, as reasons why the judgment of the district court should be reversed. We will consider only so much of the errors complained of as will be sufficient to determine the real matters in controversy in this case.

The plaintiff below brought his action in the district court of Butler county to recover damages for the failure of the defendants below to carry out the terms and conditions of a parol license granted to the St. Louis, Ft. Scott & Wichita Railroad Company, by which it was permitted to build and operate its line of railroad over and across his land. In consideration for the license to so build and operate its road over his land, it agreed to give him and his wife passes over its line of railroad in Kansas so long as it continued to maintain and operate its road over his premises. The St. Louis, Ft. Scott & Wichita Railroad Company constructed its road over his land, and operated it for about four years, when the road went into the hands of a receiver, and the mortgage was foreclosed, and the road, with all its rights and franchises, was sold in 1887; and the defendants below became the owners thereof, and took possession of the road, and have operated the same ever since. The original company obtained no other right over the lands of the plaintiff below than the mere parol license to build and operate its road over his land on consideration of giving him and his wife passes over its line of road. It continued to give him and his wife passes so long as it owned and operated the road. The plaintiff below contends that when the road was sold, and the present owners and operators of the road purchased it and its rights and privileges, and went into possession thereof, they became liable for all the burdens of the original company, so far as concerns the obligations or claims for right of way or license to operate its line of road over the lands upon which it was constructed. When the present owners purchased the property at the master's sale on foreclosure of the mortgage, they acquired no greater rights in the property than the original company had. They acquired no title to the property of the plaintiff below, but did they become liable to carry out the parol obligations of the original company, and furnish passes to the plaintiff below, and his wife, so long as they should desire to use the same? The petition of the plaintiff below alleges "that in the year 1882 the St. Louis, Ft. Scott & Wichita Railroad Company entered upon said land, without having condemned the same, and without having obtained any title to it, and constructed its railroad; that said company continued to use said roadbed and its right of way over said lands under a parol license made with defendant in error; that in consideration of said license said St. Louis, Ft. Scott & Wichita Railroad Company was to furnish him and his wife with annual passes, in the state of Kansas, over its road, during their natural life time; that passes were issued by said com-

pany to him until about January, 1887, when said railroad was placed in the hands of a receiver, and afterwards one of these plaintiffs in error, the Ft. Scott, Wichita & Western Railway Company, became the owner, and succeeded to the rights and property, of the St. Louis, Ft. Scott & Wichita Railway Company, and, together with the Missouri Pacific Railway Company, continuously operated and owned said road since the 6th day of July, 1887, and that said defendant, plaintiff in error, neglected and refused to furnish him and his wife annual passes entitling them to ride over their line of road; that said plaintiffs in error converted the pretended right of way and roadbed upon and through the lands described in the said petition to their own use, and without consent of the defendant in error, and without making any compensation therefor." The petition charges the defendants below with a trespass, in taking possession of the right of way without his consent, and with appropriating the right of way to their own use. It is difficult to determine whether plaintiff below intended to charge a permanent appropriation of the property by the defendants below, or to simply charge the taking of the privilege granted to the original company. It is not alleged or claimed that either of the defendants in error was a party to the contract, or that they had any notice whatever of such a contract at the time they became the purchasers of the road, or that they ever in any manner ratified the same, or assumed the obligations thereof. Plaintiff below seeks to recover against the defendants below merely because they became the owners of the road, its rights and franchises, by purchase at foreclosure sale, and taking possession and operating the same. The defendants below disclaimed any right, claim, or interest under the parcel license. They repudiated such contract, and insisted that the original railroad company held the right of way under a different contract, and that the same had been fully paid for. Can it be said that, having no knowledge of such contract as claimed by the plaintiff below, they could be held liable for the performance of a mere parcel license to further occupy the premises. Being railroad companies, they would have the right, after they discovered that there is no title to some portion of the land over which their road is located, to acquire the same by the exercise of the right to eminent domain,—to have the same condemned by commissioners under the law. The defendants below, not having acquired the title to the right of way by the purchase, did not thereby become entitled to the use of the property; and the plaintiff below was entitled to just compensation for the same, in case he elected to treat it as a permanent appropriation.

The court below proceeded in the trial of this case on the theory that the original company had acquired title to the property, and had not complied with the terms and condi-

tions upon which the right of way had been acquired. There could scarcely be any question as to the obligation of the purchasers of a railroad to the original owner of the right of way, where there was a conveyance or judgment of condemnation of the property, and the conditions or judgment had not been complied with by the original company. Where a purchase of a railway, its franchises and right of way, is made, and the condemnation money has not been paid, or where the original company had entered into a written obligation for the purchase of the right of way, and the right of way passes with the road, the purchaser takes the property burdened with the obligation of the original company; but, where the purchaser of the road and its property acquires no right in the land over which a part of its road is constructed, it is not bound to continue its road over such premises, and to carry out an oral promise of the original company for a license to use the land, but, if the original owner of the land is willing to treat the possession of the premises by the purchaser as a permanent appropriation, he would then be entitled to recover the value of the land appropriated, and the damages to the entire tract from which it is so taken. We think the court below tried this case on the wrong theory of the law and the pleadings and evidence. The original railroad company not having acquired the right of way over the land of the plaintiff below, he had the right to treat the use of the land by the defendants below as a permanent appropriation of the right of way, and sue the present owners of the road for the value of the strip of land so occupied and used by them, and for the damages to the residue of the tract of land from which it had been taken, or he might bring his action for a simple trespass, and recover from them damages that he had suffered by reason of the wrongful acts committed in the use of his land, or he might bring suit in ejectment for the recovery of the possession of the same, with damages for the wrongful detention thereof. In no event could the plaintiff below recover for the value of a life pass over the line of the road of the defendants below. The evidence of the plaintiff below clearly proves that no such agreement was ever made, or even contemplated. He says in his testimony: "Q. You may state what contract or what arrangement, if any, you had with Mr. Tiernan or Mr. Marshall, the officers of the first road, the St. Louis, Ft. Scott & Wichita, relative to compensation and pay for the right of way that was taken off your place. A. Do I understand you want me to give the history? Q. Yes, sir; of the agreement you had,—how you were to be compensated. A. Why, Mr. Tiernan and me talked the matter over, and I asked about this right of way. I told him I wanted a pass for myself and wife, and he says: 'I cannot give it to you in annual passes. I will give it to you quarterly, and, when it

has run out, send it in, or come in, and I will give you a new one.' Q. What was the consideration? What were you to do? What were they to get? A. This right of way. Q. What was said as to the length of time? How long was he to give these passes? A. As long as they used the land. Q. As long as what? A. As long as the railroad company used the land, and as long as I wanted passes."

This is all the evidence given, tending in any manner to prove an agreement to give passes for the license to build and operate the road over his land. No agreement was ever made to issue life passes in consideration of the right of way over the land in controversy, and it was error in the court to instruct the jury as follows: "(1) You are instructed that a purchaser at a sale of the St. Louis, Ft. Scott & Wichita Railroad, if you find that there had been a sale, would receive by such purchase just such rights as the St. Louis, Ft. Scott and Wichita Railroad Company had in the lands in controversy, and no more, and, by the terms of the purchase, would be bound for the payment of the purchase money, the same as the St. Louis, Ft. Scott & Wichita Railroad Company itself would have been if it had continued to own and to operate and occupy the road. (2) Before the plaintiff can recover in this action, he must show by a preponderance of the evidence that he was the owner of the land in controversy; that he made a contract for the right of way, as alleged by him, with the St. Louis, Ft. Scott & Wichita Railroad Company; that for that right of way he was to have a life pass for himself and wife over said road, either delivered as a life pass at the time, or quarterly or annually; that the defendants, the Ft. Scott, Wichita & Western Railway Company and the Missouri Pacific Railway Company, or either of them, subsequently became the owners of said railroad, and have operated it over the land in controversy the same as the St. Louis, Ft. Scott & Wichita Railroad Company originally did. And, also, he must show to you, by a preponderance of the evidence, the value of such passes,—what they would have been worth." We do not think, in any event, the defendants below were liable to pay for the use of the strip of land the value of life passes. Not having been parties to any such contract, and not having purchased and used the road with knowledge of any such agreement, they could not be held for its nonfulfillment.

As this judgment will have to be reversed for the errors already indicated, we do not think it necessary to decide other questions that are raised in the brief of counsel, and urged in the argument of this case to the court, as none of these are liable to come up in the future trial of this case. The judgment of the district court is reversed, and the case remanded for a new trial. All the judges concurring.

SPARKS et al. v. BEYER.

(Court of Appeals of Kansas, Southern Department, W. D. Dec. 1, 1896.)

MORTGAGE FORECLOSURE—PROCESS—SUFFICIENCY—SERVICE—JURISDICTION—WAIVER.

1. A suit to foreclose a mortgage on real estate must be commenced in the county where the land is situated, and, when rightly commenced in the county where the land is situated, summons may be issued by the clerk of the district court where the petition is filed, and directed to the sheriff of any other county in the state where the defendants may reside, or where they may be served; and, when duly served by the sheriff of the county where the defendants reside, the district court acquires jurisdiction over the subject of the action and of the defendants, and has authority to render such judgment against the defendants as may be proper under the pleadings and evidence.

2. In a suit to foreclose a mortgage on real estate, and for a personal judgment on a coupon bond, it is not necessary, under the Code of Civil Procedure, for the clerk of the district court issuing summons to indorse thereon the amount for which the plaintiff claims judgment, or to state in the summons the nature of the plaintiff's claim.

3. Where a suit on a bond and for foreclosure of a mortgage on real estate has been commenced in the district court of the proper county, and the defendants have been served with summons, and they appear, and file a motion asking the court to make an order requiring the plaintiff to make his petition more definite and certain, they thereby waive all irregularities and defects in the issuing and service of summons, and thereby submit themselves to the jurisdiction of the court, and are bound by the further proceedings in such suit.

(Syllabus by the Court.)

Error from district court, Ford county; A. J. Abbott, Judge.

Action by Charles W. H. Beyer against Lafayette O. Sparks and others. From a judgment for plaintiff, defendants bring error. Affirmed.

Milton Brown, for plaintiffs in error. Hess & Johnson, for defendant in error.

JOHNSON, P. J. This is a suit on real-estate coupon bond or note, and for decree of foreclosure of mortgage given to secure the payment of said bond. The petition of the plaintiff below was an ordinary petition on said coupon bond and mortgage. It alleges the execution of the bond, coupons, and mortgage,—and there is attached to the petition copy of the bond, coupons, and mortgage,—and alleges that the coupons and bond were due and unpaid, and asks for judgment for the amount due on said obligation, and for a decree of foreclosure. Suit was commenced in Ford county July 15, 1891, and defendants were duly served on the 16th day of July, 1891, with summons in Wichita county. On the 8th day of September, 1891, defendants, by their attorneys, appeared in said court, and moved the court to require the plaintiff to separately state and number the various causes of action upon which he predicates his right to foreclose his mortgage, in said petition, for the reason that said petition con-

tains more than one pretended cause of action to foreclose, and that said pretended causes of action are not grouped in separate paragraphs or counts; also, moved the court to strike out of the petition all matters and things therein contained relative to the prayer for personal judgment against the defendants, for the reason that the same is redundant, irrelevant, and prejudicial to these defendants' interests, and for the reason that the court has no jurisdiction of the persons of these defendants as to said personal judgment, and in support of this showed to the court that the summons served upon the defendants is not indorsed as required by statute, so as to enable said plaintiff to take personal judgment against the defendants; and also at the same time filed a motion to strike other particular allegations out of the petition, and out of the exhibits attached thereto. These several motions were overruled, and defendants duly excepted, and then filed their answer to the petition, admitting the execution and delivery of said coupon bond for the sum of \$700, and mortgage to secure the payment of said sum, and alleging that said bond and coupons were executed for a loan of \$700 for five years at 7 per cent. interest, and the coupons represent the semiannual interest thereon; and that in the transaction growing out of said loan, and the execution of the bond and coupons, a large amount of usurious interest was exacted therein; and that defendants have paid sums of money equal to all legal interest due on the money loaned; and that there was nothing due on said bond and coupons at the commencement of this suit. For a third defense defendants set up: "The land included in said trust deed was public domain, and embraced within a pre-emption filing made under the laws of the United States of America by said Lafayette C. Sparks, and that in consequence thereof the trust deed was illegal and void." To the answer of the defendants the plaintiff replied in two counts. The first was a general denial of usurious interest, and the second alleged "that the defendants were by law estopped from claiming that the trust deed was void on account of the land being included in a pre-emption claim at the time of the execution and delivery of the trust deed, because the said Sparks had received the benefit of the loan." The defendants demurred to that part of the reply only as to the plea of estoppel, which demurrer was overruled, and defendants duly excepted. The case was tried by the court without a jury on the issues joined, and on the trial the plaintiff introduced in evidence the original coupon, bond, and mortgage, and rested his case; and the defendants interposed a demurrer to the evidence, which was overruled, and defendants excepted; and, there being no other evidence introduced on the trial, the court rendered a personal judgment against the defendants for the amount found due on the bond and coupons, and for costs

of suit, and entered up a decree of foreclosure of the mortgage, and an order for the sale of the mortgaged premises. On the same day the defendants filed their motion for a new trial, which was overruled, and defendants excepted, made case, and bring the matter to this court for review, and make eight assignments of error, to which the consideration of the court is asked.

We will consider such of the assignments of error as we think are necessary for a full determination of this case. The first assignment to which the attention of the court is called is the jurisdiction of the court of the persons of the defendants. This suit was commenced in the district court of Ford county, Kan., the mortgaged premises being situated in that county. The action was brought in the only county that had jurisdiction over the subject-matter of the action. Article 5, § 48, of the Code of Civil Procedure of Kansas. Section 60 of the Code of Civil Procedure reads: "Where the action is rightly brought in any county, according to the provisions of article 5, a summons shall be issued to any other county against any one or more of the defendants, at the plaintiff's request." This suit was brought in the only county that could take jurisdiction over the mortgaged property, and, being so brought, the only way to reach the defendants, residing at that time in Wichita county, was by a summons issued by the clerk of the district court of Ford county, directed to the sheriff of the county where the defendants resided, or where they might be served with summons; and, when duly served with summons in any county in this state, the court was invested with complete jurisdiction of the subject-matter of the action and of the persons of the defendants served, and had full power to adjudicate all questions rightfully arising in said suit. The particular objection raised to the jurisdiction of the court to render a personal judgment against the defendants below is that the clerk, in issuing the summons, did not indorse thereon the amount for which the plaintiff would take judgment, nor did the summons notify the defendants of the nature of the action against them. Section 59 of the Code of Civil Procedure reads: "A summons shall be issued by the clerk upon a written præcipe filed by the plaintiff; shall be under the seal of the court from which the same shall issue, shall be signed by the clerk, shall be dated the day it is issued. It shall be directed to the sheriff of the county, and command him to notify the defendant or defendants, named therein, that he or they have been sued, and must answer the petition filed by the plaintiff, giving his name, at a time stated therein, or the petition will be taken as true, and judgment rendered accordingly; and where the action is on contract for the recovery of money only, there shall be endorsed on the writ the amount, to be furnished in the præcipe, for which with interest,

judgment will be taken, if the defendant fail to appear. If defendant fail to appear judgment shall not be rendered for a larger amount than cost." This was an action for the foreclosure of a mortgage on real estate, and hence no indorsement on the summons of the amount claimed was necessary under the Code of Civil Procedure. It was not an action on contract for the recovery of money only. *George v. Hatton*, 2 Kan. 327; *Knowles v. Armstrong*, 15 Kan. 371; *Weaver v. Gardner*, 14 Kan. 348. But if the summons was defective in the particular claimed by defendants below, all the defects and irregularities were waived when the defendants appeared in court, and moved to require the plaintiff to make his petition more definite and certain; all the irregularities in the summons or service thereof were waived, and they thereby submitted themselves to the jurisdiction of the court, and were bound by any judgment the court might render under the issues presented.

The second error complained of was that the petition of the plaintiff contained a blending of various causes of action, and it should have been separately stated and numbered, as provided by the Code of Civil Procedure. We think that this petition contains but one single cause of action. The plaintiff bases his cause of action upon a bond for \$700, with interest coupons attached, and to foreclose the mortgage given to secure the payment of said bond and interest. The object of the suit was solely for the recovery of the amount due for the money loaned on the real-estate bond, and secured by the mortgage, and the petition stated plaintiff's cause of action in plain and concise language, without repetition, and was in the ordinary form of a petition for foreclosure of a mortgage given to secure an indebtedness. There was no error in overruling the motion of the defendants below to require plaintiff to separately number and state his several causes of action.

The next error complained of was the overruling of the demurrer of the defendants below to plaintiff's petition, for the reason that the action was brought on behalf of a trustee for the benefit of others associated with him as interested in the suit. The money was loaned by the plaintiff in the action, and the bond and mortgage were given to him, and he appeared to be the real party in interest; but if, as defendants below claim, the business was transacted by Charles W. H. Beyer for the benefit of others, and he acted in the making of the contract, and taking the bond and mortgage, for the benefit of others, he might properly bring the action in his own name without joining with him the persons for whose benefit the action was prosecuted. Code Civ. Proc. § 28.

We do not think there was any error in overruling the motion of the defendants below to strike out portions of the plaintiff's petition as redundant, irrelevant, or prejudicial to

the rights of the defendants. The petition alleged the execution of the bond, of the coupons, and the mortgage, and the amount that was due and unpaid upon the obligations, and there was no redundant or irrelevant allegations in the petition. The allegation in the answer that the land mortgaged was public domain at the time of the execution of the mortgage was denied by the reply of the plaintiff, and there was no proof whatever offered upon the part of the defendants below to show that the title to the land was in the government, and the mortgagors had simply filed a pre-emption claim on the same. The mortgagors covenanted in the mortgage that they were the owners of the land, and had a right to convey.

We have examined this case with great care, and are satisfied that no errors have been committed either in the ruling of the court in relation to the motions, demurrers, and objections to testimony, and find the judgment of the court in accordance with the evidence and admitted facts; and, there being no error apparent on the record, the judgment of the district court must be affirmed. All the judges concurring.

NEUFORTH et al. v. HALL.¹

(Court of Appeals of Kansas, Southern Department, W. D. Dec. 1, 1896.)

SPECIFIC PERFORMANCE — CONTRACT TO CONVEY LAND — PAYMENT OF PRICE.

Where G. makes a bond for the sale and conveyance of real property to S. and H. jointly, and thereby binds himself to convey the land to S. and H. on the payment of the purchase money, *held*, that a specific performance of the contract cannot be enforced for a conveyance of an undivided one-half of the land on the payment by one of said parties of the one-half of the purchase price; that the contract is an entirety, and is not capable of enforcement until the entire purchase price has been fully paid.

(Syllabus by the Court.)

Error from district court, Barton county; J. H. Bailey, Judge.

Action by Joseph Hall against Phillip Neuforth and others. Judgment for plaintiff. Defendants bring error. Reversed.

Samuel Maher and W. S. Osmond, for plaintiffs in error. Dissenbacher & Banta, for defendant in error.

JOHNSON, P. J. On the 27th day of February, 1891, Joseph Hall commenced his action in the district court of Barton county, Kan., against Phillip Neuforth, Lena C. Neuforth, Martin Gutzweiler, Lizzie Gutzweiler, and Andrew Sulzman, for the specific performance of a conveyance of real estate upon a written bond or agreement given by Martin Gutzweiler and Lizzie Gutzweiler to Andrew Sulzman and Joseph Hall. In March, 1877, Robert Merten was the owner of an 80-acre tract of land in Barton county, Kan. On the 12th day of March, 1877, he

entered into a written obligation for the sale of the said tract of land to Martin Gutzweiler, and executed a bond for a deed thereof, on the conditions that Gutzweiler should pay \$48.07 on February 1, 1878, and a like sum on the 1st day of February for the nine succeeding years. On the payment of such installments in full, Merten and his wife were to execute to Gutzweiler a deed for the land. On the 2d day of October, 1879, Martin Gutzweiler and his wife, Lizzie Gutzweiler, contracted with Andrew Sulzman and Joseph Hall for the sale and conveyance of this land, and executed their bond to convey to Sulzman and Hall upon the payment of \$1,000, in installments; \$300 to be paid in cash on the execution and delivery of the bond, and the residue to be paid in four annual payments of \$175 each, with interest on deferred payments at 8 per cent. per annum from date of sale. Sulzman and Hall paid \$200 on the execution of the bond. Sulzman, not having the money, gave his individual note for \$100 in lieu of cash, and they executed their four several promissory notes, due in one, two, three, and four years from the date thereof, and took immediate possession of the land, and Sulzman remained in possession thereof until the summer or fall of 1881, when he removed from said land to Rush county, Kan. Hall still continued in possession of the land until the spring of 1882, when he removed from the land, and Robert Merten took possession thereof. The first note matured October 2, 1880; the second October 2, 1881; and, not being paid at maturity, Gutzweiler brought suit on them, and obtained judgment against Hall for \$300, which Gutzweiler assigned, and the judgment was afterwards paid to the assignee of Gutzweiler, and the other notes were never paid by either Sulzman or Hall; but on the 15th day of December, 1883, the individual note of Sulzman, that he had executed to Gutzweiler in lieu of the \$100 cash payment, was surrendered to him, and he executed a relinquishment of all claim under said contract for the purchase of this land. On the 17th day of May, 1884, Martin Gutzweiler and his wife transferred their interest in said land to the defendant Phillip Neuforth, and at the same time assigned to Neuforth the two unpaid notes given by Sulzman and Hall for a part of the purchase price of the land, and also a judgment against Hall for the rent of other land, amounting to \$260 and interest. Phillip Neuforth having obtained the title to this land from Robert Merten and wife under the bond executed by them to Martin Gutzweiler, Joseph Hall now brings this suit against Phillip Neuforth and his wife, and asks for a specific performance of the contract between Gutzweiler and Sulzman and Hall for an undivided one-half interest in said land, in consideration for the payment which he has made, without offering to pay the two remaining notes, with interest. The lower

court decreed that Phillip Neuforth and wife should convey to Hall an undivided one-half interest in this land, for the reason that Hall had paid one-half of the consideration mentioned in the bond for a deed.

The real question involved in this case is: Can a specific performance be had for a part of this land, where the obligation was for the conveyance of the entire tract of land? Is this obligation such as is capable of enforcement in part, or is it an entirety, for which the parties must comply with the entire undertaking before they can ask a court of equity to decree a specific performance? We think this contract is an entirety, for the sale of the 80-acre tract of land, for the sum of \$1,000; and, on payment of the purchase price in the manner specified in the bond, the obligors bound themselves to convey the entire tract of land to Sulzman and Hall. Gutzweiler never promised or agreed to convey one-half of this land to Sulzman, and one-half to Hall. Sulzman and Hall purchased the land jointly, and the conveyance was to be made jointly. They were by the terms of this bond to take the estate as joint tenants. The whole of this agreement and the obligation of the parties were reduced to writing, and it is plain that no deed was to be made until all the notes given for the purchase price were paid. Neither Hall nor Sulzman could pay one-half of the purchase money, and demand a deed for an undivided interest in the land; but they together agreed to pay the sum of \$1,000, and, upon the payment of that sum, a deed was to be made. When Phillip Neuforth took the title to this land, he took it subject to all the obligations made by Gutzweiler for its conveyance; and had Sulzman or Hall, or either of them, paid the full purchase price for this land and interest, as provided in the bond, Neuforth could have been compelled to specifically perform all the conditions of the bond. Sulzman and Hall having abandoned the land, and refusing to pay the purchase money, Hall cannot now enforce a specific performance of a part of the contract to an undivided interest in the land. The judgment of the district court is reversed, and the case remanded, with direction to render judgment against the plaintiff below for costs.

DENNISON, J., concurring. COLE, J., having been counsel, did not sit in the hearing of the case.

TATUM v. ROBERTS.

(Court of Appeals of Kansas, Southern Department, W. D. Dec. 1, 1896.)

APPEAL—SPECIFICATIONS OF ERROR—INSTRUCTIONS—VERDICT.

1. When the error complained of consists in the admission or rejection of evidence, the specification must state the full substance of the evidence admitted or rejected, and such other por-

tions of the record as show its importance, before this court will consider the same.

2. Where no exception is taken to the instructions given by the trial court, any objection thereto is waived.

3. The special findings of the jury in this case are not in conflict with the general verdict, and there is evidence to sustain the general verdict.

(Syllabus by the Court.)

Error from district court, Kiowa county; S. W. Leslie, Judge.

Action by D. S. Tatum against Cyrus Roberts. Judgment for defendant, and plaintiff brings error. Affirmed.

F. Dumont Smith, for plaintiff in error.

COLE, J. This was an action in replevin, brought by the plaintiff in error in the district court of Edwards county, and removed for trial to Kiowa county. The plaintiff below claimed a special ownership in the property in dispute by virtue of a certain chattel mortgage given to secure a promissory note, which note and mortgage were executed and delivered by the defendant in error to the Edwards County Bank, and afterwards sold to the plaintiff in error. The answer of the defendant denied that plaintiff in error was the owner of the note, and also alleged payment in full thereof. There was a verdict and judgment for the defendant in error, Roberts, from which plaintiff in error brings the case here for review.

The assignments in error are four in number, but only a portion of them can be considered by the court.

The first assignment of error is the admission and rejection of evidence, but neither the evidence itself, nor the substance of the same, is stated in the specification. Subdivision B of rule 7 of this court requires this to be done before the court will take notice of any error in the admission or rejection of evidence. 40 Pac. vii.

The second specification of error is the instructions given by the court to the jury, but the record discloses no exception to the instructions at the time they were given, nor any request for any further instructions than those that were given by the trial court; hence this specification cannot be considered.

The third and fourth specifications of error cover the ruling of the court in overruling the plaintiff's motion for judgment on the special findings, and overruling the motion of plaintiff for a new trial.

The argument of the counsel seems to be directed entirely toward the point that there was no evidence to support the general verdict of the jury, and that the special findings were in conflict therewith. The principal defense urged by defendant in error at the trial of the action was that the note in question, secured by the chattel mortgage, had been paid in full before it was transferred to the plaintiff in error. The evidence upon this proposition was very conflicting, but, after a careful perusal of the same, we cannot say that the verdict was wholly unsupported by the evidence. If the theory of the

defendant below was correct, and if the evidence produced by him to sustain that theory was true, then the note was paid in full prior to its sale and delivery to the plaintiff in error. It is true that many facts and circumstances are testified to which might have led the jury to a different conclusion, but, as is stated by counsel, this court will not determine the weight to be given to the evidence introduced in the trial of a case.

Nor can we agree to the contention of counsel for the plaintiff in error that the special findings are in conflict with the general verdict. It is argued by counsel that the jury found specially that there was due on the note in question, at the time when certain funds of the defendant in error came into the hands of the Edwards County Bank, the sum of \$633.91, and, according to the theory of the plaintiff in error, the funds of defendant in error, so in the hands of the bank, only amounted to \$431.86. We do not so read either the special findings or the evidence. The question asked the jury was not how much was due upon the note, but was as follows: "What was the amount of the note Exhibit A, with accrued interest, on the 25th day of February, '89, without reference to any credits?" and their answer was "\$633.91." Evidently the jury did not attempt to determine how much was due upon the note at said date, but simply how much the note amounted to, if no payments had been made; and this is plainly seen by the answers which they make to other special questions asked them. Practically the whole of the evidence introduced by both plaintiff and defendant below centered about the question as to how much was due upon the note in question at the time the funds of plaintiff in error were received by the Edwards County Bank, and we are of the opinion that there was competent evidence introduced supporting the proposition that at that date sufficient money came into the hands of the bank to pay said note in full, and also sufficient evidence to support the proposition that Roberts directed the money so received to be applied to the payment of this specific note. Perceiving no error, the judgment of the district court is affirmed. All the judges concurring.

MUNSELL v. BEALS et al.

(Court of Appeals of Kansas, Southern Department, W. D. Dec. 1, 1896.)

APPEAL—PARTIES—JUDGMENT—PERSON NOT SERVED.

1. It is not necessary to a review of a judgment of the district court that all persons who were named as parties in the original action be brought into this court. It is only necessary to bring into this court such parties as will be prejudicially affected by a reversal or modification of the judgment.

2. Where the court below renders a personal judgment against a party who was not served with summons, and made no appearance to the action, and the only notice to him was by publication in a newspaper, such judgment is a nullity, and the party against whom such judgment is rendered is not a necessary party in a

proceeding in error for a review of the proceedings of the district court.

3. Where W. and wife, being the owners of certain lots in the city of D., executed a mortgage thereon, and afterwards one of said lots, together with other real property in the city of D., are conveyed by Y. and wife, whom the record does not show were grantees of W. and wife, or by mesne conveyances from them, through other persons, down to Y. and wife, and there is a clause in the deed from Y. and wife to M. that the property is subject to a mortgage of \$625, which the grantee assumes, without specifying what portion of the property is subject to the mortgage, or stating by whom the mortgage is given, or giving any other description of the mortgage, and not showing that the mortgage given by W. and wife is the only mortgage on said property, or what part of the property is subject to such mortgage, the receiving of such deed by M., with such provisions, is so indefinite and uncertain as not to make M. liable to pay the mortgage, or subject to a judgment in a suit of foreclosure of the same.

(Syllabus by the Court.)

Error from district court, Ford county; A. J. Abbott, Judge.

Action by C. L. Beals and others against W. W. Munsell and others. Judgment for plaintiffs, and defendant Munsell brings error. Reversed.

Sutton & McGarry, for plaintiff in error. Wheeler & Switzer, for defendants in error.

JOHNSON, P. J. This was a suit on a promissory note executed by Anna L. Wilden and Perry Wilden to O. S. Bowman on the 13th day of January, 1887, for the sum of \$625, with interest at 12 per cent. per annum from date. To secure the payment of this note, the makers thereof executed a mortgage on real estate situated in Dodge City, Ford county, Kan. Before the maturity of the note, Bowman indorsed and transferred it to C. L. Beals, executor of the last will and testament of C. L. B. Whitney, deceased. The mortgage from Anna L. Wilden and Perry Wilden describes the following land, to wit: Lots 11, 12, and 14 in block 18, Dodge City, Ford county, Kan. This mortgage was executed on the 17th day of January, 1887. On the 20th day of January, 1888, B. F. Younger and his wife, Mary Younger, deeded to William W. Munsell the south 60 feet of lot No. 15 and lot 16 in block 18, and also lot No. 14 in block 18, Dodge City, Ford county, Kan. Said deed contains the following condition: "Together with all the appurtenances thereto belonging, on which there is a mortgage of \$625, the payment of which is assumed by William W. Munsell." Also lot 4 in block 13, Crawford's addition to Dodge City. Said deed contains the following clause: "And said B. F. Younger and Mary Younger, his wife, for themselves, their heirs, executors, and administrators, do hereby covenant, promise, to and with the said party of the second part that at the delivery of these presents they are lawfully seised, in their own right, of an absolute and indefeasible estate of inheritance, in fee simple, of and in,

all and singular, the above granted and described premises, with appurtenances; that the same are free, clear, discharged, and unincumbered of and from all former or other grants, titles, charges, estates, judgments, taxes, assessments, and incumbrances, of what nature or kind soever, except a bond for a deed given by B. F. Younger and Mary R. Younger to Mary J. McIntyre, of Ford county, state of Kansas, the conditions of which are that upon the payment of two notes, one for \$1,500 and one for \$1,000, and interest thereon, as described in said bond, shall execute a deed for the above-described property to Mary J. McIntyre, who is to assume the payment of the aforesaid \$625.00 mortgage." Anna L. Wilden and Perry Wilden were not served with summons in said action, and made no appearance whatever. The only service against them was by publication in a newspaper. F. T. M. Wenie, one of the defendants in the action below, appeared and filed his answer and cross petition, and admitted the facts set up in the petition of the plaintiff, and set up that on the 13th day of September, 1887, the Dodge City Land Company, a corporation, conveyed to him, by warranty deed, lots Nos. 11 and 12 in block 18 in Dodge City, as shown by the recorded plat; that his deed was duly recorded, and that, by virtue of such conveyance, he is now the owner of said property, and that the Dodge City Land Company duly conveyed, by warranty deed, to one L. K. McIntyre, lot No. 14 in block 18, and, as part consideration for said conveyance, the said L. K. McIntyre assumed and agreed to pay plaintiffs' mortgage of \$625, which was then a lien on lots 11, 12, and 14 in block 18, and that McIntyre and wife, together with certain other real estate, deeded lot 14 in block 18 to B. F. Younger, and in said deed it was written and agreed that Younger should assume and pay plaintiffs' mortgage of \$625, and that in March, 1888, Younger and wife duly conveyed by warranty deed, with other property, said lot 14 in block 18 to William W. Munsell, one of the defendants above named, and in said deed of conveyance it was written and agreed that said Munsell should assume and pay plaintiffs' mortgage of \$625. And he attaches a copy of the deed, and makes it a part of his answer, and alleges that Munsell has failed to keep or perform his contract; that, by reason of Munsell failing and refusing to perform his part of the contract, the defendant Wenie was obliged to pay certain of the coupons due on said original note,—and prays judgment against Munsell, in favor of C. L. B. Whitney, for the amount due him on the note and mortgage. Munsell appeared and filed his answer to the answer and cross petition of the defendant F. T. M. Wenie, and alleges that, in the matter in controversy between plaintiff and defendant Wenie, he has no knowledge, and therefore denies all of the allegations in re-

lation thereto, and denies all of the allegations of the petition of plaintiffs or cross petition of Wenle which purport to show the court that the real property described in the petition and cross petition was conveyed by warranty deed to him. He admits the execution of an instrument exhibited in the petition and cross petition, purporting to be a warranty deed, wherein Younger and his wife are grantors, to him. Nevertheless the defendant denies that said instrument is a warranty deed, or was ever intended to be, and that said instrument executed by Younger and wife covers lot 14 in block 18 of Dodge City, and other property which adjoins said lot, and that said Younger and wife did not sell said property to him, the said Munsell, but said instrument was intended simply as a mortgage, and recites that Younger was to convey the property to Mary J. McIntyre upon the payment of the two promissory notes given by Mary J. McIntyre and L. K. McIntyre, her husband, and as consideration for said sale, which were in the sum of \$1,000 and \$1,500, and were payable to B. F. Younger, and attaches a copy of the notes and bond to his answer. And he denies that the instrument set out in plaintiffs' petition and Wenle's cross petition, executed by Younger and wife to the defendant, is in form as set out and exhibited in said petition and cross petition, but alleges that the same is simply a mortgage. To this answer and cross petition the plaintiffs below filed a reply denying generally the allegations of the answer.

We are met at the threshold of this case by a motion of the defendants in error to dismiss this case for the reason that the parties to be affected by a reversal of this judgment are not all before the court. From a careful examination, we are satisfied that the parties to be affected by a reversal of this case are all before the court. It is true that a personal judgment was rendered against Perry Wilden, but the court had acquired no jurisdiction over him, so as to render a personal judgment, and the personal judgment, so far as Perry Wilden is concerned, is a nullity. Therefore the motion of the defendants in error to dismiss this action is overruled.

This brings us to the consideration of the question as to whether William W. Munsell had assumed and agreed to pay the mortgage of the plaintiffs below. The record shows that the land conveyed by Younger and wife to Munsell was only a part of the same property mortgaged by Wilden and wife to the plaintiffs below, and the purported deed describes other land than the land mortgaged, and contains this statement: "Together with the appurtenances thereto belonging, on which there is a mortgage of \$625." It nowhere specifies that Munsell agrees to pay the mortgage executed by Anna L. Wilden and Perry Wilden to the assignor of the plaintiff below. It does not

describe, or pretend to set forth, any particular mortgage that is on the property contained in the instrument from Younger and wife to William W. Munsell; nor does the record anywhere show that the title to the mortgaged property, or any part of it, has passed by mesne conveyances from Anna L. Wilden and Perry Wilden to Munsell. We do not think that, under the covenants in this instrument, Munsell ever assumed or undertook to pay the note of the plaintiffs below in this action. The record nor the evidence nowhere discloses the fact that there was no other mortgage on the property conveyed by Younger and wife to William W. Munsell. We think the motion for a new trial should have been granted. The judgment of the district court is reversed, and the case remanded, with directions to set aside the judgment of the court and grant a new trial herein. All the judges concurring.

BIDDLE v. ADAMS.

(Court of Appeals of Kansas, Southern Department, W. D. Dec. 1, 1896.)

PUBLIC LANDS—MORTGAGE ON HOMESTEAD—VALIDITY.

1. A mortgage given upon a piece of land prior to the making of a final proof by a person occupying the same under the homestead laws of the United States is void.

2. Certain evidence in this case held properly admitted, and that the finding of the court is sustained by the evidence.

(Syllabus by the Court.)

Error from district court, Finney county; A. J. Abbott, Judge.

Action by Lydia C. Biddle against E. O. Adams, Jr. Judgment for defendant, and plaintiff brings error. Affirmed.

Beardsley & Gregory, for plaintiff in error. A. J. Hoskinson, for defendant in error.

COLE, J. This was an action for the foreclosure of a real-estate mortgage. Defendant in error was the only defendant served in the court below, and in his answer he alleged as a defense that the mortgage in question was given while the title to the land covered thereby was still in the United States; that said land was occupied by the mortgagor under a homestead entry filing, and that the final proof had not been made at the time of the execution of the mortgage; and that said mortgage was therefore void. The action was tried before the court without a jury, and there was a general finding for the defendant in error.

Two questions are presented to us by the briefs of counsel. Plaintiff in error contends, first, that the judgment of the district court must be reversed on account of admission of certain evidence at the trial of the case. The evidence objected to was certain records of the land office at Garden City, Kan., and the objection does not seem to

go to the question of the admissibility of that class of evidence, but rather that the same was incompetent under the issues in this case. We have examined the evidence carefully, and are of the opinion that the court committed no error in its admission.

It is further contended that the evidence was not sufficient to support the finding of the court in favor of the defendant in error. We are clearly of the opinion that the evidence introduced tended to establish the fact that the mortgage in question was executed prior to the date when the mortgagor had made his final proof, and was sufficient to sustain the general finding of the court upon the question at issue.

The only question which remains in this case is whether the law applied by the district court was correct. If the question were a new one, we should be strongly inclined, in a case of this kind, to hold in favor of the plaintiff in error; but the supreme court of this state has settled the law fully in the case of *Brewster v. Madden*, 15 Kan. 249. In that case the facts were very similar to those in the one under discussion, but it was there held that a mortgage given while title to the land was still in the United States was void. It is urged by counsel for plaintiff in error that that case ought not to be followed, for the reason that since its decision a more equitable doctrine has been laid down by the secretary of the Interior of the United States; but our supreme court has followed the case of *Brewster v. Madden* in *Mellison v. Allen*, 30 Kan. 382, 2 Pac. 97, and, until a contrary doctrine is announced, we feel bound by the decisions of that court. Perceiving no error in the record, the judgment of the district court is affirmed. All the judges concurring.

NEW ENGLAND TRUST CO. v. NASH.

(Court of Appeals of Kansas, Southern Department, W. D. Dec. 1, 1896.)

HOMESTEAD—EXTINGUISHMENT—MORTGAGE—ASSUMPTION BY GRANTEE.

1. Where H. enters a piece of land under the homestead law of the United States in 1874, and acquires title by patent under such entry, and resides thereon continuously with his wife, his two sons, and daughter-in-law, until 1885, and his wife then removes to another place in the same county, and the record does not disclose whether such removal was temporary or permanent, the land still remains the homestead of H., and cannot be alienated without the joint consent of H. and his wife.

2. The liability of a grantee who assumes the payment of a mortgage on land conveyed to him depends upon the personal liability of his immediate grantor. If the grantor is not so liable, the mortgagee cannot claim any deficiency from such grantee.

(Syllabus by the Court.)

Error from district court, Rice county; J. H. Bailey, Judge.

Action by T. E. Nash against the New England Trust Company. From a judgment for plaintiff, defendant brings error. Affirmed.

John C. Hall and A. M. Lasley, for plaintiff in error. Sam. Jones, for defendant in error.

COLE, J. This action was brought by T. E. Nash in the district court of Rice county to set aside certain mortgages upon a piece of real estate in said county, executed by Jesse G. Hurt, and to reform certain deeds described in the petition. There are a number of questions which it seems to us are presented by the record, but only two of them are discussed by counsel in their briefs, and we will pass upon only such questions as are presented. The facts, so far as they relate to the questions before us, are as follows: In 1874, Jesse G. Hurt filed a homestead entry upon the land in question, which ripened into a patent in 1879. He resided continuously upon the land from the time of making such entry until the year 1885, and with him, during all of this time, lived his wife, Lucy Ann Hurt, his two sons, and daughter-in-law. In the year 1883 the wife of Jesse G. Hurt went to Sterling, in the same county in which the land was situated, and lived with her daughter, on account of some difficulty between herself and one of her sons; but the record does not disclose whether such removal was temporary or permanent. On the 19th of March, 1887, Jesse G. Hurt executed and delivered to the plaintiff in error the mortgages in question in this case, the wife of Jesse G. Hurt in no manner joining in said conveyances. On the 23d of August, 1888, Jesse G. Hurt conveyed by deed to his two sons Charles and Abner the real estate in question, but the wife of said Jesse G. Hurt did not joint in this conveyance, nor did the grantee assume the payment of the mortgages given to the plaintiff in error. On the 24th of September, 1888, Charles Hurt and wife and Abner Hurt conveyed the premises in question by warranty deed to the defendant in error, who, in said conveyance, assumed the payment of the mortgages given to plaintiff in error. In all the conveyances executed by Jesse G. Hurt he represented himself as an unmarried man. The questions presented are: First, did the real estate in question remain the homestead of Jesse G. Hurt? and, second, was the defendant liable under his assumption of the mortgages in the deed of conveyance given to him? We are of the opinion that the first question must be answered in the affirmative. There can be no doubt that when Jesse G. Hurt settled upon the land in question, with his wife, his two sons, and daughter-in-law, and continued to live upon the same, the character of a homestead was imparted to the land. No act caused the land to lose this character up to the time of the execution of the mortgages in question, unless it be the removal of Lucy Ann Hurt, wife of Jesse G. Hurt, to Sterling; and this we do not consider sufficient, under the numerous decisions of our supreme court. It is true, Mrs. Hurt had been absent from the land for nearly two years at the time of the execution of the mortgages, but the record discloses that

this was on account of a difficulty between herself and one of her sons, and not on account of any difficulty between herself and her husband; nor do we think that her removal alone would cause the family relation to cease to exist between Jesse G. Hurt and his two sons and daughter-in-law who remained upon the premises. In view of the decisions in this state, we would consider the contrary rule a dangerous precedent to establish. The constitution provides that the homestead "shall not be alienated without the joint consent of husband and wife, when that relation exists" (Const. art. 15, § 9); and the construction given to this clause by the courts of last resort has been to uphold the homestead right wherever it was possible. In the case of *Chambers v. Cox*, 23 Kan. 393, the separate conveyance of a homestead by the husband was held to be void, although the wife had never resided in the state. This doctrine has been affirmed in *Ott v. Sprague*, 27 Kan. 620. Our conclusion is, therefore, that the district court rightly held that the mortgages executed by Jesse G. Hurt alone upon the land in question conveyed no interest to plaintiff in error. The second question before us must be answered in the negative. While our supreme court has not passed upon this question in any case which has been called to our attention, the subject has been ably discussed in an opinion rendered by Gilkeson, P. J., of the Kansas court of appeals, Northern department, in the case of *Morris v. Mix* (Kan. App.) 46 Pac. 58. A careful reading of that opinion, together with the cases cited in support thereof, convinces us of the soundness of the doctrine announced by that court, and we therefore hold that the liability of the grantee who assumes the payment of a mortgage on land conveyed to him depends upon the personal liability of his immediate grantor. If the grantor is not so liable, the mortgagee cannot claim any deficiency of the grantee. In this case the immediate grantors of the defendant in error were in no manner bound for the payment of the mortgages in question, and there was, therefore, no consideration to uphold the assumption of the mortgage by the defendant in error. The judgment of the district court is affirmed. All the judges concurring.

SMITH v. MCCOOLE.

(Court of Appeals of Kansas, Southern Department, W. D. Dec. 1, 1896.)

PLEADING—MOTION TO MAKE MORE CERTAIN—REPLEVIN.

1. When the allegations of a petition are indefinite and uncertain, and the precise nature of the charge is not apparent, it is error for this court to overrule a motion of defendant to require the pleadings to be amended, if the defendant is likely to be embarrassed in his defense by reason of the character of such allegation.

2. The action of replevin is for the recovery of specific personal property, and the petition and affidavit in replevin should specifically describe the property sought to be replevined.

(Syllabus by the Court.)

Error from district court, Kiowa county; L. W. Leslie, Judge.

Action by Fannie H. McCooole against Boardman F. Smith. Judgment for plaintiff. Defendant brings error. Reversed.

Milton Brown, for plaintiff in error. A. H. Case, for defendant in error.

JOHNSON, P. J. This is a suit in replevin to recover possession of certain cattle. The plaintiff below alleged in her petition: "That she was the rightful owner of the following personal property, and entitled to the immediate possession of the same, to wit: Six head of one year old heifers; twelve head of one year old steers; twenty-one head of mixed cows,—all of the aggregate value of twelve hundred dollars. That said defendant wrongfully and forcibly took said property into his possession, and still wrongfully retains the same, although often requested by this plaintiff to return the same to her, to the great damage of this plaintiff, to wit, the sum of one thousand dollars. Wherefore plaintiff prays judgment for the return of said property, or, in case a return of the same cannot be had, then for the value thereof, twelve hundred dollars, and for one thousand dollars, her damages herein, with interest at seven per cent. from January 27, 1888, and costs of suit." At the commencement of her suit, she filed the following affidavit: "Fannie H. McCooole, being duly sworn, says: That she is the owner and entitled to the immediate possession of the following described property, of the actual value as follows, to wit: Six head of one year old heifers, value \$120; twelve head of one year old steers, actual value \$240; twenty-one head of cows, actual value \$840,—all of the aggregate value of \$1,200. That said property is wrongfully detained from her by the defendant, Boardman F. Smith; and that said property was not taken in execution of any order or judgment against the said plaintiff, Fannie H. McCooole, or for the payment of any tax, fine, or amercement assessed against her, or by virtue of any order of delivery issued in replevin, or any other mesne or final process issued against her. That said property was not taken for the payment of any tax, fine, or amercement assessed against her, or by virtue of an order of delivery issued in replevin, or any other mesne or final process issued against her. Fannie McCooole." Upon the filing of petition, affidavit, and executing the necessary undertaking, the clerk of the district court issued a writ of replevin for the seizure of the cattle described in the petition and affidavit; and thereafter said property was taken by the sheriff under said writ, and, on the execution of a redelivery bond by the defendant below, the sheriff returned the cattle to the possession of him. The defendant thereupon filed a motion for an order to require the plain-

tiff below to make her petition more definite and certain, by stating the following facts: "(1) By more particularly describing the articles alleged to be the property of said plaintiff detained by said defendant. (2) By more fully setting forth the specific items of damage alleged to be sustained by plaintiff. (3) By more fully stating the manner in which said damages were so sustained." This motion was overruled by the court, and the defendant duly excepted, and brings the case to this court for review.

The first error complained of is the overruling of the motion to require the plaintiff to make her petition more definite and certain. Section 119 of the Code of Civil Procedure provides "that where the allegations of pleadings are so indefinite and uncertain that the precise nature of the charge or defense is not apparent, the court may require the pleading to be made more definite and certain by amendment." Section 176 of the Code of Civil Procedure provides "that the plaintiff in an action to recover the possession of specific personal property may, at the commencement of the suit or at any time before answer claim the immediate delivery of such property, as provided in said chapter, and in order to obtain an order of delivery to recover possession of the property, must make and file the necessary affidavit, setting out a description of the property claimed." This being a suit in replevin, we think that the petition should have contained such a description of the property claimed to be wrongfully detained as would enable the officer holding the writ to distinguish the property from the general class of property of the same kind. The action of replevin is to recover the possession of specific property, and the word "specific" means the very opposite of the word "general," and the language of plaintiff's petition is nothing but general. It does not give any words of description by which the alleged animals could be identified or separated from other cattle of the same age or sex. We think the court should have required the plaintiff to so amend her petition as to show what cattle she was seeking to recover from the defendant below. The very object and design of all pleadings by plaintiff is that the adverse party may be informed of the real cause of action, and may thus have an opportunity of meeting and defeating it, if possible, at the trial. Where the party undertakes to recover the possession of specific personal property which is detained by another, the petition should contain such particular description of the property as that it can be identified from other property of the same general class; should give age, sex, color, brands, if any, or such other marks as indicate the specific property claimed. And the refusal of the court to require the plaintiff to make her petition more definite and certain was such error as prejudiced the rights of the defendant below on the trial of said action.

There are various other errors complained of in the trial of this case, which we think unnecessary to refer to inasmuch as this case

must be reversed for the error of the court in refusing to require the plaintiff to make her petition more definite and certain, as herein indicated. The judgment will be reversed, and the case remanded to the district court. All the judges concurring.

HOWARD INVESTMENT CO. v. BENTON LAND CO.

(Court of Appeals of Kansas, Southern Department, W. D. Dec. 1, 1896.)

TAX SALE — PURCHASE BY GUARANTOR OF MORTGAGE — TITLE ACQUIRED.

One who guaranties the payment of a note and mortgage cannot obtain a lien upon the mortgaged premises, as against the holder of the note and mortgage, by purchasing the real estate at tax sale.

(Syllabus by the Court.)

Error from district court, Comanche county; Francis C. Price, Judge.

Action by the Benton Land Company against the Howard Investment Company. Judgment for plaintiff. Defendant brings error. Affirmed.

John Marshall, for plaintiff in error. Johnson & Lucas, for defendant in error.

COLE, J. This was an action brought by the defendant in error for the foreclosure of a mortgage upon certain lands situated in Comanche county. There were a number of parties to the action, aside from the makers of the note and mortgage, among whom were Charles E. Flandro, the Showalter Mortgage Company, and the plaintiff in error, the Howard Investment Company. The only dispute in the trial of the cause in the district court was between the defendant in error and the plaintiff in error, which claims a lien upon the premises covered by the mortgage by virtue of a certain tax certificate which was originally issued to Charles E. Flandro, by him assigned to the Showalter Mortgage Company, and by it assigned to the plaintiff in error. The certificate shows that it covers the land in dispute, and the only question which was decided by the trial court was the priority of the liens between the plaintiff in error and the defendant in error. It is contended by counsel for plaintiff in error in this case that its lien for taxes should be paramount to that of the mortgage held by the defendant in error, and the question for our decision is fairly put in the brief of counsel as follows: "Could the Showalter Mortgage Company have taken out a valid tax deed on this certificate to the lands in controversy?" This question must be answered in the negative.

The note and mortgage in question were originally given to the Showalter Mortgage Company, which sold, assigned, and transferred the same to the defendant in error; and, at the time of said transfer, the said Showalter Mortgage Company guarantied the payment of the principal and interest of the debt.

The mortgage in question contained a clause making it the duty of the mortgagor to pay the taxes upon the premises, but, even if such a clause had not been inserted, it would have been his duty so to do. When the Showalter Mortgage Company guaranteed the payment of the obligation of the mortgagor, it was equivalent to guarantying that his whole contract would be carried out; and, by so doing, it was placed in such a position of trust with relation to the defendant in error that the law would not permit it to obtain title by the failure upon the part of the mortgagor to pay the taxes upon the land mortgaged, and the purchase by the Showalter Mortgage Company at tax sale on account of such default. The default of the mortgagor became the default of the company, and the purchase of the premises at tax sale was simply the payment of taxes by one whose duty it was to pay the same. The rule is well settled, and requires no citation of authorities to support it, that one whose duty it is to pay taxes upon real estate cannot obtain a lien by permitting the real estate to go to tax sale, and then purchasing at such sale. In this case the certificate was originally issued to Charles E. Flandro, but the record shows that he purchased the land at tax sale, as an officer of the Showalter Mortgage Company; and, further, that such purchase was made by said company for the purpose of protecting itself under its guaranty. Of course, the plaintiff in error obtained no rights under the certificate which were not obtained by the Showalter Mortgage Company itself, and, such being the case, obtained no lien by virtue of the certificate as against the holder of the mortgage in question. No error appearing in the record, the judgment of the district court is affirmed. All the judges concurring.

REESE et al. v. PLATT.

(Court of Appeals of Kansas, Southern Department, W. D. Dec. 1, 1896.)

ASSIGNMENT FOR BENEFIT OF CREDITORS — VOID PROVISION.

Where an assignment is made by an insolvent debtor for the benefit of his creditors, and the deed of assignment contains a provision directing the trustee to distribute the estate in a manner inconsistent with the statute relating to general assignments, such provision will not avoid the conveyance, but should be treated as a nullity by the assignee, and the estate distributed by him as the statute prescribes. The former decision in this case reviewed and overruled so far as it conflicts with the above doctrine. See *Reese v. Platt* (Kan. App.) 44 Pac. 31.

(Syllabus by the Court.)

On rehearing. For former report, see 44 Pac. 31.

COLE, J. The facts in this case are sufficiently stated in the former decision of this court. *Reese v. Platt* (Kan. App.) 44 Pac. 31. By that decision the rule was announced that, "where a general assignment is made by

an insolvent debtor, which shows upon its face a preference of creditors, such assignment is void under the statutes of this state governing general assignments." A petition for rehearing was filed, and, after due consideration by the court, was granted. The argument upon the rehearing of this cause presented all the questions passed upon by the former decision. After a careful re-examination of all the points involved in the case, we are of the opinion that the former decision should stand, with the exception of the doctrine announced by the third section of the syllabus quoted above. While the cases cited in the original opinion in this case hold the doctrine therein announced, we are of the opinion that the later decisions of the supreme court compel a reversal of the former holding in this case. These later decisions were brought to the attention of this court for the first time in the petition for rehearing. In the case of *Bank v. Sands*, 47 Kan. 591, 28 Pac. 618, and *Brigham v. Jones*, 48 Kan. 162, 30 Pac. 113, the rule is laid down that, where a general assignment is made by an insolvent debtor for the benefit of his creditors, and the deed of assignment contains a clause directing the trustee to distribute the estate in a manner inconsistent with the statute, such clause does not avoid the conveyance, but should be treated as a nullity by the assignee, and the estate distributed by him as the statute prescribes. In the absence of fraud, therefore, a preference of creditors expressed in the deed of assignment is a mere nullity, and the record in this case does not, in our opinion, bear out the contention made by the plaintiff in error that the assignment in this case was made with fraudulent intent. It follows from what has been said that the judgment of reversal first entered by this court must be set aside, and that the judgment of the district court must be affirmed. It is so ordered. All the justices concurring.

DODGE v. SMITH et al.

(Court of Appeals of Kansas, Southern Department, W. D. Dec. 1, 1896.)

CHATTEL MORTGAGE—AFTER-ACQUIRED PROPERTY—RIGHTS OF THIRD MORTGAGEE.

1. At common law nothing can be mortgaged that is not in existence, or when it does not belong to the mortgagor at the time when the mortgage is made, but parties may make a contract with reference to after-acquired property, to be added to and made a part of the property mortgaged, and the contract will be valid and binding between the parties, and all those dealing with the property with a full knowledge of the condition of the mortgage; and, if the future-acquired property is mingled with the property described in the chattel mortgage, and added to and becomes a part of the stock of goods mortgaged, and the rights of third persons have not intervened, it becomes a lien on all of the property intermingled and added to the mortgaged property. *Campbell v. Quinton* (Kan. App.) 45 Pac. 914.

2. Where a party takes a third chattel mortgage on personal property to secure an antecedent debt, with full knowledge of the terms

and conditions of the first and second mortgages, and takes such third mortgage subject to the first and second mortgages, he is thereby estopped from contesting the validity of the former mortgages.

(Syllabus by the Court.)

Error from district court, Barton county; J. H. Bailey, Judge.

Action by O. V. Dodge against E. B. Smith and others. Judgment for defendants, and plaintiff brings error. Reversed.

This is a suit in replevin, brought by O. V. Dodge as first mortgagee, to recover from E. B. Smith and Frank E. Smith, partners as Smith Bros., and Doolittle Bros., third mortgagees, the possession of a certain stock of hardware, tinners' tools, plumbers' tools, store fixtures, platform scales and fixtures. The stock of hardware sought to be recovered consisted of articles which existed and were in the store of and belonged to the mortgagors at the time the first mortgage was executed, and some other additional articles subsequently purchased by the mortgagors, and substituted for articles sold by them. The plaintiff alleged in his petition and affidavit in replevin a special ownership in the property, and right to immediate possession, under and by virtue of a chattel mortgage, and the wrongful detention by the defendants after due demand. The answer is a general denial. The case was tried before the court and a jury, and the jury returned the following verdict: "We, the jury impaneled and sworn in the above-entitled case, do upon our oaths find for the plaintiff that he was entitled to the possession of all the goods except the \$2,000.00 worth of new goods which we find the defendants entitled to the possession of." The jury also made special findings of facts, and returned same with their general verdict. The plaintiff filed a motion for judgment in his favor for the entire stock of hardware, tools, and fixtures, on the special findings of facts made by the jury, notwithstanding the general verdict. This motion was overruled by the court, and the plaintiff duly excepted. and plaintiff thereafter filed his motion for a new trial, which was overruled, and plaintiff duly excepted, made case, and brings the record to this court, and asks that the case be reviewed.

Samuel Maher and Wm. Osmond, for plaintiff in error. E. B. Smith, for defendants in error.

JOHNSON, P. J. (after stating the facts). This was a suit in replevin to recover the possession of a certain stock of hardware, tinners' tools, plumbers' tools, store fixtures, platform scales and fixtures. On the 1st day of July, 1889, O. V. Dodge was engaged in the hardware business at Great Bend, Kan., and was the owner of a stock of hardware, tinners' tools, plumbers' tools, and store fixtures, platform scales and fixtures, and on said day sold all the stock of hardware, tools, and fixtures to T. L. Owing, M. R. D. Ow-

ing, and R. E. Owing, and said Owings then formed a partnership under the name and style of Owings Hardware Company. In payment for the purchase of the stock of hardware, tools, and fixtures, the said T. L. Owing, M. R. D. Owing, W. D. Owing, and R. E. Owing executed their nine promissory notes for \$500 each to O. V. Dodge, and, to secure the payment of the money to become due on said notes, executed a chattel mortgage to Dodge upon the stock of hardware, tools, and fixtures, and all the additions that should thereafter be made to said stock of hardware. The chattel mortgage was signed by all of the obligors of the notes, and also by Lydia M. Owing, wife of T. L. Owing. She had no claim or interest in the property, and signed the mortgage simply because she was the wife of one of the mortgagors. The mortgage contained the following description of the property: "All the stock of goods in the store and wareroom recently used and occupied by the late firm of Dodge & Company and O. V. Dodge as a hardware and implement house in the city of Great Bend, Barton county, state of Kansas, said goods consisting generally of shelf and heavy hardware, stoves, tinware, plumbers' and tinners' tools and stock, plows, wagons, and farm implements, also the counters and shelving and store furniture, counter and platform scales, and horse and delivery wagon; it being the purpose and intent to cover by this mortgage all the articles sold and conveyed by O. V. Dodge to the said mortgagors as per an invoice or schedule of goods made by him to the said mortgagors on or about the first day of July, 1889. And it is herein agreed that the said mortgagors can dispose of said stock at retail in the ordinary course of trade, and they are to keep a true and accurate account of all the sales thereof, and to apply the proceeds arising from said sales to the payment of the above-mentioned notes. They are to keep the stock full and complete. And it is hereby understood and agreed that this mortgage is to cover all other goods, of every kind and nature whatsoever, which may be purchased by the said parties, and placed for sale as part of the merchandise stock, regardless of the place where the same may be stored. Warranted free of incumbrance and against any adverse claims; Provided, however, that, if said debt and interest be paid as above specified, this sale and transfer shall be void. The property is to remain in the possession of the said parties of the first part until default be made in the payment of the said debt and interest aforesaid, or some part thereof, all of which property they engage shall be kept in as good condition as the same now is, and taken care of at their proper cost and expense; but in case of sale and disposal, or attempt to sell and dispose, of the same, except as above stated, or a removal or attempt to remove the same from Barton county, Kansas, or an unreasonable depreciation in the value, or from any other cause shall have become inadequate, or if the

said party of the second part shall deem himself insecure, he, or his authorized agent or attorney, may take such property, or any part thereof, into his possession, and upon taking such property into his possession, either in case of default or as above provided, said party of the second part, his authorized agent or attorney, shall sell the same at public or private sale." This mortgage was not recorded until the 10th day of February, 1890. The Owings Hardware Company, from the time of the purchase of the property and the execution of the notes and mortgages, took possession of the mortgaged property, and continued in the business of retailing the stock, and conducted the business in the ordinary manner of retail merchants, and in the manner that it had been conducted by O. V. Dodge; and from time to time the Owings Hardware Company, as their business required it, bought new goods for the purpose of keeping up their original stock, as provided in the chattel mortgage. The new goods purchased were not kept separate from the original stock, but were intermingled with the general stock, and were offered for sale and sold to customers along with the original stock. In January, 1890, the Owings Hardware Company executed and delivered to J. V. Brinkman & Co. a second chattel mortgage upon all the merchandise then owned by said firm, and including the stock purchased from O. V. Dodge and all the subsequent purchases made by them. This mortgage was filed for record the 10th day of February, 1890. On the 10th day of February, 1890, the Owings Hardware Company executed to Doolittle Bros. a third chattel mortgage on the stock of merchandise owned by them at that time, and at the same time delivered the possession of the mortgaged property to Doolittle Bros. Doolittle Bros. then lived in the state of Nebraska, and placed the property in charge of Smith Bros. as their representatives, and directed Smith Bros. to hold the stock, and arrange with O. V. Dodge and J. V. Brinkman & Co. to pay off their said chattel mortgages. The mortgage to Doolittle Bros. contained a description of the mortgaged property, with the following conditions: "Warranted free of incumbrances and against any adverse claim, excepting \$4,360.91 and interest due Dodge, and \$1,400.00 due J. V. Brinkman & Co." On the 1st day of January, 1890, three of the nine notes executed by the Owings to Dodge became due, and remained unpaid at the beginning of this action. On the 11th day of February, 1890, O. V. Dodge demanded from Doolittle Bros. the possession of said property, claiming that, because he had the first lien or mortgage thereon, he was entitled to the possession thereof. This demand was refused, and this action was at once brought to recover such possession. By virtue of an order of delivery, O. V. Dodge got possession of said goods. Doolittle did not give a redelivery bond, and Dodge at once advertised said property for sale under his

chattel mortgage, and named the 6th day of March, 1890, as the day of sale. Just before the hour of sale, the First National Bank of Great Bend, which held a fourth chattel mortgage given by the Owings Hardware Company upon this stock, demanded the right to redeem from Dodge's mortgage by paying it off. Dodge permitted this to be done, accepted from the bank the amount due him from the Owings, assigned his unpaid notes in blank, delivered them to the bank, and also delivered to the bank possession of the goods. The bank in like manner redeemed from the J. V. Brinkman & Co. mortgage. Upon getting possession of this stock of hardware, tools, and fixtures, the bank immediately sold it at public sale under the advertisement made by Dodge. The stock was purchased at this sale by J. B. Owing, a brother of the mortgagors. The bank sold this merchandise for precisely the sum of money which it had paid O. V. Dodge and J. V. Brinkman & Co., and, in addition, the cost of this suit, which cost the bank paid. One of the Doolittle Brothers was present at the sale, and made two or three bids on the property, and loaned J. B. Owing, accepted bidder, the money to pay his bid. After O. V. Dodge had received from the bank his money, and turned over to the bank the property, he still had this lawsuit on his hands. He had taken the stock of goods from Doolittle Bros. by writ of replevin; he had not returned it to Doolittle Bros., and they insisted upon a return thereof. The case came to trial. The Smith Brothers claimed no interest in the goods. They were acting simply as agents of Doolittle Bros. The contest between O. V. Dodge and Doolittle Bros. was over the goods, agreed to be of the value of \$2,000, which the Owings Hardware Company had added to the stock after the execution of the Dodge mortgage, and which were included in both the Brinkman and Doolittle mortgages. The court instructed the jury that Dodge had the first lien upon, and was entitled to possession, at the time this suit was brought, of such goods as the Owings Hardware Company owned at the time of giving the Dodge mortgage, and that Doolittle Bros. had the first lien upon the property subsequently acquired. In obedience to these instructions, the jury brought in a verdict of \$2,000 against the plaintiff in error, and in favor of Doolittle Bros.

The instructions complained of are as follows: "(4) You are instructed that the mortgage given by the Owings Hardware Company to the plaintiff is a good and valid mortgage as to all the property mentioned therein that the Owings Hardware Company owned at the time of the giving of the mortgage as against the defendants. After the breach of such mortgage, he would have a right to demand the possession thereof, and, if refused, can recover in this action as to such goods. But as to any after-acquired goods, not in the hands of or owned by the Owings Hardware Company at the time of the mak-

ing and delivering of the mortgage to Dodge, said mortgage was void as to these defendants if they, after the purchase of such goods by Owings, took a chattel mortgage on the same to secure a valid indebtedness, and took possession of under their mortgage, before plaintiff, Dodge, got possession thereof under his mortgage." "(6) I instruct you that the mortgage under which the defendants claim to hold the possession of the property in controversy is a valid mortgage, and is superior to that of the plaintiff, so far as the new purchased goods in the stock is concerned, which is agreed by the parties to be of the value of \$2,000.00."

The contention of counsel for plaintiff is that the court erred in the instructions to the jury, where he took the position, and so instructed the jury, that the property subsequently purchased by the mortgagors and added to and mingled with the property of the mortgagors, even though the mortgage expressly provided that the mortgage lien should extend to and cover the after-acquired property added to the stock of hardware, tools, and fixtures, and that the mortgagee should be authorized to take possession of the same in case of condition broken in the mortgage, or in case he should deem himself insecure, became in no way subject to the mortgage lien, or under the dominion or control of the mortgage. At common law nothing can be mortgaged that does not belong to the mortgagor at the time when the mortgage is made. *Pierce v. Emery*, 32 N. H. 484; *Cameron v. Marvin*, 26 Kan. 628. Parties may make contracts with reference to future-acquired property to be added to and made a part of the property mortgaged, and the contract will be valid and binding between the parties; and if the future-acquired property is mingled with the property described in the mortgage, and added to and becomes a part of the stock of goods mortgaged, and the rights of third persons have not intervened, it becomes a lien on all the property so intermingled and added to the mortgaged property. When Doolittle Bros. took their mortgage upon the stock of hardware they took it with full knowledge of the mortgage of O. V. Dodge and J. V. Brinkman & Co., and took the mortgage on the entire stock of goods, including the original stock and the added stock, subject to the mortgage of \$4,360.91 and interest due Dodge, and \$1,400 due Brinkman & Co., and by reason thereof occupied the same position that the Owings Hardware Company would, had the mortgage to Doolittle Bros. not been executed. Doolittle Bros. took the mortgage subject to the Dodge mortgage, and hence are estopped from contesting the Dodge mortgage. *Campbell v. Quinton* (Kan. App.) 45 Pac. 914; *Leland v. Colver*, 34 Mich. 421; *Railroad Co. v. Cowdrey*, 11 Wall. 473; *Pennock v. Coe*, 23 How. 117. The case of *Leland v. Colver*, 34 Mich. 421, was a suit in trover for the conversion of certain furni-

ture that had been the stock in trade of the plaintiff. The defendant justified under a chattel mortgage which was given for the purchase money of the stock of goods mentioned in it. The property mortgaged was set forth and described in the following terms: "All the goods, wares, and merchandise, chattels, and effects, mentioned and described in schedule hereto annexed, and marked 'Schedule A,' this day bought of Illenden and Colver, thereby intending to convey all the present stock in trade as enumerated in said schedule; also, all stock that I may have from time to time in trade, as security for the above-named consideration; said goods to remain and continue in possession of the party of the first part, in the village of Three Rivers, Michigan, except as they are disposed of in the usual course of retail. The party of the first part is to have the privilege of selling the goods for cash or on credit in the usual course of trade, and is to apply the proceeds of the sale in buying other goods to keep up the stock, and to support his family. The party of the first part covenants to keep up a stock of like goods to the value of \$3,000.00 as security to the party of the second part, until the above amount, with interest, is paid; and also covenants to keep the stock insured to the amount of \$2,000 for the benefit of the party of the second part, and as collateral thereto; and a breach of the last two covenants shall cause the whole sum secured to become due and payable." Snyder, the mortgagor, after making the mortgage, continued in business alone and in partnership with others for some time, and then sold his interest to John Koahn, who continued to carry on the business for several months, when he sold out his entire stock to Nancy Moore, giving an inventory which was declared to be subject to a chattel mortgage. There was no other chattel mortgage except the one to Colver. The several purchasers of this stock of furniture continued in business for some time, and during their continuance in business they added \$344 worth of goods purchased from other parties, and sold about \$1,500 worth at retail. All the persons who became interested in the stock of goods took it with notice of the chattel mortgage, and bought subject to it. Campbell, J., delivering the opinion of the court, says: "In the present case the parties have seen fit to stipulate expressly that the body of the fund may be changed without losing its identity, and that the mortgagee may deal with it as if unchanged. The various purchasers have made their purchases subject to this arrangement, and are estopped from denying it. The mortgagees, in taking the property, did only what Snyder agreed they might do, and what the several purchasers also understood they were authorized to do." The evidence on the trial of this case shows that all the property taken in replevin by the plaintiff which was not in stock and not owned by the Owings Hardware Company at the time the

mortgage was executed, and included therein and covered thereby, was subsequently purchased by the mortgagors, and placed in said mortgaged stock; that the mortgagees had been selling out of the stock of hardware from the time they first purchased the stock, and from time to time added new goods to the stock of hardware; and that they were simply keeping up and adding to the stock that they had purchased from Dodge, for which they had given the mortgage as security, and carrying out their contract to keep the stock up; and, when they executed the mortgage to J. V. Brinkman & Co. and to Doolittle Bros., they each took their mortgage subject to the right and the lien of Dodge. We think they are estopped from denying it. We think the mortgage to Dodge was a valid lien on all the stock of merchandise, tools, and fixtures that were owned by the Owings at the date of its execution, and it became a lien in equity on all the subsequent acquired goods as soon as they were purchased and added to the general stock in the hardware business; and that plaintiff, on the breach of the conditions of the mortgage, had authority to take possession of the stock of hardware, tools, and fixtures then in said stock, and sell the same to pay his debts and costs of making such sale, and, on refusal of the defendants to deliver up the property to the plaintiff on demand, he could maintain replevin to recover the entire stock; and that his right to the possession of the property for the payment of his debts was paramount to the lien of Doolittle Bros. The judgment of the district court is reversed, with direction to set the verdict of the jury aside, and grant a new trial. All the judges concurring.

SHEELEY et ux. v. SIMPSON.¹

(Court of Appeals of Kansas, Northern Department, W. D. Dec. 4, 1896.)

ALTERATION OF NOTE—EFFECT.

Changing the time when interest should run on a promissory note, by making it read "from date," instead of "from maturity," is a material alteration thereof, of the same character as if it changed the principal; and the instrument is avoided when the alteration is made without the consent of the makers. And such alteration vitiates it, regardless of the intention of the party making such change.

(Syllabus by the Court.)

Error from district court, Norton county.

Action by William Simpson against M. G. Sheeley and wife. Judgment for plaintiff. Defendants bring error. Reversed.

L. H. Thompson, for plaintiffs in error. J. R. Hamilton, for defendant in error.

GILKESON, P. J. In July, 1889, M. G. Sheeley and wife made, executed, and delivered to William Simpson their promissory note, in writing, for \$150, and to secure the same gave a chattel mortgage on two mares and two colts. Before this note became due,

Sheeley, desiring to move into the state of Missouri temporarily, had a conversation with Simpson in reference to this indebtedness and security, stating that he would be unable to pay him, and wanted to know what arrangements he could make. This interview terminated in Simpson taking a new note for \$152.25, and a mortgage to secure the same upon two mares, two colts, one lumber wagon, and one set of double harness, and consenting that Sheeley might take the mortgaged property to Missouri with him. This was on the 6th day of September, 1890. Simpson filled out a note on a blank, and gave it to Sheeley, with instructions to have his wife sign it, and either return it to him or the First National Bank of Norton, Kan. Sheeley obtained the signature of his wife to the note, and delivered it to said bank through his brother, L. S. Sheeley. This note not being paid at maturity, upon the 11th day of November, 1892, Simpson brought suit in the district court of Norton county for the recovery of the property mentioned in the chattel mortgage last given. In this action Sheeley and his wife filed the following answer: "Now come the defendants, M. G. Sheeley and Anastasia Sheeley, and for answer to the plaintiff's petition, herein filed, allege and say: That they admit the execution and delivery of the chattel mortgage set out in said plaintiff's petition; that they admit that the price and value set opposite each article in said petition is the true value thereof; that they admit the aggregate value of said personal property described in plaintiff's petition to be two hundred and ninety dollars; that they admit that said chattel mortgage was given to secure the payment of a certain promissory note, dated September 6, 1890, due December 1, 1891, for the sum of one hundred and fifty-two and $\frac{25}{100}$ dollars, but deny that said note was to draw interest at the rate of ten per cent. from date. Defendants deny generally and specifically each and every other allegation contained in said petition. For a further answer and more specific defense to plaintiff's cause of action, defendants allege and say: That after said note had passed out of the hands of the defendants, and while in the hands of the said plaintiff, the said note was materially altered and changed in this: the word 'maturity' in said note was erased, and the word 'date' written therein, so as to make said note read 'ten per cent. interest from date,' instead of 'ten per cent. interest from maturity.' That said alteration and change in said note was made by the said plaintiff without the knowledge or consent of these defendants, and was made for the purpose and with the intent and design of cheating, wronging, and defrauding these defendants. That by reason of the fraudulent change and alteration of said promissory note aforesaid and the chattel mortgage, the same being the one set out in plaintiff's petition, the said note and mortgage have become illegal and void. That by reason of the wrongful taking and unlaw-

¹ Rehearing pending.

ful detention of said personal property from these defendants, the said defendants have sustained damages in the sum of two hundred dollars. Wherefore defendants demand judgment for the possession of said personal property, and, in case of inability to deliver said stock, the value thereof, in the sum of two hundred and ninety dollars, and for the further sum of two hundred dollars damages, and costs of this action." To this answer Simpson filed a reply of general denial. The case was tried to a jury, who rendered a general verdict as follows: "We, the jury duly impaneled and sworn in the above-entitled case, do upon our oath find for the plaintiff, and find that, at the commencement of this action, he was entitled to the immediate possession of the property in controversy. J. K. Gray, Foreman." And judgment rendered in accordance therewith.

There are but two questions to be considered in this case: (1) Had the note been changed after delivery, without the consent of the makers? (2) Is the verdict contrary to law; that is, did the facts alleged in the answer constitute a defense? The evidence in this case is very short, positive, and direct upon the first proposition. Each and every witness who testified as to the condition of this note at the time it was signed is positive that the word "maturity" was then in the note, and that it then read "with interest at the rate of ten per cent. per annum from maturity until paid." And the plaintiff himself testifies upon this proposition as follows: "Q. At the time this note was executed, do you know whether the erasure exhibited to the jury was made, or not? A. I do not know. I cannot say it was not, because it is a mistake that has often occurred with me in making notes on these blanks, and might have occurred in this note, and, in fact, I have not much doubt that it did occur. I do not doubt that the note was changed, since I have heard the testimony. I do not doubt that this note was changed after it was signed. I presume that I done it. I am sure I would if I had noticed it, but I also know it was our contract that the note was to bear interest." So that each and every witness testifying in this case testified that it had been changed. In fact, the plaintiff admits it, and makes it much stronger by saying that it was his custom to change notes on these blanks, and that, if he did not make this change, he would have done so if he had noticed it. There can be no question, then, as to the alteration having been made. Any change in the terms of a written contract which varies its original effect and operation, whether in respect to the obligation it imports, or to its force as a matter of evidence, when made by any party to the contract, is an alteration thereof, unless all the other parties to the contract give their express or implied consent to such change; and the effect of such alteration is to nullify and destroy the altered instrument as a legal obligation. And it is no answer to a plea of alteration that

its operation is favorable to the parties affected by it. No man has a right to vary another's obligations at his discretion, whether for his good or ill. It ceases, when varied, to be that other's act, and it suffices for him to say, "*Non hæc in fœdera veni.*" "Alterations may consist in changing (1) its date, or (2) the time, or (3) the place of payment, or (4) the amount of principal, or (5) interest to be paid, or (6) the medium or currency in which payment is to be made, or (7) the number or relations of the parties, or in (8) the character and effect of the instrument as matter of obligations or evidence." 2 Daniel, Neg. Inst. § 1375. And, in commenting on the fifth item, he says: "In the fifth place, as to interest, any addition of words making the bill or note bear interest when it originally did not, or changing the time when interest should run, or varying the percentage of interest, is of the same character as if it changed the principal." Id. § 1385.

But it is contended by defendant in error that, unless the change was made fraudulently, and it was so proven, then the defendant could not obtain any advantage by the change; and the court took this view of it, as shown by the instructions. We cannot agree with them in this. While there are authorities which hold to this view, we think the highest and best are to the effect that "if the alteration is material, then the instrument is avoided. The alteration vitiates it, regardless of intentions." *Angle v. Insurance Co.*, 92 U. S. 342; *Harsh v. Klepper*, 28 Ohio St. 200; *Booth v. Powers*, 56 N. Y. 81; *Moore v. Hutchinson*, 69 Mo. 429. And we think this rule has been adopted in this case. In *Davis v. Eppler*, 38 Kan. 633, 16 Pac. 795, the court, in passing upon this question, says: "We believe it would be a dangerous rule to allow written contracts, more especially negotiable paper, to be altered without the consent of the maker, or parties who are bound by the indorsement. It is intended that such instruments shall pass into the hands of those who may become interested in them, without addition or alteration, and without the fear that they may have been altered. The facilities for making alterations are numerous, and the difficulty of proving them great. All means should be employed to impress a sense of their inviolability upon the minds of those who have them in their possession. In *Evans v. Foreman*, 60 Mo. 449, it is said: 'If mistakes do arise in the preparation of written instruments, aside from the consent of all parties to the needed correction, the courts of the country alone can furnish adequate redress, and will not give sanction or countenance to the attempts of an interested party to effect by his own hand the desired reformation, as an honest blunder of this sort, if upheld in one instance, might necessitate sanctioning an alteration having that appearance, but which, from the infirmity of human testimony, might be grossly otherwise.' It is the policy of the law to allow no tampering with written in-

struments. The holder of a note has no right to alter it without the consent of all the parties interested, and such unwarranted alteration should make it null in his hands, no matter how pure his motive may have been in making the alteration. *First Nat. Bank v. Fricke*, 75 Mo. 78; *Moore v. Hutchinson*, 69 Mo. 429; *Neff v. Horner*, 63 Pa. St. 327; *Fraker v. Cullum*, 21 Kan. 556; *Horn v. Bank*, 32 Kan. 518."

Both of the questions, therefore, must be answered in the affirmative. The judgment in this case will be reversed, and the case remanded for new trial.

PERRY et al. v. HOGAN, Sheriff, et al.
(Court of Appeals of Kansas, Northern Department, W. D. Dec. 4, 1896.)

UNORGANIZED COUNTIES—TAXATION—LEGALITY—LEVY—PRESUMPTION.

1. As during the year 1888 Wallace county was unorganized, and was attached to the county of Trego for judicial purposes, and constituted a municipal township thereof, Trego was, under the act of March 23, 1884 (paragraph 1610, Gen. St. 1889), authorized to levy taxes upon the property in such unorganized territory for all purposes not expressly prohibited by said act.

2. In an action brought by residents of said unorganized territory to restrain the collection of taxes assessed and levied upon their property for the year 1888 by said county of Trego, it is incumbent upon them to show that the taxes so levied were prohibited by said act, or otherwise illegal. And where, in such action, it is claimed that the sheriff of Trego county is unauthorized to sell property of such residents levied upon by him under a tax warrant issued by the treasurer of said county, for the reason that said unorganized territory has become organized as the county of Wallace, subsequently to the assessment and levy of such tax, and prior to the date of the seizure, they must show that the property, when seized, was not within the county of Trego.

(Syllabus by the Court.)

Error from district court, Trego county.

Action by T. J. R. Perry and others against J. B. Hogan, sheriff of Trego county, and others, for injunction. From a judgment for defendants, plaintiffs bring error. Affirmed.

D. Rathbone, for plaintiffs in error. F. Danford and John A. Nelson, for defendants in error.

GILKESON, P. J. The facts in this case, as we understand them from the record, are that during the year 1888 Wallace county was attached to the county of Trego, and was a municipal township of said county; that during the year 1888 the officials of said Trego county levied a tax upon the property of T. J. R. Perry, H. A. Clark, and Peter Robidoux, in said Wallace county, as a municipal township of Trego county; that this tax remained unpaid. On the 15th of January, 1889, the treasurer of Trego county issued his tax warrant for the collection thereof, directed and delivered to the sheriff of Trego county, Kan., who, by virtue thereof,

seized certain personal property of said parties, and advertised the same for sale. To prevent this sale, the plaintiffs in error and plaintiffs below, Perry, Clark, and Robidoux, brought suit against the defendants in error, defendants below, in the district court of Trego county, in injunction, upon application to the Honorable S. J. Osborn, judge of said court, at chambers in the city of Wakeeney, Trego county, Kan. A temporary order was granted. Thereafter the defendants, Hogan, sheriff, et al., filed their motion to dissolve the same, alleging "that the petition filed in said action did not state facts sufficient to entitle the plaintiffs to the relief therein asked, and the said petition is not true." Upon the hearing of this motion the court sustained the same, and dissolved the injunction, for the reasons in said motion alleged. To reverse this judgment of the court the plaintiffs bring the case here for review.

The petition in error and record in the case are somewhat obscure. In just what particular the court erred the plaintiffs have failed to point out, either in their petition in error or their brief. The former is quite brief, being as follows: "Plaintiff alleges that the Honorable S. J. Osborn, judge of the 23d judicial district of Kansas, erred in vacating and dissolving the injunction issued in this action; by reason whereof he [they] prays [pray] that the judgment may be reversed." While brevity is to be considered, and the object of a case-made is to reduce the size of the record, still we think that the error complained of must be shown, or, in the language of the statute, "the proceeding to obtain such reversal, vacation or modification, shall be by petition to be entitled 'Petition in Error,' setting forth the errors complained of." Nor is the record assisted by the brief. We have failed to find an assignment of error therein, and it has been repeatedly held by the supreme court of this state that "only such alleged errors as are specially pointed out by counsel will be considered." For these reasons we think the judgment of the court below should be affirmed. But, as we have been compelled to examine this record for the purpose of ascertaining the facts in the case, we will consider the record as we find it. The trial judge made a general finding against the plaintiffs below, and gave as his reasons therefor that the allegations of the motion to dissolve were true; that is, that the facts stated in the petition did not state facts sufficient to authorize the issuance of an injunction, and that the facts of the petition were untrue. Upon the first proposition, we must agree with the court below. The tax, the collection of which is sought to be restrained, was levied for the year 1888, and it is admitted by the plaintiffs that up to January 5, 1889, Wallace county was unorganized, and attached to and formed a municipal township of Trego county. Under the act of March 23, 1884, being paragraph 1610, Gen. St. 1889, Trego county was authorized "to levy taxes on

the property therein for all purposes except such as are by the terms of this act prohibited," and it is nowhere alleged that these taxes were of or belonged to the prohibited class. They were, therefore, presumably at least, legally assessed for the year 1888 on property in this unorganized territory as a municipal township of Trego county. This being true, they should be collected, and it was proper for the treasurer of Trego county to collect it by issuing his warrant. If the property was in Wallace county when levied upon, and it had become organized prior to the levy, the treasurer should have issued his warrant to the sheriff of that county. But the petition fails to allege where the property was when levied upon, and it certainly does not allege that it was not levied upon in Trego county; and upon the plaintiffs' own theory of the case they should show this fact, for it will be presumed that the sheriff proceeded legally, and that the property was in his jurisdiction. Hence the petition failed to state facts sufficient to authorize the relief prayed for. The judgment of the court below will be affirmed.

BARNES v. CROCKETT.

(Court of Appeals of Kansas, Northern Department, E. D. Dec. 3, 1896.)

ABSOLUTE DEED—MORTGAGES—PAROL EVIDENCE.

It may be shown by the evidence aliunde the instrument itself that a deed of conveyance, absolute on its face, was, by the mutual understanding and agreement of the parties thereto, executed as a mortgage for security merely; and it may be foreclosed as such.

(Syllabus by the Court.)

Error from circuit court, Shawnee county; J. B. Johnson, Judge.

In an action against T. B. Barnes and S. M. Crockett to foreclose a mortgage, Crockett filed a cross petition. From a judgment in favor of Crockett, Barnes brings error. Affirmed.

Jetmore & Jetmore, for plaintiff in error. C. F. Spencer, for defendant in error.

GARVER, J. In an action brought in the circuit court of Shawnee county to foreclose a mortgage on certain property in the city of Topeka, the plaintiff in error, T. B. Barnes, and the defendant in error, S. M. Crockett, were made parties defendant. On a cross petition filed therein, Crockett sought to foreclose, as a mortgage, a deed of conveyance executed by Barnes to him, on property included in the plaintiff's mortgage, alleging that said deed was executed as and for a mortgage, to secure the payment of a certain indebtedness by Barnes to Crockett. Upon the trial of the case, it was admitted that, at the time said deed was executed, Barnes was indebted in the sum alleged, and that it was the intention of said parties to secure the same by said conveyance. But on the part of

Barnes it was claimed that, if such indebtedness was not paid within a year, said deed was to be held and taken as an absolute and unconditional conveyance to Crockett. The main question for the determination of the court was whether the deed was intended by the parties to have only the effect of a mortgage, and whether it should be foreclosed as such. The case was tried by the court, without a jury, and general finding made in favor of the defendant in error. A further finding of the court, as it appears in the journal entry, is as follows: "The court does further find that the deed set out in the answer of the defendant S. M. Crockett was given as and for security of an existing indebtedness of \$516, due from the defendant T. B. Barnes to the defendant S. M. Crockett, and that there is now due from the defendant T. B. Barnes to the defendant S. M. Crockett the sum of \$608, and that said amount is a lien on said premises, subject to the lien of the plaintiff herein." On such finding, a personal money judgment was rendered against Barnes, in favor of Crockett, and the premises ordered to be sold for the satisfaction thereof. The plaintiff in error assigns error upon such finding and judgment.

It is well established that a deed absolute upon its face may be shown to have been intended as a mortgage for the security of a debt; and when it appears by direct evidence, or from the facts and circumstances of the transaction, that such was the mutual understanding and agreement of the parties, the court will give to such instrument the effect intended. *McNamara v. Culver*, 22 Kan. 661; *Bennett v. Wolverton*, 24 Kan. 284; *McDonald v. Kellogg*, 30 Kan. 170, 2 Pac. 507; *Reeder v. Gorsuch*, 55 Kan. 553, 40 Pac. 897. The case was tried in the court below upon oral and other evidence, which was to some extent conflicting. The main facts upon which the evidence turned were, however, undisputed; it being admitted by the plaintiff in error (the grantor) that the deed was executed, in the first instance, for the purpose of security only. The principal controversy at the trial was as to the understanding and agreement of the parties with reference to the effect which should be given to the deed at the expiration of a year. The complaint now made is that the trial court erred in its conclusions from the evidence. We think there was sufficient competent evidence to sustain the decision, and, under the established rule of this court, the judgment of a trial court will not, under such circumstances, be disturbed. The judgment will be affirmed. All the judges concurring.

LARKIN, Sheriff, et al. v. LANE et al.

(Court of Appeals of Kansas, Northern Department, E. D. Dec. 3, 1896.)

APPEAL—DEATH OF PARTY—DISMISSAL.

Where a necessary party to a proceeding in error, and one whose rights would be affected by

a reversal of the judgment, dies after the petition in error is filed, and the action is not revived, the petition in error must be dismissed for the want of proper and necessary parties.

(Syllabus by the Court.)

Error from district court, Atchison county; Robert M. Eaton, Judge.

Action by John M. Lane and Henry L. Whitaker against M. E. Larkin, sheriff, and others. Judgment for plaintiffs, and defendants bring error. Dismissed.

B. F. Hudson and A. H. Horton, for plaintiffs in error. W. W. & W. F. Guthrie, for defendants in error.

GARVER, J. At the threshold of this case we are met by a motion, filed by the defendants in error, to dismiss the case for want of proper parties. It is claimed that, although all necessary persons were made parties when the petition in error was filed, yet, since that time, one of the plaintiffs in error has died, and the action has not been revived as to him. The record shows that on February 24, 1892, one Sarah E. Nelson obtained a judgment in the district court of Atchison county, for \$1,170.28, against Frank Royce, Jesse C. Crall, John Taylor, John M. Lane, and Henry L. Whitaker. The present action was commenced in said court by said John M. Lane and Henry L. Whitaker against M. E. Larkin, as sheriff, John Taylor, Jesse C. Crall, Frank Royce, Sallie H. Rigg, and Thomas J. Rigg, to enjoin the collection of said judgment by execution, as against said John M. Lane and Henry L. Whitaker. The petition alleged that said judgment had been fully paid and satisfied by said John Taylor on or about March 23, 1892; that said Taylor had theretofore, to wit, on July 14, 1891, obligated himself, together with said Jesse C. Crall and Frank Royce, to pay and discharge the debt for which said judgment was rendered, and to save said John M. Lane and Henry L. Whitaker harmless therefrom; and that said Taylor, through and by a pretended assignment of said judgment to Sallie H. Rigg, was attempting to enforce collection of the same against the property of said Lane and Whitaker in fraud of their rights. A trial had on the issues joined in said action resulted in a finding and judgment in favor of the plaintiffs, Lane and Whitaker. The court found that said judgment and costs were paid, on March 23, 1892, by said John Taylor, and ordered and directed that the same be satisfied and released of record as against said Lane and Whitaker. To reverse said judgment the defendants in the court below, as plaintiffs in error, filed their petition in error January 30, 1893. It is admitted that Jesse C. Crall died April 28, 1894, and that letters of administration on his estate were issued by the probate court of Atchison county, August 31, 1894, to Graham Crall. It also appears that this proceeding in error has not been revived as to said deceased plaintiff in error. On these facts, we think the motion to dismiss must be

sustained. Jesse C. Crall was a necessary party to the proceeding in error. His death, without an order of revivor having been applied for or made in this court, leaves the case in the same condition it would be in had he in the first place not been made a party thereto. It is evident that there can be no reversal or modification of the judgment complained of, without in some manner affecting each one of those against whom the Nelson judgment was rendered. As between them, there existed certain rights for contribution, growing out of their joint liability. The decision complained of very materially affected such rights, and a reversal could not be had without a necessary and material change of the rights of the parties as they were determined by the lower court. Under the well-settled practice in this state, this defect of parties prevents a review of the judgment. *Paving Co. v. Botshford*, 50 Kan. 331, 31 Pac. 1106; *Mortgage Co. v. Lowe*, 53 Kan. 89, 35 Pac. 829; *Central Kansas Loan & Inv. Co. v. Chicago Lumber Co.*, 53 Kan. 677, 37 Pac. 132; *Norton v. Wood*, 55 Kan. 559, 40 Pac. 911. For these reasons, the motion to dismiss must be sustained. All the judges concurring.

STATE v. BLUNK.

(Court of Appeals of Kansas, Northern Department, E. D. Dec. 8, 1896.)

CRIMINAL LAW—APPEAL—RECORD—ILLEGAL SALE OF LIQUORS.

1. Instructions given by the trial court in a criminal case only become a part of the record by being incorporated in the bill of exceptions, and when not so incorporated this court is not at liberty to consider them.

2. The testimony in this case examined, and held sufficient to sustain the verdict.

(Syllabus by the Court.)

Appeal from district court, Wyandotte county; H. L. Alden, Judge.

Charles Blunk was convicted of an illegal sale of intoxicating liquor, and appeals. Affirmed.

S. C. Miller, for appellant. Henry M. McGrew, for the State.

GILKESON, P. J. The information in this case charged the defendant, in three counts, with the unlawful sale of intoxicating liquors, which is verified by O. C. Hedrick; and it is admitted by the defendant that the second count charged the sale of intoxicating liquors to one August Lewtsov on July 20, 1895; and this is also the theory upon which the court tried the case. The jury rendered a verdict of guilty, as follows: "We, the jury, find the defendant, Charles Blunk, guilty upon the second count of the information, and we find him not guilty as to the first third counts of the information." He was thereupon sentenced by court to be imprisoned in the county jail for the period of 30 days, and to pay a fine of \$100 and the costs of this prosecution. From this he appeals.

and brings the case here for review, alleging, as error, that the verdict is not supported by the evidence, or by any evidence, and that, as this information was verified by C. C. Hedrick, a private citizen, and not the county attorney, the defendant could not be convicted of any offense except such as the prosecuting witness had notice or knowledge of. It is also contended that, at the trial, the state elected to rely for a conviction, under the second count of the information, upon the sale to August Leutzow on July 20, 1895.

We have examined the record in this case very closely, and fail to find where the state elected upon any one count of the information, or was required so to do. The only reference to any election which we find at all is on page 5, where there is a statement of something that appears like instructions, as follows: "(7) The state elects to rely for a conviction on the various counts of this information as follows: On the first count, for maintaining an unlawful common nuisance; on the second count, upon the sale of beer to August Leutzow on July 20, 1895; on the third count, the sale of beer to G. L. Cook on the — day of June, 1895,"—which, if we could consider at all, clearly contradicts the statement of appellant's brief. But, such as it is, it is not included in the bill of exceptions, and as in that way only can the instructions become a part of the record, we are not at liberty to consider it. *State v. Smith*, 38 Kan. 194, 16 Pac. 254.

As to the sufficiency of the testimony and the knowledge of the prosecuting witness, we have carefully and closely examined this record, and the contention of the defendant could not be sustained. We think there is ample testimony in this case to sustain the verdict of the jury as to the guilt of the defendant under the count upon which he was convicted, and undoubted testimony as to not only notice but knowledge of the prosecuting witness as to this sale; and these questions, having been passed upon by the jury, whose verdict has the approval of the trial court, are no longer open for consideration. The judgment in this case will therefore be affirmed. All the judges concurring.

McKINLEY-LANNING LOAN & TRUST CO. v. BASSETT.

(Court of Appeals of Kansas, Northern Department, W. D. Dec. 4, 1896.)

JUDGMENT—RES JUDICATA—COLLATERAL ATTACK
—MORTGAGES—ASSUMPTION BY GRANTEE
—RIGHTS OF MORTGAGEE.

1. Where, in an action to enjoin the sale of real estate ordered sold by decree in foreclosure, the petition filed in the injunction suit shows that the court had jurisdiction of the subject-matter and of the persons, and that the decree was in accord with the issues in the case, such decree is not void; and, where the petition further shows that the other questions relied upon as grounds for the injunction were fully decided by the court in the foreclosure suit, such petition does

not state facts sufficient to constitute a cause of action.

2. And, if such decree was erroneous, the plaintiff would have his adequate remedy at law, to reverse it by proceedings in error; and, failing to do so, the decree could not be attacked collaterally, or in a separate action.

3. A mortgagee is not compelled to take a personal judgment against nor accept the grantee who assumes its mortgage; he can stand on the mortgage contract.

(Syllabus by the Court.)

Error from district court, Rooks county; O. W. Smith, Judge.

Action by Thomas Bassett against the McKinley-Lanning Loan & Trust Company to enjoin a sale of land under a decree of foreclosure. From a judgment for plaintiff, defendant brings error. Reversed.

S. N. Hawkes, for plaintiff in error. W. B. Ham, for defendant in error.

GILKESON, P. J. In 1885, A. C. Reid borrowed of the McKinley-Lanning Loan & Trust Company the sum of \$750, and executed a mortgage on the S. W. $\frac{1}{4}$ of section 8, township 9, range 17, which he owned, and was unincumbered. At the same time and as a part of the transaction, George Reid, his son, gave a mortgage on the N. E. $\frac{1}{4}$ of section 15, township 9, range 17, which he owned. This last tract of land was at the time incumbered by mortgage for the sum of \$500. Both of these tracts of land were included in one instrument, which was signed and executed by A. C. and George Reid and their wives. The note given, however, was only signed by A. C. Reid and George Reid. After this mortgage was executed, A. C. Reid died, and one Jonathan Sarver, who was a creditor of his estate, as well as of George Reid, purchased the A. C. Reid tract of land, and agreed to pay the mortgage; and, some time afterwards, Thomas Bassett, the defendant in error, purchased the George Reid land, and assumed the \$500 mortgage which was on it at the time it was pledged to the plaintiff in error; but no mention was made of the mortgage of this tract to the plaintiff in error. The mortgage he assumed he paid.

In 1891 the plaintiff in error commenced his action in the district court of Rooks county, Kan., to foreclose the first-mentioned mortgage, making George Reid, Jonathan Sarver, Thomas Bassett, and 10 others defendants. Bassett and Sarver appeared. Bassett filed answer and cross petition, as follows: "Said defendants, Thomas Bassett and wife, for answer to plaintiff's petition, say: They deny each and every material allegation and averment contained in said petition." Cross petition of defendant Thomas Bassett: "For cross petition, and for affirmative relief against his co-defendant Jonathan Sarver, and against plaintiff, said defendant says: First. That on the 28th day of April, 1887, by order and under authority of the probate court of Rooks county, Kansas, said defendant Sarver purchased the S. W. $\frac{1}{4}$ Sec. 8, Tp. 9, R. 17, described in the plaintiff's petition, at the agreed

price of \$1,300, a part of which price, to the extent of the mortgage of plaintiff, with all delinquent interest on said mortgage and the delinquent taxes on the S. W. $\frac{1}{4}$ Sec. 3, Tp. 9, R. 17, said defendant Jonathan Sarver assumed, promised, and agreed to pay; that the amount so assumed and agreed to be paid by said defendant Sarver, by reason of his assumption of said mortgage and indebtedness, was, at the time of said assumption by said Sarver, about \$900; that the owners of said land, the makers of said deed, and the probate court, approving said sale, entered into said contract of sale, and conveyed said land to said Sarver, upon his express agreement to assume and pay all said indebtedness alleged in plaintiff's petition; and said Sarver accepted said deed upon the express agreement that he would assume and pay said indebtedness. Second. Said defendant further says that Abraham C. Reid, now deceased, whose name appears as one of the makers of the note described in Exhibit A of plaintiff's petition, was, at the time of executing the note and mortgage described in plaintiff's petition, the owner in fee of the S. W. $\frac{1}{4}$ Sec. 3, Tp. 9, R. 17, and defendant Geo. Reid was, at said time, the owner, in fee, of the N. W. $\frac{1}{4}$ Sec. 15, Tp. 9, R. 17, said Rooks county; that said loan was negotiated for and with said Abraham C. Reid as principal; and that said George Reid was surety only, and received no part of or benefit from said loan described in plaintiff's petition, and that the real estate of the said George Reid was included in said mortgage, as collateral and additional security to said security so given by said principal, Abraham C. Reid, now deceased; that said defendant Sarver knew at the time he purchased said S. W. $\frac{1}{4}$ Sec. 3, Tp. 9, R. 17, that the same was, in law and in fact, the principal security for the indebtedness of the plaintiff, and knew that said Geo. Reid was surety on said note, and that said N. W. $\frac{1}{4}$ Sec. 15, Tp. 9, R. 17, was the individual property of said Geo. Reid. Third. Said defendant says that he is the owner in fee of the N. W. $\frac{1}{4}$ of Sec. 15, Tp. 9, R. 17, said Rooks county, being part of the land described in plaintiff's petition, by purchase and deed from said Geo. Reid and Nettie Reid, defendants, on September 14, 1887; that, before and at the time of said purchase of said last-described land by this defendant, said defendant Sarver stated to this defendant that he (said Sarver) had assumed and agreed to pay the indebtedness described in plaintiff's petition, and that, by reason of said statements and agreements of said Sarver, this defendant was induced to, and did, purchase said N. W. $\frac{1}{4}$ Sec. 15, Tp. 9, R. 17, and did pay to the owner thereof the full value of said land. This defendant therefore prays that if judgment is by the court rendered in favor of plaintiff for any sum, that the land of said defendant Sarver, to wit, the S. W. $\frac{1}{4}$ of Sec. 3, Tp. 9, R. 17, be decreed the primary fund, which shall be first exhausted to satisfy such

judgment; and that the land of this defendant, to wit, the N. W. $\frac{1}{4}$ Sec. 15, Tp. 9, R. 17, be ordered not to be sold until said principal fund is first exhausted; and that if this defendant is compelled to pay any sum to protect his said land from sale to satisfy any judgment obtained by plaintiff, that the defendant have judgment against his co-defendant Jonathan Sarver for any sum so paid, together with all costs; and for such further relief as this defendant is entitled to obtain."

Upon the trial of the foreclosure action, the trust company dismissed as to Sarver, and waived their right to a personal judgment against him. The court made findings of fact and conclusions of law, as follows:

"Findings of fact: First. That on the 1st day of July, 1885, Abraham C. Reid and Geo. Reid executed and delivered to Thomas Frahm, as mortgagee, their certain mortgage bond for \$750, due in six years, with interest at 12 per cent. after maturity, said bond being executed for money borrowed by said Abraham C. Reid from said payee. Second. That to secure the payment of said bond and interest, and upon the same day, there were executed and delivered a certain mortgage signed by said Abraham C. Reid and Mariah Reid, his wife, and George C. Reid and Nettie Reid, his wife; that said mortgage covered the S. W. $\frac{1}{4}$ of Sec. 3, and the N. W. $\frac{1}{4}$ of Sec. 15, all in township 9, of range 17 west, in Rooks county, Kansas. Third. That the S. W. $\frac{1}{4}$ of section 3, above described, was the property of said Abraham C. Reid; that the N. W. $\frac{1}{4}$ of Sec. 15 was the property of George Reid. Fourth. That said George Reid signed said note or coupon bond as surety for said Abraham C. Reid, who was his father, he receiving none of the money borrowed, and that said mortgage executed by George Reid and wife was executed as collateral security, and was executed by said Geo. Reid, as surety of his father's debt; that prior to April, 1887, said Abraham C. Reid died, leaving adult and minor heirs, and Maria Reid, his widow; that, at the time of his death, he was indebted to one Jonathan Sarver in the sum of about \$60; that some time in April, or prior thereto, of that year, said Jonathan Sarver entered into an arrangement with Maria Reid, the widow, and the said Geo. Reid and other heirs, whereby he agreed to purchase said quarter section of land, being the S. W. $\frac{1}{4}$ of Sec. three (3), township nine (9), range seventeen (17), as above described, for a consideration of about \$1,300, which consideration consisted of the \$60, above described, as owing from Abraham C. Reid to said Sarver, and certain amounts of money owing by said George Reid to said Sarver and Charles Reid and other adult heirs of Abraham C. Reid, amounting in all to something like \$400, and also assuming the payment of said \$750 mortgage, with accrued interest, amounting, at that time, to about \$200. Sixth. The court further finds that after said purchase by Sarver, and on the 14th day of September,

1887, one Bassett, one of the defendants in this case, purchased of said Geo. Reid his quarter section of land, being the N. W. $\frac{1}{4}$ of Sec. 15, township 9, range 17, as above described; that upon said land there was a first mortgage of \$500 at the time of the purchase of the same by said Bassett, and also the \$750 mortgage above described, being a subsequent mortgage; that the deed which Bassett took from Reid was a warranty deed, and excepted only the \$500 mortgage above described, and made no reference to the \$750 mortgage. Seventh. That in the foreclosure of this case, and when the case was called for trial, in open court, the plaintiff, through its attorneys, waived the right for a personal judgment against said Jonathan Sarver in this case; that thereupon the defendant Thomas Bassett asked that question of the assumption of said mortgage debt by Jonathan Sarver be determined, and that if said assumption was found to have been made at the time of the purchase of said land, that this court render a personal judgment in this case against the said Jonathan Sarver for any deficiency that may exist after the sale of the S. W. $\frac{1}{4}$ of section 3, above described.

"Conclusions of law: The court finds in this case that the plaintiff is entitled to a judgment in foreclosure against the defendants Reid, in the sum of \$949, with interest at 12 per cent. and costs of suit; that the mortgage executed to secure the debt above described did not contain any clause waiving appraisement of the real estate; therefore, that sale shall be made, with appraisement, upon demand. Second. The court further finds, as a matter of law, that in this case equity would require that the S. W. $\frac{1}{4}$ of Sec. 3, being the land owned by the principal debtor in this case, Abraham C. Reid, be first sold to satisfy said judgment. Third. The court further finds, as a matter of law, that the defendant Bassett, not being in privity with the defendant Geo. C. Reid in this contract, is not in a position to ask that a personal judgment be rendered against Jonathan Sarver in this action. The only parties who could ask that such judgment be rendered not asking for such judgment in this action, the only judgment which can be rendered against Sarver is a judgment in foreclosure. The court further finds that, upon the sale of said S. W. $\frac{1}{4}$ of section 3, if the same shall be insufficient to satisfy the judgment of the plaintiff herein, and cost, then that the N. W. $\frac{1}{4}$ of section 15 in said township be sold to satisfy said judgment or any deficiency. It is therefore by the court ordered and decreed that the plaintiff have and recover of and from the defendants Reid and Reid, as a judgment in foreclosure, only \$949, with interest at 12 per cent. and costs, which judgment is decreed to be a lien against the land above described, being the S. W. $\frac{1}{4}$ of section 3, and the N. W. $\frac{1}{4}$ of section 15, of township 9, of range 17 west of the 6th principal meridian; and that said S. W. $\frac{1}{4}$ of section

3 be first sold, with appraisement, to satisfy said judgment and costs, and, if the same shall be insufficient to satisfy the said judgment and all costs, then that the N. W. $\frac{1}{4}$ of section 15 in said township be sold to satisfy any deficiency remaining unpaid; and that all the defendants be barred and foreclosed of any interest in the land after the sale thereof. And thereupon defendant Bassett presented to the court his motion asking that the court find, as a further conclusion of law, that the plaintiff, having a right to a personal judgment against defendant Sarver, and having knowledge of the claims and rights of the defendant Bassett, is not entitled to a lien on the N. W. $\frac{1}{4}$ 15-9-17 for any deficit after sale of the S. W. $\frac{1}{4}$ 3-9-17; and said motion, after due hearing and arguments of counsel, was and is by the court overruled and refused.

"Approved Jany. 11th, 1894. Chas. W. Smith, Judge."

After the judgment in the foreclosure action, the trust company applied for a receiver, and one was appointed on July 12, 1892; and afterwards defendant Sarver filed his motion asking that the receiver be discharged, which was on the 4th day of August, 1892, sustained, and the receiver discharged, the court holding that the order of appointment was imprudently, erroneously, and wrongfully made. No property of any kind came into the hands of the receiver, but it appears that on the land of A. C. Reid, there had been some wheat grown, which was turned over to M. C. Reville under his claim of ownership. Under the judgment in the foreclosure action, the land of A. C. Reid, viz. S. W. $\frac{1}{4}$ section 3, township 9, range 17, was sold, and, there being a deficiency, an order of sale was issued against the land of George Reid (now owned by defendant Bassett), viz. N. W. $\frac{1}{4}$ section 15, township 9, range 17. To enjoin the sale of this land, this action was commenced, and the following petition was filed: "Plaintiff says: That on July 15, 1891, defendant first herein named did, as plaintiff, file its petition in this court, among other things alleging that one Jonathan Sarver assumed and agreed to pay the debt which said plaintiff in said action sought by that action to collect, and alleging that said assumption of said debt was in part payment of S. W. $\frac{1}{4}$ section 3-9-17, Rooks county, Kansas. Said plaintiff in that action prayed judgment in foreclosure of said land, and personal judgment against said Sarver, for any balance found to be due after sale of said premises. That afterwards, on January 4, 1892, defendant Sarver filed his answer to plaintiff's petition in that action, denying the assumption by him of that indebtedness. That this plaintiff, on November 25, 1891, filed his answer and cross petition to plaintiff's petition, among other things alleging the assumption of said debt by defendant Sarver, and praying that said Sarver be adjudged to be principal for said debt, and

this defendant surety only, and that the property of the said Sarver be first exhausted, before resort should be had to the property of this defendant described in plaintiff's petition to satisfy its debt. That on January 4, 1892, said Sarver filed his reply to defendant's answer and cross petition, denying his liability, as alleged in this plaintiff's answer to said petition. That on the trial of said action, and while said Sarver was present by his attorney, and over the objections and exceptions of this plaintiff, defendant first named herein waived, in open court, its claims for personal judgment against defendant Sarver, and dismissed said action as to him. That afterwards, upon the evidence introduced in said cause, this court found that the allegations of said plaintiff's petition and of this plaintiff's (the defendants) answer of assumption of said debt of said plaintiff were true, and further found that one George Reid, of whom this plaintiff purchased real estate hereinafter described, was surety only for the payment of said plaintiff's debt, and that this plaintiff was the owner of the land mortgaged by the said George Reid to said plaintiff, but ordered that the property of this plaintiff be sold before first exhausting the property of said principal to pay said debt. Plaintiff makes each and every pleading and file in said cause heretofore referred to a part hereof. Plaintiff further says that the waiver of claim for judgment against the principal for said debt, without the consent of this plaintiff surety was a full and complete release of this plaintiff's property from any lien for payment of plaintiff's debt; and, therefore, that the order, decision, and decree of this court that this plaintiff's property should be sold to satisfy said plaintiff's judgment was contrary to law, and therefore of no effect. This plaintiff says that in no event, under the findings of this court, could this plaintiff's property be taken to satisfy the defendant corporation's claim until the property of the said Sarver within the jurisdiction of this court is first exhausted, and that said Sarver has property within the jurisdiction of this court of many times the value of defendant's judgment. This plaintiff says that the order and decree of this court adjudging that this plaintiff's property described in defendant corporation's petition should be sold before the property of said principal debtor, Sarver, within the jurisdiction of this court, had been exhausted, was absolutely void; that since the trial of said cause, and since the findings of fact and conclusions of law made by this court in said cause above referred to, said defendant corporation released a portion of the property of the principal debtor, Sarver, which was covered by the lien of plaintiff, sought to be foreclosed in said action, and of sufficient value to have fully satisfied the remainder of the defendant's claim, which release and discharge of said lien was done over the objections and exceptions of this defendant; that thereby the

plaintiff waived and released its claim upon this plaintiff for any amount in satisfaction of its judgment; that defendant has caused an order of sale to issue from the clerk of this court to the sheriff of this county, commanding said sheriff to sell the N. W. $\frac{1}{4}$ Sec. 15, Tp. 9, R. 17, Rooks county, Kansas, the property of this defendant; that said order of sale is now in the hands of said sheriff, who is about to proceed to levy upon and sell said real estate, and will levy upon and sell the same unless restrained by the order of this court, all of which acts are being done in violation of plaintiff's rights in and to the real estate of plaintiff above described. This plaintiff therefore moves the court to vacate and set aside that part of the judgment rendered in this case so far as it relates to the property of this plaintiff, and to order, and adjudge and decree that the property of this defendant, to wit, the N. W. $\frac{1}{4}$ of Sec. 15, Tp. 9, R. 17, in Rooks county, be freed from any lien of defendant corporation for any portion of its debt, and that said defendant be perpetually restrained from selling or otherwise interfering with this plaintiff in his use, enjoyment of said real estate, and for such other relief as this defendant is entitled to receive from this court affecting said judgment and said real estate, and that defendant Shaw be ordered to return said order of sale to the clerk of this court, without levy upon or sale of plaintiff's property."

The plaintiff in error contends that the petition does not state facts sufficient to constitute a cause of action. There are two grounds for injunction alleged: (1) The release by the trust company, as plaintiff in the foreclosure action, of its right to a personal judgment against Jonathan Sarver. (2) The release of a portion of the property of said Sarver, after judgment in foreclosure. We will treat them in their order, and first as to the release by the trust company of its right to a personal judgment against Sarver.

The petition shows that this question was fully decided in the foreclosure suit. That decree was not void; the court had jurisdiction of the subject-matter and of the persons; and the record shows that it was in accord with the issues in that case. Neither was it erroneous, but, if it was, Bassett would have his adequate remedy at law to reverse it by proceedings in error; and, failing to do that, the decree could not be attacked collaterally or in a separate action. The McKinley-Lanning Loan & Trust Company was not obliged to take a personal judgment against Sarver. The mortgagee is not compelled to accept the grantee who assumes its mortgage. He can stand on the mortgage contract. "Where the purchaser of land agrees to pay the debt of his grantors, as a part of the purchase price thereof, but their creditor does not accept and adopt the contract; on the contrary, he asks, in an action to foreclose the mortgage on the land sold, a personal judgment against the grantors, and a

decree of foreclosure and order of sale, and simply asks that any rights of the vendee may be adjudged inferior and subject to his mortgage lien,—held, that the vendee is not the debtor of the owner of the said note and mortgage." *Searing v. Benton*, 41 Kan. 758, 21 Pac. 800. Nor do we think that the question of principal and surety was involved under the issues of the foreclosure action, or under the law, so far as plaintiff in error was concerned. *Stove Works v. Caswell*, 48 Kan. 690, 29 Pac. 1072.

This brings us to the other alleged ground for the injunction, viz. the release of a portion of the property of said Sarver after judgment. The petition does not show or state that said property was any part of the land in controversy in the foreclosure action, or that it was ordered by the court to be sold; and the evidence in this case shows that 400 bushels of wheat were raised upon the A. C. Reid tract; but it is not shown that Sarver owned it, nor was it ever in the possession of the trust company or the receiver. We are at a loss to understand, then, how they could release that which they never had. M. C. Reville owned it. They might have litigated his right thereto, but were not compelled to do so, and that the company had the receiver discharged is not shown by the record. On the contrary, the only showing on this proposition is that Sarver had the receiver discharged, and the court found, as its reason for discharging him, that "the order appointing him was imprudently, erroneously, and unlawfully made."

We think the objection of the defendants to the introduction of testimony should have been sustained. The judgment in this case will be reversed, and cause remanded for further proceedings in accordance with the views herein expressed.

HENDRICKSON v. HARVEY et al.

(Court of Appeals of Kansas, Northern Department, E. D. Dec. 16, 1896.)

APPEAL—SUBSTITUTION OF PARTIES—REVIEW—INSTRUCTIONS.

1. Where, in an action to recover the contract price of 1,000 bushels of corn, which the plaintiff claimed to have sold to the defendants, the amount sued for was deposited in court, and a third party was substituted as defendant in lieu of the persons against whom the action was instituted, and the plaintiff was required by the court to contest with such third party their respective rights to the proceeds of such sale, and a judgment was thereafter rendered that of the sum so deposited in court a certain specific portion should be paid to such substituted defendant, and the plaintiff thereupon instituted proceedings in error to this court, but failed to make the original defendants parties to such proceedings, *held*, that the question as to whether the trial court erred in such order of substitution cannot be inquired into.

2. No prejudicial error is committed by the trial court in refusing to give to the jury certain special instructions, asked by the plaintiff, where

the propositions of law therein correctly stated have already been covered by the general instructions.

(Syllabus by the Court.)

Error from district court, Atchison county; Robert M. Eaton, Judge.

Action by George W. Hendrickson against A. B. Harvey and Webb Allison, partners under the firm name of Harvey & Allison. Mrs. Parks was made defendant. From a judgment for plaintiff against the former, and ordering a portion of the judgment to be paid to Mrs. Parks and the balance to plaintiff, plaintiff brings error. Affirmed.

H. C. Solomon, for plaintiff in error. W. D. Webb, for defendants in error.

CLARK, J. Mrs. C. G. Parks was the owner of a farm in Atchison county, and in the years 1888 and 1889 she rented the same to C. C. Phillips. By the terms of the lease, Phillips agreed to pay her \$100 per year for the grass land, and three-fifths of all the grain raised on the premises. In the year 1889 Phillips farmed, in addition to this land, several other tracts belonging to different owners. A portion of the corn which he raised on these several tracts of land was by him commingled with corn raised by him on the farm belonging to Mrs. Parks. Being indebted to one George Storch, he gave him a chattel mortgage on all of this corn. He was also indebted to one G. W. Hendrickson, and to the firm of Harvey & Allison. In the months of January and February, 1890, he delivered to Harvey & Allison about 1,573 bushels of corn, and had remaining upon the Parks farm about 1,200 bushels, a portion of which had been raised on the other tracts of land above mentioned. Hendrickson claimed that 1,000 bushels of the corn which Phillips delivered to Harvey & Allison had been purchased by him from Phillips, and sold to Harvey & Allison at an agreed price of 18½ cents per bushel, and he accordingly demanded that the purchase price thereof be paid to him. At that time Phillips had not settled with Mrs. Parks for any portion of the rent for the year 1888, and still owed her the stipulated rent for the grass land for the year 1888, and she claimed a lien on this corn, and demanded that Harvey & Allison pay her the proceeds thereof, which they refused to do. She thereupon commenced two separate actions, in justices' courts, against Phillips, in March, 1890, and recovered judgments therein,—one for \$100, the amount due for the rent of the grass land for the year 1888; and the other for \$253.70, the amount due her as rent for the year 1889. In each of these actions she caused an attachment to issue, which was levied on the 1,200 bushels of corn then on her farm, in addition to some other property belonging to Phillips, and also caused a garnishment summons to be served on Harvey & Allison. On March 18th the garnishees answered, acknowledging themselves

indebted to Phillips in the sum of about \$250. This amount was on that day ordered to be paid into court to be applied upon these judgments, but the order was not complied with. After the levy of the attachment, Storch demanded possession of the 1,200 bushels of corn, which was covered by his mortgage, and a compromise was then effected between Storch and Mrs. Parks, whereby the latter released from the lien of the attachment about 886 bushels.

On March 29, 1890, Hendrickson brought this action against Harvey & Allison to recover the contract price for 1,000 bushels of corn which he claimed he had sold to them. Although it is stated, in the case-made, that all the pleadings are preserved therein, it is apparent from the record that such is not the case. The record does not contain an answer filed by Harvey & Allison, nor recite that one was filed; yet, as Hendrickson filed what he denominated a "reply to the answer of Harvey & Allison," and which amounted to a general denial, it is probable that an answer was filed. And, as the record contains an affidavit made by Harvey, wherein he states that he served on Mrs. Parks a certified copy of a certain order, a copy of which was attached to the affidavit, and which purported to be an order of the court making Mrs. Parks a party defendant, and requiring her, within 10 days from the service on her of a copy thereof, to appear and maintain, or relinquish, her claim to the \$185 sued for, being the alleged contract price of 1,000 bushels of corn which Hendrickson claimed to have sold to Harvey & Allison; and as the order recited that it was made on the application of the defendants, and the court required Harvey & Allison to "hold said sum of \$185 in readiness to answer to and comply with the further orders of the court herein"; and as Mrs. Parks filed an answer, in which she stated that she did so "by order of the court," and therein denied generally the allegations of the petition, and set out in detail the facts on which she relied to entitle her to recover the amount sued for by Hendrickson, to which answer the plaintiff replied by general denial,—we think it is fair to assume that Mrs. Parks was substituted as defendant in lieu of Harvey & Allison, although no such order appears in the record, nor do we find therein the affidavit which is prescribed by section 43 of the Code of Civil Procedure as the basis of such proceeding. After the evidence had been introduced, the court instructed the jury that, under the pleadings and evidence, the plaintiff was entitled to recover from Harvey & Allison the sum of \$196.22, being the amount sued for, with interest thereon, and also instructed the jury that, if they found certain facts to exist, Mrs. Parks would also be entitled to a verdict against Harvey & Allison for the amount of the balance due on the judgment obtained by her against Phillips. The jury

returned a verdict in favor of the plaintiffs as directed, and in favor of Mrs. Parks against Harvey & Allison for \$145.50. Harvey & Allison moved for a new trial, and also moved for judgment in their favor. In their motion for judgment they recited the various proceedings of the court by which Mrs. Parks had been made a party to the action, the fact that the court had directed them to hold the \$185 sued for subject to its further order, and alleged that they were ready to pay the said sum of money as should be directed by the court. Thereupon the motion for a new trial was sustained, Harvey & Allison were directed to pay the \$185 into court, and their motion for judgment was overruled. The record recites that "on February 8, 1892, the second trial of this cause was had and begun, when * * * George H. Hendrickson objected to the trial of this case on the order heretofore made by the court relieving Harvey & Allison from their liability as defendants herein, or excluding them in this case from their full liability to the plaintiff and to the interpleader, or to Mrs. Parks, who had been brought into this case"; that Mrs. Parks also interposed a similar objection, and stated that she had no dispute with Mr. Hendrickson, but claimed to be entitled to a judgment against Harvey & Allison, but, should the court hold that the corn mentioned in plaintiff's petition and in her answer was in dispute, then "she desired to defend her right to the fund, or the corn in this case." These objections were overruled, and exceptions were duly saved. Numerous witnesses were examined, special findings of fact were made, and a general verdict returned in favor of Mrs. Parks for \$145.40 against Harvey & Allison, that being the amount which they found to be due on her judgments against Phillips. On this general verdict and special findings, a judgment was rendered that, of the \$185 deposited in court, \$145.40 should be paid to Mrs. Parks, and the balance to Mr. Hendrickson. The plaintiff complains of the judgment, and seeks a reversal thereof.

The first contention is that the court erred in substituting Mrs. Parks as defendant in lieu of Harvey & Allison. If the court made such order of substitution, it must have been done on the application of the original defendants. The judgment thereafter rendered in the action is binding upon them, and of this they are not complaining. If error was committed in substituting Mrs. Parks as defendant, this court cannot correct that error, as Harvey & Allison are not made parties to this proceeding. They evidently admitted a liability in favor of Mr. Hendrickson, or of Mrs. Parks, for \$185, the proceeds of a sale of 1,000 bushels of corn, which had been delivered to them by Phillips. Hendrickson claimed the right to recover by virtue of a pretended sale by him after having purchased from Phillips. Mrs.

Parks not only controverted the allegation that Hendrickson had purchased the corn from Phillips and sold the same to Harvey & Allison, but she contended that she had a landlord's lien on the corn, and also that she was entitled to the proceeds of the sale by virtue of the garnishment proceedings to which reference has heretofore been made. The jury resolved the question in dispute in favor of Mrs. Parks. There was evidence tending to show that, in January, 1890, Phillips contracted with Harvey & Allison for the sale to them of about 4,000 bushels of corn at 18½ cents per bushel, and that afterwards this contract was canceled, and on the same day three new contracts were executed, evidencing sales of corn to Harvey & Allison, as follows: By Storch, from 2,000 to 2,500 bushels, "taken under chattel mortgage of C. C. Phillips"; by Hendrickson, 1,000 bushels, "to be delivered by C. C. Phillips under contract with George Hendrickson"; and by Phillips, 900 bushels, "due the said Mrs. C. G. Parks for rent, which I authorize said Harvey & Allison to pay her before any other claim out of said corn delivered." There can be no question, under the evidence, that these three contracts had reference to the sale of the same corn which Phillips had, in January, contracted to sell to Harvey & Allison. The jury found that it was the agreement and understanding between Hendrickson, Phillips, and Harvey that Mrs. Parks should be paid out of the first corn that should be delivered. This finding is supported by the testimony of Harvey.

The plaintiff in error also contends that the court erred in its general instructions to the jury, but the record does not show that the attention of the court was called to the errors of which complaint is made. We do not think any prejudicial error was committed in refusing the instructions which were asked by the plaintiff in error. The portions thereof which correctly stated the law applicable to the case are embodied in the general instructions. The special findings of the jury which are material to the issue, when considered as a whole, can be made to harmonize with each other and with the general verdict. Being unable to discover any prejudicial error in the rulings of the court, the judgment will be affirmed. All the judges concurring.

CITY OF KANSAS CITY v. HESCHER.

(Court of Appeals of Kansas, Northern Department, E. D. Dec. 3, 1896.)

RECOGNIZANCE—VALIDITY—VIOLATION OF ORDINANCE—UNNECESSARY PROVISIONS.

1. A recognizance, executed in behalf of a defendant upon appeal from a judgment of conviction for violation of a city ordinance, is not void because it fails to state the particular offense charged, where it clearly appears that the defendant was legally in custody, charged with a pub-

lic offense, and that he was discharged therefrom by reason of the giving of the recognizance, and where it can be ascertained from the recognizance that the sureties undertook that the defendant should appear before the proper court for trial for such offense.

2. A recognizance given by a defendant in a prosecution for violation of an ordinance of a city of the first class is not void because of the fact that the city is therein named as recognizor.

3. Where a defendant, charged in the police court of a city of the first class with an offense criminal in its nature, in order to perfect an appeal from a judgment of conviction therein rendered against him, voluntarily executes a recognizance containing conditions prescribed by the statute, which are more onerous than could, under the constitution, be required of him, and he is thereupon discharged from custody, and the recognizance and a proper transcript of the proceedings had in said cause are duly certified to the district court, *held* error to dismiss the appeal, upon the application of the city, because of the superadded conditions of the recognizance.

(Syllabus by the Court.)

Appeal from district court, Wyandotte county; H. L. Alden, Judge.

Julius Hescher was convicted of keeping a tippling house, and appeals to the district court. From an order dismissing the appeal, he appeals. Reversed.

McGrew, Watson & Watson and John A. Hale, for appellant. T. A. Pollock and K. P. Snyder, for appellee.

CLARK, J. This is an appeal by Julius Hescher from an order of the district court of Wyandotte county dismissing his appeal from a judgment rendered against him in the police court of Kansas City. From the record filed in this court, it appears that Hescher was arrested upon complaint of J. A. Walsh, a police officer, charged with a violation of section No. 1 of Ordinance No. 775 of the said city by keeping a tippling shop in said city, at No. 426 Minnesota avenue; that said cause was duly entered upon the docket of the police judge, at page 183, under the caption, "The City of Kansas City vs. Julius Hescher (No. 9,558)"; that on September 3, 1895, the defendant waived arraignment, and pleaded not guilty; that thereafter, and on said day, a trial was had, at which the said police officer was sworn and testified on behalf of the plaintiff; that the defendant offered no evidence; that Hescher was found guilty as charged, and fined \$50, and ordered to stand committed to the jail of said city until said fine should be paid; that on September 10th thereafter he tendered a recognizance, which was approved and filed by the court, and the defendant was discharged from custody, the following being a copy of said recognizance:

"The City of Kansas City, Plaintiff, vs. Julius Hescher, Defendant. No. 9,558. Judgment before P. K. Leland, Police Judge of the City of Kansas City, Kansas. Whereas, judgment in the above-entitled cause was on the 3d day of September, 1895, rendered by the above-named police judge against the said ——— for \$50 fine, and costs of suit, taxed at

no dollars; and whereas, said Julius Hescher, has appealed from said judgment to the district court of Wyandotte county, Kansas: Now, therefore, we—Julius Hescher, as principal, and ———, as surety—jointly and severally acknowledge ourselves to owe and be indebted to the city of Kansas City, Kansas, in the sum of one hundred dollars, to be levied of our goods, chattels, and tenements, if default be made in the conditions following, to wit: The condition of this recognizance is such that if the above-named Julius Hescher shall personally be and appear before the district court of Wyandotte county, Kansas, on the first day of the term thereof next to be holden in and for said county, to answer the complaint in said cause against him, if the case be determined against him, and abide the judgment of the court, and not depart the court without leave, then this recognizance shall be void; otherwise shall be and remain in full force and virtue. Witness our hands this 10th day of September, 1895. Julius Hescher. J. F. Erb.

"Taken and the surety approved by me this tenth day of September, 1895. P. K. Leland, Police Judge."

The record further shows that the recognizance, and a transcript of the proceedings had in said cause before the said court, were by the police judge duly certified to the district court of Wyandotte county, and that on the 30th day of November, 1895, the city of Kansas City, by its attorneys, filed a motion to dismiss said appeal on the ground that the district court had no jurisdiction either of the cause or of the parties thereto, for the want of a valid recognizance; the contention being that the instrument filed as a recognizance is void because, as claimed: (1) It does not state or designate the offense for which the principal therein is required to appear for trial; (2) the city of Kansas City, Kansas, instead of the state of Kansas, is therein named as recognizor; (3) neither in form nor in substance does it meet the requirements of the law; and (4) the condition therein that the defendant should pay all such fine and costs as should be imposed on him, if the case should be determined against him, is contrary to the law and constitution of this state. The court, over the objection of the defendant, sustained the motion and dismissed the appeal, to which ruling an exception was duly saved.

The General Statutes of 1889 contain the following provisions:

Section 612: "In all cases before the police judge, an appeal may be taken by the defendant to the district court in and for the county in which said city is situated; but no appeal shall be allowed unless such defendant shall within ten days after such conviction enter into recognizance, with sufficient security, to be approved by the judge, conditioned for his appearance at the district court of the county, at the next term thereof, to answer the complaint against him, and for the

payment of the fine, and costs of appeal, if it should be determined against the appellant."

Section 5201: "All recognizance required or authorized to be taken in any criminal proceeding, or in any proceeding of a similar nature, shall be in writing and shall be subscribed by the parties to be bound thereby."

Section 5219 (section 154, Cr. Code): "No action upon a recognizance shall be defeated, nor shall judgment thereon be arrested, on account of any defect of form, omission of recital, condition of undertaking therein, neglect of the clerk or magistrate to note or record the default of any principal or surety at the term or time when such default shall happen, or of any other irregularity, so that it be made to appear that the defendant was legally in custody, charged with a public offense, that he was discharged therefrom by reason of the giving of the recognizance, and that it can be ascertained, from the recognizance, that the sureties undertook that the defendant should appear before a court or magistrate for examination or trial for such offense."

Counsel for the city insist that at common law, in order to be of any validity, a recognizance must state the offense for which the defendant is required to answer, and that, notwithstanding the provisions of the statute above quoted, that rule is in force in this state. In *McLaughlin v. State*, 10 Kan. 581, it was held that the strict rule of the common law with reference to recognizances is changed by our statute, and that it is now sufficient if, from the whole record, it be made to appear that the defendant is duly in custody, charged with a public offense, that he was discharged therefrom by reason of the giving of the recognizance, and that it can be ascertained from the recognizance that the sureties undertook that the defendant should appear before a court for trial for such offense. In *Jennings v. State*, 13 Kan., at page 91, *Brewer, J.*, who wrote the opinion, used the following language: "Counsel for plaintiff in error has been very diligent, and collected numerous authorities, and presented his points with clearness and force, and, under the old rules which obtained prior to the enactment of said section 154 [Cr. Code], might properly have expected a different decision from this court. But language could hardly be more sweeping and comprehensive than section 154. It has, at one blow, swept away, so far as this state is concerned, nearly the entire accumulation of authorities in the matter of recognizances. It has, we think, introduced a truer and better rule, and one which will tend to promote the interests of justice." In *Tillson v. State*, 29 Kan. 452, it was held that a recognizance would not be fatally defective and void merely because of its indefiniteness in failing to show that it was given in a criminal case wherein the defendant was charged with the commission of a public offense, and especially so where the previous portions of the record show definite

ly, explicitly, and in detail the nature and character of the offense with which the accused was charged. In that case, Valentine, J., speaking for the court, said: "The point that the recognizance does not show that Masterson, the accused, was charged with the commission of any offense, we also think is untenable. * * * The recognizance is an obligation of record, and, wherever it is obscure or indefinite, other portions of the record may be examined for the purpose of making its meaning clear and explicit. The plaintiff in error founds his argument upon this point principally, if not entirely, upon the language of section 154 of the Criminal Code, which says that no recognizance shall be held to be insufficient if it be made to appear, among other things, that the defendant was 'in custody charged with a public offense' * * * and that it can be ascertained, from the recognizance, that the sureties undertook that the defendant should appear before a court or magistrate for examination or trial for such offense.' The words 'such offense,' above quoted, simply mean 'public offense,' and refer back to these words as previously used; and the section does not mean that the offense shall be set out in detail, but simply that a statement shall be made, or words inserted, showing that the defendant was charged with the commission of some public offense. We think the recognizance in the present case shows this, although it shows the same only indefinitely, obscurely, and inferentially. The recognizance is entitled, 'The State of Kansas, Plaintiff, vs. Philip Masterson, Defendant.' It shows that the case was pending before George M. Everline, a justice of the peace of Monroe township, Anderson county, Kansas; and it is shown that the plaintiff in error bound himself to the state of Kansas for the appearance of Masterson before the said justice for an examination in the case. Now, can the above description apply to any case except a criminal case? Can it apply to any case except a case where a public offense has been intended to be charged? We would think not. * * * We do not think that the recognizance is so fatally defective as to be utterly null and void." In this case, while the recognizance fails to designate the particular offense charged against Hescher, it shows that on September 3, 1895, in an action pending in the police court of Kansas City, bearing the number 9,558, wherein said city was plaintiff and Hescher was defendant, the latter was fined \$50, and that he had appealed from that judgment to the district court, and the transcript of the proceedings in the police court shows the particular offense charged against him. We think under the rule laid down in *Tillson v. State*, supra, the objection to the recognizance on the ground that it fails to state the offense charged against the defendant is without merit.

It is next contended that as the section of the statute which authorizes an appeal from

the judgment of the police court provides that, in order to perfect such appeal, the defendant should enter into a recognizance conditioned as therein prescribed, but fails to designate in whose favor the same should be executed, under section 617 the same rules of procedure obtain as in perfecting an appeal from a judgment rendered by a justice of the peace in a criminal case, which, under section 5454, require the recognizance to be executed to the state of Kansas, and that, as the recognizance in this case was executed in favor of the city of Kansas City, it is void. While the two sections of the statute last above mentioned would seem to indicate that the recognizance should run to the state of Kansas, yet as the law provides that, upon a breach of a recognizance given in an action for a violation of a city ordinance, the same should be deemed and declared forfeited, and the city attorney should forthwith cause the same to be prosecuted in the name of the city as plaintiff, and that all moneys recovered in such action be paid over to the city treasurer, to the credit of the general fund of the city (section 621), the city is the real party in interest, and is in fact the only party aggrieved by the misconduct with which the defendant is charged. The defect in the recognizance was at most but one of form, which, under section 5219 (section 154, Cr. Code), would not render it void. It is certainly a good common-law obligation, which could be enforced against the makers thereof, should the judgment of the police court be affirmed. *Johnson v. Weatherwax*, 9 Kan. 75; *Lewis v. Stout*, 22 Wis. 234; *Garretson v. Reeder*, 23 Iowa, 21. For the reasons above given, we do not think the order dismissing the appeal could be sustained on the ground that the recognizance was executed in favor of the city instead of the state.

In answer to the third objection, that the obligation "is not in form or substance as required by law," we need but to quote from Valentine, J., in *Ingram v. State*, 10 Kan. 635: "It is true that that portion of the instrument which contains the obligation is in the form of a penal bond, and not in the form of a recognizance. It is true that that portion of the instrument seems to create a new debt or obligation, as a penal bond does, and is not the acknowledgment of a pre-existing debt, as a recognizance is; but this is such an immaterial difference that the instrument cannot be declared void under our statutes merely for that reason. Cr. Code, § 154."

It is finally insisted that the condition in the recognizance that the defendant should "pay all such fines and costs as shall or may be imposed on him, if the case be determined against him," violates section 5 of the bill of rights, makes the recognizance more onerous upon the defendant than is required by the law, and renders it void; and in support of this contention the following, among other, authorities are cited by counsel: *Roberts v. State*, 34 Kan. 151, 8 Pac. 246; *Darien*

v. State, 38 Kan. 485, 17 Pac. 49; and In re Jahn, 55 Kan. 694, 41 Pac. 956. But we do not think that either of those decisions has any application to the facts in this case. Roberts was charged with the commission of a criminal offense. The court fixed the amount of the recognizance to be given by him at \$1,200. The sheriff required and accepted from him a bond in the sum of \$1,250. In an action upon the bond it was held that the court alone had authority to fix the amount of the bail, that the sheriff was bound to pursue his authority strictly, and that when he departed from it, and required bail in excess of the order of the court, he acted without authority, and the recognizance was as void as if he had no authority whatever to require bail. In the Durlen Case the principal defendant pleaded guilty to the sale of intoxicating liquor in violation of law. On February 23, 1884, he was sentenced to pay a fine, and, in addition thereto, was by the court required to give security for his good behavior for the term of two years, in the sum of \$500, and that he stand committed to the county jail until such security should be given. Cr. Code, § 242. On June 10th thereafter, to avoid being imprisoned, he gave a bond, with approved sureties, conditioned as required by the order of the court, and which bond also contained a provision that he would not, "during said term of two years, in person, or in connection with, or by means or through the agency of, others, or any one else, either directly or indirectly, or in any form or manner, barter or sell intoxicating liquor of any kind." He was afterwards convicted of the unlawful sale of intoxicating liquor in September, 1884, and soon thereafter an action was commenced to recover the amount of the bond, and it was held that the sheriff was not authorized to require him to give a bond containing the superadded condition that notwithstanding Durlen might within two years, upon compliance with certain prescribed conditions, be authorized by law to sell intoxicating liquor, yet a lawful sale made by him within that period would constitute a breach of the condition of the bond which he was required to give in order to avoid being committed to the county jail. The bond was not voluntarily executed, the superadded condition rendered it void, and no recovery could be had thereon. The Jahn Case was an original proceeding in habeas corpus. The petitioner was charged in the police court of a city of the third class with a violation of an ordinance of said city which declared it unlawful for any person other than a druggist having a permit to sell or barter intoxicating liquors. While no provision is made by statute for a jury trial in prosecutions in the police court for violations of city ordinances, Jahn demanded such a trial, which was refused by the court. He was found guilty, and adjudged to pay fines aggregating \$200, in addition to the costs,

and was committed to jail until the fines and costs should be paid. The statute authorizing an appeal from such a judgment, and prescribing the conditions of the recognizance to be given by the appellant (section 1010), is almost identical with section 612, under which Heschler perfected this appeal. Jahn claimed that, under section 5 of the bill of rights, he was entitled to a jury trial, and as, under the statutes, the only way in which he could obtain such a trial would be by appealing to the district court from the judgment rendered against him, he was entitled to such appeal clogged by no unreasonable restrictions; that under said section 1010 he was denied an appeal to the district court, and consequently a jury trial, unless he would enter into a recognizance, with good and sufficient security, to be approved by the police judge, conditioned for the payment of such fine and costs as should be imposed on him, should the case be determined against him; that that requirement of the statute was unreasonable, and violated the spirit of the bill of rights; and that he was unlawfully restrained of his liberty. The supreme court sustained him in this contention, and held that the recognizance should provide for nothing more than the personal appearance of the appellant before the district court of the county on the first day of the next term thereof, and ordered that, upon the execution of such a recognizance, he would be discharged from imprisonment. It will be seen that the questions which were presented for solution in the cases referred to called for the application of legal principles which do not arise in the case now before the court. Each of the first two cases was an action to recover upon a written obligation which had been unlawfully required by the officer, and involuntarily executed by the defendant, as the alternative of being committed to jail; and in the Jahn Case the complaint made by the petitioner was that he had been denied the constitutional right of a trial by jury, except upon compliance with certain requirements of the statute, which he claimed, and which the court there held, to be unreasonable, and therefore inoperative. In this case the city, while claiming that the offense charged against the defendant is criminal in its nature, and that the accused is entitled to a jury trial (which he can secure if it should be held that an appeal has in fact been perfected), is seeking to have the appeal dismissed, which, if successful, would operate to make final the judgment which was rendered by the police judge of the city upon its own finding, unaided by the verdict of the jury, and one of the grounds upon which that motion is based is that the condition of the recognizance that the defendant should pay such fine and costs as might be imposed upon him, if the case should be determined against him, is contrary to, and in violation of, the constitution

of the state. In the consideration of the question thus presented, it is important that we do not lose sight of the fact that there is no constitutional requirement that one charged with a criminal offense shall be tried by a jury, and it must also be borne in mind that all that is contemplated by that portion of the organic law which relates to the subject under consideration is that the accused shall have the right to have the question as to his guilt passed upon by a jury, and that in the exercise of that right he shall be hampered by no unreasonable restrictions. There is no constitutional restriction upon legislation, with reference to the terms upon which a person convicted of a criminal offense may appeal to a higher court. There is nothing in the record to indicate that Heschel either demanded or desired a jury trial in the police court. For aught that appears therein, he may have preferred that the police judge hear the evidence, and pass upon the question as to his guilt, unaided by a jury. In fact, he may even have anticipated a finding of guilty, and the imposition of a fine, and, relying upon the right of appeal given him by section 612 of the statute, he may have thought it to his interest to make no defense in the police court, suffer a judgment to be rendered against him, and then appeal therefrom by giving a recognizance conditioned as prescribed by that section of the statute. If such were the case, and the sureties had knowledge thereof, they certainly could not be heard to say that the recognizance was void because it contained a stipulation for the payment of the judgment. The record fails to show that the defendant interposed any objection to being tried in the police court without a jury, or that he objected to giving a recognizance conditioned for the payment of any judgment which might be rendered against him. Upon being convicted and sentenced, he tendered this recognizance, the amount and conditions of which were in strict accordance with the requirements of the statute authorizing an appeal from the judgment rendered against him. It was taken and approved by the police judge, and, with a transcript of the proceedings, was duly certified to the district court, and the defendant was discharged from custody. He did not complain in the district court that, in order to secure a jury trial, he was required to give security for the payment of the judgment; but, on the contrary, he resisted the motion to dismiss his appeal, and he is here contending that the court erred in sustaining that motion. If the recognizance was voluntarily executed, and the parties signing the same were at the time cognizant of all the facts connected with the taking of the appeal, the instrument certainly should not be held to be void. The judgment was in favor of the city, and when collected the money would be paid into the city treasury, to the credit of the

general fund of the city. A part of the judgment was that the defendant stand committed to the city jail until the fine should be paid, although the mayor of the city had the power, by and with the consent of the council, to remit the fine. If the fine was neither paid nor remitted, the defendant could secure his discharge from custody only by appealing from the judgment, and an appeal could not be taken except by giving a recognizance. To sustain the ruling of the trial court would be to hold that the presumption is that the recognizance conditioned for the payment of the judgment was not voluntarily executed, and from which presumption the irresistible conclusion would follow that the city required the execution of a recognizance containing such condition, as the only alternative by which Heschel should secure his discharge from custody, and a trial by jury in the district court. We do not believe such to be the law, but, even were it the law, the city could not be heard to complain that the defendant, in order to secure an appeal to the district court, had, in compliance with the requirements of the city, given a recognizance containing conditions more onerous than the law requires of him. The recognizance is not void upon its face, nor is there anything in the record from which an inference could fairly be drawn that it was not voluntarily executed. The court erred in sustaining the motion to dismiss the appeal, and the judgment will therefore be reversed, and the cause remanded for further proceedings in accordance with the views herein expressed. All the judges concurring.

CITY OF KANSAS CITY v. FAGAN.

(Court of Appeals of Kansas, Northern Department, E. D. Dec. 3, 1896.)

CRIMINAL LAW — APPEAL FROM POLICE COURT — RECOGNIZANCE — EXECUTION.

1. Under the statute authorizing an appeal from a conviction in a police court of a city of the first class, a defendant is given ten days in which to perfect his appeal to the district court from the judgment rendered against him.

2. It is not essential to the validity of a recognizance given by a defendant, upon appeal from a conviction of a violation of a city ordinance, that the recognizance should be executed in the presence of the police court or police judge, or that its execution should be acknowledged before such court or officer.

(Syllabus by the Court.)

Appeal from district court, Wyandotte county; H. L. Alden, Judge.

C. E. Fagan was convicted of a violation of a city ordinance, and appealed to the district court. Appeal dismissed, and defendant appeals. Reversed.

McGrew, Watson & Watson and John A. Hale, for appellant. T. A. Pollock, for appellee.

CLARK, J. This is a prosecution for a violation of an ordinance of the city of Kansas

City. The facts are similar to those in the case of *City of Kansas City v. Hescher* (Kan. App.) 46 Pac. 1005, and several of the questions raised are identical with those just decided in that case. The record, however, fails to show that the defendant personally appeared before the police court for trial, but it does show that he appeared by his attorney, waived arraignment, and pleaded not guilty; that on the same day a trial was had, the officer making the arrest was sworn and testified as a witness, but no evidence was offered on behalf of the defense. Fagan was found guilty, fined \$50, and ordered to stand committed to the jail of the city until the fine should be paid. Six days thereafter he filed with the police judge a recognizance, which was conditioned in exact conformity to the requirements of section 612, Gen. St. 1889. This recognizance was on that day approved, and thereafter, together with a transcript of the proceedings had in said cause, was certified to the district court of Wyandotte county, where the city filed its motion to dismiss the appeal; the motion being based upon the same grounds as were set out in the motion filed in the *Hescher* Case, but also alleging that the recognizance was not acknowledged by either of the parties thereto before the police judge or police court of Kansas City, nor filed within 24 hours after the rendition of the judgment. This motion was supported by the affidavit of the police judge, and was sustained by the court, and from the order of dismissal this appeal is prosecuted by the defendant.

At common law, it was essential to the validity of a recognizance that it be entered into before the court or officer authorized to take the same. It was not signed, but was simply spread upon the record; and the parties sought to be charged thereby were informed as to its terms and conditions, to which they orally assented, and a record was, in like manner, made of that fact. This constituted it an "obligation of record," and it amounted in reality to a conditional judgment. It is contended by counsel for the city that notwithstanding section 5201, Gen. St. 1889, provides that all recognizances shall be in writing, and shall be subscribed by the parties to be bound thereby, such instruments are still "obligations of record," and that, in order to be of any validity, they must be executed and acknowledged before the proper court or officer, and that an instrument, although in form a recognizance, if it is not in fact so executed or acknowledged, does not rise to the dignity of an "obligation of record," and is consequently insufficient upon which to base an appeal in a criminal action, and is wholly void. The statutes of this state do not, in terms, require that a recognizance shall be either executed or acknowledged in the manner above indicated, nor is this court advised as to any valid reason for adhering to the common-law rule which requires the recognizance to be entered into before the court in which the proceedings are pending, or before an officer

specially authorized to make the same. Under our statutes, no constitutional judgment is rendered; simply a written acknowledgment of the indebtedness is filed. The only evidence that a party to a common-law recognizance ever assented to its conditions is the record itself, while the assent of a recognizer to the terms and conditions of a recognizance executed under the statute may be shown by proof of the signature thereto. In one case, it is given orally; in the other, in writing. The only purpose which could be subserved in requiring the recognizers to execute a recognizance in the presence of the court, or to acknowledge such execution before an officer, would be to secure evidence of the assent to the terms and conditions therein prescribed, and without which no recovery could be had in case of a breach thereof. As already stated, this fact may be otherwise shown.

The city contends that section 612, Gen. St. 1889, is wholly void, because of the provision therein that the defendant, upon an appeal from a judgment rendered in the police court for an offense criminal in its nature, and which is prohibited by a city ordinance, shall be entitled to an appeal only upon the execution of a recognizance conditioned for the payment of the fine and costs of appeal, if it should be determined against him. It is true that the supreme court, in the case of *In re Jahn*, 55 Kan. 694, 41 Pac. 936, held that a clause in section 1010, Gen. St. 1889, similar to the one to which objection is here made, was an unreasonable restriction on the right of appeal, and in conflict with the constitutional guaranty that "the right of trial by jury shall be inviolate"; but we do not think that, because the right to a jury trial cannot be made contingent upon the execution by the defendant of a recognizance conditioned for the payment of the fine, it necessarily follows that the entire section of the statute which contains such a requirement, and which also allows the defendant 10 days from the date of the rendition of the judgment in which to perfect his appeal, is absolutely void, and that under section 617, which provides that, "in all cases not herein specifically provided for, the process and proceedings shall be governed by the laws regulating proceedings in justices' courts in criminal cases," an appeal can only be had by complying with the statute authorizing an appeal from a judgment rendered before a justice of the peace, which allows but 24 hours after the rendition of the judgment in which to perfect an appeal. Section 5454. In answer to the argument of counsel, we need only repeat what was said in the *Hescher* Case: "The record fails to show that the defendant interposed any objection to being tried in the police court without a jury, or that he objected to giving a recognizance conditioned for the payment of any judgment which might be rendered against him. * * * He did not complain in the district court that, in order to secure a jury trial, he was required to give security for the payment of the judgment, but,

on the contrary, he resisted this motion to dismiss, and he is here contending that the court erred in sustaining that motion. * * * The recognizance is not void upon its face, nor is there anything in the record from which an inference could fairly be drawn that it was not voluntarily executed." The defendant was entitled to 10 days in which to perfect his appeal. The recognizance which was given is not void upon its face, and, in view of the facts disclosed in the record, the presumption cannot be indulged that it was not voluntarily executed. The court erred in dismissing the appeal, and the judgment will therefore be reversed, and the cause remanded for further proceedings in accordance with the views herein expressed. All the judges concurring.

STEVENS v. MOORE.

(Court of Appeals of Kansas, Northern Department, El. D. Dec. 3, 1896.)

COURT OF APPEALS—JURISDICTION—HABEAS CORPUS.

1. As the act creating the Kansas courts of appeals limits their appellate jurisdiction, in civil actions, to cases in which the amount involved, or the value of the controversy, does not exceed \$2,000, exclusive of interest and costs, such courts cannot exercise jurisdiction to review any order or judgment of a district court, or the judge thereof, unless made or rendered in an action for the recovery of money, or in which the matter in controversy has a money value.

2. A proceeding in habeas corpus, instituted and had before the judge of a district court, for the discharge of the petitioner from an illegal imprisonment, is subject to review on petition in error, is appealable to the supreme court, and not to the court of appeals.

(Syllabus by the Court.)

Error to district court, Douglas county; A. W. Benson, Judge.

Application by Mary Stevens against John C. Moore, sheriff, to be discharged on habeas corpus. From an order remanding petitioner to the custody of the sheriff, she brings error. Case certified to the supreme court.

Bishop & Mitchell, for plaintiff in error. Ellis & Cook, for defendant in error.

GARVER, J. The plaintiff in error, Mary Stevens, sought, by a proceeding in habeas corpus instituted before Hon. A. W. Benson, judge of the district court of Douglas county, to be discharged from an alleged illegal imprisonment enforced by the defendant in error, John C. Moore, as sheriff of said county. The petitioner was imprisoned under a commitment issued by one W. H. Mason, a notary public of Douglas county, because of her refusal to testify as a witness in the taking of depositions before him. A writ was duly issued by order of said judge, and, upon its return with the body of the plaintiff in error, hearing was had, resulting in an order remanding her to the custody of the sheriff. To review and reverse such order, a petition in error, with transcript of the record, has been

filed in this court. The defendant in error now moves to dismiss these proceedings, for the reasons (1) that no appeal lies from the order and decision complained of; and (2) that, if an appeal lies, the jurisdiction to review is in the supreme court, and not in this court. With this latter contention, we agree. The act creating the Kansas courts of appeals (Laws 1895, c. 96) confers upon such courts only a limited and special jurisdiction. The supreme court remains, as it always has been, the only court having general appellate jurisdiction. The jurisdiction of this court must be found within the provisions of section 9 of said chapter 96, which provides: "Said courts of appeals * * * shall have exclusive appellate jurisdiction, as now allowed by law in all cases of appeal from convictions for misdemeanors in the district and other courts of record; also in all proceedings in error, as now allowed by law, taken from orders and decisions of the district, and other courts of record, or the judge thereof, except probate courts, in civil actions before final judgment, and from all final orders and judgments of such courts, within their respective divisions, where the amount or value does not exceed \$2000, exclusive of interest and costs."

* * * All other cases of appeal and proceedings in error shall be taken as now provided by law." It is unimportant, for the purposes of this case, at this time to determine as to the correct classification, among actions and proceedings, of the proceeding known as "habeas corpus." It matters not whether the proceedings had before the judge of the district court of Douglas county should be classed with civil actions or special proceedings, or whether it is of a quasi criminal nature. The important question is, are the order and decision complained of such as this court is authorized to review? Certainly the plaintiff in error was not convicted of a misdemeanor. That term has a well-understood meaning in the law, which must be presumed to have been in the legislative mind when the statute was under consideration. There is nothing in the proceedings in this case that would justify their classification under that head. Neither can it be regarded as a continuation of the contempt proceedings, and therefore partaking of its criminal character, as is the case (Gleason v. Commissioners, 30 Kan. 53, 1 Pac. 384) when an order of commitment issued by an examining magistrate is reviewed by habeas corpus. There is no authority for such review of an order of commitment for contempt issued by a court or officer having authority to commit. Gen. St. 1889, § 4785; In re Morris, 39 Kan. 28, 18 Pac. 171. Ordinarily, we think, habeas corpus is a civil proceeding. The Code of Civil Procedure makes provision for it, and governs the practice relating to it. But, considered as a civil proceeding, we have no jurisdiction. The courts of appeals have jurisdiction to review an order or judgment of the district court, or the judge thereof, only where the

amount or value does not exceed \$2,000, exclusive of interests and costs. Jurisdiction is thus limited to a particular class of civil actions,—such only as involve controversies having a money value. It necessarily embraces only such cases as are for the recovery of money, or that concern property and property rights which have a money value. The statute furnishes no criterion other than the amount or value in controversy, by which the appellate jurisdiction of this court in civil actions may be determined. When, as in this case, the controversy is of a nature which does not allow of a reasonable valuation in money, how can it be said that the case falls within the class to which the jurisdiction is limited? This was the view of the law expressed by the supreme court in *McPherson v. State*, 56 Kan. 139, 42 Pac. 374. The last part of the second paragraph of the syllabus of the court in that case, having reference to the statute above quoted, reads: "That clause in said section which gives the courts of appeals jurisdiction where the amount or value does not exceed \$2,000, exclusive of interest and costs, includes only actions where there is an amount, or something having money value, in controversy." This was an action of quo warranto, appealed from the district court to this court, and by us certified to the supreme court, where it was held on the ground that that court had exclusive jurisdiction of that class of cases. In principle, we are unable to distinguish that case from the one under consideration, so far as jurisdiction is concerned. We are of the opinion that the questions presented upon this record are not reviewable by this court. It appealable at all, the case falls within the general appellate jurisdiction of the supreme court, which has not been disturbed by the act creating this court, except as to the special class of cases above mentioned. The case will therefore be certified to that court. All the judges concurring.

MANSPEAKER v. BANK OF TOPEKA.

(Court of Appeals of Kansas, Northern Department, E. D. Dec. 3, 1896.)

VALIDITY OF WRIT—AMENDMENT OF PLEADING—ISSUANCE OF NEW SUMMONS.

1. Where a petition and præcipe for summons are filed with the clerk of the court, neither of which is signed by the plaintiff or his attorney, the defect is merely formal, which could be, and the party should be allowed to correct by amendment. The defect is purely technical, and does not affect the substantial rights of the party. Civ. Code, § 140.

2. Nor do such defects oust the court of its jurisdiction, where a summons has been issued by the clerk, and personally served upon the defendant; and, upon amendment being made, no new summons need be issued nor served, and the action will be held as commenced at the date of the issuance of the original summons.

(Syllabus by the Court.)

Error from circuit court, Shawnee county; J. B. Johnson, Judge.

Action by the Bank of Topeka against W. W. Manspeaker. Judgment for plaintiff, and defendant brings error. Affirmed.

E. A. Austin, for plaintiff in error. D. W. Mulvane, for defendant in error.

GILKESON, P. J. The Bank of Topeka, as plaintiff below, filed a petition without signature of plaintiff or attorney, and also a præcipe for summons in like condition. The clerk of the court issued summons, which was personally served upon the defendant below, and thereupon he filed the following motion: "Comes now said defendant, appearing specially for the purpose of this motion only, and moves the court: (1) To set aside and to quash the summons, and the service thereof, for the reason that the same was not issued in pursuance of a written præcipe filed by the plaintiff. (2) To set aside and to quash the summons and the service thereof for the reason that the same was not issued upon any petition filed in the office of the clerk of this court. (3) Objecting to the jurisdiction of this court to set aside and to quash the summons herein, and the service thereof, and to strike said cause from the docket of said court for the reason that no petition, præcipe, or other proper and sufficient pleading by the party or its attorney has been made, signed, or filed sufficient to give this court jurisdiction of the case. Edward A. Austin, Atty. for Deft." This the court overruled, and permitted the plaintiff to amend its petition by signing the same, and then rendered judgment by default for the amount prayed, without new service, and this is the error complained of, for the reasons:

1. That no written præcipe was filed with the clerk of the court. While we might concede that the præcipe was informal, we cannot say that none was filed, and, if there had not been, we cannot say that it affected the jurisdiction of the court. The issuing of a summons by the clerk of the district court without a præcipe is not an error of which the defendant can complain. It is true that it was the duty of the plaintiff to file a præcipe with the clerk, and until he did so the clerk might refuse to issue the summons, and be excused therefor. But as the clerk in this court proceeded to issue the summons required by law, with the proper indorsements thereon setting forth the amount of the plaintiff's claim, we are unable to see how the defendant could be at all prejudiced by the failure of plaintiff to file a præcipe. *Goff v. Russell*, 3 Kan. 213. And in the case at bar a præcipe was filed, but not signed by the attorney or plaintiff, and the statute does not require the præcipe to be signed. Would not a præcipe (written upon the back of a petition) without signature, and filed with the petition, be a compliance with the statute? We think so.

2. That the petition filed was not signed by

the plaintiff or its attorney. Civ. Code, § 87, provides: "The petition must contain: (1) The name of the court and the county in which the action is brought, and the names of the parties plaintiff and defendant, followed by the word 'Petition.'" In *Butcher v. Bank*, 2 Kan. 70, the court held: "The action of the court in permitting the party to amend by inserting the word 'Petition,' which had been admitted, was so manifestly correct that we need not argue it. By the Code it is made necessary that the word shall follow the names of the parties to the suit in the caption. When omitted, the court should allow an amendment at any time, without delaying the suit, and ought not to sustain a motion to strike it from the files without first, at most, giving an opportunity to amend. * * * We do not happen to see how it would affect the substantial rights of the adverse party whether the amendment is made or not." Now, section 107 of the Civil Code is not any stronger: "Every pleading in a court of record, must be subscribed by the party or his attorney." And we think that a failure to sign would be a mere formal defect, which could be (and the party omitting to sign should be permitted to have) corrected by an amendment. If it is an error, it is purely technical, and does not affect the substantial rights of the party. "The court in every stage of action must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect." Civ. Code, § 140. Nor do the defects in the præcipe and petition oust the court of its jurisdiction. It certainly had jurisdiction of the subject-matter of the action, and acquired jurisdiction of the person of the plaintiff by the service of the summons; and if no motion had been filed, and the court had rendered judgment, with the petition and præcipe in the condition they originally were, judgment would not be reversed under section 140, supra.

3. That new service should have been obtained after the amendment before judgment was rendered. We cannot agree with counsel in this contention. Where the amendment was formal, and the defendant could derive no benefit from a service of summons after the amendment, such service is unnecessary. That these amendments were formal, we have decided. What benefit could the defendant derive from the service of new summons? None. The summons served gave him the same information he would have received if the præcipe and petition had been signed, and he would have received no more by the issuance of a new one. He was informed by whom he had been sued, the amount claimed, and the time required for his answer. We think the rule laid down by the supreme court of Nebraska is correct, and peculiarly applicable to this case. Upon the amendment of a petition, where the identity of the cause of

action is preserved, and the claim of the plaintiff is not substantially changed, no new summons need be issued nor served, and the action will be held as commenced at the date of the issuance of the summons in the case. *Bank v. Bollong* (Neb.) 45 N. W. 164. *Cobb, Ct. J.*, in delivering the opinion of the court, says: "Doubtless there is an abstract rule of reasoning by which it may be contended that a petition which falls short of the requirements of the law is not a petition; but a rule of that severity does not prevail in the interpretation of the statutes, and especially of the statute of amendment to pleadings in civil actions, which owes its existence to a necessity for the application of liberal rules in the furtherance of justice. * * * From an examination and comparison of the amended petition with the original, it does not appear that any new cause of action was set up, but that they are all the same causes of action, originally brought, 'separately stated and numbered,' as required by section 93 of the Civil Code, but are the same in fact; hence it is held that the amended petition is consubstantial with the original in inception and filing, and that the action was in law commenced with the service of the summons in the case; and, that I may not be misunderstood, there was no requirement of an alias summons following the amended petition." We fail to see any error in the record. The judgment of the district court will be affirmed. All the judges concurring.

**BOARD OF COM'RS OF WYANDOTTE
COUNTY v. KANSAS CITY,
FT. S. & M. R. CO.**

(Court of Appeals of Kansas, Northern Department, E. D. Dec. 3, 1896.)

**TAXES—PAYMENT UNDER PROTEST—RECOVERY
BACK.**

A payment of illegal taxes, made under protest, and to prevent the issuing of a tax warrant therefor, is not a voluntary payment, and may be recovered back, notwithstanding no warrant or other process had been actually issued for the collection of the same. *Kansas Pac. Ry. Co. v. Commissioners of Wyandotte Co.*, 16 Kan. 587, followed.

(Syllabus by the Court.)

Error from district court, Wyandotte county; H. L. Alden, Judge.

Action by the Kansas City, Ft. Scott & Memphis Railroad Company against the board of commissioners of Wyandotte county. Judgment for plaintiff. Defendants bring error. Affirmed.

S. C. Miller, for plaintiffs in error. Wallace Pratt, I. P. Dana, and Charles W. Blair, for defendant in error.

GARVER, J. This was an action brought by the defendant in error to recover back from the plaintiffs in error certain sums of money paid by the former to the latter, in satisfaction of certain illegal taxes, assessed

for the year 1888, under the provisions of chapter 214 of the Laws of 1887, entitled "An act providing for the improvement of county roads." Since this action was commenced, the act in question has been passed upon by the supreme court, and held to be unconstitutional and void. *Commissioners v. Abbott*, 52 Kan. 148, 84 Pac. 416.

The only remaining question in the case is whether the payment was a voluntary one, and therefore not recoverable. The case was tried in the district court upon an agreed statement of facts, in which it was stipulated and agreed: "Said payments were made under due protest of the illegality of the taxes, and with due notice to the county that suit would be brought to recover the same. It was paid to prevent the seizure and sale of the railroad property under the warrant of the treasurer which would have been issued if said taxes had not been paid." It was also agreed that one half of said illegal taxes was so paid on December 20, 1888, and the other half on June 20, 1889. It is contended by the plaintiffs in error that the payment should have been held to be a voluntary one, because, when made, no tax warrant or other process had been issued to collect the same. With this contention we do not agree. A payment of illegal taxes, made under the circumstances shown in this case, is not a voluntary one. This question is too well settled by the decisions of the supreme court to require further discussion. *Kansas Pac. Ry. Co. v. Commissioners of Wyandotte Co.*, 16 Kan. 587; *Atchison, T. & S. F. R. Co. v. Commissioners of Atchison Co.*, 47 Kan. 722, 28 Pac. 999. Upon the authority of these decisions, the judgment is affirmed. All the judges concurring.

In re CHAPMAN.

(Court of Appeals of Kansas, Northern Department, E. D. Dec. 16, 1896.)

HABEAS CORPUS—ILLEGAL IMPRISONMENT—ARREST ON CIVIL PROCESS—DISCHARGE.

1. While habeas corpus is a proper remedy for every illegal imprisonment, both in civil and criminal cases, an imprisonment is not illegal, in the sense of this rule, merely because the process or order under which a party is held has been irregularly issued, or is erroneous.

2. Where a creditor in a civil action files in the office of the clerk of the court in which the action is pending an affidavit of his authorized agent, stating therein the nature of his claim, that it is just, and the amount thereof, and showing that the defendant is guilty of one or more of the several fraudulent acts enumerated in section 148 of the Civil Code, and the affidavit also contains a statement of the facts claimed to justify the belief that the defendant is guilty of the fraudulent acts so charged against him, and there is also filed in said office a proper bond, as required by law, the said clerk thereby acquires jurisdiction to issue an order for the arrest of the defendant; and in such case, where the process so issued is regular upon its face, and is executed by the sheriff in the manner required by law, the defendant will not be discharged on habeas corpus merely because an attachment may have been previously

issued against him in the same case, and levied upon sufficient property to satisfy the plaintiff's claim.

(Syllabus by the Court.)

Petition of Andrew Daniel Chapman for a writ of habeas corpus. Remanded.

Mohler & Hiller, for petitioner. Z. C. Milliken and Bond & Osborn, for respondent.

CLARK, J. On February 12, 1896, Andrew Daniel Chapman applied to this court for a writ of habeas corpus, alleging that he was illegally restrained of his liberty by the sheriff of Saline county. The writ was duly issued returnable March 6th, and the petitioner was admitted to bail pending the hearing and final decision of this court. From the sheriff's return to the writ, and the agreed statement of facts submitted at the hearing, it appears that on January 6, 1896, the H. D. Lee Mercantile Company commenced an action in the district court of Saline county against the petitioner to recover the sum of \$1,282.65 then due and unpaid, on an account, and on the same day an attachment was duly issued out of said court, and levied upon stock of groceries and store fixtures, of the appraised value of \$1,342.17, as the property of the petitioner. On January 16th, Chapman filed his motion for a dissolution of the attachment. A hearing thereon was had, and on January 27th the court made, among others, the following findings of fact: That on January 4th the defendant was indebted to his brother in the sum of \$400, to his wife in the sum of \$105, and to his father in the sum of \$614; that on that day he executed chattel mortgages on the property attached to secure the payment of the \$505 to his wife and brother, and delivered possession of the property to the mortgagees; that he assigned to his father, in payment of the indebtedness due him, his book accounts, the face value of which was about \$1,300, but which did not exceed in actual value the sum of \$800; that on January 6th he executed to W. H. Bishop a note for \$100, which he also secured by a chattel mortgage on the property attached; that the statements made by the defendant to the plaintiff as to his financial condition for the purpose of obtaining credit were fraudulent as against the plaintiff; that the mortgage given to Bishop was likewise fraudulent as against the plaintiff; that the allegations in the affidavit for attachment "that the defendant had assigned, removed, and disposed of his property with the intent to hinder, delay, and defraud his creditors, and that he had fraudulently contracted the debt for which said action was brought," were true; and overruled the motion to dissolve the attachment. On the same day the plaintiff filed its motion for the sale of the attached property because of its perishable nature, and on January 28th the court ordered said property to be sold, the proceeds thereof to be held subject to the final order

and judgment of the court. An order of sale was accordingly issued on January 30th, and the property was duly sold on February 13th for \$1,450 cash. On January 29th, while the levy of the order of attachment was in full force and effect, the plaintiff filed in the office of the district clerk of Saline county an affidavit for an order of arrest, alleging therein that it had brought an action against Chapman to recover \$1,282.55, and that said claim was just, due, and remained unpaid; that Chapman fraudulently contracted this said indebtedness, and fraudulently incurred said obligation; that he had fraudulently assigned and removed and disposed of his property, with the intent to defraud his creditors; that he had begun to convert his property into money for the purpose of placing it beyond reach of his creditors; and that he had begun to dispose of his property with the intent to defraud his creditors; that the defendant had executed the several mortgages and the assignment above mentioned, and that at the time of the execution and delivery of said mortgages and assignment all of the property owned by Chapman did not exceed in value the sum of \$1,500, and that he was insolvent, and unable to pay his debts. The affidavit also recited the issuance of the order of attachment in that action and the overruling of the defendant's motion to dissolve said order. A sufficient undertaking having been entered into by the plaintiff, an order of arrest was issued by the clerk, directed to the sheriff, which was in all respects in compliance with the requirements of the statutes, and commanded the officer to arrest the defendant, and hold him to bail in the sum of \$2,585.30, or, in default thereof, to commit him to the county jail, to be kept in custody until discharged by law. Chapman was taken into custody under this order, and on February 10th he applied to the probate court of Saline county for a writ of habeas corpus, which was duly issued, and on the following day a hearing was had, and the petitioner was remanded to the custody of the sheriff. Upon the facts as above recited, the petitioner claims that he is illegally restrained of his liberty, and is entitled to be discharged by proceedings in habeas corpus.

The statute provides that the plaintiff in a civil action for the recovery of money may, upon the existence of certain facts, at or after the commencement thereof, have an attachment against the property of the defendant when certain conditions prescribed by the statute have been complied with. The order of attachment must require the officer to attach the property of the defendant, or so much thereof as will satisfy the plaintiff's claim to be stated in the order, and the probable cost of the action not exceeding \$50. Civ. Code, §§ 190-193. The requisite facts existing, and the conditions prescribed by law being fully complied with in this case, the order of attachment was right-

fully issued, and it was also properly executed.

The statute likewise authorizes the arrest of a defendant in a civil action either before or after judgment, when an affidavit of the plaintiff, his authorized agent or attorney, is filed in the office of the clerk of the court in which the action is brought, containing certain essential allegations. Civ. Code, §§ 147-149. The grounds upon which an order of arrest may be issued are quite similar to those which authorize proceedings in attachment. The object of the proceeding by order of arrest and by attachment is the same,—to compel payment of a debt fraudulently contracted, or payment of which is fraudulently evaded,—and the statute does not, in terms, provide that the plaintiff shall not have an order of arrest in an action wherein he has taken defendant's property in attachment. We do not think that the law contemplates that the creditor may, before judgment, cause the arrest of the defendant after having attached sufficient property to satisfy the full amount of his claim and the probable costs of the action. This seems to be the view taken by our supreme court in *Bank v. Mottin*, 47 Kan. 455, 28 Pac. 200, where it was held that, while a creditor holding a chattel mortgage as security for his debt upon property belonging to the debtor can maintain an attachment against the same and other property of the debtor, if such a chattel mortgage is ample security to pay the creditor's claim in full, any one interested would be entitled upon motion to have so much of the property not embraced in the chattel mortgage discharged from the attachment as is not needed for the payment of the claim. In that case the court with approval cited *Gillespie v. Lovell*, 7 Kan. 419, where an attachment had been levied in an action for the recovery of money and to foreclose a mechanic's lien, and it was said, "It can hardly be supposed that the law intends to give the plaintiff a double security." But, if sufficient property is not levied upon to satisfy the order of attachment, or the property attached is incumbered by prior liens of any kind, probably an order of arrest might properly be issued, and the defendant be held to bail in a sum double the amount of the debt remaining unsecured. *Shedd v. McConnell*, 18 Kan. 594. What may be finally determined as to which has priority, the liens of the chattel mortgage or the attachment levy, is mere speculation. The court found the attached property to be of the value of about \$1,500. It was appraised at \$1,342.17, and was afterwards sold by order of the court as perishable property for \$1,450. The plaintiff's claim and the probable costs of the action amounted to only \$1,332.65. Had the plaintiff admitted that the liens of the chattel mortgages had priority over the attachment levy, then, for the purpose of procuring an order of arrest, all of plaintiff's claim in excess of the amount due on the mortgages should have been considered as fully satisfied by virtue of the attachment proceedings, and

the defendant ought not to have been held to bail in a sum exceeding double the amount due on the chattel mortgages, instead of double the amount of plaintiff's claim as set forth in the petition, as was required in this case. If by the attachment levy the plaintiff acquired a prior lien on the property attached, it had all the security to which it was justly entitled. We think, as the affidavit for an order of arrest showed upon its face that the plaintiff had elected to pursue its remedy by attachment, and failed to show that its claim had not been amply secured by virtue of the levy of the attachment, a presumption would arise that sufficient property had been levied upon to satisfy the order of attachment. While the statements recited in the affidavit, if true, were sufficient to justify the belief that the defendant had fraudulently contracted the debt, and was seeking to fraudulently evade its payment, the further recital therein with reference to the attachment proceedings in our opinion tended to show that the plaintiff had obtained ample security for the payment of its claim, and that an order of arrest should not have been issued. Still the affidavit was made by the authorized agent of the plaintiff. It contained the essential particulars required by the statute, and was filed in the proper office. Under section 148 of the Civil Code, the clerk has jurisdiction and authority to pass upon the question as to the sufficiency of the affidavit, and, having done this, and the proper bond having been filed, he also had jurisdiction to issue the order of arrest. The process was regular upon its face, and there is no claim that the sheriff in any way failed to execute it in the manner required by law. Such being the case, the order of arrest was not void, nor were the proceedings thereunder mere nullities. While habeas corpus is a proper remedy for every illegal imprisonment, both in civil and criminal cases, an imprisonment is not illegal in the sense of this rule merely because the process or order under which a party is held has been irregularly issued, or is erroneous. The authorities are uniform that this writ is not intended to have the force or operation either of an appeal or a writ of error, nor is it a substitute for either. *Ex parte Maxwell*, 11 Nev. 428; *Ex parte Ah Sam*, 24 Pac. 276; *Sennott's Case*, 146 Mass. 489, 16 N. E. 448; *Ex parte McCullough*, 35 Cal. 97; *Ex parte Crouch*, 112 U. S. 178, 5 Sup. Ct. 98; *In re Morris*, 39 Kan. 28, 18 Pac. 171; *Barton v. Saunders*, 16 Or. 51, 16 Pac. 921. In *Peltier v. Pennington*, 14 N. J. Law, 312, it is said that a defendant will not be discharged on a writ of habeas corpus where the writ on which he is detained is in itself a legal and proper one, and the court out of which it issued is of competent jurisdiction, and where the only matter in dispute is the regularity of the process and the validity of the arrest. In *Re Morris*, *supra*, the following language is used: "We can question any defects which may affect the jurisdiction of the court or

officer, and which would render the proceedings void. The jurisdiction having been established, we cannot inquire into the regularity of the proceedings. If there have been errors committed, even flagrant ones, the remedy for correcting them is not to be found in proceedings in habeas corpus." In *State v. Bridges*, 64 Ga. 146, we find the following language: "Where the imprisonment takes place on mesne process, the range of inquiry upon habeas corpus is merely whether the plaintiff has brought a proper suit in the proper court, and has taken all the steps in the procedure which the law lays down as conditions precedent. These things appearing, the lawfulness of the custody follows necessarily. The investigation relates to what has been done, not to whether it ought to have been done." In *People v. Liscomb*, 60 N. Y. 559: "If the process is valid on its face, it will be deemed *prima facie* legal, and the prisoner must assume the burden of impeaching its validity by showing a want of jurisdiction. Error, irregularity, or want of form is no objection; nor is any defect which may be amended or remedied by the court from which it issued." In *Church, Hab. Corp.* § 383, the author says: "To obtain a discharge on habeas corpus from an arrest under a body execution, the defects in the execution must be matters of substance required by law, rendering the process void, and not merely voidable; for in the latter case the remedy is by motion to set it aside." A New York statute in effect provided that a warrant for the arrest of the defendant in a civil action should not issue until after execution against his property, directed to the proper officer of the county in which the defendant resided, had been returned unsatisfied. A defendant was arrested upon process regular in all respects, except that no execution against his property had been issued as required by the statute, and it was held that, although the issuance of the process under which he was held was irregular, it was not void, and that he was, therefore, not entitled to be discharged on habeas corpus, but that his proper remedy was to apply to the court to have the order of arrest vacated. *Bank v. Jenkins*, 18 Johns. 304. The petitioner has cited in support of his application the cases of *In re Grey*, 41 Kan. 461, 21 Pac. 678; *In re McMicken*, 39 Kan. 406, 18 Pac. 473; *Ex parte Randolph*, Fed. Cas. No. 11,558. In the *Grey Case* the order of arrest was issued in accordance with section 27 of justice's act, which commanded the constable to arrest the execution debtor only in case the judgment should not be paid, or an amount of personal property sufficient to satisfy the judgment could be found within the county whereon to levy execution. The constable levied on property which was subsequently replevined by a third party claiming to be its owner, and it was held that, while that levy remained in full force and subsisting, and no further effort was made to obtain satisfaction of the judgment from other personal property of the

judgment debtor, the officer had no authority to arrest the defendant. In the Randolph Case it was held that the auditor of the treasury, after having settled an account of a public officer, and closed it, had no authority thereafter to open it, restate it, and upon the account thus restated to institute proceedings by a warrant of distress against the debtor; and it was there said that upon habeas corpus the question is not whether there is error in the proceedings, but whether there was jurisdiction in the case of the auditor of the treasury. In the McMicken Case the petitioner had been informed against for crime, and the district court overruled his motion to discharge him under section 220 of the Criminal Code, which reads: "If any person under indictment or information for an offense, and committed to prison, shall not be brought to trial before the end of the second term of the court having jurisdiction of the offense, which shall be held after such indictment found or information filed, he shall be entitled to be discharged so far as relates to the offense for which he was committed unless the delay shall happen on the application of the prisoner or shall be occasioned by the want of time to try the cause at such second term." The court said that there could be no question that the prisoner was entitled to his discharge upon his motion, as the record clearly shows that the delay had not happened upon his application, or been occasioned by the want of time to try the case; and a majority of the court reached the conclusion that, as the petitioner was entitled to his discharge in the district court, he ought to be released in his proceeding in habeas corpus, as that proceeding was the only one which afforded him a speedy remedy; that, if his only remedy was by appeal, he must continue wrongfully restrained of his liberty until the case was finally determined by the district court, as an appeal can be taken by defendant only after judgment that it would be a palpable violation of the bill of rights, and also of the statute, to require an accused, who was entitled to his discharge so far as relates to the offense for which he was committed, to be restrained of his liberty indefinitely at the instance of the state, or upon the order of the court to await his final trial or determination of the case against him. While the decision in the McMicken Case was not unanimous, a much stronger showing was made in that case than in this one. There the petitioner had applied to the court in which the criminal action was pending against him for his discharge under the statute. The court erroneously overruled his motion. In this case no application for relief was made to the court in which the civil action was pending against the petitioner. Section 173 of the Civil Code provides that "a defendant may at any time before judgment apply on motion to the court in which the suit is brought, if in session, and in vacation to a judge thereof, to vacate the order of arrest or to reduce the

amount of bail." Under this section of the statute ample authority is given the trial court to correct any error which may have been committed by the clerk by vacating the order of arrest, if it should appear that the plaintiff was already ample security for the payment of its claim, or to reduce the amount of bail if for any cause it should be found too excessive. In *Barton v. Saunders*, supra, it was said: "Where a court acquires jurisdiction over the subject-matter and person, it becomes its right and duty to determine every question which may arise in the cause without any interference from any other tribunal. Writs of habeas corpus cannot reach errors or irregularities which render proceedings voidable merely, but only such defects in substance as render the proceedings or judgment absolutely void. It is unanswerable return to a writ of habeas corpus that the court had jurisdiction in which the action was pending and out of which the writ of arrest was issued, and was competent to correct any error or abuse of its powers, or to set it aside. As already said, the petitioner has made no application to the district court for the relief to which he was entitled under section 173 of the Civil Code. Should he do so, doubtless the irregularities of which he complains would be rectified. A much more speedy remedy is afforded under that section than could be had by proceedings in habeas corpus, even if the latter were a proper remedy. We are, however, of the opinion that the restraint of the petitioner is not illegal in the sense in which the word is used in section 660 of the Civil Code, that he is not entitled to be discharged in this proceeding, and that he should be remanded to the custody of the sheriff. All the judges concurring.

CITY OF OREGON CITY v. MOORE,
Treasurer.¹

(Supreme Court of Oregon. Dec. 7, 1896.)

ROAD TAXES—SPECIAL LAW—MANDAMUS.

1. A provision, in a special law incorporating a city, giving the city authorities the right to control the expenditure of funds applicable to the improvement of roads and streets within the city, collected under general laws, does not conflict with Const. art. 4, § 23, subds. 7, 10, inhibiting special or local laws "for laying, opening, and working on highways and for the election or appointment of supervisors," and "for the assessment and collection of taxes for * * * road purposes."

2. Under Hill's Ann. Laws, § 4085, as amended by Laws 1893, p. 60, authorizing the county to levy and collect a road tax, and providing that the county court shall apportion the amount collected among the road districts in the county, having due regard to the amount of taxes collected therein, to the condition of the roads, and the necessity for repairs, and to the amount of travel thereon, a city having the right to control the expenditure of its part of such funds cannot compel the county treasurer to pay the same to it till such apportionment is made.

Appeal from circuit court, Clackamas county; T. A. McBride, Judge.

¹ Rehearing pending.

Application by the city of Oregon City for mandamus to M. L. Moore, treasurer. Writ denied, and plaintiff appeals. Affirmed.

C. D. Latourette, for appellant. O. C. Brownell, for respondent.

BEAN, J. This is a mandamus proceeding to compel the county treasurer of Clackamas county to pay over to the plaintiff certain road taxes collected under the general laws of the state. The record discloses that in January, 1895, the county court of that county levied a tax of four mills on the dollar on all the taxable property within the county, and a poll tax of two dollars upon each and every person liable therefor, for road purposes, as authorized by subdivision 4 of section 4085, Hill's Ann. Laws Or., as amended in 1893 (Laws 1893, p. 60), and that pursuant to such levy there has been collected from the property and inhabitants of the plaintiff, and paid over to the defendant, the sum of \$2,874.77, which the plaintiff claims by virtue of subdivision 28 of chapter 5 of its charter, which reads as follows: "The council shall have exclusive control and direction of all funds collected under general laws for the improvement of roads and streets within said corporation, and the street superintendent shall perform the duties of supervisor as required by the general laws of this state relating to streets and highways; but he shall report to and be under the direction of the city council and not to the board of county commissioners of Clackamas county; provided, that the city council may, by ordinance, direct that any or all of such funds collected for road purposes be expended on any main county road leading into Oregon City when, in their judgment, the city would be benefited thereby; provided, that the city council shall turn over to the county court of Clackamas county forty per cent. of the funds so collected each year and the same shall be expended under the direction of said county court on main county roads leading into Oregon City." In behalf of the defendant it is contended that this provision of plaintiff's charter is in conflict with article 4, § 23, subds. 7, 10, of the state constitution, which inhibits the legislature from passing special or local laws "for laying, opening, and working on highways, and for the election or appointment of supervisors," and "for the assessment and collection of taxes for state, county, township, or road purposes," and is therefore void. But it seems to us that upon this question the case is ruled by City of East Portland v. Multnomah Co., 6 Or. 62, in which it was held that a provision, in an act incorporating a city, excepting the territory within the limits of the municipality from the jurisdiction of the county court for road purposes, and vesting the same in the municipality, was not violative of the provisions of the constitution referred to. This case was reaffirmed in Multnomah Co. v. Sliker, 10 Or. 65, and City of Astoria v. Clat-

sop Co., cited Id., not reported. Now, if the legislature may, by a special law incorporating a city, constitutionally vest in the municipality exclusive jurisdiction over the county roads within its boundaries, it seems to us that no valid objection can be made, on constitutional grounds, to a provision in such an act merely conferring upon the municipal authorities the right to control the expenditure of funds applicable to the improvement of roads and streets within the municipality, collected under general laws.

But, notwithstanding the constitutionality of plaintiff's charter, the demurrer to the alternative writ was properly sustained, because it does not appear from the record that the portion of the tax collected under the levy of January, 1895, to which plaintiff is entitled, has ever been ascertained or determined by the proper tribunal, or at all. The statute under which it was levied provides: "That in any county of this state the county court of such county at the time of levying the tax for county purposes may if in the judgment of the county court it is for the best interest of the county, levy a tax upon all the taxable property in the county, not to exceed five mills upon the dollar, and in addition thereto a poll tax of two dollars be assessed upon every person who shall be liable to pay a state poll tax, which taxes shall be collected with and at the same time and in the same manner as county taxes shall be collected, and shall be paid into the county treasury, and shall be kept as a separate fund to be known as the road fund, and shall be used for the purpose of laying out, opening, making and repairing county roads, and building and repairing bridges; and no other tax or other taxes for the purpose in this section mentioned shall be levied or collected except that the county court may order bridges built or repaired out of the general fund. Such county court shall apportion the taxes so collected among the several road districts in the county, having due regard to the amount of taxes collected in the several road districts, to the condition of the roads, and necessity for repairs, and to the amount of travel thereon. The county clerk shall thereupon notify the road supervisor in each of the road districts in his county of the amount of the road fund set apart for the use of his road district for opening, making and repairing county roads and building bridges in his road district; and such supervisor shall direct and supervise the expenditure of such amount of the road fund so set apart for the purpose herein named, and certify his accounts for labor performed or material furnished to the county court; and if the county court approves the same, it shall order warrants on the county treasurer in favor of the person performing such labor or furnishing such material payable out of the fund to the credit of such road district and until such fund is exhausted." Laws 1893, p. 60. Under the general law the county court is invested with jurisdiction to divide the

county into road districts, and, by the statute in question, to levy and collect a special tax for road purposes, and apportion the same among the several road districts of the county, in the manner therein provided, and, through supervisors appointed by it, to control and direct the expenditure of the amount set apart for each road district. This jurisdiction extends to all parts of the county, including the territory of Oregon City, except as it may be limited and qualified by the city charter. And the only limitation to be found in the charter is that the municipal, and not the county, authorities shall "have the control and direction of all funds collected under the general laws for the improvement of roads and streets within said corporation," and the right to appoint the road supervisor. In all other respects, the jurisdiction of the county court over the territory of Oregon City remains unimpaired. It may divide it into road districts; levy and collect from the inhabitants thereof, and the property therein, in connection with the remainder of the county, a road tax; ascertain and determine the amount thereof, which shall be apportioned to and expended in the road district or districts within the limits of the municipality; but, when the apportionment is made, its jurisdiction ceases, so far as the expenditure of the amount set apart for the district or districts within Oregon City is concerned, and that of the municipality begins. Until such apportionment there can be no fund arising out of the tax "for the improvement of roads and streets" within Oregon City, or in any other district of the county. The statute does not require the tax to be expended in repairing the roads and highways in the district from which it is collected, but it becomes a common road fund, to be apportioned by the county court among the several districts of the county; having due regard to the amount of tax collected from each district, the condition of the roads, and the amount of travel thereon. This apportionment is a judicial act, and until it is made the county treasurer certainly cannot be compelled by mandamus to pay over any part of the fund to the plaintiff. No such proceeding seems to have been had, and therefore the judgment must be affirmed, and it is so ordered.

KANSTEINER v. CLYNE.

(Supreme Court of Idaho. Dec. 3, 1896.)

NONSUIT—PRIMA FACIE CASE.

Held, that the plaintiff established a prima facie case, and the court erred in granting nonsuit.

(Syllabus by the Court.)

Appeal from district court, Bingham county; D. W. Standrod, Judge.

Action by E. Kansteiner against D. H. Clyne to recover certain live stock, or its value, and damages. Judgment of nonsuit, and plaintiff appeals. Reversed.

F. S. Dietrich and H. J. Hasbrouck, for appellant. Reeves & Terrell, for respondent.

SULLIVAN, J. This is a suit in replevin, brought to recover the possession of 16 head of live stock (cattle), or their value, alleged to be \$275, in case a recovery of the possession cannot be had, together with damages. The defendant admitted the taking, and seeks to justify on the ground that he, as constable, took said stock under and by virtue of an execution against the property of plaintiff's husband. The judgment of the justice court was in favor of the defendant, and an appeal was taken to the district court. The cause was tried in that court to a jury, and, at the close of plaintiff's evidence, on motion of defendant, a nonsuit was granted, and judgment entered against plaintiff. This appeal is from the judgment. The appellant specifies as error the granting of the motion for nonsuit and the entry of judgment of dismissal. The evidence of plaintiff shows that she was in the actual possession of the live stock mentioned in the complaint, and at least tends to show that she is the owner thereof, and established a prima facie case. It was error to grant the nonsuit. The judgment is reversed, and cause remanded for trial. Cost of appeal awarded to appellant.

MORGAN, C. J., and HUSTON, J., concur.

HOLCOMB et al. v. REED.

(Supreme Court of Idaho. Dec. 3, 1896.)

UNDERTAKING ON APPEAL—JUSTIFICATION OF SURETIES—DISMISSAL OF APPEAL.

Notice of filing exceptions to the sufficiency of sureties to an undertaking on appeal should be given to the adverse party. Under the facts of this case, *held*, that appellant had sufficient time in which to have sureties justify or to file a new undertaking after notice in open court of filing exceptions.

(Syllabus by the Court.)

Appeal from district court, Bannock county; D. W. Standrod, Judge.

Action by J. T. Holcomb and others against J. S. Reed in the probate court. Judgment for plaintiffs, and defendant appealed. From an order dismissing the appeal in the district court, defendant appeals. Affirmed.

H. V. A. Ferguson, for appellant. W. C. Love, for respondents.

SULLIVAN, J. This is an appeal from an order of the district court of Bannock county dismissing an appeal from the probate court of said county, and from the judgment of dismissal. The facts are as follows, as disclosed by the transcript: Judgment was made and entered against the appellant, Reed, by the probate court of Bannock county, and thereafter an appeal was taken to the district court of said county. The appellant filed his undertaking on appeal on November 9, 1896, and on

the 13th day of said month the plaintiffs, by their attorney, duly filed exceptions to the sufficiency of defendant's sureties to said undertaking. No notice of the filing of said exceptions was served on appellant or his attorney. On the 18th day of November the case came on for trial in the district court, and counsel for respondents was then notified in open court that said sureties had been excepted to. Thereafter, and on the 19th day of November, the cause came on to be heard on the motion to dismiss the appeal, whereupon counsel for respondents consented to give appellant two days' time for the sureties to appear and justify; and on the 21st day of November, the sureties having failed to appear and justify, the appellant asked for further time in which to file an undertaking, and the court granted said request, and extended the time to November 23d, whereupon, on the 23d of November, no undertaking having been filed, the cause came on for hearing on motion to dismiss the appeal, and, after hearing the argument of counsel, and as the record recites, the court, being fully advised in the premises, ordered the appeal dismissed. The contention of appellant is that he was entitled to notice of the filing of exceptions to the sufficiency of the sureties, and that such notice was not served on him.

Under the provisions of section 4842, Rev. St., the adverse party may except to the sufficiency of the sureties on an undertaking on appeal. Said section does not, in terms, require notice of the filing of such exception to be served on the appellant or his attorney. But professional courtesy and the better practice require such notice to be served. However, in this case the time for the sureties to justify or for the filing of another undertaking was extended from the 18th of November to the 23d of that month, with full notice to appellant's counsel; and the record shows that they failed to appear and justify, and respondents failed to offer a new undertaking. Under that state of facts, the court did not err in dismissing said appeal. The judgment of the court below is sustained. Costs of this appeal awarded to respondent.

MORGAN, O. J., and HUSTON, J., concur.

**COMMERCIAL BANK OF MOSCOW v.
LIEUALLAN et ux.**

(Supreme Court of Idaho. Nov. 30, 1896.)

CONFLICT IN EVIDENCE—FINDING OF FACTS.

1. The facts found by the court will not be disturbed on appeal where there is a substantial conflict in the evidence.

2. *Held*, that there is no such conflict in this case.

(Syllabus by the Court.)

Appeal from district court, Latah county; W. G. Piper, Judge.

Action by the Commercial Bank of Moscow against J. W. Lieuallen and wife. Judgment for plaintiff. Defendants appeal. Reversed.

Sweet & Steel, for appellants. Forney, Smith & Moore, for respondent.

SULLIVAN, J. This action is by the commercial bank against J. W. Lieuallen and C. C. Lieuallen, as makers of a promissory note for \$1,683.75. The plaintiff prays for a decree foreclosing the real-estate mortgage executed by J. W. Lieuallen and Ivanella Lieuallen, husband and wife, as security for the payment of said note. A. A. Lieuallen and A. J. Cable were made defendants, on the ground that they had a lien against the real estate, which lien plaintiff claims is subsequent to the lien of said mortgage. J. W. Lieuallen and his wife contested the right of the bank to foreclose said mortgage, on the ground that said promissory note had been paid in full. The suit was tried by the court, without a jury, and judgment and decree of foreclosure were entered against the defendants. This appeal is from the judgment and order overruling defendants' motion for a new trial. Several errors are assigned.

The facts of this case are substantially as follows: The plaintiff seeks to foreclose a mortgage on real estate given to secure a promissory note executed for \$1,683.75, and dated January 27, 1892, due six months after date, claiming a balance due thereon of \$894.20, with interest from November 21, 1892. The defendants admit the execution of the note and mortgage, but claim that said note has been paid in full, by the payment of a certain amount of cash, and the execution of a promissory note for the sum of \$1,556.25, dated August 23, 1893; that the last-mentioned promissory note was paid, part in cash, and the balance by a promissory note for \$763.60, dated November 23, 1893, which was secured by chattel mortgage, on which chattel mortgage foreclosure proceedings were commenced December 4, 1894, during the pendency of this action. The plaintiff claims that said \$1,556.25 note and the \$763.60 note were "memorandum notes," representing the balance due on the \$1,683.75 sued on in this action, after certain payments were made, and gives as one reason for taking said first-mentioned note that the matter would run for a long time, and would save the expense of executing a new mortgage, every time a partial payment was made thereon. Witness Funk, cashier of the bank, testified as follows, to wit: "I took a note for \$1,500 and some odd dollars,—I think \$1,525.25, if I remember correctly,—simply as a settlement as to the balance due, and pinned it right to this [note of \$1,683.75], and told him [Lieuallen] we would hold this as the collateral to this note of \$1,556.25; and then when he made a further settlement, after selling some property for \$700, I destroyed the other note [meaning the \$1,556.25 note], gave it to him, and pinned a note to this as a memorandum note, still holding this note in the same position as it was when we had the fifteen hundred. we considered a memorandum; it was with us

all the time." Some of the above evidence is a little obscure, but is made plain by other evidence. Mr. Funk, on behalf of plaintiff, testified in regard to the \$763.60 note as follows: "It is simply a memorandum of a settlement that we had, which is the balance due on this note,"—meaning the \$1,683.75 note. The following question was propounded to witness Funk: "Q. Mr. Funk, I will ask you to state whether or not it is the fact that this \$764 note [meaning the \$763.60 note], which is secured by chattel mortgage, is not the balance which was due upon the \$1,600 note [meaning the \$1,683.75], or whatever the amount is, that you have sued on in this complaint." "A. That is the facts in the case." The witness Funk further testified: "Q. Please state to the court what your object was in taking the personal note of Mr. Lieuallen, when you had a note which was secured by a real-estate mortgage. A. I have already explained that every time he made a little payment,—any time he wanted to settle up,—he would have to go to the expense of a new mortgage." The evidence on the part of the appellants shows that the \$1,556.25 note was given to pay a balance due on the \$1,683.75 note; that on the 16th day of October, 1893, he paid \$764 on the \$1,556.25; that when said \$1,556.25 note became due, on the 23d of November, 1893, the defendants paid the balance due on said note by giving a promissory note for \$763.60, dated November 23, 1893, and by paying the interest then due, which was \$56.25, and gave a chattel mortgage to secure said last-mentioned promissory note. The original note for \$1,556.25 is before us, and is stamped, "Paid November 25th, 1893," and contains the signatures of "J. W. and C. C. Lieuallen." It is a little surprising to find a promissory note such as the one last above referred to, claimed to have been made and kept as a "memorandum" of the balance due on another note, containing not only the signature of the debtor, but the signature of a surety. Why the signature of a surety to mere memoranda? There is indorsed on the face of the original note (the \$1,683.25 note) the following, in pencil: "R. E. Mtg. Collateral to note \$763.60, due Feb. 23rd, 1894." Witness Funk testified that, when he took the \$1,556.25 note, he indorsed on the face of said original note the above indorsement, except that in place of "\$763.60, due Feb. 23rd, 1894," he wrote, "\$1,556.25" and when due.

Appellant contends that the note of \$1,683.25, on which this suit was brought, had been paid, and that the evidence clearly shows that fact. The evidence shows that the original note was superseded by the note for \$1,556.25, and that note was paid in full, and stamped "Paid" by the respondent and delivered to appellants; that it was paid as follows: Cash, on October 16, 1893, \$764; cash, on November 23, 1893, \$56.25; and balance, \$763.60, by promissory note, dated November 23, 1893, and secured by chattel mortgage. While it is true there is a conflict in

the oral testimony given by J. W. Lieuallen, for defendants, and the oral testimony of the witness Funk, for the plaintiff, as to the place occupied by the note of \$1,556.25 in this transaction, the testimony of Mr. Lieuallen is supported by the written evidence in the case made by the plaintiff, and is in direct conflict with the oral evidence produced by plaintiff. Mr. Lieuallen testified that the \$1,556.25 note was given in part payment of the \$1,683.25 note sued on in this case, and on the last-named note are written by Mr. Funk, cashier of the bank, the following words and figures: "R. E. Mtg. Collateral to \$1,556.25, due Nov. 23rd, 1893." If that be true, then there was a change of some kind made. The \$1,556.25 note took the place of the original, and the original became the collateral, if the testimony of Funk be true. But Mr. Funk also testified that the \$1,556.25 was only a "memorandum note," as he terms it, made for the purpose of showing the balance due on the original note. If that, in fact, was the purpose, why call in C. C. Lieuallen to sign said memorandum note as a security? And if that be simply a memorandum of the balance due on the original note, why indorse on the face of the original that the original is held as collateral to the memorandum? And why indorse the \$1,556.25 note "Paid," and deliver it to appellant J. W. Lieuallen, if it was intended simply as a memorandum of the balance due on said original note on August 23, 1893? And if the \$763.60 note was a mere memorandum note, to show balance due on note of \$1,683.75, why have it secured by chattel mortgage? If the theory of the plaintiff is in accordance with the facts of this case, it has been most unfortunate in making evidence that strongly supports the theory of the defendants, and absolutely refutes its own position. There is no substantial conflict in the evidence. The respondent contends that there is a conflict in the evidence, and that the note of \$1,683.75 was paid, part in cash, and part by the \$1,556.25, thus satisfying that note and the mortgage given to secure it. The \$1,556.25 note was paid, part in cash, and the balance, \$763.60, by promissory note, dated November 23, 1893, which note was secured by chattel mortgage.

The respondent contends that there is a conflict in the evidence, and, for that reason, this court will not disturb the findings of the court below where there is a scintilla of evidence to support them, and cites, among other cases, that of *Sabin v. Burke*, 37 Pac. 352, 355, decided by this court, as sustaining that contention. That case does not sustain the position of respondent. In that case the court said: "In causes tried by the court below, without a jury, the decision of the court on questions of fact takes the place of the verdict of the jury in jury trials, and will not be disturbed when there is a substantial conflict in the testimony, unless the decision is clearly against the weight of the testimony."

That, we think, is the correct rule; and, as there is no substantial conflict in the evidence, the court will not hesitate to reverse the judgment, in order that justice may be done.

It is not necessary for us to pass upon other points raised in this case. The judgment of the court below is reversed, and the case is remanded, with instructions to enter judgment in favor of appellants. Costs of this appeal awarded to appellants.

MORGAN, C. J., and HUSTON, J., concur.

CAMPBELL, Sheriff, v. BOARD OF COM'RS OF CANYON COUNTY.

(Supreme Court of Idaho. Nov. 30, 1896.)

DEPUTY SHERIFFS—APPOINTMENT—REVIEW.

1. The sheriff cannot appoint a deputy, unless empowered by the board of county commissioners so to do; and the said board must, when so requested, determine the necessity therefor.

2. The order of such board, authorizing or refusing to authorize such appointment, may be reviewed on appeal by the district court.

3. When such appeal is taken, there must be a trial de novo by the district court.

(Syllabus by the Court.)

Appeal from district court, Canyon county; J. H. Richards, Judge.

Application was made by plaintiff, Daniel D. Campbell, sheriff of Canyon county, Idaho, to the board of county commissioners of said county for authority to appoint a deputy. The application was denied by the board. The sheriff took an appeal from the order of the board of county commissioners to the district court. The district court reversed and set aside the order of the board, and directed the county commissioners to authorize the sheriff to appoint a deputy, and fix a reasonable compensation for the same; and the board appealed. Reversed.

John T. Morrison, for appellant. W. M. Borah, for respondent.

MORGAN, C. J. Section 1815, Rev. St. Idaho, is as follows: "Every county officer except probate judge, commissioner, school superintendent and coroner may appoint as many deputies as may be necessary for the faithful and prompt discharge of the duties of his office." This section of the statute evidently places the question as to whether one or more deputies are required to properly discharge the duties of his office wholly within the discretion of the officer making the appointment. Under this section the sheriff might, whenever he deemed there was a necessity therefor, appoint a deputy or deputies to assist him in the discharge of his duties. With this discretion, thus vested in the sheriff, neither the commissioners nor any other county officer could interfere in any manner. The constitution (article 18, § 6) has made a change with reference to this matter. The provision relating thereto is as follows: "The sheriff, auditor, recorder, and clerk of the dis-

trict court shall be empowered by the county commissioners to appoint such deputies and clerical assistance as the business of their office may require; said deputies and clerical assistants to receive such compensation as may be fixed by the county commissioners." It would appear from this provision of the constitution that the sheriff has no power to appoint a deputy unless he is so authorized by the action of the board of county commissioners, and said board is to authorize him so to do when the business of the office may require. Clearly, this question of the appointment is by the constitution submitted entirely to the judgment of the county commissioners, and therefore, necessarily, the discretion heretofore exercised by the sheriff is taken away, and conferred upon the board. In determining the question of the necessity of deputies, the board of county commissioners acts in a semi-judicial capacity; that is, in determining whether the business of the office requires one or more deputies, they must gain information in regard to the amount of business transacted by this officer, and, in doing so, it will be necessary for them to receive evidence, either written or oral, or both, as to the amount of such business. Having received this evidence, they are to determine the matter, by consideration of the same, as to whether the officer should be authorized to appoint one or more deputies. Having come to a determination of the question, the order must be entered in their records, authorizing such appointment or refusing to do so.

In this case the record does not show that the board of county commissioners was informed in any manner as to the business of the office, or as to the amount of fees coming into the office; and it does not appear, from this record, that they received any evidence whatever to guide them in making the order of April 13th, by which they refused to empower the sheriff to appoint a deputy. From this order of the board the sheriff appeals to the district court, and for the first time files what may be termed a "complaint," stating, substantially, that he is a taxpayer of Canyon county, Idaho, and resides therein; that he is the duly elected, qualified, and acting sheriff of said county; that on the 12th day of April he made application to the board of county commissioners of said county, asking to be empowered to appoint a deputy for the sheriff's office for the balance of the then present year, at a salary of \$100 per month; that on the 13th of April aforesaid the board refused this request; that the appellant deemed said order illegal and prejudicial to the public interests and welfare of said Canyon county; that he is personally aggrieved by said action; that said deputy was required by the business of his office; that it is impossible for him to efficiently attend to the duties of said office and business without the assistance of a deputy. Thereupon the attorney for the appellant, and C. M. Hays, district attorney, who appeared for the board of county commission-

ers, entered into the following stipulation, substantially: The plaintiff is the sheriff of Canyon county, and has been since the 7th day of January, 1895, and, acting as such, the said sheriff made application to the board of county commissioners of said county for power to appoint a deputy; that, at the time of such application, the sheriff had no other assistance than the deputy asked for in said application, and has not had since; that, at the time of said application, and ever since, and at all times, the duties and responsibilities of said office necessitated the assistance of a deputy as applied for, and that \$100 a month would be a reasonable compensation for said deputy; that these facts were made known to the county commissioners at the time of said application; that, in case said deputy is appointed, and said county commissioners are directed to appoint said deputy, he shall receive the compensation referred to, or fixed, from April 8, 1895. Upon such stipulation of facts the court, sitting without a jury, finds that the duties and responsibilities of the said office necessitate the assistance of a deputy, as applied for in said application, and, as a conclusion of law, that the refusal of said board to allow said application was error, and that the plaintiff herein is entitled to an order from said board empowering him to appoint said deputy at a reasonable compensation; and judgment was entered accordingly, ordering and directing the order of the board of county commissioners to be set aside, and directing the said board to empower said sheriff to appoint said deputy and fix a reasonable compensation for the same, and for costs.

Authorizing the sheriff to appoint a deputy being wholly within the discretion of the board of county commissioners, it is clear that the district attorney, or the attorney for the board, cannot stipulate away this discretion; and when, as appears in this stipulation, he has determined, for the board, that the assistance of a deputy is necessary for the proper transaction of the public business in charge of the sheriff, and that \$100 would be a reasonable sum per month as compensation for said deputy, and that his compensation should commence on April 8, 1895, it is, in effect, stipulating away the discretion of the county commissioners, and is beyond the power of the district attorney so to do. As stated before, the county commissioners should determine, themselves, upon the evidence presented, whether the business of the office of the sheriff requires the assistance of a deputy, when application for such deputy is made. Having so determined, they should enter their order. This order, by the statute, like all other orders of the board of county commissioners, is made appealable to the district court in and for the proper county. The trial in the district court is, like all other trials, a trial de novo upon the evidence presented; and, upon such trial, the judge of the district court, with or without a jury, as the case may be, has the right to direct the county

commissioners, as in this case, either to refuse to empower the sheriff to appoint a deputy, or to authorize him to make such appointment, as the case may seem to justify. Inasmuch as the board of county commissioners seem to have acted without evidence in the matter, so far as the record shows, and as the district attorney has practically stipulated away the discretion of the board of county commissioners by a stipulation signed by him, and as the district court has acted upon this statement of facts, and taken for granted that the district attorney had a right to so stipulate, it will be necessary to send the cause back for a new trial, or for further proceedings in accordance with this opinion; that is, the board of county commissioners should act upon evidence in making their order. If an appeal is taken to the district court, it is a trial de novo, and the district court also acts upon proper, competent evidence.

Considerable was said, in the argument of the cause in this court, in regard to the power of the board to authorize the appointment of a deputy unless the fees coming into the office of the sheriff should be sufficient to pay said deputy. The attorney for the appellant claimed that no deputy could be appointed who was to be paid by the county; in other words, that, if the fees coming to the office of the sheriff should not be sufficient to pay the deputy, none should be appointed, and that the compensation of such deputy should come from fees the same as the compensation of the sheriff, and, if the fees were not sufficient to pay him, that he could receive no salary from the county. After a careful consideration of the complaint in this case, and of the stipulation, it is clear that this proposition is not submitted to this court, and therefore it would not be proper or possible for the court to give an opinion with reference to that matter; but, certainly, the amount of fees coming into the sheriff's office would be a proper consideration for the board of county commissioners, in making up their opinion as to whether one or more deputies were necessary, under the circumstances. The decision of the district court is reversed, and the cause remanded for further proceedings in accordance with this opinion. If, in the opinion of the district court, the cause is properly before it on this appeal, it will only be necessary for the district court to take such evidence as would enable it to determine the necessity for such appointment. Inasmuch as the board of county commissioners took no action with reference to compensation, it will remain for them, in case it is determined that they should empower the sheriff to appoint a deputy, to fix the compensation which he shall receive. Whether this compensation is to come from the county, or from the fees only, is not before this court, and cannot be determined for that reason. The judgment is reversed.

HUSTON and SULLIVAN, JJ., concur.

RAFT RIVER LAND & CATTLE CO. et al. v. LANGFORD.

(Supreme Court of Idaho. Dec. 3, 1896.)

BILL TO ENFORCE DECREE.

Where a decree has been entered, settling and adjusting the rights of various parties to the waters of a stream, and enjoining the use or appropriation of said waters otherwise than as provided in such decree, the remedy for a violation of the provisions of such decree, where neither a change of parties, conditions, or interests appears, is not by bill to enforce the decree.

(Syllabus by the Court.)

Appeal from district court, Cassia county; C. O. Stockslager, Judge.

Action by Raft River Land & Cattle Company and others against Francis Langford. Judgment for plaintiffs. Defendant appeals. Reversed.

Zane & Costigan, for appellant. Arthur Brown, James H. Hawley, and H. S. Hampton, for respondents.

HUSTON, J. In October, 1893, a decree was entered in the district court for Cassia county settling and adjusting the rights of various parties, including the parties to this suit, to the waters of Raft river. Every question involving the rights of the parties to that litigation in the premises was considered, passed upon, and settled by that decree. It is now claimed by plaintiffs in this suit that there has been a violation of the decree by defendant, and this action is instituted to carry out the decree of October 5, 1893. We do not think this is the proper proceeding to enforce a decree of this character. No new facts have arisen which could warrant or excuse disobedience to the decree. At least, none appear in the record. The decree was definite, and conclusively settled and adjudicated all the rights of the parties in the premises, and prohibited and enjoined every person from taking any water whatsoever from said Raft river, otherwise than as provided in said decree. "Where, from any cause, it becomes impracticable to carry the decree into execution, a bill may be exhibited to execute or confirm the decree, and settle and ascertain the right of the parties. * * * The bill must state the reason and circumstances why the decree has not been and cannot be carried into execution without further order and assistance of the court," etc. None of these facts or conditions are manifest from the complaint, or from the testimony. A violation of the terms of the decree is substantially all that is averred, and for that the law gives a complete and adequate remedy, but not by this proceeding. 6 Am. & Eng. Enc. Law, 773. Judgment of district court reversed, with costs.

MORGAN, C. J., and SULLIVAN, J., concur.

ARAVE v. IDAHO CANAL CO.

(Supreme Court of Idaho. Dec. 3, 1896.)

CANAL—FLOODING ADJOINING LANDS—LIABILITIES.

One erecting or maintaining a canal along the line of another's land is liable for any damage resulting from a want of proper care in the management of the same, or for want of proper care in its construction.

(Syllabus by the Court.)

Appeal from district court, Bingham county; D. W. Standrod, Judge.

Action by William Arave against the Idaho Canal Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Reeves & Terrell, for appellant. F. S. Dietrich, for respondent.

HUSTON, J. The plaintiff in the spring of 1894 was, and for many years prior thereto had been, the owner and in the possession and occupancy of the N. W. $\frac{1}{4}$ of section 23, township 1 N., of range 38 E. of the Boise meridian, in the county of Bingham, state of Idaho, and had made valuable improvements thereon in the way of houses, barns, outhouses, fences, etc., and was at the date last mentioned using and occupying said premises as a home for himself and family. About the year 1890, the defendant corporation constructed a large canal, running along the westerly side of the plaintiff's said homestead, and adjacent thereto, and, in the construction of said canal, built and erected high embankments along the line of, and as a part of, said canal, and put a flume across and obstructed the channel of Sand creek, a natural water course running along the — line of plaintiff's said homestead. Plaintiff's said land slopes in the direction of said canal and embankments, and the water from rains and the melting snows upon plaintiff's said land and the foothills lying contiguous thereto all flows across plaintiff's said land towards said embankments, and before the construction of said canal said water all naturally flowed off from plaintiff's land without damage thereto, and did not stand thereon. Plaintiff claims that, by reason of the erection of said canal and embankments without proper means, as by gates or other appliances, to prevent such a result, the water which would, and before the construction of said canal did, flow off from the said lands of the plaintiff, was, by reason and on account of the construction of said canal of the defendant as aforesaid, dammed and backed up, upon the land of plaintiff, to the extent of flooding his dwelling house, barns, outhouses, and granary, and destroying a large amount of property, to wit, hay, seeds, grain, and fruit, and greatly damaging his house and household furniture, etc.; and he claims damages therefor to the amount of \$1,750, and prays judgment therefor, and that the defendant be perpetually restrained and enjoined from maintaining said canal, etc. The defendant admits ownership of land in plaintiff and construction of canal by defend-

ant, and denies damage, or, if any resulted, it was attributable to the extraordinary character of the season, and not to any wrongful act or neglect of defendant. Trial was had before the court with a jury, and resulted in a verdict in favor of plaintiff for the sum of \$370, upon which, after filing certain findings of its own, the court entered judgment, in favor of plaintiff and against the defendant, for said sum of \$370 and costs, and also entered a decree that the defendant do so change that portion of its said canal "lying and being on the westerly side of and adjacent to plaintiff's farm or homestead as to afford a passage or passages, outlet or outlets, for waters gathering or flowing upon the lands lying easterly from and adjacent to said portion of said canal, sufficient to allow such water to flow and pass off from said lands." From this judgment the defendant appeals, and also from the order denying motion for new trial.

Much of appellant's brief is taken up with a discussion of the evidence in the case. We think the verdict of the jury and the findings of the court are fully sustained by the evidence. In fact, there is little or no conflict in the evidence upon any material issue. Appellant's contention that plaintiff was guilty of contributory negligence in erecting his house and other improvements where they were liable to be damaged by the canal of defendant, subsequently constructed, is not maintainable; nor is the appellant's position strengthened by the fact that there was a small irrigating ditch, on the line where defendant's canal was constructed, at the time plaintiff built his house and other buildings. The maxim, "So use your own property as not to injure the rights of another," applies as well to corporations as to individuals. Appellant's claim that the corporation defendant is not called upon to consider or respect the rights of settlers along the line of its canal, who have made such settlement subsequent to the location of the canal, is not only unsupported by law, but is repugnant to every principle of equity and good conscience. The judgment of the district court is affirmed, with costs.

MORGAN, C. J., and SULLIVAN, J., concur.

CLEVELAND v. ANDREWS et al.
(Supreme Court of Idaho. Dec. 3, 1896.)

EXEMPTIONS—HORSES USED IN BUSINESS.

Where the plaintiff, having been incapacitated by injuries from pursuing the employment in which he had been engaged upon a railroad, purchases a pair of horses for the purpose of engaging in the business of a teamster or drayman, and where the evidence shows conclusively the bona fides of such intention, such horses are exempt from levy, although the plaintiff has not actually entered upon such business.

(Syllabus by the Court.)

v.46p.no.18- 65

Appeal from district court, Bannock county; D. W. Standrod, Judge.

Action by Harper Cleveland against Henry Andrews and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Quarles & Willis, for appellants. Reeves & Terrell, for respondent.

HUSTON, J. The facts in this case, as they appear in the record, are substantially as follows: The plaintiff, having been injured while in the employ of a railroad, was compelled to seek other means of earning a livelihood for himself and family, and, to this end, purchased a pair of horses, and was negotiating for a wagon, with the intention of engaging in the business of a teamster or drayman,—a business in which he had been engaged prior to his employment by the railroad company. Before he had completed his outfit, the horses were seized, upon a writ of attachment issued against plaintiff, by the defendant Andrews, as constable. Plaintiff brings his action of claim and delivery against defendant Andrews as constable, and the other defendants as sureties. The cause was tried by a jury, who rendered a special verdict for plaintiff, and from the judgment entered upon such verdict this appeal is taken.

The only question raised by this record is, was the property levied upon exempt, under the statutes of Idaho? Subdivision 6 of section 4480 provides that "two oxen, two horses, or two mules," etc., "by the use of which a cartman, drayman, truckman, huckster, peddler, hackman, teamster, or other laborer habitually earns his living," etc., is exempt from execution. It is contended by appellant that, as the plaintiff had not actually engaged in the business of a drayman or teamster at the time the levy was made, the property does not come within the provisions of the statute. While courts should be careful that the beneficent purposes of statutes like the statute of exemptions are not made the means or excuse for fraud, it is equally important that the palpable intent of the law should not be defeated by mere technicalities or strained construction. No suspicion is cast upon the bona fides of the plaintiff in this action. The evidence shows conclusively that he was acting in the utmost good faith, and was proceeding as speedily as was possible, under the circumstances in which his misfortunes had placed him, to engage again in the business or avocation in which he was engaged before his employment by the railroad company. We think his case is clearly within the spirit and intent of the statute,—that the horses were exempt. See *Elliot v. Hall*, 2 Idaho, 1142, 31 Pac. 796. The judgment of the district court is affirmed, with costs.

MORGAN, C. J., and SULLIVAN, J., concur.

FRANTZ v. IDAHO ARTESIAN WELL & DRILLING CO.

(Supreme Court of Idaho. Dec. 3, 1896.)

LIMITATIONS—PERSONAL PRIVILEGE—ACCRUAL OF CAUSE OF ACTION.

1. The defendant, a corporation, having a judgment rendered against it, upon which the sale of its property was imminent, not being able to procure money to satisfy said judgment upon its own credit, the money was raised by certain stockholders upon their individual note, the corporation agreeing to protect them from the payment of said note. The corporation paid a portion of said note; the balance was paid by the individuals. *Held*, that the corporation was liable to the parties so paying for the amount paid by them. And the cause of action accrued at the time said payments were made.

2. The statute of limitations is a personal privilege, and, to be made available, must be pleaded. It cannot be interposed by argument or inference.

(Syllabus by the Court.)

Appeal from district court, Bannock county; D. W. Standrod, Judge.

Action by J. I. Frantz against the Idaho Artesian Well & Drilling Company. Judgment for plaintiff. Defendant appeals. Affirmed.

H. V. A. Ferguson, for appellant. Reeves & Terrell, for respondent.

HUSTON, J. This is an appeal from a judgment of the district court for Bannock county. The facts are substantially as follows, as shown by the record: In August, 1891, the defendant was, and for some time previous to that date had been, a corporation organized under the laws of Idaho, and doing business in this state. Being in need of money to carry on the business in which they were engaged, and not being able to procure the same upon the credit of the corporation, at a stockholders' meeting, held on the 5th day of August, 1891, the following record was made: "Meeting called to devise means to raise money to satisfy a judgment rendered in district court against the Artesian Well and Drilling Company in favor of the Carlisle Manufacturing Company of Carlisle, Pa. It was moved and seconded that a note payable at the First National Bank be made to satisfy said judgment, and that a mortgage be executed to protect the signers of said note, covering the entire plant of the concern. Carried." It is contended that this action of what was said to be a stockholders' meeting was void, it not having been held in conformity with law or the charter or by-laws of the company. Nevertheless, in pursuance of the same, it being ascertained that no money could be procured upon the credit of the company, the plaintiff and three others, members and stockholders in the company, procured from the First National Bank of Pocatello the sum of \$1,700, giving their personal note therefor, and which said sum of \$1,700 was by them paid into the treasury of said company for the purpose of meeting the exigency aforesaid; said company at the same

time executing and delivering to said parties, to secure to them the payment of said sum of \$1,700, the note and mortgage heretofore mentioned! When the note given to the bank by the plaintiff and his co-makers became due, its payment was extended; another note, being signed by four additional parties, was given. In the meantime the amount of the first note given had been reduced to about \$1,300 by payments made by the defendant corporation, and for this latter amount the note of the four original makers and four additional parties was given. In the language of plaintiff (testifying): "When that note became due, we all split up, and gave an individual note, except West, and he gave his note, and we signed with him." The transaction last mentioned occurred on April 10, 1894, and the notes so given have been paid by the parties who gave them. This action is brought by plaintiff to recover from the defendant corporation the amount of money so paid by him, alleged in his complaint to be some \$868. The cause was tried before the court without a jury, and judgment rendered for plaintiff, from which defendant takes this appeal.

It is claimed by appellant that the findings and judgment of the court are not supported by the evidence, because: First. The plaintiff and three other persons made their note to the First National Bank of Pocatello for a certain sum of money, which they procured and loaned to the defendant corporation. That there was no privity or contractual relation between the plaintiff and his co-makers of the first note, and the defendant. We cannot accept this contention. The record shows conclusively—in fact, there is no disagreement between parties as to the facts—that the corporation defendant required a certain sum of money to protect them from a sale of their property upon execution. Not being able to raise the money upon the credit of the corporation, they say to the plaintiff and his co-makers of the first note, "You raise the money for us, and we will secure you by a note, and chattel mortgage upon the property of the company." The money being raised and paid over to and accepted by the defendant, the defendant executes its note and mortgage to the makers of the note to secure them (as stated in the resolution of the stockholders' meeting) against the payment of the note to the bank. That this was the understanding of all parties is shown by the fact that the defendant corporation paid several hundred dollars to the bank upon the note before it became due. With these facts admitted, how can it for a moment be contended that there was no privity or contractual relation existing between the makers of the note and the defendant? The plaintiff's right of action accrued upon the payment by him of his note, given for the benefit and behoof of the defendant corporation, and he was not required to resort to an attempted enforcement of the mortgage of doubtful validity. The complaint

stated a good cause of action under our statutes. As the cause of action did not accrue until April, 1894, the statute of limitations could not avail the defendant, even had it been interposed, which it was not. The statute of limitations is a personal privilege, and must, to be made available, be pleaded directly. It cannot be interposed by argument or inference. The complaint is entirely sufficient. It states a cause of action which is fully made out by the proofs. The judgment of the district court is affirmed, with costs.

MORGAN, C. J., and SULLIVAN, J., concur.

NORTHWESTERN & PACIFIC HYPOTHEEK BANK v. SUKSDORF et al

(Supreme Court of Washington. Nov. 11, 1896.)

REMOVAL OF CAUSES—TIME FOR APPLICATION.

1. In an action to foreclose a mortgage, there is no such separable controversy as will entitle the mortgagor to a removal to the federal court, the complaint representing that the other defendants claim some interest in the land, and alleging that it is subsequent to the mortgage.

2. Application for removal of cause to the federal court is properly denied, where made after an extension of time for answering.

Appeal from superior court, Spokane county; James Z. Moore, Judge.

Action by the Northwestern & Pacific Hypotheek Bank (Northwestern & Pacific Mortgage Company), a corporation, against Stella B. Suksdorf and others. Judgment for plaintiff. Defendant Suksdorf appeals. Affirmed.

Samuel R. Stern, for appellant. Blake & Post, for respondent.

SCOTT, J. The error complained of in this case was the denial of the appellant's application for a transfer of the cause to the federal court. The action was brought to foreclose a mortgage given by the appellant and her husband, Henry F. Suksdorf, upon land in Spokane county. The other defendants were represented as claiming some interest in said lands, which, it was alleged, was subsequent to the plaintiff's mortgage. The defendants were served with process in said action, the service upon appellant being by publication. She was a resident of the state of Oregon. She appeared in the action on September 16, 1895, and made a motion for security for costs. Thereafter, on October 14th, the default of all the defendants excepting appellant was entered: A motion for judgment made by the plaintiff was denied, and appellant was granted an extension of time until October 23, 1895, within which to answer. On said last date appellant made the application in question for a transfer of the cause to the federal court, which was denied. There was no error in denying the application for a transfer. The complaint stated but a single cause of action against all the defendants, and they, or some of them, at

least, aside from appellant, were necessary parties to a complete determination of the plaintiff's rights, and there was no such separable controversy as would entitle the appellant to a transfer of the cause. Furthermore, the application was properly denied in consequence of not having been seasonably made. Appellant was in default. The extension of time which was granted was to allow her to answer, and should not be held as having enlarged the time within which she could apply for a transfer of the cause to the federal court, as such application should have been made before the expiration of the time fixed by statute within which she was called upon to answer. Affirmed.

HOYT, C. J., and DUNBAR, ANDERS, and GORDON, JJ., concur.

D. M. OSBORNE & CO. v. STEVENS et al

(Supreme Court of Washington. Nov. 11, 1896.)

ACTION ON NOTE—PLEADING—ALLEGATION OF OWNERSHIP.

An allegation, in a complaint on a note by one not the payee, that the payee for value and before maturity indorsed the note by writing his name across the back, and that "plaintiff is now the owner and holder" of said note, is a sufficient allegation of ownership in plaintiff, as against a general demurrer.

Appeal from superior court, Kittitas county; Carroll B. Graves, Judge.

Action by D. M. Osborne & Co. against Cyrenus E. Stevens and others. From a judgment entered on an order sustaining a demurrer to the complaint, plaintiff appeals. Reversed.

W. S. Smith, for appellant. Ralph Kauffman, for respondents.

HOYT, C. J. The superior court sustained a demurrer to the complaint filed in this action, and, the plaintiff electing to stand upon such complaint, judgment was entered against it, from which it has prosecuted this appeal. The only suggestion as to the insufficiency of the complaint was that the title to the notes upon which the action was brought was not shown to be in the plaintiff. It appeared from the complaint that the notes were made to one Alexander A. Munson, and the allegations as to the ownership of the plaintiff were "that, for value and before maturity, Alexander A. Munson indorsed said notes by writing across the back of each, before delivery, the name 'Alexander A. Munson'; that plaintiff is now the owner and holder of said notes and mortgage." These allegations were not so full and definite as they should have been, and the complaint on that account might have been open to a motion to make more definite and certain; but they were, in our opinion, sufficient, when attacked by general demurrer. The old rule

the law not having provided sufficient safeguards for the protection of purchasers, the common-law rule would prevail, and the purchaser would take the property subject to all burdens, known and unknown. We do not think this position is tenable. The law provides, through our recording statutes, for constructive notice, and it would have been easy for the attaching creditor in this case to have given notice to the world of the attachment of the property of Mrs. Montgomery. Not having done so, the rights of an innocent purchaser should not be destroyed in his interest. We are not inclined to find any fault with the finding of the court so far as the rights of the other appellants are concerned, but for this error the judgment will be reversed, and the cause remanded, with instructions to modify the judgment so that the decree shall not apply to the lands purchased by the appellant Christianson.

SOOTT and ANDERS, JJ., concur.

COLVIN v. COLVIN.

(Supreme Court of Washington. Nov. 12, 1896.)

DIVORCE—FAILURE TO LIVE PEACEABLY TOGETHER
INSUFFICIENT GROUND—ATTORNEY'S FEES.

1. Under 2 Hill's Code, § 764, subd. 7, which provides for a divorce on application of either party for any other cause deemed sufficient, where the court "shall be satisfied that the parties can no longer live together," where the court has found that "the estrangement is so great that the parties cannot henceforth peaceably live together," a divorce will yet be denied where it appears that their failure to live together is due to their own obstinacy, and that in regard to the quarrels and disagreements which caused the estrangement both parties were equally at fault. Dunbar, J., dissenting.

2. An award of \$300 to defendant as counsel fees in a divorce case does not show an abuse of discretion.

Appeal from superior court, Thurston county; T. M. Reed, Jr., Judge.

Action by Ignatius Colvin against Emma E. Colvin for divorce. From a judgment denying a divorce, and awarding costs and attorney's fees to defendant, plaintiff appeals. Affirmed.

John R. Mitchell, for appellant. John O. Kleber and A. E. Rice, for respondent.

GORDON, J. The appellant (plaintiff below) brought this action to secure a divorce. His complaint, in substance, charges the respondent with continual, habitual unkindness, and that she is irreconcilably opposed to plaintiff's will, wishes, welfare, business, and interests, and that it is not possible for the plaintiff to longer live with the defendant. The answer, after denying the material allegations of the complaint, contains an affirmative defense, setting up specific acts of cruelty by the plaintiff. At the trial of the cause, after appellant rested, respondent moved for a dismissal upon the ground that the testi-

mony on the part of the plaintiff failed to show a prima facie case for the relief prayed. This motion was granted, findings of fact made, and judgment entered in favor of the respondent, dismissing the cause, awarding costs to the respondent, and \$300 as counsel fee. The appeal is from such judgment.

The appellant is 66 and the respondent 55 years of age. They were married in Thurston county, in the year 1866, and from that time until about the 15th of December, 1895, continued to live together as husband and wife. As issue of such marriage there are four children, ranging in age from 17 to 23 years. During their marriage they have accumulated property to the value of some twenty-five or thirty thousand dollars, and, in addition to the property so accumulated, the appellant is the owner in his own right of considerable property, which was acquired by him prior to his marriage with the respondent. Pursuant to an agreement between the parties, their property was divided through the instrumentality of arbitrators chosen by them, in the fall of the year 1895, and since such division the parties have lived separate and apart. For a number of years appellant has been afflicted with a cancerous affection of the upper lip and mouth, from which he continuously suffers more or less pain, and doubtless much of his irritability of temper is due to this disease. Among other things, the lower court found: "(6) That for about four years last past there have been occasional quarrels and misunderstandings between plaintiff and defendant, and for about sixteen months last past there has resulted from such misunderstandings and disagreements a complete estrangement between plaintiff and defendant. (7) That such estrangement is so great that the parties cannot henceforth peaceably live together. (8) That such quarrels, misunderstandings, and disagreements occurring aforesaid were not occasioned wholly by the fault or misconduct of the defendant, but that the plaintiff was equally in fault in regard thereto." The main contention of the appellant is that his case is strong enough to invoke the discretionary power conferred by subdivision 7 of section 764, 2 Hill's Code, which provides: "And a divorce may be granted upon application of either party for any other cause deemed by the court sufficient, and the court shall be satisfied that the parties can no longer live together." There was no proof that the appellant had sustained any mental or physical injury, or suffered any personal indignities, at the hands of the respondent, or that he lived in a state of danger or apprehension of violence, nor does the complaint charge any specific acts of cruelty on the part of the respondent, but it is insisted that the evidence does not justify the finding of the court that the "quarrels, misunderstandings, and disagreements occurring aforesaid were not occasioned wholly by the fault or misconduct of the defendant, but that the plaintiff was equally in fault in regard thereto." It

appears from the evidence that appellant had posted notices upon the farm whereon he has resided since their property was divided, forbidding the respondent to go upon his land. Also that he had made it a condition in a lease that the lessee should not permit respondent to go upon the demised premises. It further appears that, while there were numerous wordy disputes and disagreements between the parties, no personal violence was ever offered or threatened by either of them towards the other. Examined as a witness in his own behalf, appellant said: "We couldn't agree about certain things for the last year or two; * * * get to disputing over some trivial matter; * * * just like two can't agree, you know, get to talking over things, get to quarreling about one thing and another; sometimes she would get up and leave, sometimes I did; so we finally quit entirely." He frankly admitted that the measure of his blame was as great as that of the respondent, and, indeed, we think that this conclusion is justified by the entire evidence. The testimony of one of the daughters was that both parties were at fault. Thomas Ismay was one of appellant's witnesses. It appears that he was one of the arbitrators selected by the parties to effect a division of their property. On cross-examination he was asked: "Q. Now, you stated on direct examination that you thought the parties might still live together. I will ask you, in making the division, and the time you spent where they both were, what the general treatment that he received at her hands was. A. Well, so far as I saw any treatment, it was all right. Me being a stranger, and not being a party interested, I should not have thought there was any grievance in the family. I think I made two or three suggestions that they were sparking again." But it is urged that, inasmuch as the court found "that the parties cannot henceforth peaceably live together," a case is made under the discretionary power lodged in the court by virtue of subdivision 7, § 764, 2 Hill's Code. Under a similar provision in the Code of Indiana it has been held that this discretionary power must be exercised in a sound and legal manner, so as to conduce to domestic harmony, and the peace and morality of society, and that the action of the lower court in such cases is subject to revision. *Ritter v. Ritter*, 5 Blackf. 81; *Ruby v. Ruby*, 29 Ind. 174. We do not think it was intended by the legislature that a divorce should be granted in every case wherein it should be found "that the parties can no longer live together"; and where, as here, their failure to live together is due to their own obstinacy and stubbornness, we think a divorce should be denied. It is not the policy of the law that divorces should be granted merely because parties, "from unruly temper," or mutual wranglings, live unhappily together. In order to have relief, it is not required that the party complaining should be

wholly without fault, for the law recognizes the weakness of human nature, and measures the conduct of the parties by the standard of common experience. But "where the parties to a divorce suit are in pari delicto, the conduct of each being a constant aggravation to further offense by the other, no divorce will be granted at the instance of either party." *Cate v. Cate*, 53 Ark. 486, 14 S. W. 675. We think the rule applicable to the present case is well stated by Chief Justice Cockrill in the case of *Cate v. Cate*, supra, as follows: "Unhappiness sufficient to render the condition of both parties intolerable may arise from the mutual neglect of the conjugal duties; but when the parties are thus at fault the remedy must be sought by them, not in the courts, but in the reformation of their conduct. The remedy is in their own hands, and, until it has been tried without effect by the party complaining, the courts will not give effect to the complaint. Until this home remedy has been tested and failed, the condition of each may be said to be due to his or her own acts, and one must bear the consequences of his own misconduct." See, also, *Cooper v. Cooper*, 17 Mich. 210; *Morrison v. Morrison*, 64 Mich. 53, 30 N. W. 903. In the case last cited the court say: "Where both are to blame, neither should be granted a divorce. * * * The marriage relation should not be considered as a garment, to be worn or cast aside at pleasure." The proof shows the appellant to be a man of rough, but kindly, nature, who received few advantages in early life. For upwards of a quarter of a century he and the respondent lived together peaceably and happily, amidst the discouragements and privations of their pioneer home. Their plans worked well, and as a result of their joint industry and good judgment they find themselves in easy circumstances, and comparatively rich. In the light of these circumstances and of the entire record, we are unwilling to believe that these parties, who have endured so much for each other and for their children, cannot, if they will, continue to live together happily. To do so involves the making of mutual concessions and sacrifices, but these they should cheerfully make for their own happiness and their children's welfare. We do not think the allowance of \$300 to the respondent for counsel fees was exorbitant under the circumstances of the case. At least, we are not satisfied that in allowing that sum the court abused its discretion. Upon consideration of the entire record, the judgment is affirmed.

HOYT, C. J., and ANDERS, J., concur.

DUNBAR, J. (dissenting). I am satisfied that the parties cannot and ought not to live together, and I think the plaintiff showed good cause for a divorce. I therefore respectfully dissent from the conclusion reached by the majority.

UNDERWOOD v. STACK et ux.

(Supreme Court of Washington. Nov. 13, 1896.)

SALE OF LANDS—STATUTE OF FRAUDS—VALID CONTRACT—TRIAL—JUDGMENT WITHOUT VERDICT.

1. Plaintiff introduced letters, signed by a husband and wife, relating to the purchase of certain land, and a telegram from the husband, stating that they would take the lands, and a subsequent letter directing that the deed should be made to the wife, and stating that anything done by her would be satisfactory to him. The deed was executed to the wife and she went into possession. *Held*, that there was a valid contract for the purchase of the lands on the part of defendants, as against the statute of frauds.

2. In an action for damages for the breach of a contract, where defendant offers no evidence, it is not error for the court to take the case from the jury, and render judgment for the amount proved by plaintiff.

Appeal from superior court, Kittitas county; Carroll B. Graves, Judge.

Action by Julia A. Underwood against J. F. Stack and Miriam Stack, on a contract. From a judgment in favor of plaintiff, defendants appeal. *Affirmed*.

W. S. Smith, for appellants. E. Pruyn and Kirk Whitel, for respondent.

SCOTT, J. This was an action to recover damages for the alleged breach of a contract relating to the sale of certain lands by the plaintiff to the defendants. The defendants contend that the court erred in overruling their demurrers to the complaint on the ground that it did not state a cause of action. No particular is pointed out wherein the complaint is defective, except the general statement in their brief that the contract was void. We fail to see wherein it was void, and think that the complaint was sufficient. Aside from this question, the main controversy is over the facts. It is contended that no sufficient contract was proven to support a recovery. The defendants were husband and wife, and letters relating to the purchase of the land, signed by them, were introduced in evidence. There was also introduced a telegram from the husband stating that they would take the land, and in a letter by him, thereafter, it was directed that the deed should be made to Mrs. Stack, and stated that anything done by her would be satisfactory to him. The deed was executed accordingly, and Mrs. Stack went into possession of the premises. This was sufficient to show a valid contract for the purchase of the lands on the part of the defendants, as against the statute of frauds.

A motion for a nonsuit was denied. The defendants offered no proof, and the court took the case from the jury, and entered a judgment against them for \$1,500. It is contended that this was error, and that the matter should have been submitted to the jury to determine the amount; but, as the case stood, there was no conflict in the proofs,

and it was not error, under the circumstances, for the court to render a judgment for said sum. *Affirmed*.

HOYT, C. J., and ANDERS, GORDON, and DUNBAR, JJ., concur.

STATE ex rel. NOLTE et al. v. SUPERIOR COURT OF KING COUNTY.

(Supreme Court of Washington. Nov. 13, 1896.)

BRINGING IN NEW PARTIES—PROCESS.

A garnishee denied any indebtedness to the judgment defendant, but it appeared that it had executed a note payable to him, which was alleged to be the property of his wife. *Held*, that it was error, on affidavit and application of the judgment plaintiff, to issue an order reciting that the wife was a necessary party, and that it was ordered that she "be, and she hereby is, made a party defendant hereto," and is required to file, within 20 days after the service of a copy of the order and affidavit, her answer, if any, and that otherwise her default would be entered without service of process.

Application by the state of Washington on the relation of Mary Nolte and Fred Nolte, her husband, for a writ of prohibition to the superior court of King county, J. W. Langley, judge thereof. Writ granted.

Condon & Wright, for relators. Byers & Byers, for respondent.

SCOTT, J. This is an application for a writ of prohibition based upon the following facts: One Byers obtained a judgment in the superior court of King county against one Nolte, and thereafter caused a writ of garnishment to be issued against the Eureka Coal Company. Said company appeared and answered, denying any indebtedness to the principal defendant, but it appeared that it had executed a note payable to him, which, however, was alleged to be the property of his wife, the relator. Thereupon, upon an affidavit and application of the plaintiff, the court issued an order reciting that relator was a necessary party to said controversy; and, further, that it was "therefore ordered that said Mary Nolte be, and she hereby is, made a party defendant hereto, and she is hereby required to file in this court within twenty days from and after the service on her of a copy of this order, together with a copy of the aforesaid affidavit, her answer setting up her claim, if any, to the note and mortgage," and that otherwise her default would be entered. The court had no authority to proceed in any other way than the regular one, by the service of the process provided by statute, to make the relator a party, and the writ should issue, with costs against the plaintiff in the original action.

HOYT, C. J., and ANDERS and DUNBAR, JJ., concur.

MEGRATH v. GILMORE et al.

(Supreme Court of Washington. Nov. 17, 1896.)
**DECEASED JOINT DEBTOR—SURVIVAL OF LIABILITY
 —DEATH PENDING APPEAL—SUBSTITUTION
 OF EXECUTORS—PLEADING—BRIEF.**

1. The liability of a deceased joint debtor survives against his representatives.

2. Where defendant dies pending his appeal from a judgment, and his executors are substituted, and obtain a reversal, the claim need not be presented to his executors before a retrial. *Strong v. Eldridge*, 38 Pac. 696, 8 Wash. 595, followed.

3. In such case it is not necessary to file an amended complaint alleging defendant's death, and the appointment and substitution of his executors.

4. Defendants cannot complain of a judgment in favor of plaintiff which is supported by a contract which they have pleaded, and in which, as they have admitted, plaintiff alone is interested, though he failed to plead it.

5. Where appellant predicates error on the admission of certain testimony, and fails in his brief to cite the part of the record where it is to be found, and respondent denies that such testimony was introduced, the assignment will not be considered.

Appeal from superior court, King county; T. J. Humes, Judge.

Action by John Megrath against David Gilmore and the executors, etc., of William A. Kirkman, deceased, on a contract for the erection of the Arlington Hotel. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

For former report, see 39 Pac. 131, 10 Wash. 339.

Burke, Shepard & McGilvra and Burke, Shepard & Woods, for appellants. Stratton, Lewis & Gilman and Carr & Preston, for respondent.

SCOTT, J. This case was before this court upon a former occasion (10 Wash. 339, 39 Pac. 131), to which reference can be had for a statement of the nature of the action. Pending the former appeal, Kirkman died, and it was stipulated in this court that the executors of his will might be substituted as defendants in his stead. When the second trial was begun, the defendants moved to dismiss the action as against Kirkman's executors on the ground that there is no survival of liability against the representatives of a deceased joint debtor. This point has been passed upon by this court contrary to appellant's contention since his brief herein was filed. *Donnerberg v. Oppenheimer* (Wash.) 46 Pac. 254.

It is next contended that the court should have granted the defendants' motion for a nonsuit as to the executors of Kirkman on the ground that the claim had not been presented to said executors, as required by sections 986, 988, 2 Hill's Code. Judgment had been obtained against Kirkman in the lower court during his lifetime. After the stipulation substituting his executors pending the appeal, they appeared herein, and contested the

same, and obtained a reversal of the judgment, and ever since have been, and are now, contesting it; so there can be no substantial merit in this contention, and to sustain it would be inconsistent, at least, with the decision of this court in the case of *Strong v. Eldridge*, 8 Wash. 595, 38 Pac. 696.

The third point is disposed of in what has been said, as that relates to the claim of release of Gilmore on the ground that the executors of Kirkman were released by the failure to present the claim to them.

The fourth point is that the complaint does not state facts sufficient to constitute a cause of action against the executors of Kirkman, because it does not show Kirkman's death, and the appointment and substitution of his executors; but we think this was immaterial, and that it was not necessary to file an amended complaint containing these formal allegations. The executors had, in fact, been substituted by the stipulation in this court.

It is next contended that the plaintiff cannot recover on the ground of there being a fatal variance between the contract pleaded and the one offered in evidence; that the contract offered in evidence shows on its face that it is a contract by Megrath and Collins jointly as parties of the first part, and the contract pleaded was the contract of Megrath alone. As to this, it seems to us that the position of the respondent is sound. The defendants, in their answer, set up a contract between Megrath and Gilmore, in which it is admitted that the plaintiff alone is interested, and the plaintiff would be entitled to recover upon the contract so set up, regardless of the complaint. The defendants should not be heard to complain of a judgment supported by a contract which they have pleaded in their answer; and, furthermore, the law of the case on this point was settled by the former decision, where the cause was remanded for retrial upon two separate questions, and wherein it was held that Collins signed the contract only as a surety for Megrath.

It is next contended that the court erred in admitting the testimony of Gilmore as to conversations with Kirkman, who was dead at the time of the trial. Nowhere in appellants' brief has attention been called to any part of the record containing such testimony, and the respondent denies that any such was introduced, and we pass the point without further comment.

The remaining points urged relate to the sufficiency of the evidence and to the instructions which were requested and refused. After an examination of the evidence, we think it was entirely sufficient to sustain the verdict, and the point involved in the first instruction refused has been disposed of in what we have previously said. All that the defendants were entitled to under the contract and the proofs in the remainder of the

instructions requested was fully covered in the charge given the jury. Affirmed.

HOYT, C. J., and ANDERS, DUNBAR, and GORDON, JJ., concur.

BARTO v. NIX et al.

(Supreme Court of Washington. Nov. 18, 1896.)

PLEADING—CORPORATION—RIGHT TO RECEIVE ITS STOCK IN PAYMENT OF DEBT—RECEIVER—ACTION TO COLLECT STOCK SUBSCRIPTION—ESTOPPEL.

1. Where a single transaction is relied on to entitle a plaintiff to a recovery, the complaint is not subject to objection, as stating two causes of action, because the facts alleged constituting such transaction may show a liability both on contract and in tort.

2. While, under the statutes, a corporation is not authorized to traffic in its own stock, it may legally receive such stock in payment of an indebtedness due it, where the transaction is in good faith, and for the purpose of saving the corporation from loss.

3. In an action by a receiver of an insolvent bank against the directors to recover the par value of stock held by them, which had not been paid for, the defendants cannot set up in defense a secret agreement with the bank that they should not pay for the stock, nor incur any liability by reason of its issuance to them, but should hold it for the benefit of the corporation.

4. In an action brought by the receiver of a corporation, under order of the court, to collect unpaid subscriptions from its stockholders, the correctness of the determination of the court in the original action that such collections were necessary to pay the indebtedness cannot be reviewed.

Appeal from superior court, Pierce county; W. H. Pritchard, Judge.

Action by Fred D. Barto, receiver of the Bank of Puyallup, against R. Nix, Willis Boatman, A. Gardella, W. J. Bowman, Henry Williams, and A. G. Matthews. Judgment for plaintiff, and defendants appeal. Affirmed.

John P. Judson, for appellants. Remington & Reynolds (John A. Shank, of counsel), for respondent.

HOYT, C. J. In 1890 the Bank of Puyallup was organized under the laws of the state with a capital stock of \$100,000 divided into 1,000 shares of \$100 each. This stock was all subscribed for, and 60 per cent. paid thereon before any business was transacted. A. C. Campbell was the owner of 200 shares of this stock, and on the 13th day of November, 1891, he transferred 199 shares directly to the bank, and received a credit of \$14,000 therefor on the books of the bank, to which he was then indebted; and the bank thereupon attempted to cancel these certificates of stock. Thereafter it was thought necessary by the officers of the bank that these 199 shares of stock should be held by some one, and it was agreed that they should be reissued to J. P. Stewart and Willis Boatman, who were to give their promissory notes for 70 per cent. of the face value of this stock. This was done, and the

stock so issued held by them until 1892, when it was by them surrendered to the bank, and the certificates evidencing their ownership canceled; and it was then agreed that this stock should be reissued to the directors of the bank, each to receive the number of shares then agreed upon. The certificates, in accordance with this agreement, were issued to the several defendants, who each gave to the bank his note for 70 per cent. of the face value of the stock. This stock so issued to these defendants was held by them until June, 1893, at which time the bank was declared insolvent, and its assets placed in the hands of a receiver, for the purpose of closing up its business. In the action in which the receiver was appointed, it was determined by the court that the assets in the hands of the receiver were insufficient to pay its indebtedness, and such receiver was directed to levy an assessment upon the stockholders for the amounts unpaid upon their several stock subscriptions. In pursuance of this order, assessments were duly levied upon the several defendants in this action for the full amount of the par value of the stock standing in their name, which had been issued to them as hereinbefore stated, and due notice thereof given. Thereafter, such assessments not having been paid, this action was brought to enforce payment.

The first assignments of error are founded upon the rulings of the court in settling the pleadings, and all relate to the alleged claim that the second amended complaint stated more than one cause of action, and that the several causes of action were not separately stated. This complaint simply set out in an orderly manner a statement of the facts relating to the transaction which was relied upon to show that the plaintiff was entitled to recover a judgment against the defendants; and while some of the facts so alleged may have tended to show that a contract was entered into between the bank and the defendants, and others to show wrongful action on the part of the defendants and the bank, they all related to a single transaction, and were properly included in a single count. Whether a claim of relief is rightfully founded upon a contract relation entered into, or wrongful acts done, where but a single transaction is relied upon, the recital of the facts relating to such single transaction is not open to objection, for the reason that such recital may tend to show a liability upon contract and also in tort. The facts as to such single transaction having been set out, it is for the court to say whether or not they constitute a cause of action. Such being the rule, there was no foundation for the claim that there had been any such change of the cause of action in the several complaints as to justify the court in granting defendants' motion to strike.

The question raised by the demurrer to the second amended complaint is so connect-

ed with questions growing out of the trial that a separate discussion is not necessary. Something is said in the brief as to the right to trial by jury, but, since no error is assigned upon the action of the court in refusing a jury trial, that question cannot be here considered.

It appeared that, at the time this stock was issued to the defendants, there was an agreement between them and the bank that they should never be called upon to pay the notes which they had given for 70 per cent. of its par value, nor held liable in any manner by reason of the fact that such stock was issued to them, and carried in their name; and upon this agreement, and the fact that the stock issued to the defendants had been theretofore issued to Campbell, and by him transferred to the bank, in payment of his indebtedness thereto, are founded the principal claims of defendants for a reversal of the judgment.

One other ground is somewhat relied upon, and that is that a judgment had been rendered in another action against these defendants and other stockholders, for the amount due upon the stock severally held by them. But a comparison of the record in that case with the one in the case at bar will clearly show that the liability for which that judgment was rendered was a different one from that for which it was sought to recover in this action. This suit was to recover for an unpaid subscription to the amount of the par value of the stock. The other was to recover the contingent liability over and above the par value of the stock, provided for in the constitution. Besides, that judgment was not, at the time it was offered in evidence, a final one. An appeal therefrom had been taken to this court, upon which the judgment has been reversed, and the proceeding dismissed.

The appellants earnestly contend that, under our statute, the bank had no authority to take the stock of Campbell in payment of his indebtedness to the bank. It may be conceded that a corporation in this state cannot traffic in its own stock. Such we believe to be the rule established in all the states having similar statutory provisions. But it does not follow that it may not receive such stock in payment of the indebtedness of one of its stockholders when such transaction is bona fide, and for the purpose of protecting the corporation from loss. In our opinion, the transaction between the bank and Campbell was authorized, and thereby the bank became the owner of the stock in question, and had the right to reissue it. But, whether it did or not, these defendants, who were the managers of the bank, cannot defend upon the ground that what was done was not authorized by law.

The other material question grows out of the secret agreement between the defendants and the bank, to the effect that they should incur no liability by reason of the stock be-

ing issued to them. Relating to this question, the trial court found as a fact that what was done for the purpose of giving the bank, and that, by reason of the stock given, its creditors, represented by the receiver, were induced to give it their notes. This finding of fact is excepted to by the appellants, on the ground that it was not sustained by the evidence; but this exception was not well taken. The fact of the stock having been issued and the notes being taken therefor would require that such stock should be carried as a part of the assets of the bank, and there would be, at least, a parent liability upon the part of the bank thereof for the remainder of its par value. This being so, the law would presume, in the absence of any proof as to the object of the transaction, that it was for the purpose of putting the books show that the bank was in better condition than it would have been if such stock had not been reissued. But there was direct proof that it was understood that it was necessary that this stock should be issued to somebody, in order that they might be in such a condition that an examination of its books would not discredit its issue. Such being the object for which the stock was issued to the defendants, it will be questioned whether they could sue upon this secret contract between them and the bank in an action brought by the bank to recover the par value of the stock. The contract was clearly an illegal one, and it might be reason for holding that the transaction must be treated as though this secret illegal agreement had never been entered into. But it is not necessary here to decide this question. This action is in the name of the receiver, who represents both the bank and its creditors; and, as between the creditors and these defendants, it is clear that the secret agreement, by which it was sought to change the liability of the holders of the stock, was without any force whatever. To hold that one could have stock issued to him and allow the same to stand in his name upon the books of the bank, and yet, by a secret agreement with such bank, be released from all liability growing out of the issue of such stock, would be contrary to the provisions of our statute, and to public policy. This would be true even if the person to whom the stock was issued was a stranger to the corporation at the time of its issue, and where, as in the case at bar, the stock was issued to the directors of the bank, who must be presumed to know its condition and the purpose of the issue, the reason for holding them liable is much greater. A director is an officer of the bank, and it is through the board, composed of himself and his associates, that its business is transacted. To hold that one of these can make a note to the bank, and have it taken up as a part of its assets, and afterwards, when such note is sought to be enforced against him in the interest of the creditors of the bank, set up a

secret agreement which nullifies the note, would be contrary, not only to all legal rules, but to every principle of justice; and the rule which would apply to a note so made and executed would apply to the liability created by the holding of stock issued under the circumstances disclosed by this record.

The only other reason suggested why the judgment should be reversed which we think it necessary to notice is that it appeared from the record in the action in which the receiver was appointed that the assets of the bank were sufficient to discharge its indebtedness. But that fact, if fact it was, was immaterial under the issues in this action. The court in that cause had determined that it was necessary that the unpaid assessments upon the capital stock should be collected, and it must be presumed that this determination was necessary and rightful.

We find no error in the record, but, even if there were technical error, it did not affect the rights of appellants, for the reason that the facts as stated in their own brief show that the judgment was what it should have been. Judgment affirmed.

DUNBAR, ANDERS, SCOTT, and GORDON, JJ., concur.

STATE v. WITHEROW et al.
(Supreme Court of Washington. Nov. 18, 1896.)

CRIMINAL LAW—EVIDENCE—HARMLESS ERROR.

Where no evidence is introduced by defendant, and the state's evidence shows conclusively that defendant is guilty as charged, possible error in the instructions is without prejudice.

Appeal from superior court, Spokane county; Norman Buck, Judge.

W. B. Witherow and Arthur Case were convicted of grand larceny, and appeal. Affirmed.

Fitzgerald & Hopkins, for appellants. J. W. Felghan, for the State.

PER CURIAM. The defendants were convicted of the crime of grand larceny, and have appealed. Several questions were raised as to the sufficiency of the evidence relating to the proof of venue and the ownership of the goods; but the record discloses that there was proof showing that the goods were taken within the jurisdiction of the court, and sufficient proof of the ownership to sustain the verdict.

It is further contended that a motion for a continuance made by the defendants should have been granted; but we find nothing to show that the court abused its discretion in denying the same.

It is contended that certain of the instructions were erroneous; but it appears that the only testimony introduced in the case was upon the part of the state. Several witnesses were sworn who testified that the defendants admitted stealing the goods from

a freight car on the Northern Pacific Railroad, and the goods were found in their possession. There was no substantial conflict in the testimony upon the part of the state, either in the direct or cross examination, and the proof conclusively showed that the defendants were guilty of the crime with which they were charged. This being so, there was but one verdict that the jury could have rendered, and that was to find the defendants guilty; and, if there was any error in the instructions, it was clearly error without prejudice. *Territory v. Gay*, 2 Dak. 125, 2 N. W. 477. The judgment of conviction must be affirmed.

PERCIVAL et al. v. COWYCHEE & WIDE HOLLOW IRRIGATION DIST. et al.

(Supreme Court of Washington. Nov. 11, 1896.)

STATUTES—EXPRESSING SUBJECT IN TITLE—CONSTITUTIONALITY.

Act March 22, 1895, entitled "An act to amend an act providing for the organization and government of irrigation districts and the sale of bonds arising therefrom and declaring an emergency," which validates past debts of any district organized thereunder, and provides for the levy of a tax to pay such indebtedness, violates Const. art. 2, § 19, providing that the subject of an act must be expressed in its title.

Appeal from superior court, Yakima county; H. B. Rigg, Judge pro tem.

Action by A. Percival and others against the Cowychee & Wide Hollow Irrigation District and another to enjoin levy of a tax. Judgment for plaintiffs, and defendants appeal. Affirmed.

H. J. Snively, Fred Miller, Reavis & Englehart, and Whitson & Parker, for appellants. Frank H. Rudkin, for respondents.

HOYT, C. J. The only authority for the levy of the tax the collection of which was in controversy in this action was the provision of the act of March 22, 1895, which provided that: "Whenever the board of directors of any district heretofore formed under this act shall have attempted to incur any indebtedness prior to this amendment going into effect, and when the only ground of the invalidity of such indebtedness is that the board of directors was not authorized to incur such indebtedness so contracted by said board, such indebtedness is hereby declared valid and binding upon said district, and the said directors are authorized to make an assessment of the property in said district as provided by this act as amended and to levy a tax upon said property as other levies are required to be made to pay such debts; provided, such indebtedness shall not exceed the sum of \$5000." If this provision was in force, it was sufficient to authorize the levy in question; but it is claimed that it is void, for the reason that it is not within the title of the act, and hence in violation of section 19 of article 2 of the constitution. The title of the act in

which the provision is contained is in the following language: "An act to amend an act providing for the organization and government of irrigation districts and the sale of bonds arising therefrom, and declaring an emergency, the same being sections 1, 2, 4, 10, 16, 17, 18, 19, 20, 22, 24, 25, 26, 27, 28, 29, 30, 31, 33, 34, 35, 36, 38, 39, 40, 42, 59 and 70, approved March 20th, 1890, and declaring an emergency." The wording of this title is such as to make it difficult to determine the exact title of the act of which it was amendatory. It was in the following language: "An act providing for the organization and government of irrigating districts and the sale of bonds arising therefrom, and declaring an emergency." It will appear from a comparison of the two titles that there is no language used in the one to the amendatory act which in any manner extends the title to the original act. The latter act is simply amendatory of the former one, and the subject-matter embraced in the title is the same. Hence the question presented for decision is as to whether or not a title which shows nothing more than that the act is to provide for the organization and government of irrigation districts, and the sale of bonds arising therefrom, is broad enough to warrant the enactment thereunder of a provision for the validating of the indebtedness of a district which might have been organized thereunder, and the levying of a tax to pay the same. That the provision in the constitution in question should be reasonably construed, and legislation sustained which fairly comes within the subject-matter embraced in the title, has been frequently held by this court. See *Marston v. Humes*, 3 Wash. 267, 28 Pac. 520; *In re Rafferty*, 1 Wash. 382, 25 Pac. 465. And such we believe to be the tendency of the decisions of all of the courts. But it will not do to sustain legislation which is so foreign to the subject-matter embraced in the title that one could read such title without having his attention in any manner directed towards the legislation attempted to be embraced thereunder. A title may be as broad as the legislature sees fit to make it, and thereunder any specific legislation as to any subject relating to the general matter thus broadly embraced in the title sustained. But when it sees fit to adopt a restricted title, and thereunder attempts to enact provisions not fairly within such restricted title, such provisions cannot be given force by reason of the fact that it would have been competent for the legislature to have adopted a more generic title, and thereunder properly included all of the provisions of the act. The object of such constitutional provisions is twofold: First, to prevent log-rolling legislation; and, second, to require such a title that one reading it would have his attention directed to every subject-matter in the act. Having this latter object in view, was the title of the act in question sufficient to authorize the enactment thereunder of the provision which was the

foundation of this tax levy? Would one reading the title of the act, which simply provided for the organization of irrigation districts, have his mind at all directed to the question of validating an indebtedness which such district had in the past sought to incur? It seems to us not. A provision for the incurring of an indebtedness in the future might be reasonably expected to be found among the provisions for the organization of such districts; but the validation of past indebtedness, or the fact that such past indebtedness existed, would have no reasonable or natural connection with the organization of such districts. The contention that this provision is so far outside of the subject-matter of the title as to be void under the section of the constitution referred to must be sustained, and, there being nothing left to sustain the attempted levy, the decree of the superior court enjoining its collection must be affirmed.

SCOTT, ANDERS, DUNBAR, and GORDON, JJ., concur.

WASHINGTON BANK OF WALLA WALLA v. FIDELITY ABSTRACT & SECURITY CO.

(Supreme Court of Washington. Nov. 12, 1896.)

EXECUTION—PROPERTY SUBJECT.

A set of abstract books is corporeal, tangible property, and the subject of levy and sale under execution.

Appeal from superior court, Walla Walla county; William H. Upton, Judge.

Action by the Washington Bank of Walla Walla against the Fidelity Abstract & Security Company, a corporation, to foreclose a chattel mortgage. From a judgment and decree in favor of plaintiff, defendant appeals. Affirmed.

Thomas & Dovell, for appellant. Thos. H. Brents and Wellington Clark, for respondent.

DUNBAR, J. The appellant corporation, by its secretary, S. E. Dean, applied to the respondent, a corporation, for a loan of \$2,000, offering as security a chattel mortgage on a set of abstract records, maps, and indices of lands in Walla Walla county. The particular description was as follows: "The abstract records of all lands in Walla Walla county, state of Washington, and all maps, plats, and indices thereunto belonging, or in any wise appertaining, now in the office of said mortgagor." The loan was made, appellant made default in payment, and respondent brought suit to foreclose the mortgage. The defendant answered, setting up as an affirmative defense that the property described in the mortgage was a copy of the financial records of Walla Walla county, arranged in a certain and peculiar manner by appellant, together with certain peculiar indices to said records, made and arranged by

appellant; that, without a knowledge of the arrangement of said copies and said indices, the said property was of no value whatever; that the property described was the product of the work and mind of the said Dean, secretary, and of no other; and that the same were made and arranged for the use of said corporation, and none of the property was of any value whatever unless the party having possession thereof had the right to publish and copy the same. The cause was referred to a referee, and, after trial, the referee returned a report recommending the decree as asked in the complaint. The defendant below excepted, and asked the court to make finding in accordance with the answer just above quoted. Only one question is brought to the attention of this court, namely, the contention that, on account of the peculiar nature of the property described in the mortgage, the court erred in decreeing its sale. The appellant relies on the case of *Dart v. Woodhouse*, 40 Mich. 399. This case holds that a set of abstract books such as those in suit is but the unpublished manuscript of an author, valuable only on account of its literary contents, and belongs to the class of unleviable property, such as a patent right or a copyright, which are held by most of the courts to be unassignable privileges or incorporeal and intangible rights. We cannot indorse the conclusion or the reasoning of the case just cited. It seems to us that these abstract books were not so intangible or incorporeal that they could not be the subject of levy or of sale, and such was the holding in *Leon Loan & Abstract Co. v. Equalization Board of Leon*, 86 Iowa, 127, 53 N. W. 94, where the case of *Dart v. Woodhouse*, supra, was reviewed. That case was also unfavorably commented upon by Freeman on Executions (2d Ed., § 110), where the author, in reviewing the case, says: "In a set of abstract books, or in any other manuscripts, we see nothing intangible, nothing which makes it difficult or improper to subject them to execution. Confessedly they are property, and, as such, may be valuable to their compiler or owner; and, doubtless, he may, by his voluntary transfer, divest himself of title, and vest it in another. His transfer may not divest him of the information contained in them, and certainly will not impair the skill required in their compilation or use. The fact that he does not and cannot transfer his information and skill constitutes no ground for denying his ability to transfer so much as is transferable. In a state whose statutes in general terms declare all property subject to execution, we can perceive no reason for holding abstract books or other valuable writings not subject to execution." It will be observed, in this connection, that section 479, Code Proc., provides that "all property, real and personal, of the judgment debtor, not exempt by law, shall be liable to execution." This was also the view taken by this court in *Abstract Co.*

v. Phelps, 8 Wash. 549, 36 Pac. 490, where it was said: "There is a conflict in the authorities as to whether abstract books are subject to taxation. We think the better rule is that they are subject thereto,"—citing *Leon Loan & Abstract Co. v. Equalization Board of Leon*, supra. Many of the cases are cases where the question arose on the right to tax such property, but in this case a more rigid rule should be adopted against the claim of appellant. By his own contract he treated these abstract books as property of value, and obtained a valuable consideration for them in the nature of a loan, and it would be unconscionable to allow him to plead their worthlessness in a court of equity. The judgment will be affirmed.

HOYT, C. J., and SCOTT, ANDERS, and GORDON, JJ., concur.

BENNEY v. CLEIN et al.

(Supreme Court of Washington. Nov. 20, 1896.)

VACATION OF JUDGMENT—EFFECT AS BETWEEN THE PARTIES—SALE OF PROPERTY UNDER—REPLEVIN—ESTOPPEL TO DENY PLAINTIFF'S TITLE.

1. The effect of the vacation of a judgment for irregularity in obtaining it, after the sale of personal property on an execution thereon, and its purchase by the execution plaintiff, is the same as a reversal of the judgment would be, and it operates to vacate the sale as between the parties.

2. A judgment plaintiff, who causes property to be sold on execution under the judgment, and becomes the purchaser, is estopped to deny the title of the judgment defendant in replevin by the latter to recover the property after a vacation of the judgment.

Appeal from superior court, King county; R. Osborn, Judge.

Action of replevin by George Benney against S. Clein & T. A. Babcock, partners as Clein & Babcock. Judgment for defendants, and plaintiff appeals. Reversed.

Chas. F. Fishback and Chas. E. Shepard, for appellant. Gill, Keene & Shaw, for respondents.

GORDON, J. This action was brought by the appellant for replevin of a certain frame building, with certain fixtures and furniture therein, of the total value of \$300. After certain formal allegations, the complaint alleges the recovery by the respondents, on or about October 5, 1894, of a judgment against the appellant, as garnishee, in an action then pending in the superior court for King county, in which the respondents were plaintiffs, Wand-schneider and Campbell were defendants, and the appellant was garnishee; that on November 3, 1894, an execution issued on said judgment, under which the property which is the subject of this suit was levied upon and sold on November 14, 1894, to the judgment creditors in that action (respondents herein). The complaint further alleges that said judgment "was improperly and irregularly entered

against this plaintiff [appellant here] as garnishee"; that thereafter on January 8, 1893, the superior court vacated and set aside the judgment against the appellant, as garnishee; a demand for the possession of the property; and an allegation of damage, by the detention, in the sum of \$250. A general demurrer was interposed to the complaint, and overruled. Respondents thereupon answered, setting up, in addition to what has already been stated, that the respondents took possession of the property in suit, and retain it, by virtue of the purchase at the execution sale; that appellant had full knowledge of the sale, and of all proceedings, and at no time made objection thereto, permitted it to go on, without attempting to stay it or to vacate the judgment, until three months after possession of the property was taken by respondents; that respondents had appealed from the judgment of the superior court, which vacated and set aside the judgment; and that the appeal was then pending. A demurrer to the answer was overruled, and appellant (plaintiff below) replied, setting forth, among other things, that, after the vacation of the judgment, the action had been tried between the respondents (plaintiffs therein) and the appellant (garnishee therein), and resulted in a judgment in favor of appellant upon the merits. When the cause came on for trial, the lower court, on respondents' motion, entered a judgment in their favor upon the pleadings, and dismissed the action.

The question to be determined upon this appeal is the effect of the vacation of a judgment, after an execution sale of personal property, upon the title to the property sold thereunder, and purchased by the execution plaintiff. The appellant insists that the order vacating the judgment, like the reversal of a judgment, operates to avoid a sale made under it as between the parties, and cancels the purchase by the execution plaintiff of the property sold; and counsel have cited numerous authorities to the effect that a reversal of a judgment, as between the parties, is the same as if the judgment had never been, and, by reversal, the judgment ceases to be a justification (as between the parties) for any acts done by virtue of it before the reversal occurred. Counsel for the respondents do not question the soundness of the rule relied upon by appellant in so far as it pertains to a case wherein judgment has been reversed, but insist that a different rule is applicable where the judgment has been vacated merely. The record in this case does not disclose the grounds upon which the judgment in the garnishment proceeding was vacated, but, as already noticed, the complaint in this case alleged that the judgment was "improperly and irregularly" entered; and while, strictly considered, this is the statement of a conclusion, rather than of an issuable fact, it is, we think, at this stage of the proceedings, entitled to a liberal construction. So construed, it would appear that the entry of judgment was due to some irregularity upon the part of the plaintiffs in

that proceeding, who subsequently became the purchasers of the property sold; and it will be presumed that the order vacating the sale was granted because of such "irregularity," and not as a matter of grace or favor to the defendant therein. Adopting this view, the case, we think, falls within the principle (already referred to) which governs in cases of reversal. We perceive no reason for distinguishing between a judgment which has been vacated because of the irregularity of the plaintiff in obtaining it, and a judgment reversed by an appellate court upon appeal, in so far as the rights of purchasers (other than third parties) are concerned.

Aside from the allegation of irregularity in entering the judgment, it was suggested by counsel upon the oral argument, and appears from the record in the original cause (which was appealed to this court by the respondents herein, and the appeal thereafter dismissed), that the judgment was vacated, and the default of the defendant therein (appellant here) set aside, upon a showing that his answer in garnishment was duly served upon plaintiffs' counsel prior to the entry of default; and thereafter it was left with the clerk of the superior court to be filed, but the same was not filed, because of the neglect to pay the filing fee. We are not at this time called upon to review the action of the court in setting aside the default, and vacating the judgment entered therein. It has become final, and is binding upon all parties to that proceeding. But we refer to it in this action for the purpose only of ascertaining whether the action of the lower court in that behalf was based upon the inadvertence or excusable neglect of the defendant against whom the default and judgment had been entered, or for irregularity upon the part of the plaintiff in procuring the judgment; and, as already noticed, the record referred to discloses that it was upon the latter ground that the relief was awarded in the lower court.

It appears that, in granting the motion to vacate and set aside the default and judgment referred to, the court directed "that the title of innocent purchasers and subsequent bona fide incumbrancers of the property heretofore purchased at the sale made by the sheriff of King county, under and by virtue of execution heretofore issued herein, be not in any wise disturbed or affected hereby, but that the status of property heretofore sold under and by virtue of an execution issued herein, and the title thereto of such innocent purchasers and bona fide incumbrancers, be and remain as though this order had not been made." The respondents in this action are not in a position to avail themselves of this provision of the order. As execution plaintiffs, they were neither "innocent purchasers" nor "bona fide incumbrancers."

Counsel for the appellant have urged in their brief that this court should not only reverse the judgment appealed from, but should direct that judgment be entered below in favor

of appellant upon the pleadings. This is resisted by the respondents' counsel, who insist that they have a right, in any event, to put the appellant to proof of his title to the property in question. We think that respondents are not in a position to question appellant's title. They levied upon the property as the property of the appellant, and caused it to be sold as his property. They found it in his possession, and are attempting to retain it, upon the assumption that the title to it passed to them in virtue of the execution sale referred to. This, we think, should be held to estop them upon the question of ownership. But the answer does contain a sufficient denial of any damages arising from a detention of the property, and to this extent the appellant would not be entitled to recover in the present condition of the pleadings. The judgment will be reversed, and the cause remanded for further proceedings in accordance with this opinion.

HOYT, C. J., and ANDERS, SCOTT, and DUNBAR, JJ., concur.

PERKINS v. MITCHELL, LEWIS & STAVES CO.

(Supreme Court of Washington. Nov. 10, 1896.)

APPEAL — BRIEF — INSUFFICIENT ASSIGNMENT OF ERRORS.

Under the statutory requirement that appellant must clearly point out in his brief the errors relied upon for a reversal, assignments which make no reference to the fifth finding, and merely allege that, "under the proofs, the first three findings of the lower court are wholly immaterial; that the fourth is absolutely contradicted by the testimony; * * * as to the sixth and seventh findings, neither of them is worthy of notice,"—are insufficient. Hoyt, C. J., dissenting.

Appeal from superior court, Chehalis county; Mason Irwin, Judge.

Action by C. E. Perkins, receiver of the Aberdeen Cedar Manufacturing Company, against the Mitchell, Lewis & Staver Company, to bring property under the receivership. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

M. J. Cochran and J. B. Bridges, for appellant. Shank & Smith, for respondent.

GORDON, J. This cause was tried below without a jury, and findings of fact and conclusions made, upon which a decree was entered in favor of the defendant (respondent here). A motion was made in this court to strike the brief of appellant, and for affirmance of the judgment, upon the ground that appellant had not complied with rule viii. of this court (40 Pac. x.), in that he failed to make a reference in the statement of his case to the transcript for verification, and for the further reason that "he has not complied with the laws of the state or rules of this court by pointing out in his brief the errors relied upon for reversal." Upon oral argument of the

motion to dismiss we were disposed to consider that some of the findings of the lower court were sufficiently challenged by the brief, and hence we heard argument on the merits. Upon further examination a majority are convinced that the motion should have been granted, upon the authority of *Haugh v. City of Tacoma*, 12 Wash. 386, 41 Pac. 173, and 43 Pac. 37. It is utterly impossible to determine from the brief what appellant relies upon for a reversal. No errors are assigned or pointed out beyond the statement that "appellant contends that, under the proofs, the first three findings of the lower court are wholly immaterial; that the fourth is absolutely contradicted by the testimony, which shows conclusively that the date of the articles of incorporation was the date of its organization, and also the date when it took possession of its property, the date of the issuance of the stock being wholly immaterial, as its issuance at all was wholly immaterial. * * * As to the sixth and seventh findings, neither of them is worthy of notice." Upon the merits, however, the decree must be affirmed. There were, in all, seven findings. To each of them the appellant excepted. The brief informs us that five of them are "wholly immaterial," and therefore harmless. As to finding No. 5 no mention is made, and No. 6 is the only one objected to; but we are not satisfied that it is without sufficient evidence to support it, and, indeed, we think that, even if this finding was disregarded, the decree should, nevertheless, stand. Affirmed.

DUNBAR, SCOTT, and ANDERS, JJ., concur. HOYT, C. J., dissents.

STATE v. OWENS.

(Supreme Court of Washington. Nov. 10, 1896.)

CRIMINAL LAW—FAILURE TO SAVE EXCEPTIONS—NEW TRIAL.

1. Where appellant's objection to the admission of evidence was based on the sole ground that it was not proper in rebuttal, he cannot urge that it was not competent for the state, by such testimony, to show specific acts of bad conduct on his part.

2. Where the only grounds urged for a new trial are alleged errors to which the party failed to save exceptions during the trial, a new trial is properly denied.

Appeal from superior court, Yakima county; Carroll B. Graves, Judge.

E. Owens was convicted of an assault with intent to commit murder, and appeals. Affirmed.

H. J. Snively and Fred Miller, for appellant. Ira P. Englehart and F. H. Rudkin, for the State.

HOYT, C. J. Appellant was tried upon an information charging him with assault with intent to commit murder. A verdict of guilty was returned, and thereon, after a motion for a new trial had been denied, judgment and

sentence was duly entered. Four specifications of error are relied upon as grounds for reversal: (1) That the court erred in allowing the prosecuting attorney to cross-examine defendant's witnesses as to particular acts of bad conduct alleged to have been committed by the defendant; (2) for like error in permitting the prosecuting attorney to cross-examine the defendant as to like particular acts; (3) that the court erred in permitting two witnesses to testify in rebuttal as to particular acts of bad conduct on the part of the defendant; and (4) error in overruling the motion of the defendant for a new trial.

If the appellant was in a situation to derive any benefit from the action of the court as to the matters complained of, some important questions of law might be presented for our determination; but his treatment of the matter in the court below was such that he is not in a position to take any advantage of any of the allegations of error unless it is the fourth. As to the first two, he made no objection to the admission of the testimony as to which he is now complaining. Not only did he fail to object to the questions asked his witnesses upon cross-examination, but upon their re-examination himself went fully into the subject-matter as to which such witnesses had been cross-examined. As to the third assignment, the only objection that was made to the testimony the admission of which is claimed to have constituted reversible error was that it was not proper in rebuttal. There was no suggestion made that the objection to such testimony was based upon the ground that it was not competent for the state to show specific acts of bad conduct upon the part of the defendant; and, no such claim having been made in the court below, it cannot avail appellant here. The motion for a new trial, the denial of which is the foundation for the fourth assignment of error, presented no questions not already passed upon by the court during the progress of the trial, and, the defendant not having been in a position to avail himself of the errors, if any, which the court had committed, by reason of the fact that he had saved no exception thereto, the motion was properly denied. The judgment and sentence will be affirmed.

ANDERS, SCOTT, DUNBAR, and GORDON, JJ., concur.

ROGERS v. STROBACH.

(Supreme Court of Washington. Nov. 10, 1896.)

WILLS—CONSTRUCTION—RIGHTS OF LEGATEE'S ADMINISTRATOR.

Under a will bequeathing to each of testator's two children half the money to be realized from sale of his property, the money to be paid them respectively when they attain the age of 21; giving all his property to S., in trust for execution of the will, with power to sell as to him shall seem meet; and appointing S. executor, and di-

recting that he shall, after payment of debts, pay to the two children, on their respectively arriving at the age of 21, one-half to each of all money then held by him as executor,—the bequest is to each of the children, and, one of them dying before majority, his administrator is entitled to receive his share.

Appeal from superior court, Spokane county; Norman Buck, Judge.

Petition by W. S. Rogers, administrator of Heinrich Dehning, deceased, against Paul J. Strobach, executor of William I. Dehning, deceased. From an order in favor of the administrator, the executor appeals. Affirmed.

Adolph Munter, for appellant. R. E. Porterfield, for respondent.

HOYT, C. J. Upon a petition filed in the matter of the estate of William I. Dehning in behalf of the administrator of the estate of Heinrich Dehning an order was made by the superior court of Spokane county directing the executor of the estate of William I. Dehning to deliver to said administrator a certain portion of said estate, which it was alleged had been devised to said Heinrich Dehning in his lifetime, and had passed to his administrator upon his death. From this order the executor of the estate of William I. Dehning has prosecuted this appeal.

Two reasons are suggested why the order should be reversed: First, that no notice was given of the hearing of the petition upon which it was founded; and, second, that under the will of William I. Dehning no part of his estate passed to Heinrich Dehning during his lifetime. The record does not bear out the alleged fact upon which the first claim is founded. It not only does not appear that no notice was given, but it affirmatively appears that the notice required by the statute was given, and that, if it was not, no objection on that account was interposed to the hearing of the petition in the court below. The second ground of reversal is founded upon the claim that under the will of William I. Dehning all his property passed to his executor, to be by him paid to the children therein named when they reached the age of 21 years, and that, Heinrich Dehning having died before he reached that age, nothing passed under the will to his representatives; that thereunder the other child became entitled to the entire estate when he should reach the age of 21. There is much discussion as to who were, under the laws of Montana, the heirs of Heinrich Dehning, but that entire discussion is foreign to the issues presented. A duly-appointed administrator of his estate was in court, and, if the executor of the estate of his father had any property to which his estate was entitled, such administrator was entitled to its possession, and the question as to whom it would descend to must be determined in the course of the administration of his estate. The provisions of the will which

it is necessary to interpret are in the following language: "(1) I bequeath to each of my children, Heinrich Dehning and Louis Dehning, one-half of all the moneys that may be realized from the sale of all my personal and real property of whatsoever kind, the money to be paid to them respectively when they obtain the age of twenty-one. (2) I give and devise all my personal and real property of whatsoever kind and nature to Paul J. Strobach, in trust for the execution of my will, with power to sell and dispose of the same at public or private sale at such times, and upon such terms, and in such manner as to him shall seem meet. (3) I direct the said Paul J. Strobach, whom I hereby appoint executor of this, my last will, to invest all moneys received by him as said executor, after paying all the expenses of my last sickness and of the funeral expenses, in mortgage or other interest bearing securities, as he may deem best, and to pay over to my said children, Heinrich Dehning and Louis Dehning, on their respectively arriving at the age of twenty-one years, one-half to each of all moneys, principal and interest, then held by him as executor." And thereunder it must be held that the devise was to the children, and each of them, and not to the executor. If it had been the intent of the testator to devise to his executor for the use of his children, and not to make any direct devise to them, the clause first above set out would have been entirely unnecessary. But that clause was not only inserted, but was given such form as to clearly show an intention to devise the property directly to the children therein named; and, this being so, the provision as to the duty of the executor in reference thereto set out in the last paragraph could not take away its effect. Under the will, the right to half of the property passed to Heinrich Dehning, and upon his death became part of his estate, and the administrator thereof was entitled to its possession. The judgment appealed from will be affirmed.

GORDON, DUNBAR, SCOTT, and ANDERS, JJ., concur.

WATTERSON et al. v. MASTERSON et al.
(Supreme Court of Washington. Nov. 14, 1896.)
APPEAL—NOTICE—BANKS—STOCKHOLDERS' LIABILITY—ENFORCEMENT.

1. Where a part of the defendants give notice of appeal, but do not serve it on the other defendants, and the other defendants then give notice of appeal, and serve it on all necessary parties, those attempting the first appeal may abandon it, and join in the second.

2. The contingent liability of stockholders of a bank under Const. art. 12, § 11, for its debts, can be enforced only by its receiver. *Wilson v. Book* (Wash.) 43 Pac. 939, followed.

Appeal from superior court, Pierce county; W. H. Pritchard, Judge.

v.46p.no.13—66

Action by Thomas Watterson and others against C. P. Masterson and others, impleaded with the Bank of Puyallup and others. Judgment for plaintiffs, and defendants appeal. Reversed.

Arthur Remington and John P. Judson (Remington & Reynolds, of counsel), for appellants. John A. Shank and Walter M. Harvey (Herbert S. Griggs, of counsel), for respondents.

HOYT, C. J. A portion of the defendants in this action gave notice of appeal, but did not serve it upon all who had appeared in the action. Thereafter the defendants not served with notice themselves gave notice, and served it upon all necessary parties. Respondents moved to dismiss both appeals,—the first for the reason that the required parties had not been served, and the second because it was taken while the first was pending and undisposed of. It was clearly the right of the defendants not served with notice of the first appeal to give notice in their own behalf. Hence, their appeal was regularly taken; and, this being so, those who attempted the first appeal could abandon it, and join in the second one. By their doing so the duplication of papers was prevented, and the whole matter of the prosecution of the appeal simplified, and at the same time every object which the requirements of the statute had in view was fully accomplished. The motion to dismiss must be denied.

The Bank of Puyallup had failed, and a receiver of its assets had been duly appointed by the superior court of Pierce county. Thereafter this action was brought by a creditor of the bank against its stockholders to recover, in his own interest and that of all other creditors, the contingent liability of the stockholders, under the provisions of the constitution of this state. The receiver was made a party to the action. Other creditors intervened, and the action resulted in a judgment against the stockholders, respectively, for their share of the liability growing out of the claims of all the creditors which were established in the action. From this judgment this appeal has been prosecuted.

The principal questions involved in this case were decided in *Wilson v. Book* (Wash.) 43 Pac. 939, and it is conceded that, under the rule therein announced, the judgment cannot stand; but respondents earnestly contend that the decision in that case was against the great weight of authority, and ask that the questions therein decided be again examined. This has been done, but such re-examination has resulted in the confirmation of the views expressed in the opinion filed in that case. If any proof had been needed that the method pointed out in that opinion for enforcing the contingent liability of stockholders was demanded by public pol-

icy, and was in the interest of all classes interested in the bank, such proof is furnished by the record in this case. After great expense, and the waste of much time for the purpose of establishing the facts necessary to authorize the enforcement of the liability in behalf of creditors against the stockholders, such creditors were in no better situation than the receiver was before they had commenced this proceeding. Hence, it was the duty of the courts to interpret our constitutional provision so as to make the enforcement of this contingent liability a part of the duties of the general receiver, if the language used would authorize such a construction. We thought then, and still think, that such a construction is reasonable. It is true that the courts of many states have interpreted somewhat similar constitutional provisions to authorize the creditors to proceed directly against the stockholders; but in most, if not all, of these states their constitutional or statutory provisions were so different from ours that the cases are entitled to but little consideration. For that reason we thought it our duty to interpret our constitutional provision so as to best protect the interests of all concerned, so far as the language used would warrant such construction. We are satisfied with the conclusion upon this question to which we arrived in the case above referred to, and must adhere thereto.

The only reason suggested why this case is not governed by that one is that in that case the general receiver was not made a party to the action against the stockholders, while in this one he was. But we are unable to see how this fact could in any manner affect the right of the creditors to maintain an independent action. The judgment will be reversed, and the proceeding dismissed.

DUNBAR, SCOTT, ANDERS, and GORDON, JJ., concur.

HILL v. LOWMAN.

(Supreme Court of Washington. Nov. 14, 1896.)

APPEAL—REVIEW.

A finding that an infant was made a party to a foreclosure suit by service on her guardian ad litem, not having been excepted to, is conclusive on appeal.

Appeal from superior court, King county; R. Osborn, Judge.

Action by Eliza Maud Hill against J. D. Lowman. Judgment for defendant. Plaintiff appeals. Affirmed.

W. F. Hays, for appellant. Carr & Preston, for respondent.

DUNBAR, J. It is doubtful if there is such an assignment of errors in the brief of the appellant as would warrant the court in entering into an investigation of the cause, but,

considering the nature of the case, we will pass over that inadvertence, and look at the case upon its merits. Appellant is the daughter of George D. and Ellen K. Hill, both deceased. Before the decease of either Ellen K. or George D. Hill, they borrowed \$15,000 from one Reed, and gave a mortgage to secure it upon certain real estate described in the record in this case. Ellen K. Hill died testate at Seattle on the 14th day of February, 1887, and the said George D. Hill died testate December 5, 1890. By the will of the said Ellen K. Hill her husband was made her executor, and she bequeathed all of her property to her four children, share and share alike, appellant being the eldest. The mortgage spoken of was executed on the 24th day of March, 1885, due March 24, 1888. On the 28th day of November, 1887, the payee, S. G. Reed, transferred said mortgage to the respondent, J. D. Lowman, and on the 28th day of December, 1887, respondent brought suit to foreclose the mortgage, and obtained a decree of foreclosure thereof on the 11th day of February, 1888, prior to the time appellant was 18 years old, but after she was 14 years old. The note for which the mortgage was given as security provided that the amount of money borrowed should be paid three years after the date thereof, with interest after date thereof until paid, payable quarter-yearly. In the mortgage the note was set out verbatim, but, instead of saying, "with interest after date until paid," the copy set out in the mortgage reads, "with interest after maturity until paid." The mortgage provided that the whole principal sum evidenced by the note should become due, and the mortgage might be foreclosed for the whole sum, upon default being made in the payment of any interest installment. The interest upon the note was paid quarter-yearly up to the 24th day of December, 1886, but no installment of interest falling due thereon at any time thereafter was ever paid. This action was brought by the appellant, Eliza Maud Hill, to vacate the judgment rendered in the foreclosure proceeding, and for a decree to the appellant of such portion of the mortgaged premises as she was entitled to. The court below found that there was no equity in the petition of plaintiff in this action, that she had no interest in the property affected by the decree in the former suit of foreclosure sufficient to entitle her to maintain this action, and that the defendant was entitled to a decree upon the facts found; dismissed the action; and entered judgment against the plaintiff for costs.

We are not able to find any merit in this appeal. If it is considered as an action for the vacation of the judgment, it is barred by the statute of limitations, more than a year having expired since the arrival of the appellant at the age of majority. Again, there is no equitable showing made by appellant—really no allegation in the complaint—that the decree was not an equitable one, and that the judgment would be any different if it were vacated.

and the cause retried. It is contended by the appellant that she is not bound by the decree of foreclosure from the fact that she was not a party to the foreclosure suit. Even if this were true, it is not disputed that the executor was made a party to the foreclosure of the mortgage, and, under the decision of this court in *Hyde v. Heller*, 10 Wash. 586, 39 Pac. 219, that would be sufficient to give the court jurisdiction. Again, the court finds as a fact in this case that the appellant was made a party to the foreclosure suit by service upon her guardian ad litem. This finding was not excepted to by the appellant, and must stand as the established fact in this case. In fact, no exceptions were made to either the findings of fact or conclusions of law made by the lower court; and as the findings of fact, we think, without any question warrant the conclusions of law, and the conclusions warrant the judgment rendered, said judgment must be affirmed.

HOYT, C. J., and SCOTT, ANDERS, and GORDON, JJ., concur.

STATE v. GLEASON.

(Supreme Court of Washington. Nov. 14, 1896.)

CRIMINAL LAW—JURISDICTION.

Though Const. art. 1, § 25, provides that all offenses "theretofore prosecuted by indictment" may be prosecuted by information or indictment, as prescribed by law, the municipal court of Spokane has jurisdiction to try a person on an ordinary complaint for assault and battery, and impose a fine of \$500, since, at the time the constitution was adopted, justices of the peace had concurrent jurisdiction with district courts in prosecutions for assault and battery.

Appeal from superior court, Spokane county; Norman Buck, Judge.

William S. Gleason was convicted of assault and battery in the municipal court of the city of Spokane, and appealed to the superior court. From a judgment of conviction in the latter court, he appeals. Affirmed.

L. H. Prather, for appellant. J. W. Feighan, for the State.

SCOTT, J. The defendant was tried upon an ordinary complaint, in substance such as is used before a justice of the peace, in the municipal court of the city of Spokane, and convicted of the crime of assault and battery, and was fined in the sum of \$500. From this judgment he appealed to the superior court, and therein moved to quash all the proceedings, and for his discharge, because the court had no jurisdiction to try him without an information or indictment first having been found or presented against him. This motion was denied, and he was again tried, and convicted, from which judgment he has appealed.

It is contended that the constitution (article 1, § 25), which provides that all offenses

theretofore prosecuted by indictment might thereafter be prosecuted by information or indictment, as might be prescribed by law, would require an information in this case, as, prior to the constitution, all offenses except those within the jurisdiction of a justice of the peace had to be prosecuted by indictment, and that the jurisdiction of the municipal court in this case to proceed without it was no greater than that of a justice of the peace, and that, when the municipal judge concluded that a fine of \$100 was not a sufficient punishment, it was his duty to bind the defendant over to the superior court unless the municipal court could proceed by indictment or information. Conceding, for the purposes of this case, that the question was properly raised, we do not think the contention is well founded. At the time the constitution was adopted, justices of the peace had concurrent jurisdiction with the district courts in prosecutions for assault and battery, and hence this offense was not necessarily an offense "theretofore prosecuted by indictment." A justice of the peace had jurisdiction to try a defendant for this offense, before the adoption of the constitution, and impose a fine up to the statutory limit. The nature of the offense was not changed by the constitution. The constitution authorized the creation of the municipal court, and authorized the legislature to prescribe its jurisdiction and powers. The legislature, by merely increasing the limit within which a fine might be imposed, did not change the nature of the offense, nor require it to be prosecuted by indictment or information in the municipal court, or in the superior court upon an appeal. Affirmed.

HOYT, C. J., and ANDERS and DUNBAR, JJ., concur.

CITY OF TACOMA v. COMMERCIAL ELECTRIC LIGHT & POWER CO.

(Supreme Court of Washington. Nov. 14, 1896.)

ABATEMENT—SUFFICIENCY OF PLEA—ANOTHER ACTION PENDING.

A city having torn down the wires of an electric light company, the latter brought suit for injunction, and obtained a temporary order restraining the city from interfering with the stretching of the wires by the company. A few hours after service of this order the city brought suit, and obtained a temporary order restraining the company from replacing the wires. Held that, as the issues in the two actions were identical, a plea in abatement by the company in the second suit, setting out the fact of the commencement of the first suit, was sufficient.

Appeal from superior court, Pierce county; John C. Stallcup, Judge.

Suit for injunction, brought by the city of Tacoma against the Commercial Electric Light & Power Company. From a decree for complainant, the defendant appeals. Reversed.

Stiles & Stevens, for appellant. John P. Judson and W. H. H. Kean, for respondent.

DUNBAR, J. Careful and elaborate briefs have been prepared by both appellant and respondent on the merits of this case, but there is a question lying at the threshold which renders it unnecessary for us to discuss the merits. A plea in abatement was made by the appellant, and the court was asked to vacate the restraining order, and dismiss this action, by reason of the pendency of another case involving the same questions. The appellant had commenced in the superior court of Pierce county, before Judge Pritchard, superior judge, injunctive proceedings against the respondent in this case, and a restraining order had been granted by Judge Pritchard prohibiting the city of Tacoma, the respondent here, from interfering with the Commercial Electric Light & Power Company, appellant here, stretching certain wires which had been torn down the night before by the city officials. The restraining order obtained by the appellant had been served upon the respondent, together with the summons and complaint in the action, and a few hours after such service the present action was commenced by the respondent seeking to restrain appellant from proceeding to replace its wires. The second restraining order—the present one—was brought in the superior court before Judge Stallcup, superior judge of Pierce county. The pleadings show conclusively that the real issues in the two cases are identical, and the motion to vacate and dismiss ought to have been, upon the showing made, at once granted by the judge. Every issue involved in this action could have been litigated in the prior action, which was pleaded in abatement. Even the question of nuisance would have been a defense which the defendant in the first action could have pleaded. Without specially reviewing the pleadings in the respective cases, it is too plain for argument that the substantive issues in the two cases are identical, and the only result of entertaining jurisdiction in the last case was to interfere with and annul the action of the judge who issued the first restraining order. Such a practice is wrong in theory, and is liable to be pernicious in effect. The judgment will be reversed, and the cause remanded, with instructions to the lower court to vacate the restraining order, and dismiss the action.

HOYT, C. J., and ANDERS, GORDON, and SCOTT, JJ., concur.

PORT TOWNSEND SOUTHERN R. CO. v. WEIR.

(Supreme Court of Washington. Nov. 14, 1896.)

PLEADING—SUFFICIENCY OF—ERROR NOT SHOWN IN RECORD—CONFLICTING EVIDENCE—NEW TRIAL.

1. In an action upon a note, where the defendant pleaded failure of consideration and fraud in its execution, a motion for judgment for plaintiff on the pleadings was properly denied.

2. An assignment of error based on the admis-

sion of evidence will not be considered on appeal when it appears from the record that the objection to the admission of the evidence was sustained.

3. Where there is evidence to sustain the verdict, it will not be disturbed because the evidence was conflicting.

4. An assignment of error based on the denial of a motion for new trial will not be considered, in the absence of anything to show an abuse of discretion.

Appeal from superior court, Thurston county; T. M. Reid, Jr., Judge.

Action by the Port Townsend Southern Railroad Company against Allen Weir. There was a judgment for defendant, and plaintiff appeals. Affirmed.

S. H. Piles and J. E. Lilly, for appellant. M. A. Root and Allen Weir, for respondent.

SCOTT, J. This action was brought upon a promissory note for \$250, executed by the defendant to plaintiff. From a verdict and judgment for defendant, the plaintiff has appealed.

The first error complained of is the denial of a motion for judgment on the pleadings; but, as the answer alleged a failure of consideration, and, further, that the defendant's signature to the note was obtained by fraud, this motion was properly denied.

It is next contended that the court erred in admitting evidence of fraud, but the record shows that the plaintiff's objection to this testimony was sustained.

Another contention is that there was no evidence to support the verdict. It appeared that the defendant had executed to the plaintiff his bond, in the sum of \$1,000, conditioned, in substance, that if the plaintiff should, on or before September, 1890, complete and operate a line of railroad for a distance of 20 miles southerly from a point in the city of Port Townsend, one-fourth of said sum should then become due and payable, and that the remainder of it should become due and payable upon the completion of such railroad to a point connecting Port Townsend with a transcontinental railroad; and it was admitted, by a stipulation, that the note was executed pursuant to the stipulations of such bond. It was admitted, also, that the first 20 miles of road had been completed, and the conditions of the bond in that respect complied with. But the issue was as to whether, as claimed by the plaintiff, the note had been given for the first installment provided for by the bond, or whether, as claimed by the defendant, it was given to represent a portion of the second installment. This question was submitted to the jury under proper instructions by the court, and the jury, having rendered a verdict for the defendant, must be presumed to have found that it was given as a part of the second installment. As to this, it was conceded that the terms of the bond had not been complied with by the plaintiff, and that the consideration had wholly failed. We

think this was competent proof to sustain the verdict rendered.

It is lastly complained that the court erred in denying a motion for a new trial, but we find nothing in the proofs submitted which would warrant us in holding that the discretion of the court was abused in this particular, and the judgment is affirmed.

HOYT, C. J., and ANDERS, GORDON, and DUNBAR, JJ., concur.

McKEE v. WHITWORTH et ux.

(Supreme Court of Washington. Nov. 16, 1896.)

APPEAL—FINDINGS OF FACT—NO EXCEPTIONS—NOTE—COMMUNITY CONTRACT—EXTENSION OF TIME BY HUSBAND.

1. Where the findings of fact are not excepted to, and the court has found the amount due from defendants to plaintiff on the note in controversy, the supreme court will not inquire into the correctness of the computation made by the trial court.

2. Where a wife joins her husband in making a note in payment of one upon which he was surety, and which was secured by a mortgage, and it is agreed that they are to have the mortgage, on the payment of their note, it is a community contract; and the wife is bound by an extension of their note, or by any other action of the husband which is for the benefit of the community interest.

Appeal from superior court, King county; T. J. Humes, Judge.

Action by George C. McKee against F. H. Whitworth and wife on a promissory note. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Stratton, Lewis & Gilman, for appellants. John E. Humphries, Thompson, Edsen & Humphries, and R. J. Huston, for respondents.

DUNBAR, J. The statement of this case, as we view it, is pretty much all there is to it. The action is upon a promissory note signed by the defendants, in favor of the plaintiff, dated May 4, 1893, for \$2,508.80. The complaint contains the usual affirmations, and, in addition, alleges that the defendants are husband and wife, and that the note was given for a community debt. The affirmative answer, upon which the defendants rely, is, in substance, that, at the date of the execution of the note by defendants, one Jennings and wife were indebted to plaintiff on a note dated May 4, 1892, in the sum of \$2,240, and accrued interest, amounting to \$2,260.80, which was secured by a mortgage on certain real property owned by Jennings and wife, and that the note in suit was made as collateral security for the Jennings note; that the Jennings note is still unpaid; that neither of the defendants received any value for the making of said alleged collateral note, but that the same was made for the accommodation of Jennings and wife, and that this fact was known to the plaintiff; that on the 7th day

of May, 1894, plaintiff and Jennings and defendant F. H. Whitworth entered into an agreement in writing whereby it was agreed, in consideration of the payment to plaintiff of \$225, that plaintiff would extend the time of payment of the note sued on for six months from May 4, 1894, and that the rate of interest reserved in said note should be reduced to 12 per cent. per annum; that Jennings thereupon paid said \$225, and the said extension was made, without the knowledge or consent of the defendant Ada J. Whitworth. A second affirmative defense alleges that plaintiff still holds the Jennings and wife note and mortgage, and has taken no steps to realize the amount due out of the makers, or the mortgaged property. A demurrer was interposed to the affirmative defense, which was overruled, whereupon the affirmative matter pleaded in the answer was denied by reply. The cause was tried without a jury, and judgment rendered in favor of plaintiff, as prayed for in the complaint.

The appellants contend that the amount of the judgment is excessive; that, upon the facts found by the court, the defendant Ada J. Whitworth is entitled to judgment in her favor; that, inasmuch as the note sued upon was a mere accommodation note, and the time for the payment was extended without the knowledge or consent of Mrs. Whitworth, she is released from her responsibility; and further that, under the agreements entered into in this case, it was the duty of the plaintiff to collect the first note given by Jennings and wife.

The findings of fact were not excepted to, and must therefore be considered the facts in the case. On the question of the excess of judgment, the court having found the amount due from defendants to plaintiff on the note, and that fact not having been excepted to, this court will not inquire into the correctness of the computation made by the trial court. From the findings, it appears that defendant Whitworth was surety upon the note executed by Jennings and wife to the plaintiff on the 4th day of May, 1892; that after the maturity of that note, and on the 4th day of May, 1893, the defendants, in order to prevent any action being brought by the plaintiff against defendant Whitworth as surety, and for the purpose of relieving said Whitworth from liability on said note, executed to the plaintiff the promissory note which is the subject of this suit. This is set forth in the agreement entered into at the time of the execution of the note. The court found, and the agreement plainly shows, that it was the evident intention of the parties that the note in suit was given in payment, as between respondent and Jennings and wife and F. H. Whitworth, and that the note in suit became the principal debt, and the original note became collateral security for the note in suit. The condition of the agreement is as follows: "Whereas, said Whitworth has given his own promissory note, signed

by his wife, Ada J. Whitworth, to the said George C. McKee, for the sum of \$2,508.80, payable one year after date, for the purpose of preventing any action being brought against him as surety, and for the purpose of satisfying said McKee, and of relieving himself from any liability on said first-named note (with the express understanding and agreement, however, that said last-named note is to be paid when due): Now, it is hereby agreed that said first-named note and mortgage shall be left with said George C. McKee as collateral security for said last-named note. And it is agreed that, upon payment of said last-named note, said George C. McKee will assign said first-named note and mortgage to such person or persons as shall be directed by said Whitworth; it being the express understanding and intent of the parties hereto that the indebtedness secured by said mortgage shall not merge in the indebtedness created by said last-named note, but that said Whitworth shall have said mortgage, upon payment of said last-named note, as security for all moneys paid and advanced by him for and on account of said Jennings." Afterwards, on the 7th day of May, 1894, defendant F. H. Whitworth and the said W. J. Jennings, by L. C. Gilman, his attorney, and the plaintiff, George C. McKee, by R. J. Huston, his attorney, without the knowledge or consent of the defendant Ada J. Whitworth, made and entered into a memorandum of agreement, the pertinent portion of which is as follows: "Witnesseth, that whereas said second party holds the promissory note of F. H. Whitworth and wife for the sum of \$2,508.80, which is now overdue, secured by the collateral note of F. H. Whitworth and W. J. Jennings to the second party, said last-named note being secured by mortgage; and whereas, first parties desire an extension of time upon said mentioned note, of six months from the 4th day of May, A. D. 1894: Now, it is agreed hereby that the second party does grant said extension upon the following terms and conditions, to wit," etc. It would seem that, considering the terms of these agreements, and especially in view of the statement in the agreement that the note of F. H. Whitworth and wife was secured by the collateral note of F. H. Whitworth and W. J. Jennings, there is hardly room for the construction claimed by the appellants, that the Jennings note was the principal note, which should have been collected before resorting to the defendants upon their note. So far as the claim put forth in the interest of Mrs. Whitworth is concerned, she saw fit to sign this note to relieve her husband from being pressed upon the first note, upon which he was a surety, and she, of course, became liable upon her own contract. This contract, then, being a community contract, she would be bound, under the frequent decisions of this court, by any action of her husband which was for the benefit of the community interest; and the facts, as found by the court,

show that the action of F. H. Whitworth in extending the time of payment was prompted by a desire to prevent the community from being sued upon the community debt, and was in the direct interest of the community, and under the doctrine announced in the case of *Horton v. Banking Co.* (Wash.) 46 Pac. 409, the community will be bound. The judgment will be affirmed.

HOYT, C. J., and SCOTT, ANDERS, and GORDON, JJ., concur.

AMES v. BIGELOW et al.

(Supreme Court of Washington. Nov. 16, 1896.)
MORTGAGE—STIPULATION FOR ATTORNEY'S FEES—DECREE.

On foreclosure, where plaintiff has introduced the note and mortgage, wherein it was stipulated by defendants, mortgagors, that, in case of foreclosure, \$500 for attorney's fees should be included in the decree, no further proof is necessary to authorize a decree for such fees.

Appeal from superior court, King county; J. W. Langley, Judge.

Action by Blanche Butler Ames against Emeline Bigelow and I. N. Bigelow to foreclose a mortgage. From a decree in favor of plaintiff, defendants appeal. Affirmed.

Robinson & Rowell, for appellants. Elder & Harger, for respondent.

HOYT, C. J. This appeal is from a decree foreclosing a mortgage made by the appellants to the respondent. Three errors are assigned. The first is founded upon the finding by the court that the mortgage was due; the second, upon the ruling of the court in refusing to allow one of the appellants to testify as to what he did on the strength of certain letters received from the husband of the respondent; and the third, upon the action of the court in allowing the sum of \$500 as attorney's fees.

As to the first, it is sufficient to say that there was abundant proof to show that the respondent had, under the terms of the mortgage, elected to declare the whole sum due by reason of the nonpayment of installments of interest; and the letters from the husband of the respondent, relied upon by the appellants to show that there had been no such election, were entirely insufficient for that purpose.

The second assignment is without merit, for the reason that the letters referred to were not such as to show any change in the relation of appellants to the principal and interest provided for in the mortgage and note thereby secured.

The third assignment is founded upon the alleged fact that the court fixed the attorney's fees without any proof having been introduced which would authorize such action on its part; but, in making this claim, appellants have overlooked the fact that the mortgage and note were introduced in evi-

dence, and that therein it was stipulated by the appellants that, in case of foreclosure, \$500 should be included in the decree for attorney's fees.

We find no error in the record, and the judgment will be affirmed.

GORDON, ANDERS, SCOTT, and DUNBAR, JJ., concur.

KNAPP v. KING COUNTY.

(Supreme Court of Washington. Nov. 16, 1896.)

TAXATION—DECISION OF BOARD OF EQUALIZATION—APPEAL.

An appeal will not lie to the superior court from a decision of the board of equalization denying a petition for the reduction of an assessment.

Appeal from superior court, King county; R. Osborn, Judge.

Appeal by George E. Knapp from a decision of the board of equalization of King county. The superior court having refused to dismiss the appeal on motion of the county, and having rendered judgment, the county appeals. Reversed.

A. W. Hastie and W. W. Willshire, for appellant.

PER CURIAM. From an order of the board of equalization of King county denying the respondent's petition for a reduction of his assessment, he appealed to the superior court for that county; and the appellant having appeared therein, and specially objected to the jurisdiction of that court to entertain said appeal, its objections were overruled, and a judgment was entered, from which it has appealed.

An appeal does not lie from a board of equalization to the superior court. *Olympia Waterworks v. Board of Equalization of Thurston Co.* (Wash.) 44 Pac. 267; *Buchanan v. Adams Co.* (decided Nov. 9, 1896) 46 Pac. 643. The judgment will be reversed, and the cause remanded, with directions to the superior court to dismiss the proceeding.

STATE v. MILES.

(Supreme Court of Washington. Nov. 16, 1896.)

TRIAL—REQUEST FOR WRITTEN INSTRUCTIONS—IMPEACHMENT OF WITNESS.

1. Under 2 Hill's Code, § 354, providing that the court must charge the jury in writing when so requested, it is reversible error for the court to charge the jury partly in writing and partly orally, when a written charge has been requested.

2. It was not a compliance with the statute that a stenographer was present and took down the charge as given.

3. Testimony having been introduced tending to show that the reputation of a certain witness for truth and veracity was bad, the witnesses were asked if, from their knowledge of his reputation, they would believe him under oath. *Held*, that the opinion thus called for was properly excluded.

Appeal from superior court, Spokane county; Norman Buck, Judge.

George Miles was convicted of larceny, and appeals. Reversed.

Plummer & Thayer, for appellant. J. W. Felghan, for the State.

SCOTT, J. The defendant was convicted of larceny, and has appealed. One of the errors complained of is the failure of the court to instruct the jury in writing, the defendant having requested the court to give written instructions. The charge given was partly written and partly oral, and for this reason the case must be reversed, and remanded for a new trial. The fact that a stenographer was present, who took down the charge as given, was not a sufficient compliance with the statute. Another error complained of was in relation to the impeachment of a witness. Testimony had been introduced to show that his reputation for truth and veracity was bad, and the witnesses were then asked whether, from their knowledge of his reputation, they would believe him under oath, and the court sustained an objection to the question. We think the weight of authority is now against permitting witnesses to testify to their opinions in this respect, and the objection was properly sustained.

HOYT, C. J., and ANDERS, GORDON, and DUNBAR, JJ., concur.

LOUDIN v. CROSSMAN et ux.

(Supreme Court of Washington. Nov. 16, 1896.)

EVIDENCE OF FRAUD—HUSBAND AND WIFE—COMMUNITY LIABILITY.

1. In a suit to recover money paid defendants for a mine, evidence of representations made by defendants regarding the existence and character of the mine in controversy, and as to the value of the ores therein contained, to others than plaintiff or to the people of the vicinity generally, was admissible, where it appeared that the purpose of defendants was to sell the mine to any one that could be induced to purchase it, and that it was all one continuous scheme or transaction.

2. Where the pretended title of a mine, which has no existence, is in a wife, and the alleged mine is sold through fraudulent representations, the liability to the purchaser for the purchase money is a community liability.

Appeal from superior court, Spokane county; John McBride, Judge.

Action by O. P. Oudin against Charles Crossman and Mabel Crossman, his wife, to recover money paid to defendants for the purchase of a mine. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Wm. T. Stoll, for appellants. Plummer & Thayer, for respondent.

SCOTT, J. The plaintiff brought this suit to recover a sum of money paid to the defendants for the purchase of a mine. The cause was tried without a jury, and the findings and

judgment were in favor of the plaintiff, and the defendants have appealed.

The first error complained of is over the admission of certain testimony, and it is contended that some of the necessary findings of the court are totally unsupported except by the testimony in question. This testimony related to representations made by the defendants, or by Charles Crossman, the husband, regarding the existence and character of the mine in controversy, and as to the value of the ores therein contained. It is urged that the same is inadmissible, on the ground that the representations were not specifically made to the plaintiff, but were made to other parties, or to the people in the vicinity generally. We think this testimony was admissible. It is evident that the purpose of the defendants was to sell the mine to any one that could be induced to purchase it, and that it was all one continuous scheme or transaction, and the plaintiff was not precluded from showing such representations made in furtherance of that purpose, although the same were not made to him personally.

It is further contended that the findings are not sustained by the evidence, and that, if they are, they do not support the judgment. Without entering upon a discussion in detail of the points urged under these heads, we think it sufficient to say that there was evidence tending to show that the mine in fact had no existence, the location being invalid, and that the ore exhibited as a sample did not come from the mine at all, and there was evidence to sustain the findings which the court made, and the facts found sustain the judgment entered.

It is next contended that the plaintiff was not entitled to a judgment against Mabel Crossman, on the ground that it was not a community liability. But the alleged title to the mine was in her name, and the consideration paid therefor was clearly community property; and this contention is untenable. Affirmed.

GORDON, ANDERS, and DUNBAR, JJ., concur.

DAY et al. v. SINES et al.

ALFORD et al. v. SAME.

(Supreme Court of Washington. Nov. 16, 1896.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—DELIVERY—WHAT CONSTITUTES CHATTEL MORTGAGE—ACCEPTANCE BY CREDITOR—PRESUMPTION—NOTICE OF APPEAL.

1. Where an assignment for the benefit of creditors, after being executed, was handed to the assignee, who indorsed his acceptance thereon, and immediately returned it to the assignor, to be filed by him for record, there was no such delivery of the instrument as would make it effective as against a chattel mortgage filed for record subsequent to the acceptance by the assignor, but prior to the recording of the assignment.

2. An insolvent, having agreed to give a non-resident creditor security, executed a chattel

mortgage in his favor, and caused it to be filed for record. *Held*, that the assent of the creditor thereto would be presumed, constituting the recording of the mortgage a sufficient delivery.

3. An appeal will not be dismissed on the ground that all the parties to the action were not served with notice where it appears that all necessary parties were served.

Dunbar, J., dissenting.

Appeal from superior court, Pierce county; Emmett N. Parker, Judge.

Petition by Frank D. Day, C. G. Alford & Co., and others, mortgagees of H. H. Day, against E. B. Sines, assignee, to have their claims declared to be preferred claims. The petition was opposed by Low, Weinberg & Co. and other creditors. From a judgment in favor of defendants, the petitioners appeal. Reversed.

Johnson Nickeus, for appellants Day and others. Marshall K. Snell, for appellants Alford and others. Murray & Christian, Hudson & Holt, Easterday & Easterday, Doolittle & Fogg, and Sharpstein & Blattner, for respondents.

HOYT, C. J. A motion to dismiss the appeal has been interposed in one of the above-named cases, for the reason that all parties who had appeared therein had not been served with notice. But, in our opinion, the record disclosed facts which authorized the appellants to assume that those served represented all necessary parties. The motion will be denied.

On December 28, 1895, H. H. Day, the insolvent herein, executed his three chattel mortgages, one to F. D. Day, one to Emma L. Day, and one to C. G. Alford & Co. These mortgages were all left with Johnson Nickeus, who had prepared them for execution, who, being called away from his office, requested his brother William D. Nickeus to have them recorded in the auditor's office on said 28th day of December. They were not recorded on that day, but were, on the Monday following, the 30th day of December, filed for record by William D. Nickeus, who caused the entry to be made that they were filed at the request of Johnson Nickeus. On said 30th day of December, before said mortgages were recorded, the mortgagor, H. H. Day, made an assignment for the benefit of his creditors to one J. W. Cloes. This assignment, after having been prepared and executed by said Day, was by him handed to the assignee therein named, who indorsed thereon, "I hereby accept the trust created by the above instrument, and agree faithfully to perform the same," and signed said indorsement, and immediately returned the deed of assignment to the assignor, who took it to the auditor's office, and caused it to be recorded; but it was not so recorded until after the recording of the chattel mortgages hereinbefore mentioned. Thereafter, in the matter of the assignment of said H. H. Day, the several mortgagees presented their claims founded upon said mortgages and the notes secured thereby, and asked that they

be allowed as preferred claims. Objections to such allowance were duly made, and such proceedings were had in the matter that the superior court found that the several mortgages were executed by said Day for the purpose of securing bona fide claims held by the mortgagees against him; that of Frank D. Day and that of C. G. Alford & Co. being for the full amount of the mortgages, and that of Emma L. Day in an amount a little less than that named in the mortgage. The court further found that these mortgages were executed in good faith, and without any contemplation on the part of the mortgagor to take the benefit of the insolvent act. It, however, refused to order that the claims founded thereon should be given any preference over others by reason of the fact that they were secured by these mortgages, for the reason that, in its opinion, the mortgages did not take effect as against the assignee of the mortgagor, because they were not recorded until after the assignment had taken effect; and the said several mortgages were held to be void and of no effect as against said assignee or his successor, who had been duly elected by the creditors of the insolvent. From this order, the claimants F. D. Day and Emma L. Day have joined in an appeal to this court, and the claimants C. G. Alford & Co. have also prosecuted an appeal therefrom. Both appeals involve the same questions, and will be considered together.

From the facts above recited, the superior court was of the opinion that the deed of assignment was delivered and took effect at the time it was handed to the assignee, and his acceptance of the trust indorsed thereon, and for that reason held that it was superior to the mortgages, which, though executed, were not at that time on record. But, in our opinion, what was done at the time did not constitute a delivery of the deed of assignment, so as to give it effect. It is not necessary for us to decide as to whether such deeds of assignment become effective and irrevocable before they have been recorded in the proper office, when delivered to and retained by the assignee therein named, for the reason that the facts proven did not show that the assignor had so parted with the possession of the deed in question as to divest him of the right to control it. The simple fact of its delivery to the assignee for the purpose of having his acceptance of the trust indorsed thereon, taken in connection with the fact that such indorsement was made in the presence of the assignor, who at once thereafter resumed possession of the instrument, was not sufficient to show an intention on his part to divest himself of the right to retain possession of the deed to dispose of as he saw fit. If, after having resumed possession of the deed, he had destroyed it, he would have been guilty of no wrongful act.

In our opinion, the deed was not so delivered that it took effect until it was presented for record in the auditor's office; and, since this

was not done until after the chattel mortgages had all been recorded, the property of the insolvent passed to the assignee, charged with the lien of these mortgages if they had been properly executed and delivered at the time they were recorded. That they were executed in good faith and for a valuable consideration was expressly found by the trial court, and, as to the one to F. D. Day, there could be no question as to its delivery. It was fully executed, and left as an effective instrument with the attorney for the mortgagee. As to the others, the person with whom they were left with instructions to have them recorded was not the agent or attorney of the mortgagees; yet, under the circumstances disclosed by the undisputed evidence, these mortgages, when recorded, were so delivered that they became effective. The mortgagor had been requested by the mortgagees to give them security upon his property, and he had agreed to do so whenever it became necessary to protect their interests. This being so, we think that the execution of the mortgages, and the placing them upon record, will be presumed to have been by their consent, and, if it was, they were sufficiently delivered. The order appealed from will be reversed so far as it affects the rights of any of these appellants, and their claims against the insolvent estate will, to the extent to which they have been found to be bona fide, be given a preference over those of unsecured creditors in the settlement of the estate of the insolvent; and, as a part of such claims, the costs of appellants will be included.

ANDERS and GORDON, JJ., concur. DUNBAR, J., dissents.

HALL v. ELGIN DAIRY CO. et al.

(Supreme Court of Washington. Nov. 17, 1896.)

LIBEL—EVIDENCE OF GOOD CHARACTER—JUSTIFICATION—OPENING AND CLOSING.

1. Defendants' evidence, to sustain their plea of justification, of specific instances of misconduct by plaintiff, does not authorize plaintiff to prove his good reputation.

2. The defense in a libel suit being justification, defendant is entitled to open and close.

3. Defendants, to justify their publication that plaintiff had admitted appropriating money belonging to them, need not prove the appropriation, but only the admission.

Appeal from superior court, King county; T. J. Humes, Judge.

Action by Edward P. Hall against the Elgin Dairy Company and others. Judgment for plaintiff, and defendants appeal. Reversed.

Thompson, Edsen & Humphries, Stratton, Lewis & Gilman, Thomas B. Hardin, and Pierre P. Ferry, for appellants. Edward Von Tobel and William E. Humphrey, for respondents.

SCOTT, J. The plaintiff brought suit for the publication of an alleged libel. The defendants pleaded a justification. Judgment

being rendered for the plaintiff. the defendants have appealed.

The defendants Galloway and Romain were partners, engaged in the dairy business under the name and style of the Elgin Dairy Company, and Pratt and Berry were employes of the partnership. The plaintiff was also an employe of the partnership, engaged in driving one of the milk wagons and making collections for milk delivered to the company's customers. There was testimony to show that the plaintiff's route, which had previously been a paying one, became, and for some time continued to be, a losing one. The company found fault with the plaintiff, and claimed that something must be wrong with his conduct of the business, which the plaintiff denied, whereupon he was taken off the route for a period of 30 days, and appellant Pratt was substituted in his place. For this period the route again showed a profit. Within a few days thereafter the plaintiff applied to the company for money. His salary was \$50 a month, and there was then to his credit on the books something over \$90. One of the firm told him that, considering the loss in the business as conducted by him, he did not think anything was justly due him, and that he ought to give the partnership a receipt in full for the balance claimed. Some considerable conversation was had between the parties, whereupon it was contended by the defendants that the plaintiff admitted that he had appropriated money belonging to the partnership, and it is conceded that he gave a receipt for the amount due him as shown by the books. It appears that the plaintiff did no more work for the company, but engaged in like business for himself, resuming the route he had been upon while in the employ of the company, and, in order to obtain the company's customers, represented to them that he had been unjustly discharged, whereupon the company issued and caused to be distributed by the appellants Pratt and Berry the following circular: "Notice. It having come to our knowledge that E. P. Hall, formerly the driver of one of our milk wagons, is endeavoring to alienate our customers by repeating a story that we discharged him unjustly and without cause, we take this method of contradicting him, and stating that we discharged him only upon his own confession of having wrongfully converted to his own use considerable sums of money collected for and belonging to us. We feel compelled to make this statement in order to protect our business from the injury he is doing us by his constant repetition of a 'tale' which he knows to be untrue. Yours, respectfully, Elgin Dairy Company,"—which the plaintiff contends was libelous.

It is first contended that the court erred in allowing the plaintiff to prove his good reputation. The respondent contends that this evidence was admissible in consequence of the defendants having given in evidence, to sustain their plea of justification, specific instances of misconduct on the part of the re-

spondent. Many cases have been cited by counsel upon either side, but, without undertaking to review them, it seems to us the better rule is that such testimony is inadmissible, and that instances of specific misconduct do not authorize the plaintiff to prove his general good reputation.

Another error complained of is the refusal of the court to allow the defendants to open and close the case to the jury. The court rightly assumed that the burden of proof was upon the defendants. The publication of the circular in question had been admitted, and the defense was a justification which the defendants had to establish. This being so, we are of the opinion that they were entitled to open and close the case.

A number of other errors complained of grow out of the view taken by the lower court of what the defendants were called upon to prove to establish their plea of justification. The case was evidently tried upon the theory that it was not sufficient for the defendants to prove that the plaintiff had in fact admitted that he had misappropriated money belonging to the company, but that they must go further, and prove that he had actually misappropriated their moneys. We are of the opinion that this was erroneous. The plaintiff was charged with having confessed to the misappropriation, and this, in our opinion, was all the defendants were called upon to establish in order to sustain their defense, regardless of whether the confession imputed that the plaintiff had been guilty of criminal conduct in the premises. The charge was only that he had confessed the misappropriation, and the defendants should not have been called upon to prove anything further to sustain their justification than the fact that he did confess it, and the burden should not have been put upon them of going further and proving that what the plaintiff confessed was true. Reversed, and remanded for a new trial.

HOYT, C. J., and DUNBAR, ANDERS, and GORDON, JJ., concur.

STATE v. CAREY.

(Supreme Court of Washington. Nov. 17, 1896.)

HOMICIDE—INDICTMENT—INSTRUCTION—JURORS.

1. A juror having no fixed or definite opinion as to the merits of the case is competent, notwithstanding a vague, indefinite, or floating impression, based on a newspaper report at the time of commission of the crime with which defendant is charged.

2. An indictment cannot be complained of because alleging commission of the crime by striking with "a heavy, blunt instrument, a more particular description of which is to the prosecuting attorney unknown," where the evidence does not show that its description was known by him at the time.

3. An instruction on the theory of death having been caused by a fall is unnecessary where the general charge tells the jury that, if it is "possible to account for the death * * * on any reasonable hypothesis other than that of the guilt of the defendant," they should do so, and,

if they have any "reasonable doubt upon any single fact or element necessary to constitute the offense," they should acquit.

4. The language in an instruction, with reference to the credit to which the respective witnesses are entitled, "and in the case of the defendant you have the right to consider the great interest he has in the result of your verdict," cannot be complained of as a comment on the evidence.

Appeal from superior court, King county; T. J. Humes, Judge.

William Carey appeals from a conviction of murder. Affirmed.

Melvin G. Winstock and John B. Wright, for appellant. A. W. Hastie and W. W. Wilshire, for the State.

GORDON, J. The appellant was convicted in the superior court for King county of the crime of murder in the first degree, and sentenced to death. From the judgment of conviction, and an order denying his motion for a new trial, he has appealed.

1. The first assignment is that the court erred in overruling his challenge for actual bias interposed to Jurors Van Wort, Roberts, and Osborn. As to Juror Roberts, it is sufficient to say that the action of the court in overruling the challenge was without prejudice, even if erroneous, inasmuch as it appears from the record that he was subsequently excluded upon the peremptory challenge of the prosecution. From a consideration of the voir dire examination of Jurors Van Wort and Osborn, we are satisfied that they were competent and impartial jurors. Counsel for the defendant cite the cases of *State v. Murphy*, 9 Wash. 204, 87 Pac. 420, *State v. Wilcox*, 11 Wash. 215, 39 Pac. 368, and *State v. Rutten*, 13 Wash. 203, 43 Pac. 30, decided by this court; but, in our opinion, the record in this case does not justify their claim that the question here presented is within the rule announced in any of these cases. The record in this case clearly and satisfactorily shows that no fixed or definite opinion existed in the minds of either of said jurors relative to the merits of the case, but only a vague, indefinite, or merely floating impression, based upon a newspaper report of the case, or heard at about the time of the commission of the supposed crime. The ruling of the lower court may well be sustained without in any wise infringing upon anything that is laid down in any of the cases above referred to.

2. It is next objected that there was a variance between the allegations of the information and the proof, in this: The information charges that the appellant "purposely and of his deliberate and premeditated malice killed one Lucy Williams, by then and there purposely, and of his deliberate and premeditated malice, striking and beating the said Lucy Williams, thereby inflicting in and upon the said Lucy Williams several mortal contusions, fractures, and wounds, with a heavy, blunt instrument, which he, the said William Carey, then and there had and held in his hands;

a more particular description of which said heavy blunt instrument is to the said prosecuting attorney unknown"; and it is contended that the record shows that the "heavy, blunt instrument" was a certain broken oar found in the possession of the appellant, and which oar was offered by the prosecution, and received in evidence; and that it further appears that this oar was in possession of the prosecution, and that the prosecuting attorney had full knowledge of its existence, at the time of filing the information in question. Counsel has cited numerous cases in which it has been held that, where an indictment charges a defendant with committing an offense against the person or property of a person unknown, and it appears at the trial that the name of the person was in fact known to the grand jury, the defendant must be acquitted. *Com. v. Blood*, 4 Gray, 31; *State v. Stowe* (Mo. Sup.) 33 S. W. 799; *Presley v. State*, 24 Tex. App. 494, 6 S. W. 540; *Com. v. Thornton*, 14 Gray, 41. The reason is found in the rule requiring fullness and precision in charging an offense, and that the identity of the offense charged with that upon which the conviction is sought should be established upon the trial. An allegation in an indictment or information that the name of a person or a fact necessary to be alleged is unknown is permissible only from necessity. But, however sound may be the rule for which counsel contends, we do not think that it is applicable to the present case. It is true that it is charged in the information that the homicide was committed by means of striking and beating the deceased with "a heavy, blunt instrument, a more particular description of which is to the prosecuting attorney unknown"; but it is was not established by the evidence on the trial what that instrument really was, or that its description was known by the prosecuting attorney at the time of filing the information or up to the time of the trial. There was evidence from which the jury might well have found that the blows or wounds causing death were inflicted with an oar, and there were in all three oars introduced in evidence,—one by the state, and two by the defendant. But we think that it cannot with certainty be told from the record that the wounds were inflicted with either or all of them; while, upon the other hand, from the condition and appearance of the deceased, and the expert and other testimony, there was abundant evidence to warrant the finding that death was occasioned by means of wounds inflicted "with a heavy, blunt instrument" of an unknown description.

3. It is urged that the court committed error in refusing to instruct the jury, as requested by the defendant, upon the subject of the corpus delicti. Counsel argues that there was evidence tending to show that death was occasioned by a severe fall which the deceased had sustained on the night in question, and not by the means charged in the information, and that it was the defendant's right to have

the jury instructed upon any theory of the case having evidence in its support. Conceding the fact and the law to be as contended for by counsel, we think that no error was committed in refusing the particular instruction requested, because the subject-matter was included in and covered by the general charge, in which the jury were told that, if it was "possible to account for the death of the deceased upon any reasonable hypothesis other than that of the guilt of the defendant," then it became their duty to so account for it and find the defendant not guilty; also that, "if the jury entertained any reasonable doubt upon any single fact or element necessary to constitute the offense," it was their duty to acquit him.

4. It is complained that the court commented upon the evidence in instructing the jury with reference to the credit to which the respective witnesses were entitled. The particular language complained of is in these words: "And in the case of the defendant you have the right to consider the great interest he has in the result of your verdict." An instruction in the language here complained of was expressly upheld by this court in *State v. Nordstrom*, 7 Wash. 506, 35 Pac. 382, and, for the reasons there given, the contention of counsel cannot be sustained.

5. It is further complained that the jury erred in finding the defendant guilty of murder in the first degree. This claim proceeds upon the theory that the defendant was intoxicated at the time when the offense was committed, if committed at all by the defendant. At the request of the defendant, the court correctly instructed the jury as to how intoxication should be regarded by them in determining the degree of defendant's guilt (in the event that they should find that he was intoxicated). It was for the jury, under such instruction, to determine the fact, and their finding is not without sufficient evidence to support it.

6. It is also urged that the verdict is contrary to the evidence. We think this claim cannot possibly be maintained without disregarding a very great deal of uncontradicted and competent evidence adduced at the trial. The record shows that the appellant had, for several years prior to the time of the homicide, which occurred (as is charged) on Christmas of 1895, followed the occupation of a fisherman; that for some months prior to that date the defendant had been living with the deceased,—an Indian woman,—occupying a shack or float house, built upon a scow, moored at a point on the shore of the Duwamish river, distant about two miles from where it empties into Puget Sound. On the afternoon or evening of the 24th day of December, 1895, the defendant and deceased left their place of abode, and went in a rowboat to the home of William Dobson and wife (the latter being a sister of the deceased), who lived in a shack upon the shore of Elliott Bay, in front of the city of Seattle, distant some five

or six miles from the home of the defendant and deceased, already referred to. They remained at Dobson's until about 8 o'clock Christmas night, during which time considerable beer and some whisky was drunk, all hands participating. While at that place, as shown by the evidence, the defendant, prompted by jealous motives, rudely assaulted the deceased, striking her in the face and body with his clenched fist. About 8 o'clock Christmas night the defendant and deceased got into their boat, ostensibly to go home. Prior to leaving, the defendant stated to John D. Frazer (one of the state's witnesses), who had been one of the company at the home of Dobson on that day, that he would "do her up that night," referring to the deceased. Before embarking, the defendant rudely and forcibly lifted the deceased from the ground, carried her to the side of boat, and roughly and violently threw her into its bottom. Some time after 11 o'clock of the same night the defendant visited a saloon known as "The Exchange," situated near the water front between Dobson's house and the mouth of the Duwamish river, and about one mile from Dobson's house. He remained in the saloon only a short time, during which time he procured a dollar's worth of whisky, and, thereafter returning to his boat, was seen to proceed in company with the deceased in the direction of their home. Mr. John O'Leary and J. W. Earey testified that about midnight of the same night they saw out on the bay, at a considerable distance from the shore, but within hearing, a rowboat occupied by two people, going in the direction of Duwamish river. One of the occupants of the boat was striking the other occupant, who was seated at or near the stern, with something which he held in his hands; that they distinctly heard the sound of the blows, and the screams and groans of the person who received them; that said boat proceeded on its course in the direction of the mouth of the Duwamish river. About 2 o'clock in the morning of December 26th, one Joseph Tulp, who resided with his wife and child in a cabin distant about 50 feet from the float house of defendant, was aroused by the defendant, who came to Tulp's house, stated that he had just returned from Seattle, and asked Tulp if he had seen anything of his wife (meaning the deceased), saying that she ought to have been there before him; that she had left him at Seattle at about 11 o'clock, and was to come home by way of South Seattle on a street car. He obtained permission to spend the remainder of the night at Tulp's. He also stayed there the next night. About noon of the 27th he informed Tulp that the woman was dead, and requested help to bury her. Tulp, suspecting foul play, declined to assist, and that night, while defendant was asleep, Tulp informed the officers, who proceeded to the house, and arrested the defendant. Upon being arrested, the defendant cursed Tulp, and displayed much anger towards him. On the way to

the jail the defendant remarked, in substance, two or three times, that he regretted that he had not killed Tulip instead of "the woman"; also that he wished he was going to be hung "for killing that s— of a b— [referring to Tulip], instead of for killing the woman," and similar expressions. On the morning after arriving at the jail, the defendant disclosed, for the first time, the whereabouts of the body, which was found in about eight feet of water, a rope attaching it to the end of defendant's float. The body was held under water by being fastened to a sack containing lead. The autopsy disclosed the fact that life was extinct before the body was placed in the water, and that death resulted from concussion of the brain, produced by blows upon the head from some blunt instrument. There were bruises and contusions upon the head, arms, and hands. Such, in brief, was the case made by the evidence introduced on the part of the state, and, although the defendant became a witness in his own behalf, and expressly asserted his innocence, the jury found him guilty of murder in the first degree. There was, we think, "a maturity of proof" to sustain the verdict, and we have been unable to discover any reason why it should be set aside, and a new trial awarded. The judgment of conviction is affirmed, and the cause remanded to the lower court, with directions to proceed to appoint a day for the carrying of its sentence into effect according to law.

HOYT, C. J., and ANDERS, DUNBAR, and SCOTT, J., concur.

CITY OF SEATTLE v. PEARSON.

(Supreme Court of Washington. Nov. 18, 1896.)

ORDINANCE—REGULATION OF LIQUOR SALES—CERTIORARI—RETURN—PLEADING ORDINANCE.

1. Under Laws 1896, c. 65, § 4, certiorari will lie to the superior court to review an order of the municipal court of Seattle discharging a defendant from a prosecution under Ordinance No. 4151, regulating the sale of intoxicating liquors within the city.

2. A city ordinance regulating liquor sales need not be pleaded or set out in the return to a writ of certiorari brought to review an order of the municipal court discharging a defendant from a prosecution thereunder.

3. Ordinance No. 4151 of the city of Seattle, regulating liquor sales within the city, and providing that a conviction under the ordinance shall, of itself, revoke a liquor license, does not conflict with a subsequent ordinance providing a special mode for the revocation of licenses.

4. Though that portion of Ordinance No. 4151 of the city of Seattle which provides that the liquor license of one convicted of violating the ordinance shall be, ipso facto, revoked, may be void, the remaining portion, providing for a fine and imprisonment for its violation, may be sustained, since the remedy is distinct from the remedy by revocation.

5. Ordinance No. 4151 of the city of Seattle, regulating liquor sales within the city, and providing for a fine of not less than \$25 for its violation, does not conflict with the general misdemeanor law (2 Hill's Ann. St. [Pen. Code] § 301), which fixes no minimum punishment for misdemeanors.

Appeal from superior court, King county; R. Osborn, Judge.

Complaint was made in the municipal court of the city of Seattle against Charles Pearson for violating an ordinance. From an order discharging defendant, the city brought certiorari to the superior court. From a judgment in the latter court in favor of the city, defendant appeals. Affirmed.

Melvin G. Winstock, for appellant. John K. Brown, F. B. Tipton, and Z. B. Rawson, for respondent.

DUNBAR, J. The defendant (appellant in this case) was complained against in the municipal court of the city of Seattle for the violation of Ordinance No. 4151 of the said city of Seattle, which was an ordinance prescribing the limits of time within which intoxicating, malt, vinous, mixed, or fermented liquors might be sold, and saloons and drinking places kept open, in the city of Seattle, and providing penalties for the violation thereof. Under the provisions of this ordinance its violation is punished by a fine of not less than \$25 nor exceeding \$150, or by imprisonment for a period not exceeding 30 days, or by both such fine and imprisonment. And there is also a provision in the ordinance that any license for the sale of any such liquors, granted by the city of Seattle to any person convicted of violating any of the provisions of section 1 (which section prescribes the time of closing), shall be forfeited and annulled by such conviction, without further action or proceeding of the city council, or any other officer or department of the city. The defendant was arrested, and demurred to the complaint upon statutory grounds, particularly contending that the ordinance under which he was complained against was invalid. The demurrer was sustained, and the defendant discharged, whereupon the plaintiff, the city of Seattle, petitioned for a writ of certiorari to the superior court for King county, state of Washington. A motion to quash was introduced and overruled. Upon the argument of the question upon its merits as to the validity of the ordinance, the court held the ordinance to be valid in so far as the infliction of a fine and imprisonment was concerned, but invalid as to that portion which provides for forfeiture of the license. Judgment was rendered, and an appeal taken to this court.

Respondent complains, and with some reason, we think, that the assignments of error are not clearly set forth in appellant's brief; but, as no motion was made to strike the brief for that reason, we will consider it upon its merits.

The first contention of appellant is that certiorari does not lie in a case of this kind; that the ordinance, being quasi civil in its nature, the respondent, the city of Seattle, had a remedy by appeal. We think, under the best authorities, this is not a quasi civil action, but that it is either criminal or quasi

criminal. This view is sustained by 1 Dill. Mun. Corp. (4th Ed.) § 411, although there seems to be some conflict in the authorities cited. But, under the provisions of chapter 64, Laws 1891, and of section 4, c. 65, Laws 1895, and under the authority of *Woodbury v. Henningsen*, 11 Wash. 12, 39 Pac. 243, we think it is clear that the writ was properly issued in this case.

The second contention of appellant, that the ordinance was not properly pleaded, is also answered by 1 Dill. Mun. Corp. (4th Ed.) § 413, to the effect that it is not necessary to plead the ordinance. We think, also, that there was nothing in the further contention that this ordinance was in conflict with the subsequent ordinance. The subject-matter of one was the licensing of saloons, and that of the other was the regulation of the hours during which they should be closed. They had no necessary relation to each other.

The most strenuous contention of the appellant is, however, that the lower court erred in holding that portion of section 2 of Ordinance No. 4151 which provides a forfeiture of the license void, while it sustained that portion which provided for a fine and imprisonment for violating said ordinance. We are inclined to think that that portion which the court held to be void can be eliminated without in any way destroying the efficacy or utility of the rest of the ordinance. In *State v. Kantler*, 33 Minn. 69, 21 N. W. 858, where a charter authorized the penalty of fine and imprisonment, an ordinance imposing, in addition thereto, "costs of prosecution," was declared void as to such addition, but valid as to the remainder. It cannot be said that the provision in regard to the revoking of the license has a general influence over that portion of the ordinance which fixes the penalty of fine and imprisonment, because such penalty could be imposed and enforced as fully without the additional imposition of revoking the license as with it. The fine and imprisonment are complete penalties within themselves, and are in no wise dependent upon the subsequent provision of the ordinance with relation to the revocation of the license; and, if this be true, then the independent provision of the statute can be maintained, although the other part is held void. *Municipality v. Morgan*, 1 La. Ann. 111; *Ex parte Mayor, etc., of Florence*, 78 Ala. 419; *Rau v. City of Little Rock*, 34 Ark. 303. And in *Wille. Mun. Corp.* 160, the rule is laid down that, "if a by-law consist of several distinct and independent parts, although one or more of them may be void, the rest are equally valid as though the void clauses had been omitted." See, also, many other cases, cited by 1 Dill. Mun. Corp. § 421. We do not wish to be understood as deciding now that any portion of the ordinance is invalid, for, as the case is presented to us, it is necessary to determine only the validity of that portion in regard to the penalty of fine and imprisonment.

We think there is no merit in the further contention that the ordinance in question is in conflict with the general misdemeanor law of the state.¹ *Reach, Pub. Corp.* §§ 89, 90. The judgment will be affirmed.

HOYT, C. J., and SCOTT, ANDERS, and GORDON, JJ., concur.

PAYNE v. SPOKANE ST. RY. CO.

(Supreme Court of Washington. Nov. 16, 1896.)
CARRIERS OF PASSENGERS—NEGLIGENCE—DEGREE OF CARE—APPEAL—GENERAL OBJECTIONS.

1. In an action against a street-railway company for injuries to a passenger, due to negligence, the jury were instructed: "Ordinary care is such care as persons usually engaged in the particular line of business in question ordinarily exercise in and about such business. If defendant in this case exercised such care at the time of the accident, it had discharged its full duty." *Held*, that the instruction was erroneous, in that it did not define defendant's duty to exercise the highest degree of skill and care which might reasonably be expected of prudent persons engaged in that business.

2. An appeal will not be dismissed, on the ground that the statement of facts was not settled in conformity with law and the appeal not legally taken, where no specific errors are pointed out.

Appeal from superior court, Spokane county; Norman Buck, Judge.

Action by Charles H. Payne against the Spokane Street-Railway Company. From a judgment for defendant, the plaintiff appeals. Reversed.

Winston & Winston, for appellant. Thomas C. Griffiths, for respondent.

SCOTT, J. The plaintiff was a passenger on one of defendant's cars, and, while it was rounding a curve, was thrown from it through the open doorway, and injured. He brought this action to recover damages, alleging that the defendant was guilty of negligence in running its car at a high and dangerous rate of speed around the curve. The verdict was for the defendant, and the plaintiff has appealed.

The respondent moves to strike the statement of facts, on the ground that the same has not been settled in conformity with the law, and to dismiss the appeal, on the ground that the same is not legally taken; but, as no specific error has been called to our attention, either in the brief or by reference to the transcript, the motion will be denied.

But a single question is raised upon the appeal, and that is as to an instruction given by the court to the jury that "ordinary care is such care as persons usually engaged in the particular line of business in question ordinarily exercise in and about such business. If defendant in this case exercised such care

¹ The act (2 Hill's Ann. St. [Pen. Code] § 301) provides that misdemeanors shall be punished by imprisonment in the county jail for not more than one year, or by fine not exceeding \$500, or both.

at the time of the accident, it had discharged its full duty, and plaintiff cannot recover." It is contended that this instruction does not lay down the proper rule in such cases, and we think this contention is well taken; for the question was not whether the defendant had exercised such care as was usually exercised by persons in that particular business, but the question was whether it had exercised such care as the law required, and we think it is well settled that a common carrier of passengers is required to exercise the highest degree of skill and care which may reasonably be expected of intelligent and prudent persons engaged in that business, in view of the instrumentalities employed and the dangers naturally to be apprehended. The respondent contends that the appellant should not be allowed to urge this question, for the reason that he has not brought up all of the instructions of the court, and therefore that we should presume that proper instructions were subsequently given. We cannot adopt this view of the practice. If the error complained of could have been, and was, subsequently obviated by the court, in its further instructions to the jury, the burden should be held to be upon the respondent to show it, and it should have seen to it that such instructions were made a part of the record on the appeal. Reversed.

HOYT, C. J., and ANDERS, GORDON, and DUNBAR, JJ., concur.

CITY OF BALLARD v. WEST COAST IMP. CO.

(Supreme Court of Washington. Nov. 18, 1896.)

ASSESSMENTS FOR IMPROVEMENTS—ACTION BY CITY—LIMITATIONS—PLEADING.

A complaint, filed in August, 1894, by a city to foreclose street-assessment liens, stated that plaintiff was, and had been during all the times thereafter mentioned in the complaint, a municipal corporation, and then alleged that the assessments became delinquent in August, 1891. It was admitted on the trial that the city had been incorporated under Act Feb. 2, 1888, and had been thereafter reincorporated under Act March 27, 1890, both of which acts have been declared unconstitutional, but that the city had again been reincorporated under Act March 9, 1893, which legalized incorporations under Act March 27, 1890. *Held*, that the city could not set up, in order to avoid the bar of the two-years statute of limitations, that the cause of action did not in reality accrue until the passage of the validating act of March 9, 1893.

Appeal from superior court, King county; J. W. Langley, Judge.

Action by the city of Ballard against the West Coast Improvement Company to foreclose liens for street assessments. Judgment for defendant, and plaintiff appeals. Affirmed.

Elwood Harshman and P. V. Davis, for appellant. Donworth & Howe, for respondent.

GORDON, J. This action was commenced by the appellant city to foreclose two street-assessment liens against the property of the respondent. Summons was served on the 9th of August, 1894. The ordinance under which the first assessment was laid was passed and approved July 15, 1890, and the complaint charges that the improvement was made between August, 1890, and the 4th of June, 1891. The ordinance under which the second assessment was laid went into effect July 15, 1890, and the complaint shows the improvement to have been made prior to the 2d day of June, 1891. The answer of the defendant set up three independent defenses to each cause of action, one of such defenses being that the cause of action did not accrue within two years prior to the commencement of the action. From a judgment of dismissal "without prejudice to whatever rights the plaintiff may have to make a reassessment and to the laws relating to reassessment," the city has appealed.

The judgment appealed from recites that "the plaintiff, in making its opening statement, stated by its counsel that the assessment alleged in the first cause of action in the complaint became delinquent on August 19, 1891, and that the assessment stated in its second cause of action alleged in the complaint became delinquent on August 10, 1891, whereupon it was agreed in open court, by the counsel for the respective parties, that the question whether said action was barred by the statute of limitations should be determined by the court from said admission, and from the files and records of the cause, and that no evidence should be introduced unless the court should adjudge that said action was brought within the time limited by law; and thereupon said cause was argued by counsel. * * * The court now finds that this action was commenced more than two years after said dates of delinquency, and more than two years after said several causes of action accrued, if, in fact, the same ever did accrue,"—and concludes that the causes of action were barred by the statute. The appellant does not seriously contend that this ruling was incorrect, if it be ascertained that the city was legally incorporated at the time when the assessments were laid.

The first affirmative defense set out in the answer is that the territory comprised within the corporate limits of the appellant city was incorporated in accordance with an act of the legislature of the territory of Washington, approved February 2, 1888; that thereafter, in accordance with the provisions of sections 4, 5, and 6 of an act entitled "An act providing for the organization, classification and incorporation and government of municipal corporations and declaring an emergency," approved March 27, 1890, the inhabitants took steps to reincorporate. The former of these acts was held unconstitutional in *Territory v. Stewart*, 1 Wash. St. 98, 23 Pac. 405; and the sections above mentioned of the latter act were likewise held unconstitutional by this court in *Town of Denver v. City of Spokane Falls*, 7 Wash. 228,

34 Pac. 923. This branch of the answer proceeded upon the theory that the assessments in question were illegal, inasmuch as the plaintiff was not legally incorporated. The reply "denies each and every allegation [of said defense referred to], except that it admits that the city of Ballard, prior to the year 1890, was incorporated under and by virtue of and in accordance with the provisions of an act of the legislative assembly of the territory of Washington, * * * approved February 2, 1888, and that thereafter, in the year 1890, the said city of Ballard was incorporated under and by virtue of * * * an act * * * approved March 27, 1890." The contention of appellant is that the causes of action set out in the complaint did not accrue until the taking effect of the act of the legislature of the state of Washington, approved March 9, 1893, entitled "An act to legalize and validate the incorporation or reincorporation of towns and cities incorporated or reincorporated under an act approved March 27, 1890," because at no time prior thereto was the appellant legally incorporated. For the purposes of this case, this latter question must be determined upon the record which the parties have made. We think the contention of appellant cannot be sustained. The action was not brought upon that theory. The first allegation of the complaint is "that, at all times hereinafter mentioned, plaintiff was, and is now, a municipal corporation, duly organized and existing under and by virtue of the laws of the state of Washington"; and it was not permissible for it to abandon that theory, and to claim a recovery upon an inconsistent one.

The recital in the judgment already referred to is that it was admitted in open court that the assessment laid in the first cause of action became delinquent on August 19, 1891, and that stated in its second cause of action became delinquent on August 10, 1891, and the lower court was clearly right in holding that the action was barred by the statute. *City of Spokane v. Stevens*, 12 Wash. 687, 42 Pac. 123. Affirmed.

HOYT, C. J., and ANDERS, DUNBAR, and SCOTT, JJ., concur.

VON SCHMIDT v. VON SCHMIDT. (Sac. 117.)

(Supreme Court of California. Dec. 8, 1896.)

PARTNERSHIP—CONTRACT—CONSTRUCTION.

A partnership agreement between a father and son for the purchase and cultivation and improvement of land for which the father paid the purchase price, and to which each took title to a moiety, provided that the father was to be reimbursed for the price; that the son was to superintend the cultivation and improvement, for the expenses of which the father was to advance the money; that the services of the son were to be set off against the money advanced by the father. *Held*, that the agreement required the proceeds and profits of the lands to be applied to the expenses of cultivation and improvement,

and the father to advance money for that purpose only if the profits and proceeds proved insufficient therefor.

Department 2. Appeal from superior court, Fresno county; J. R. Webb, Judge.

Action by Edward A. Von Schmidt against Alfred W. Von Schmidt. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

E. D. Edwards, for appellant. Frank H. Short, for respondent.

PER OURIAM. This action is for an accounting of the affairs and business of an alleged partnership. The court found that upon the accounting defendant was indebted to plaintiff, on account of said partnership, in the sum of \$3,200, and also interest for a certain period upon the sum of \$1,600, making in all \$4,616. Defendant appeals from the judgment. There is also in the transcript a notice of an appeal from an order denying a motion for a new trial; but there is no bill of exceptions or statement, and this latter appeal has been abandoned. The appeal from the judgment rests entirely upon the judgment roll, which includes findings of the court below, where the case was tried without a jury. Appellant does not make any point upon the pleadings, but he contends that under the findings there should have been a balance decreed to him of something over \$5,000 against plaintiff, instead of a balance of \$4,616 in favor of plaintiff. The judgment is so clearly favorable to the appellant that it should not be reversed, unless for some material error which is quite clear and palpable. The court finds that in 1881 one Alexey W. Von Schmidt, the father of appellant, and the appellant entered into a partnership for the purchase, improvement, development, and cultivation of certain described land; that the land was purchased by the said father, and the deed taken in the name of the son, appellant herein, who afterwards redeeded one undivided half thereof to his father; that the father was to be reimbursed for the amount expended by him in the said purchase; that the appellant was to superintend and assist in the development and improvement of said property, and that the father should advance the expenses therefor, and that the services of the appellant should be a set-off against the money that should be advanced by the father; that the father from time to time advanced, over and above what was received by him upon the sale of some of the property, the net sum of \$63,938.33; that the appellant advanced the sum of \$93.50, and no more; that the appellant devoted his time, skill, and labor personally to the development, etc., of said lands, and planting and improving the same, since about the 27th of February, 1881; and that, with the exception of about \$2,400 diverted by appellant to other uses, and "a reasonable amount for the support and maintenance of the defendant and his family upon said premises," the appellant has devoted the proceeds

and product of said property towards the expenses and improvement thereof, which proceeds aggregate the sum of \$20,838. (The father afterwards assigned the interest to plaintiff.) Now, the whole contention of appellant is that, as he used this latter sum of money, which was derived from the proceeds and profits of the property, to the expenses of its improvement, cultivation, etc., he should be credited with one-half of that amount, and that under this view he would be entitled to a judgment of about \$5,000 against plaintiff, and that the judgment should be so amended. The court does not find what the amount of the support and maintenance of defendant and his family was, although, as this complaint was not filed until February, 1895, more than 13 years after the appellant commenced living on the land, it is quite evident that such amount would greatly exceed the claim made by appellant here as to half of said proceeds of the land; and, as there is no pretense that under the agreement the appellant was entitled to any support for himself and family, it is clear that, if the court had found the amount of said expenses, it should have been added to the charges against appellant. But as the amount of such expenses was not found, they cannot be considered on this appeal; and the only question is whether, upon the findings, the court clearly erred in not crediting appellant with one-half of the value of the products and proceeds of the land which were used in its improvement, development, etc. We do not think that the court so erred. The findings were, no doubt, somewhat carelessly and loosely drawn; but we think that, under a fair construction, they mean merely that the father was to advance from his individual resources all the outside, independent capital and money that should be necessary to the development and cultivation of the land, and not that the proceeds of the land itself should not be used in its future development and cultivation. Under this view the judgment is in all respects sustained by the findings. The judgment and order appealed from are affirmed.

SAN JOAQUIN LUMBER CO. v. WELTON
et al. (Sac. 104.)

(Supreme Court of California. Dec. 7, 1896.)

SUPREME COURT—Costs—Jurisdiction.

Code Civ. Proc. § 1195, requiring the superior court in actions to enforce liens to allow, as part of the costs, reasonable attorney's fees in the superior and supreme courts, places the allowance of attorney's fees as part of the costs in such actions, in the first instance, in the superior court, so as to preclude the supreme court, on appeal from judgments in such actions, from making any order directing the superior court as to allowance of attorney's fees incurred on the appeal as part of the costs.

Department 2. Appeal from superior court, Tulare county; Wheaton A. Gray, Judge.

v.46p.no.13—67

Petition by San Joaquin Lumber Company in action by it against S. L. Welton and others, a judgment in their favor having been affirmed on appeal (46 Pac. 735), for a modification of the judgment of affirmance. Denied.

Fred H. Hood, for appellants. Davis & Allen, for respondent.

PER CURIAM. A decision was rendered in this cause by this department on November 7, 1896, affirming the judgment of the superior court. 46 Pac. 735. The action was for the enforcement of a mechanic's lien; and, since the decision, the respondent has filed here a petition that this court amend its judgment of affirmance by directing the court below to add to the amount of the original judgment an attorney's fee for defending the cause in this court on the appeal, under section 1195 of the Code of Civil Procedure. But it was held in *Lumber Co. v. Neal*, 94 Cal. 192, 29 Pac. 622, that "section 1195 of the Code places that matter in the hands of the superior court," and that an order made here upon the subject would not be binding upon the trial court. An application for the attorney's fee must therefore be made to the superior court. The petition is denied.

In re JACK'S ESTATE. (Sac. 205.)

(Supreme Court of California. Dec. 7, 1896.)

GUARDIAN'S SALE—WHEN SET ASIDE—EVIDENCE.

1. On request of a guardian to set aside a sale by him of 78.41 acres of land for \$1,450, unless a higher offer be made by the purchaser, the latter offered to increase her bid \$3 per acre. Witnesses estimated it to be worth from \$20 to \$50 per acre. *Held*, that the court did not err in setting aside the sale, notwithstanding the additional bid, under Code Civ. Proc. § 1789, providing that all proceedings for the sale of property by guardians must be the same as those for the sale of property of decedents, and sections 1517, 1552, and 1554, providing that sales by executors shall be reported to the court, and giving the court discretion to order a new sale.

2. Where real-estate dealers testified to the value of land, it was not error to permit them to be cross-examined as to the ground on which they based their estimates as to such value.

Commissioners' decision. Department 2. Appeal from superior court, San Joaquin county; Joseph H. Budd, Judge.

Proceeding in the matter of the estate and guardianship of Edward Roy Jack, a minor, for the sale of real estate, in which there was a return of the sale to the court. From an order setting aside the sale, and directing a new sale, Margaret McCormick, the purchaser, appeals. Affirmed.

Jas. A. Louttit and Paul C. Morf, for appellant. Minor & Ashley, for respondent.

BELCHER, C. Edward Roy Jack, a minor, was the owner of a tract of land in San Joaquin county, containing 78.41 acres, and Ada H. Jack was the guardian of his person.

and estate. On December 6, 1895, the said guardian, pursuant to due and legal proceedings theretofore had in the superior court of said county, offered for sale, and sold, the said tract of land to Margaret McCormick for the sum of \$1,450, subject to confirmation by the court. The guardian duly made to the court a return of the sale, and stated that the same was legally made and fairly conducted, but that the sum bid was disproportionate to the value of the property sold; wherefore she asked that, after a hearing upon the return, the court make an order rejecting said sale, unless a higher offer be made at the time of such hearing. Notice of the hearing was duly given by the clerk of the court, and the matter came on regularly for consideration and decision by the court on January 8, 1896. At that time, Mrs. McCormick, being present in court, filed, in writing, an offer increasing her bid in the sum of three dollars per acre, and thereupon asked that the said sale be confirmed. Witnesses were called and examined on both sides in relation to the value of the property, and, after due consideration, the court found that the sum originally bid and the increased bid were disproportionate to the value of the property sold, and that it would be for the best interests of the minor and his estate to vacate said sale, and to refuse to accept said offer. Thereupon, it was ordered that the sale to Mrs. McCormick be vacated and set aside, and that her offer increasing her bid in the sum of three dollars per acre be declined, and that a new sale of said premises be made by said guardian. From this order, Mrs. McCormick has appealed.

The Code provides that all the proceedings for the sale of property by guardians must be the same as those prescribed for the sale of the property of decedents by executors or administrators. Code Civ. Proc. § 1789. And, as to the sale of property by executors or administrators, the same Code contains the following provisions:

"Sec. 1517. All sales must be under oath reported to and confirmed by the court before the title to the property passes."

"Sec. 1552. The executor or administrator, after making any sale of real estate, must make a return of his proceedings to the court. * * * Upon the hearing the court must examine the return and witnesses in relation to the same, and if the proceedings were unfair, or the sum bid disproportionate to the value, and if it appear that a sum exceeding such bid at least ten per cent., exclusive of the expenses of a new sale, may be obtained, the court may vacate the sale and direct another to be had, of which notice must be given, and the sale in all respects conducted as if no previous sale had taken place; if an offer of ten per cent. more in amount than that named in the return be made to the court in writing by a responsible person, it is in the discretion of the court to accept such offer and confirm the sale to such person, or to order a new sale."

"Sec. 1554. If it appears to the court that the sale was legally made and fairly conducted, and that the sum bid was not disproportionate to the value of the property sold, and that a greater sum, as above specified, cannot be obtained, or if the increased bid mentioned in section fifteen hundred and fifty-two be made and accepted by the court, the court must make an order confirming the sale, and directing conveyances to be made."

In view of these provisions of the Code, the question is: Did the court err in determining that Mrs. McCormick's bid, including her increased bid, was disproportionate to the value of the property, and in refusing to confirm the sale? In our opinion, the evidence was sufficient to justify the decision, and the court properly exercised its discretion in vacating and setting aside the said sale, and ordering a new sale to be made. It is true that two witnesses, M. D. Eaton and Fred Arnold, called on behalf of Mrs. McCormick, testified, in effect, that they resided in Stockton, San Joaquin county, and had been engaged in the real-estate business for a number of years; that they knew the land in question, and its value, and considered the sum of \$20 to \$21.50 per acre a fair price for it at that time. And, on cross-examination, each witness testified that his estimate of the value was based upon a forced sale, and that there was no demand for such property then; that, if he owned the property, he would not sell it for any such price. And the witness Eaton further testified that a portion of the land was "China land," which rented to Chinamen for from eight to ten dollars per acre, and that a similar piece of land in that neighborhood, but better shaped, had been sold within a year for \$30 per acre. On the other hand, J. D. McDougald was called as a witness on behalf of the guardian, and testified that he lived in San Joaquin county, and had known the land in question intimately for many years; that he owned adjoining lands, and knew their value. He was then asked, "What do you consider the fair market value of this land per acre?" and answered: "It is from forty to fifty dollars per acre, even in these times. I based my estimate upon what it would bring and what it will rent for or produce."

It is objected for appellant that the testimony of McDougald was incredible, and not sufficient to raise a substantial conflict as against that given by Eaton and Arnold. This objection, cannot be sustained. It was for the court below to determine what were the facts, and its conclusions cannot be disturbed on appeal.

It is also objected for appellant that the court erred in permitting the witnesses Eaton and Arnold to be cross-examined as to the ground upon which they based their estimates of the value of the land. We see no error in the rulings complained of. The question to be determined was, what was the real value of the land sold? And, in ascertaining that value, it was proper for the court to be informed up-

on what grounds the estimates of value were based. *Montgomery v. Sayre*, 100 Cal. 182, 34 Pac. 648. The order appealed from should be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

PEOPLE v. ROSS. (Cr. 139.)

(Supreme Court of California. Dec. 8, 1896.)

CRIMINAL LAW—REVIEW ON APPEAL—ARGUMENT OF COUNSEL—EXAMINATION OF WITNESS—CREDIBILITY—INSTRUCTIONS—REASONABLE DOUBT.

1. An assignment that the evidence does not sustain the verdict in a criminal case will not be sustained, unless it is plain that the verdict could only have been rendered through passion or prejudice.

2. Error in sustaining an objection by the prosecuting attorney to questions put to a witness is cured if the witness thereafter testifies in regard to the matter without objection.

3. Where a witness for the state testifies on the trial differently from his testimony on preliminary examination, a portion of such testimony may be read to him, and he may be required to explain it.

4. On trial for robbery committed on a prostitute, where she testified for the state, a charge that there was no evidence directly assailing her reputation for truth is not objectionable, as ignoring the testimony as to her occupation, and evidence of contradictory statements, made out of court, where there was a further charge that "the common experience of mankind is that there is rarely found united in the character of persons as degraded as she is any regard for truth. It does not, however, follow that, because she is the degraded woman that she is admitted to be, she is for that reason alone not to be believed, and her testimony entirely disregarded."

5. The prosecuting attorney may properly remark that defendant's flight might be considered in determining his guilt.

6. The use of the words "wholly satisfied," in defining reasonable doubt, is not ground for reversal, where they could not mislead the jury, when taken with the rest of the charge.

7. A charge on reasonable doubt, stating that "the doubt must be supported by reason, and not by mere conjecture and idle supposition, irrespective of evidence," is not objectionable, as directing the jury to disregard their own judgments, founded upon their experience.

Department 2. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Walter Horace Ross was convicted of robbery, and appeals. Affirmed.

Carroll Cook, for appellant. Atty. Gen. Fitzgerald, for the State.

TEMPLE, J. Having been convicted of the crime of robbery, and sentenced to the penitentiary for the term of 25 years, the defendant appeals from the judgment and from an order refusing a new trial. He was accused of robbery, committed upon the person of one Grace Walls, in a house of prostitution in San Francisco.

1. The first point made is that the evidence does not sustain the verdict. It is not claimed

that there was not some proof of every essential fact, but the contention is that the story told by the prosecuting witness is grossly improbable; that she made contradictory statements, both in her testimony and out of court; and that she was contradicted by other witnesses. There is some plausibility in all these claims, but they are matters peculiarly in the province of the jury. We should not interpose unless the matter is so plain that one can see that the verdict could only have been rendered through passion or prejudice. This is not such a case.

2. If there was error in sustaining an objection made by the prosecuting attorney to the questions asked the witness Wynn, that error was cured, for the witness was recalled, and without objection testified fully in regard to the matter.

3. The prosecution read to its own witness a portion of his testimony, given at the preliminary examination, in which he testified to a different state of facts to that stated upon the trial. This was objected to, and the court, somewhat impatiently perhaps, overruled the objection, and asked the witness if his former testimony refreshed his memory as to the fact, and whether his former statement was correct. I see no objection to this course. It is not the case of refreshing the memory of a witness at all, and no doubt the accidental use of the word "refresh" by the judge suggested the point. It is the ordinary case in which a witness has disappointed the party calling him, and is confronted with his former statements, and asked to explain them.

4. Many exceptions are taken to the charge of the court:

(1) In the course of its charge the court said: "There has been no evidence brought here that I have heard that directly assails her reputation or character as being a truthful person." It is said that this ignores the testimony as to her degrading occupation, and the evidence of contradictory statements made out of court. This criticism is hardly fair. It ignores the qualifying word "directly," and also the balance of the same sentence from which the quotation was made, which is: "The common experience of mankind is that there is rarely found united in the character of persons as degraded as she is any regard for truth. It does not, however, follow that, because she is the degraded woman that she is admitted to be, she is for that reason alone not to be believed, and her testimony entirely disregarded." Much more to the same effect was said by the judge. There was no error here to the prejudice of the defendant.

(2) Several expressions are quoted from the charge in which the defendant is mentioned as leading a dissolute life. In the instructions these sentiments are mentioned as admissions or statements made by counsel for the defense in his address to the jury. If the propositions were admitted by counsel, and the case submitted on that basis, there was nothing wrong about it. I have no doubt such was

the case. At all events the contrary does not appear. The evidence would fully justify the jury in so concluding, but would not authorize the positive statement by the judge. I do not think error is shown here.

(3) I fail to see anything erroneous or which could prejudice the defendant in the remarks in regard to flight as a circumstance from which the jury could infer guilt.

(4) In the definition of what constitutes a reasonable doubt, the court told the jury that they need not be "wholly satisfied." I do not think the new phrase inserted in the stereotyped definition an improvement, but in the context it could not mislead.

(5) Nor do I think the defendant was injured by the statement that "the doubt must be supported by reason, and not by mere conjecture and idle supposition, irrespective of evidence in the case." This could not have been understood as directing them to disregard their own judgments, founded upon their experience in life, but quite the contrary.

5. The two points founded upon the assumption that there was no verdict upon the issue as to prior conviction are not borne out by the record as corrected on a suggestion of a diminution. It shows that the prior conviction was admitted. The record does not show that the clerk read to the jury that part of the information relating to the former conviction. The minutes merely show that the information was read. No exception was taken to this on the arraignment, and we must presume it was properly read. The judgment and order are affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

PETERSON v. SHERIFF OF CITY AND COUNTY OF SAN FRANCISCO.
(S. F. 457.)

(Supreme Court of California. Dec. 7, 1896.)

PATENT RIGHT NOT SUBJECT TO EXECUTION — ASSIGNMENT—EQUITY JURISDICTION.

1. A patent right cannot be sold under a common execution, since it is neither "personal property capable of manual delivery," within Code Civ. Proc. § 542, subd. 3, providing that such property may be attached by taking it into custody, nor "debts and credits, and other personal property not capable of manual delivery," which can be attached by leaving notice with a third person owing such debts, or having such credits or personal property in his possession.

2. The provision of the act of congress that a patent right may be transferred by assignment is exclusive, so that a creditor of the patentee can have such right subjected to the satisfaction of his judgment only by an application to a court of equity to compel the patentee to make an assignment.

Department 2. Appeal from superior court, city and county of San Francisco; J. M. Seawell, Judge.

Petition by Lewis Peterson for a writ of mandamus to compel the sheriff of the city and county of San Francisco to sell a pat-

ent right under execution. From a judgment denying the writ, plaintiff appeals. Affirmed.

John L. Boone, for appellant. Reddy, Campbell & Metson, for respondent.

McFARLAND, J. The appellant filed a petition in the superior court for a writ of mandate. He averred in his petition (briefly) that he had obtained a judgment in a justice's court against the Eureka Electric Company, a corporation, for \$233.50; that he had taken out an execution upon said judgment, which had been returned nulla bona; that, upon an examination of the secretary of said company, he discovered that it was the owner of two certain United States letters patents, and the inventions covered thereby; that thereupon he procured an alias execution, which he delivered to the sheriff, with instructions "to levy upon, advertise, and sell all the right, title, and interest of said defendant, the Eureka Electric Company, in and to said letters patent, and the inventions covered and protected thereby"; and that the said sheriff refused to advertise and sell said rights, etc., of said company to said patent rights. Wherefore he prayed for a writ of mandamus requiring the sheriff "to advertise and sell all the right, title, and interest" of said company in and to said patent rights. A general demurrer to the petition was sustained by the superior court, and judgment was entered for the respondent. From this judgment the petitioner appealed.

The demurrer was properly sustained. There is no method by which the sheriff could levy upon said property. It was neither "personal property, capable of manual delivery," which, under subdivision 3 of section 542 of the Code of Civil Procedure, must be attached by taking it into custody; nor does it come under the category of "debts and credits, and other personal property not capable of manual delivery," which must be attached by leaving notice with a third person owing such debts, or having such credits or personal property in his possession. A patent right is a thing created entirely by federal legislation. It is a personal favor or monopoly, granted to a particular person by the United States government. It could not be transferred to another person at all, if the government had provided no method of transferring it; but the government has provided that it may be transferred by assignment, and that is the only method by which it can be transferred. And if a creditor of the patentee can have the patent right subjected to the satisfaction of his judgment at all, it can be done only by a court of equity acting in personam, and compelling the patentee to make an assignment. It cannot be advertised and sold under a common execution. As before said, there is no way in which it can be levied upon, and the mere advertising and selling of it upon notice

would convey nothing to the purchaser. *Carver v. Peck*, 131 Mass. 291, and cases there cited; *Bank v. Robinson*, 57 Cal. 520. In *Carver v. Peck*, supra, the court says: "The incorporeal and intangible right of an inventor or an author in a patent or a copyright cannot be taken on execution at law." In *Bank v. Robinson*, supra, the court says: "But a patent right is not tangible property. It is an incorporeal thing, subsisting in grant from the government of the United States. Yet it is subjected to some of the legal incidents of ownership of tangible property, such as succession and transfer. But, as a creation of legislation, it is transferable only according to the provisions of the statutes which created it; and the only question is, has a court of equity power to compel its assignment and sale for the benefit of judgment creditors?" The judgment appealed from is affirmed.

We concur: TEMPLE, J.; HENSHAW, J.

PEOPLE v. WORTHINGTON. (Cr. 181.)
(Supreme Court of California. Dec. 8, 1896.)
HOMICIDE—EVIDENCE—INSTRUCTIONS—HARMLESS
ERROR.

1. A charge stating that the question of self-defense is not in the case, being supported, without contradiction, by the record, is not ground for reversal, the case being one where, under Pen. Code, § 1105, the burden of proving self-defense is on defendant.

2. Admission of evidence as to deceased's whereabouts for some time before he was killed, even if immaterial, is harmless.

3. Evidence that witness received from deceased certain papers and letters after he was shot, and before he died, is harmless, though they are not identified or connected in any way with the case.

In bank. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Louisa Worthington appeals from a conviction of murder. Affirmed.

Burnette G. Haskell and J. J. Gullfoyle, for appellant. Atty. Gen. Fitzgerald, for the People.

GAROUTTE, J. The appellant was convicted of murder in the second degree, and now appeals from the judgment and order denying her motion for a new trial.

It is insisted that the trial court committed error in giving the jury the following instruction: "It is, however, supposed to be unnecessary to elaborate the law of self-defense for the purpose of this case, inasmuch as it is understood to be conceded that the deceased was not, at the moment he was shot, endeavoring to do any injury to the accused woman, or to any other person, but was standing quietly at the wharf when she took his life by shooting him with a loaded pistol." It is unfortunate that the statements of the judge found in this instruction as to the facts of the case should have gone to the

jury. It is said in *People v. Gordon*, 88 Cal. 426, 26 Pac. 504: "That judges must not charge juries with respect to matters of fact is a constitutional prohibition, which has been jealously guarded and rigidly upheld from the earliest judicial history of the state." In *People v. Phillips*, 70 Cal. 68, 11 Pac. 496, the trial court detailed to the jury certain facts of the case as having been proven, and this court there said: "Of course, this mode of charging a jury should be carefully avoided; but it has been held here that an instruction assuming a fact does not demand a reversal, if the fact is admitted, or there is no shadow of conflict of evidence with respect to it." In the present case, if there was any bona fide claim that the killing was done in self-defense, this instruction of the judge would demand a new trial of the case; but we examine the record in vain for any such claim by counsel, and look in vain in that record for a word of evidence tending to show that the killing was done in self-defense. The statement of defendant's counsel to the jury in outlining the facts which were to constitute his client's defense did not even hint at self-defense. The defendant herself testified: "I have no recollection of having fired a shot at him." Defendant's counsel rested the case upon the theory that, if the defendant killed the deceased, she was insane at the time, and not legally responsible for the act. That she did kill the deceased must be taken as a conceded fact, and upon such concession appellant is then left to justify upon the sole plea of nonaccountability. Of course, evidence at the trial offered by a defendant may take a wider range than his opening statement, and may establish defenses not there adverted to. Yet here such is not the fact. The most injurious construction to defendant which could be given the charge is that, in effect, the jury were told by it that the question of self-defense was not in the case. The record discloses that fact without contradiction, and as matter of law; and there is nothing in the giving of this instruction to demand a new trial. There are many trials upon charges of murder where self-defense is not an element, and no harm could possibly result to a defendant in such a case if the jury were so instructed by the judge.

Section 1105 of the Penal Code provides: "Upon the trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable." Under the evidence placed before the jury by the prosecution, this was essentially a case covered by the foregoing section of the Penal Code. The homicide by the defendant was proven. No evidence of the prosecution tended to show that the crime committed only amounted to manslaughter, or that it was justifiable or excusable. Under the evidence, these conditions cannot be gainsaid for a moment; and, such being

the fact, the burden of proof shifted to the defendant, and, if self-defense was relied upon by her, it was for her to produce the evidence. This she did not even attempt to do. In no possible way was defendant's case prejudiced by the giving of this instruction. There is nothing in the case of *People v. Webster* (Cal.) 43 Pac. 1114, opposed to the foregoing views.

There was no material error committed in admitting evidence as to the whereabouts of the deceased, Baddeley, between March 10th and April 25th. If the evidence was immaterial, the error committed was harmless. But the objection would seem to point more to the weight of the evidence than to its materiality.

Neither could any sound objection be made to the evidence of Mahoney, given to the effect that he received certain papers and letters from the deceased immediately after he was shot. As to papers and letters unidentified, and not connected in some way with the case, no possible harm to defendant could have resulted from the admission of this evidence; and, as to one letter upon which evidence was offered tending to show that it had been written by defendant, the evidence was clearly admissible. If the letter had been found upon the body of the deceased after death, that fact would have been admissible; and the circumstance that it was given to the witness by deceased immediately after he was wounded, and shortly prior to his death, demands the application of no different principle of law. This letter, which was introduced in evidence, was signed "Louise," and addressed "Dear Harry." The defendant admitted after the killing, upon an inspection and reading of the letter, that it was "hers." The fact that the defendant's name was "Louisa," and the deceased's name "Harry," taken in connection with the admission, furnished a foundation of identification amply sufficient to justify its admission in evidence as her letter.

The court committed no error in refusing to give the various instructions asked by defendant's counsel.

For the foregoing reasons, the judgment and order are affirmed.

We concur: VAN FLEET, J.; HARRISON, J.; McFARLAND, J.; HENSHAW, J.

BRADBURY v. DAVENPORT et al. (L. A. 161.)

(Supreme Court of California. Oct. 24, 1896.)
MORTGAGE—ABSOLUTE DEED—EQUITY OF REDEMPTION—PLEADING.

1. A conveyance of the mortgaged premises by the mortgagor to the mortgagee, by delivery of deed in escrow, to be delivered in case of the non-payment of the mortgage deed within a certain time, will be set aside where the property is of double the value of the indebtedness.

2. In a suit to have an absolute deed by a mortgagor to a mortgagee, in consideration of the mortgage debt, decreed a mortgage, a complaint alleging that the mortgagor's "equity of redemption" at the time of the conveyance, was of a certain value, though not technically correct, sufficiently alleges, in the case of a special demurrer,

that the interest of the mortgagor was of such value.

3. In a suit by the administrator of a mortgagor to have a conveyance of the mortgaged premises to the mortgagee, in consideration of the mortgage debt, decreed a mortgage, a tender of the amount of the mortgage debt is not necessary, where the estate is embarrassed, and unable to raise the money, except by a sale of the mortgagor's interest.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county.

Action by William N. Bradbury, administrator, against Joseph N. Davenport and others. From a judgment for defendants plaintiff appeals. Reversed.

Withington & Carter, for appellant. Haines & Ward and D. N. Hanmack, for respondents.

HAYNES, C. This appeal is from a judgment rendered against the plaintiff upon demurrer to the complaint. The complaint, after alleging the appointment of the plaintiff as administrator of Daniel Keniston, deceased, and describing the property involved in the controversy herein, alleged, in substance, as follows: That on January 1, 1891, Keniston executed a mortgage to the defendant Davenport upon certain of the real estate described in the complaint, to secure the sum of \$4,000, with interest at 10½ per cent. per annum, payable in two years from said last-mentioned date, which mortgage was duly recorded; and defendant Davenport claimed that there was due thereon, of principal and interest, to March 1, 1895, the sum of \$3,933.87. The remainder of the complaint (except paragraph 4, which need not be noticed) is as follows: "That on or about said 1st day of March, 1895, the said Daniel Keniston, being then sick in body, and embarrassed financially, and being persuaded thereto by the representations of said defendant Davenport, was induced to sign, and did sign, a certain agreement with said Davenport, and to execute a deed to lots 4 and 5 of the premises above described to said J. N. Davenport, which he (the said Keniston) handed, together with said agreement, to the defendant J. H. Anderson, cashier of the Bank of Escondido; that by the terms of said agreement, upon the payment to said cashier of a sum of money, not expressed in said agreement, before July 1, 1895, the said cashier was to discharge said mortgage, and return the note secured thereby to said Keniston; and that in case said Keniston should not pay said sum of \$3,933.87, and interest to July 1st, before said July 1, 1895, the said cashier should deliver said deed to said Davenport, and the note to said Keniston, and the delivery of said deed should be in full cancellation and satisfaction of said note. (3) That the said Daniel Keniston, from the time of the execution of said agreement, continued sick and unable properly to attend to his business, and from and after the 29th day of June until the 9th day of July, 1895, the said date of his death, was unconscious; and that subsequent to the death of said Daniel Keniston,

and after plaintiff had applied for administration in behalf of himself and the heirs of said Keniston, he notified the defendant Anderson not to deliver said deed to said Davenport; but that he (the said Anderson), in violation of the trust reposed in him, and well knowing that said Keniston was dead, and after said notice, upon the demand of said Davenport, upon the 24th day of July, 1895, delivered said deed to said Davenport, and the said Davenport caused the same to be recorded, and claims to be the owner of said property. That no demand had been made by said Davenport before said last date for said deed." (5) "That said deed constitutes a cloud upon the title of plaintiff, and his right to subject said property to administration; that the equity in said property is of great value, namely, the sum of \$4,000; and that the estate of said Daniel Keniston is largely indebted; and that it is necessary to sell the interest of the estate in said premises in order to pay said indebtedness." The prayer of the complaint is that said deed from Daniel Keniston to the defendant Davenport be decreed to be void and of no effect; or that the same is a mortgage to secure any sum, which may be found due from said intestate to said defendant Davenport; and that said property be further decreed to be assets of the estate, and subject to administration. The demurrer to the complaint is as follows: "That said complaint does not state facts sufficient to constitute a cause of action, in this, to wit: First. That it shows on its face that this defendant is the owner of lots four (4) and five (5) in section four (4), township twelve (12) south, range two (2) west, S. B. M. Two. That the complaint contains no offer or tender, or any allegation of offer or tender, to pay the overdue mortgage indebtedness to this defendant therein alleged to be subsisting." This demurrer was sustained, and, the plaintiff declining to amend his complaint, judgment was rendered "that the complaint herein be, and the same is hereby, dismissed on the merits," and for costs.

Appellant insists that said contract or agreement deposited with Anderson with the deed is void, because it is an agreement for forfeiture of the property subject to the lien in case the debtor does not pay before July 1st; and, in support of this proposition, he cites section 2889 of the Civil Code, which is as follows: "All contracts for the forfeiture of property subject to lien in satisfaction of the obligation secured thereby, and all contracts in restraint of the right of redemption from a lien, are void." Aside from the provision of said section of the Civil Code, it is well settled that the mortgagor is not allowed to renounce beforehand his privilege of redemption; that, while generally any one may renounce any privilege or surrender any right he had, an exception is made in favor of debtors who have mortgaged their property, for the reason that their necessities often drive them to make ruinous concessions; that, when one borrows mon-

ey upon the security of his property, he is not allowed by any form of words to preclude himself from redeeming (Jones, Mortg. §§ 251, 10-15), though the doctrine, "once a mortgage, always a mortgage," does not apply to subsequent contracts. *Watson v. Edwards*, 105 Cal. 70, 75, 38 Pac. 527, 528. In *Peugh v. Davis*, 96 U. S. 332, it was held that an equity of redemption is so inseparably connected with a mortgage that it cannot be waived or abandoned by any stipulation of the parties made at the time, even if embodied in the mortgage, though a subsequent release of the equity of redemption may undoubtedly be made to the mortgagee. As to such release, the court, by Field, J., said: "It must appear by a writing importing in terms a transfer of the mortgagor's interest, or such facts must be shown as will operate to estop him from asserting any interest in the premises. The release must also be for a consideration which would be deemed reasonable if the transaction were between other parties dealing in similar property in its vicinity. Any marked undervaluation of the property in the price paid will vitiate the proceeding." In relation to such subsequent agreement, Jones, in his valuable work on Mortgages (section 251), says: "A subsequent agreement that what was originally a mortgage shall be regarded as an absolute conveyance is open to the same objection [that is, the objection to such agreement in the mortgage itself], and will not be sustained unless fairly made, and no undue advantage is taken by the creditor. The burden is therefore upon the creditor to show that the right of redemption was given up deliberately, and for an adequate consideration." In support of this proposition, the author cites, among many other cases, *Villa v. Rodriguez*, 12 Wall. 323, from which we quote the following passage: "The law upon the subject of the right to redeem, where the mortgagor has conveyed to the mortgagee the equity of redemption, is well settled. It is characterized by a jealous and salutary policy. Principles almost as stern are applied as those which govern where a sale by a cestui que trust to his trustee is drawn in question. To give validity to such a sale by a mortgagor, it must be shown that the conduct of the mortgagee was, in all things, fair and frank, and that he paid for the property what it was worth. He must hold out no delusive hopes. He must exercise no undue influence. He must take no advantage of the fears and poverty of the other party. Any indirection or obliquity of conduct is fatal to his title. Every doubt will be resolved against him. Where confidential relations and the means of oppression exist, the scrutiny is severer than in cases of a different character. The form of the instrument employed is immaterial. That the mortgagor knowingly surrendered, and never intended to redeem, is of no consequence. If there is vice in the transaction, the law, while it will secure to the mortgagee his debt, with interest, will compel him to give back that

which he has taken with unclean hands. Public policy, sound morals, and the protection due to those whose property is thus involved, require that such should be the law."

Respondent contends, however, that this case is conclusively settled by this court in *McDonald v. Huff*, 77 Cal. 279, 19 Pac. 499. But that case is clearly distinguishable from this. In that case an unsecured debt, as well as a debt secured by a mortgage, was to be satisfied by the deed deposited in escrow, if such debts were not otherwise paid within the time limited by the agreement, so that a price in addition to the amount of the mortgage lien was paid for the property, and there is no indication, either in the statement of facts or in the opinion of the court, but that the price thus paid was the full value of the property conveyed; while in the case at bar the plaintiff, while not disputing respondent's right to a lien as security for the amount of the mortgage debt and interest, alleges that the equity of the estate in said premises is of the value of \$4,000. In the absence of a special demurrer, we must hold this to be an allegation that, at the commencement of this action, said premises were worth \$4,000 more than the amount secured by the mortgage, with interest to that date.

Respondent also contends that the deed to him took effect when delivered, as of the date of the escrow, and that the agreement was therefore fully executed before this action was begun. But that does not conclude the plaintiff. In *Russell v. Southard*, 12 How. 139, it was held that, though a mortgagee in possession may take a release from the mortgagor, the transaction is to be carefully scrutinized, and, if any unconscientious advantage was taken, the release will be set aside. Conceding that the depository may, upon the happening of the condition, deliver the deed held by him in escrow, notwithstanding the death of one of the parties to the escrow agreement, the transaction is not placed beyond the control of a court of equity if the circumstances of the case require its interposition. It is said, however, by respondent, that the term "equity," when applied to mortgages in this state, describes nothing, and he quotes *Pom. Eq. Jur.* § 1188, to the effect that it is an entire misuse of language to apply the name "equity of redemption" to the legal estate of the mortgagor. *Sichler v. Look*, 93 Cal. 600, 29 Pac. 220, is also cited, where it is said, in substance, that the clause usually inserted in decrees of foreclosure, "that the defendant be forever barred and foreclosed of and from all equity of redemption," etc., does not add to the effect of a sale under the decree beyond what it would have had if the provision had been omitted. But the learned justice who wrote the opinion refers to the matter as one of common practice, and says: "Its insertion is due to the conservatism of the profession, which hesitates to adopt a reform in procedure, and prefers to adhere to the forms which were used under a different system."

If the allegation contained in said fifth paragraph had been specially demurred to upon the ground of uncertainty or ambiguity, such demurrer should have been sustained; but we think, when tested by a general demurrer, that the allegation is a sufficient statement that the interest of the estate in the property described in the deed is of the value of \$4,000 over and above the indebtedness of the estate to the defendant. It is alleged that the said deed constitutes a cloud upon the title of plaintiff and his right to subject said property to administration. The "equity," therefore, must refer to the interest which the estate would have had in the land subject to the mortgage; and, as the demurrer concedes the truth of this allegation, a cause of action was stated entitling the plaintiff to relief upon that ground, if no other.

Respondent contends, however, that the complaint is fatally defective, because it contains no offer or tender, or any allegation of offer or tender, to pay the overdue mortgage indebtedness. They treat this as an action to quiet title, or as an action to redeem. Strictly speaking, it is neither. It alleges that a mortgage was given; that, at the date of the deed and agreement, a subsisting debt, secured by the mortgage, was due, unpaid, and enforceable under the mortgage, which was then, and still would have been, a valid lien upon the premises; alleges facts which show the invalidity of the deed; and prays that the said deed be canceled, or that it be declared a mortgage to secure any sum that may be found due from the intestate to defendant Davenport. Plaintiff treats the lien as still subsisting. A bill in equity to redeem from a subsisting and enforceable mortgage lien would not lie, as the lien could be discharged by payment; but the defendant claims to have an absolute title to the land, and that the mortgage, which formerly subsisted, has been paid and discharged by the conveyance of March 1, 1896. If the decree prayed for in a given case would leave the defendant without remedy for the recovery of the money which would have been secured by the mortgage if a deed had not been subsequently given, it is clear that a court of equity would not grant it, unless the plaintiff had tendered or offered to pay the money which he alleged the deed was given to secure, whether the debt was barred by the statute of limitations or not. But the decree here sought can have no such effect. The suit is brought, not to deprive the defendant of any of his just rights, but to determine the validity of the transaction by which the defendant claims what amounts to a forfeiture of the mortgaged property, and not to deprive him of a remedy whereby he may collect his debt. To impose upon the plaintiff the condition that he shall first tender payment would give the defendant a benefit or advantage of great value from what is, upon the facts alleged, a transaction from which he should not be permitted to derive any benefit or advantage; that is, he could stand upon the apparent title conveyed by the deed without fore-

closure, for all time, knowing that his debtor cannot quiet his title against him without payment of the debt and interest, though barred by the statute, with the power of alienation at any time to an innocent purchaser,—advantages which he did not and could not have had under the mortgage.

Nor is it true that the debtor who has given a deed absolute in form, as security for the payment of his debt, must, under all circumstances, tender payment before he can litigate the character of the instrument; as, for example, where the debt is not due, and the grantee asserts an absolute title, or is attempting to sell and convey to a stranger. A court of equity will not tie its hands by an unbending rule, which would require it to impose inequitable terms, or do any injustice in a given case falling within a general class, though having peculiar or distinguishing features. There are sufficient facts appearing in the complaint, though not clearly stated, to show that the imposition of the condition of plaintiff's right to maintain this action, namely, that he must tender payment of the mortgage debt to the defendant, would result in a denial of justice. Keniston died July 9th, plaintiff was appointed administrator July 23d; and this action was commenced July 30th, the deed to defendant Davenport having been delivered on the 24th. It is alleged that the estate is largely indebted, and that a sale of the interest of the estate in the premises described in the deed is necessary in order to pay said indebtedness. Under such circumstances, it would be inequitable to require a tender of the amount due as a condition upon the performance of which alone the action could be maintained; and a compliance with such condition would appear, from the facts stated, to be impossible. Certainly, the money could not be raised upon the premises embraced in the deed, whatever its value, until it should be determined that the deed was itself only a mortgage. We think the court erred in sustaining the demurrer, and that the judgment should be reversed, with leave to the plaintiff to amend his complaint if so advised.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, with leave to the plaintiff to amend his complaint if so advised.

MCNEIL v. HANSEN. (S. F. 486.)
(Supreme Court of California. Dec. 7, 1896.)
TRANSFER BY INSOLVENT—ACTION BY ASSIGNEE
IN INSOLVENCY—RIGHTS OF CREDITORS—
PRO RATA DISTRIBUTION.

A suit by an assignee in insolvency to set aside conveyances made by the insolvent, by deeds absolute, under oral agreements with the transferee that he would sell all the insolvent's property, and distribute the proceeds pro rata among the creditors, cannot be maintained where the transferee had not yet disposed of part of the real estate transferred, and all sales which had

been made were for a fair price, and it does not appear that such transferee had agreed to distribute pro rata the proceeds of each sale as it was made, or that any of the unpaid creditors had complained of his actions, or were not willing to wait until the rest of the property had been sold.

Department 2. Appeal from superior court, city and county of San Francisco; J. M. Seawell, Judge.

Action by J. W. McNeil, as assignee in insolvency of C. G. White, against E. H. Hansen, to set aside conveyances on the ground of fraud. From a judgment of nonsuit, plaintiff appeals. Affirmed.

John J. Coffey, for appellant. Wm. H. Jordan, for respondent.

McFARLAND, J. After plaintiff had introduced his evidence and rested, the court granted a nonsuit, and rendered judgment for defendant. Plaintiff appeals from the judgment, and from an order denying his motion for a new trial.

We see no reason for disturbing the judgment. C. G. White filed his petition in insolvency on October 3, 1891, and, in December following, appellant was appointed his assignee. This action was commenced in February, 1893, to cancel and set aside certain sales of personal property and certain conveyances of real property made by said White to respondent on February 17, 1891,—nearly eight months before the filing of the said petition in insolvency, and two years before the commencement of this action,—and to account for and pay to appellant all moneys which he had received from sales of part of the property which he had received from White, which moneys he had paid to White's creditors. Respondent contends that the complaint does not state facts sufficient to constitute a cause of action, and the contention is, no doubt, difficult to answer. There are uncertainties and inconsistencies in the complaint. There is no showing in it that any of the creditors of White are complaining of the transfers and conveyances by him to respondent. It does not show with certainty what part of the described property was actually transferred to respondent, and what was retained by White, and its averments as to the consideration of the transfers are inconsistent. Respondent also contends that, under section 55 of the insolvent law, an action like the one at bar cannot be maintained by an assignee unless the alleged transfer was made within one month before the filing of the petition in insolvency. We mention these points because they are raised by respondent, and are important; but we do not deem it necessary to pass upon the sufficiency of the complaint. We will assume that the complaint states with sufficient certainty that on February 17, 1891, White was actually insolvent, and that Hansen knew it; that on said day he, by written instruments, transferred and conveyed to respondent, Hansen, certain describ-

ed personal and real property, which included all his property; that these instruments were, in form, absolute, and in no way purported to be assignments for the benefit of creditors; that they were made, however, upon the consideration and with an oral understanding that respondent was to make sales of the property on as favorable terms as practicable, and from the proceeds of such sales pay White's creditors, pro rata, in equal proportionate amounts to each; that respondent did sell some of said property, and paid the proceeds to White's creditors; that he did not pay the same ratably, but paid to some of the creditors more, proportionally, than to others, and that a few of the creditors had not yet received anything; and that some of the property transferred to respondent is still in the latter's hands, unsold. The gist of the cause of action alleged, conceding that any cause of action is alleged, is that respondent wrongfully violated the alleged agreement with White, by paying more to some of the creditors than to others, thus making the former preferred creditors.

The only witness introduced at the trial by appellant was White, and the court below was entirely right in holding that his testimony failed to establish any of the material facts relied on for a recovery. His testimony showed that, at the time of said transfers and conveyances, he did not consider himself insolvent, and that Hansen did not know that he was insolvent. It shows that the transfers and conveyances were not made with intent to hinder, delay, defraud, or prefer creditors. It appears from his testimony that, although he considered his assets greater than his liabilities (and that fact appeared from the statements which he then made), still he owed some debts which he could not then readily pay, and, being desirous of engaging in a certain business, he wanted to be free from the pressure of said debts. Under these circumstances, he had interviews with his creditors,—or at least with nearly all of them,—who consented to relieve him if he would transfer his property to the respondent, Hansen, whom they selected for that purpose, who was to sell the property and apply the proceeds to the debts. This was done, and Hansen sold a considerable part of the property at fair prices, to which White consented, and paid the proceeds to creditors. There is no contention that Hansen did not make good sales. Indeed, the sales were negotiated by White himself. As to the only objection now urged to the transaction, viz. that Hansen did not pay the moneys received from the different sales ratably among all the creditors, the evidence does not show that Hansen agreed to pay all the debts, pro rata, or to distribute the proceeds of each sale, as it should be made, equally among all the creditors, in proportion to the amounts owing them. Indeed, it appears incidentally that some of

the creditors had liens on certain property, and were thus legally preferred creditors; and we have not been able to discover from the testimony that any one of the few creditors who have not yet received anything from the sales has complained, or is not willing to wait until the remaining part of the property shall have been sold. We see no material error committed by the court in any ruling made at the trial.

As appellant has put his contentions under three headings, namely, (1) that the court should have granted his motion for a judgment on the pleadings, (2) that the motion for a nonsuit should have been denied, and (3) that a new trial should have been granted, it is sufficient to say that, in our opinion, each of said contentions is without substantial merit. The judgment and order appealed from are affirmed.

We concur: HENSHAW, J.; TEMPLE, J.

GOODSELL v. ASHWORTH et al. (S. F. 291.)

(Supreme Court of California. Dec. 7, 1896.)

SUPERINTENDENT OF STREETS — ACTION ON BOND — DAMAGES.

In an action by a lot owner on the bond of the superintendent of streets, under section 22 of the street law (St. 1885, p. 160), for the neglect of such official to see that a sewer built under his supervision was properly constructed, evidence that the sewer was not covered with earth, as required by the specifications, and was cracked at places, but that sewage passed through without apparent leakage, and that it could be put in good condition for \$952, one-third of which sum would be plaintiff's proportion if he could be required to contribute to the cost of reconstruction, did not warrant a finding that the sewer was valueless, and that plaintiff's damage was \$755, the full amount which he had paid under the original assessment.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by D. C. M. Goodsell against Thomas Ashworth and others on the official bond of defendant Ashworth, as superintendent of streets, and others. From a judgment for plaintiff, and from an order denying a motion for new trial, defendants appeal. Reversed.

John T. Humphreys, W. C. Burnett, L. G. Burnett, and J. F. Tevlin, for appellants. Edward R. Taylor, for respondent.

BELCHER, C. On the 6th day of February, 1890, the board of supervisors of the city and county of San Francisco, after the necessary preliminary proceedings had been taken therefor, awarded to one Thomas Philbin a contract to construct a brick sewer of certain dimensions, and according to certain specifications, on Susquehanna street, from the northeasterly line of Corea street to the northeasterly line of Trinidad street, in said city. On the 19th of the same month the defendant, Thomas Ashworth, as superintendent

ent of streets, and said Philbin, entered into a contract whereby the latter was to construct the said sewer according to the attached specifications, and at a stipulated price. Shortly thereafter Philbin commenced the construction of the sewer, and completed the same before May 28, 1890. On the last-named day Ashworth, as such superintendent of streets, having accepted the work as done to his satisfaction, made an assessment to cover the sum due therefor under the contract, with incidental expenses. To the assessment he attached a diagram and warrant, as required by the statute, and the same were recorded in his office. The whole amount for which the assessment was made was \$2,291.43, and the amount assessed against the plaintiff's property was \$780.65, the balance being assessed to other persons and against other property than that owned by plaintiff. On June 16, 1890, plaintiff paid, to satisfy his assessment, the sum of \$755.65, the balance of \$25 being thrown off by the contractor. On December 29, 1890, the plaintiff notified Ashworth in writing that the specifications under which the work of constructing the sewer was done were not complied with in several particulars. To this notice Ashworth paid no attention, as his term of office expired four or five days—one of which was Sunday—thereafter, and he had no time. On January 24, 1891, the plaintiff commenced this action against Ashworth and the sureties on his official bond as superintendent of streets, and, after setting out the facts as to the office held by Ashworth, the making of the contract with Philbin, the construction of the sewer, and the making and filing of an assessment for the cost thereof, the complaint alleged "that by reason of the premises it became the duty of the defendant Ashworth, as said superintendent, to see that said Philbin followed said contract and the specifications thereto attached in the matter of constructing said sewer; but that said Ashworth, wholly neglecting his duty in that regard, permitted said Philbin to violate said contract and specifications in the following particulars"; then setting out various particulars in which the contract and specifications were violated. It was then alleged "that by reason of the aforesaid violation of said contract and specifications said sewer is valueless for the purpose for which it was intended, and is in constant danger of injury." It was further alleged that plaintiff's lands were assessed for the sum of \$780.65, and the amount so assessed became a lien on said lands, to discharge which plaintiff was compelled to pay, and did pay, on July 16, 1890, the whole of said sum; and that by reason of the premises plaintiff had been damaged in the sum of \$780.65, for which he prayed judgment, with interest from the date of payment. To that complaint a general demurrer was interposed and sustained, and, plaintiff declining to amend, judgment was entered that he take nothing by his action. From that judgment an appeal was taken to this court, where it

was reversed. *Goodsell v. Ashworth*, 96 Cal. 397, 31 Pac. 261. When the case went back to the court below, the plaintiff amended his complaint by striking out the averments as to the particulars wherein the contract and specifications were not complied with in the construction of the sewer, and by inserting in lieu thereof more specific averments, and alleging "that by reason of the said violation of said contract and specifications said sewer has become badly cracked in several places, and valueless for the purposes for which it was intended, and is in constant danger of injury." The defendants answered the complaint, and denied, among other things, that the contract and specifications were violated in the construction of the said sewer, or that the plaintiff had been damaged by reason of any alleged violations thereof in the sum named, or in any sum whatever. After a trial of the case without a jury, the court below found "that all and singular the matters and things set out and alleged in the complaint are true, except that plaintiff paid to discharge the assessment lien mentioned in the complaint the sum of seven hundred and fifty-five dollars and sixty-five cents, instead of the sum of seven hundred and eighty dollars and sixty-five cents as alleged." And as a conclusion of law the court found "that plaintiff was entitled to judgment against the defendants for the sum of seven hundred and fifty-five dollars and sixty-five cents, with interest thereon at the rate of seven per centum per annum from the 16th day of June, 1890, together with costs of suit." Judgment was accordingly entered against defendants on July 5, 1894, for the sum of \$970, besides costs. From that judgment, and an order denying their motion for a new trial, defendants have appealed.

In our opinion, the court clearly erred in finding that the sewer was valueless for the purposes for which it was intended, and that by reason of the premises plaintiff had been damaged in the sum of \$755.65, there being no evidence to justify such findings.

1. It is true that Thomas McMann, a witness for plaintiff, testified that he lived in the neighborhood at the time the sewer was constructed, and considered that it was not properly built. "It gives no drainage to the gutter. It is only six feet down. It is four feet too shallow. They started to build it up instead of sinking it down. That sewer is no use to the property there,—no use at all, even if it didn't crack. It ought to be down in the ground ten feet below the grade." But it was not claimed that the sewer was not placed upon the grade established for it, and it was afterwards admitted by counsel for both sides "that the work was done according to the official grade of the street." As the opinion of the witness that the sewer was of no use to the property was based upon the theory that it was constructed on the wrong grade, it is of no weight and is entitled to no consideration. The sewer contracted for and construct-

ed was 560 feet long, and was oval shaped, 2 feet 3 inches by 3 feet 4 inches in size. It was constructed partly below, partly on, and partly above the surface of the street as it was then found. And according to the specifications its sides were to be covered and protected by embankments of earth which were to extend up and be at least two feet deep on the top of it. It is alleged that a large part of the sewer was not, and never had been, protected by an embankment or earth filling of any kind, and that it remains throughout a considerable portion of its length in an exposed condition. There was a conflict in the evidence as to whether the sewer was properly covered with earth by the contractor, and as to whether the embankments had since been washed down by rains and flowing streams of water, and trod down by animals. It was proved, however, by witnesses for the plaintiff, that the embankments could now be restored and made good at an expense of \$300. It was also proved by witnesses for the plaintiff that the sewer was in good condition, except where it was cracked, and that so much of it as was cracked could be reconstructed at a cost of \$4 per foot. One of the witnesses referred to—John E. Shepard—testified that he made a careful examination of the sewer, outside and inside, the day before the trial, and that he found it cracked at various places on the sides and top for a distance of 163 feet, and he said: "With the sewer in that condition, such as I found it, in order to make that a good sewer, I consider that one hundred and sixty-three feet of that sewer would have to be reconstructed." Another of the witnesses referred to—C. B. Williams—testified that he had examined the sewer in its present condition, and saw cracks in it on the sides and on top. "The cracks I saw were sixty-two or sixty-three feet, and it would cost, as I say, to repair those cracks [about \$4 a foot]. If a new sewer were put in there, the whole extent of those cracks, the entire sewer would then be good. So far as the sewer itself, it seemed to be very good work. That is all the defects that I saw, and that it was not covered. It seemed to be of good workmanship, but the trouble seems to have been that the filling on the side did not protect it. That is where the trouble was. I do not know anything about whether that was filled, and the earth washed away." It was also proved, without conflict, that water and sewage were passing through the sewer without any apparent leakage. Assuming, then, in view of the evidence introduced by the plaintiff, that, in order to put the sewer into good condition, it was necessary to reconstruct 163 feet of it, still there can be found no warrant for saying that it was valueless for the purposes for which it was intended.

2. As to the question of damages. By section 22 of the street law (St. 1885, p. 160) it is provided that the superintendent of streets shall, before entering upon the duties of his office, give bonds to the municipality with

sureties; "and should he fail to see the laws, ordinances, orders and regulations relative to the public streets or highways carried into execution, after notice from any citizen of a violation thereof, he and his sureties shall be liable upon his official bond to any person injured in his person or property in consequence of said official neglect." The whole sewer was 560 feet long, and the part of it requiring reconstruction was at most 163 feet long. That part could be reconstructed, so as to make the whole sewer a good one, for about \$652, and the sewer could be embanked and covered with earth so as to meet the requirements of the specifications for about \$300, aggregating \$952. The plaintiff's assessment was about one-third of the whole assessment, and if he could be required to pay his proportion of the cost of reconstructing and covering the sewer the amount would be only about \$317. Under these circumstances, how can it be said that the plaintiff was damaged in the full amount he paid to discharge the assessment against him? We fail to see any valid ground for the conclusion reached by the court below.

The attorney for respondent has devoted a large part of his brief to the proposition that "the decision on the former appeal is decisive on this appeal." It is said: "The case now before the court is precisely the same case as on the former appeal. * * * It is, therefore, plain that the only questions in the case are as to whether or not the sewer was built in accordance with contract and specifications, and whether, by reason of its not having been so built, it was defective. If these questions are answered in the affirmative, then the judgment and order must necessarily be affirmed." The case now before the court is not the same as on the former appeal. That appeal was from a judgment on demurrer, and the question was whether, under the street law, one claiming to have been injured in his person or property in consequence of the official neglect of the superintendent of streets had a remedy by action against the superintendent and the sureties on his bond, or was limited to an appeal to the board of supervisors. The court said: "The contention of respondent's counsel is that the remedy by appeal to the board of supervisors is exclusive, and that by failing to avail himself of that remedy appellant is without any remedy. The law does not say so. On the other hand, the same act that provides for an appeal to the board of supervisors gives the appellant a remedy by action upon the bond of the superintendent and his sureties." The judgment was accordingly reversed, with directions to the court below to overrule the demurrer, and allow the defendants to answer. When the case went back to the court below, the defendants did answer the complaint, denying most of its material averments. One of the issues tried was as to whether the sewer was valueless for the purposes for which it was intended, and another was as to the damages sustained by the

plaintiff. These were not matters involved in the former appeal, and it seems idle to claim that they are res judicata. The judgment and order appealed from should be reversed, and the cause remanded for a new trial.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and the cause remanded for a new trial.

SHAIN v. MAXWELL et al. (S. F. 400.)

(Supreme Court of California. Dec. 7, 1896.)

RECORD ON APPEAL—BILL OF EXCEPTIONS—SUFFICIENCY—ACTION FOR GOODS SOLD—SUFFICIENCY OF VERDICT.

1. An order denying a motion to require plaintiff to furnish a more specific bill of particulars will not be disturbed where the bill of exceptions does not show upon what evidence the court made the order.

2. A verdict for plaintiff, in a suit for goods sold, will not be disturbed on the ground that the bill of items furnished by plaintiff shows that the larger part of the account was for liquors, bringing the case within Act March 20, 1874 (St. 1873-74, p. 509), providing that no recovery could be had on retail liquor accounts exceeding five dollars, on a computation that the payments acknowledged in the bill were more than sufficient to extinguish the whole debt, except items within such statute, if there is nothing in the record showing what evidence was produced at the trial.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by Joseph E. Shain against George H. Maxwell, as executor of the estate of R. S. Mesick, deceased. Judgment for plaintiff, and defendant appeals. Affirmed.

Eugene R. Garber, for appellant. Vincent Neale, for respondent.

BRITT, C. Action to recover a balance of \$2,882.50 on an account for goods furnished and cash advanced to defendant's testator. Plaintiff had a verdict and judgment for \$750. In the judgment roll appears a bill of exceptions, the sum and substance of which is that the court heard defendant's motion for an order requiring plaintiff to furnish a "further and other" bill of particulars, more specific than one he had previously, on December 5, 1893, served on defendant and filed with the clerk; that defendant's notice of such motion and the said bill of particulars "are hereby referred to and made a part of this bill of exceptions, as fully as though incorporated herein"; that, after argument on the motion, the court denied the same, and defendant excepted.

A paper, entitled in the cause, indorsed as filed by the clerk December 5, 1893, and purporting to be a bill of particulars, is printed in the transcript near said bill of exceptions. Respondent insists that this is not identified as the document of that date mentioned in the bill of exceptions, and cannot be considered on the ap-

peal. We think, however, that no decision on this matter is necessary. For, conceding the identification of the document as part of the record to be sufficient, there is yet nothing in the bill of exceptions to show upon what evidence the court made its order. The reference to the paper of December 5, 1893, is to it merely as the subject concerning which defendant desired action by the court. It is not shown that the same was introduced in evidence to support the motion, or that it was before the court in any manner prior to the settlement of the bill of exceptions. For anything appearing, the motion may have been denied for the reason that the nature and contents of the bill previously rendered by the plaintiff were not exhibited to the court. There is, therefore, no foundation for argument that the order should have been different.

It appears from the said bill of items in the transcript that the larger part of the account in question was for wines and liquors furnished to said testator. Appellant contends that this was a retail liquor account, and that, under the statute of March 20, 1874 (St. 1873-74, p. 509), no recovery could be had thereon exceeding five dollars; and he presents sundry computations to show that payments acknowledged in the bill were more than sufficient to extinguish the whole thereof, except items within said statute. Hence he claims that the verdict should have been in his favor. But, obviously, the propriety of the verdict cannot be impeached by a method so indirect. There is nothing in the record to show what evidence was produced at the trial. It may have been proved that the parties to the account agreed that payments should be applied to the several charges in the order of their date, in which case—so far as any possible effect of the act of 1874 is concerned—the verdict might have been much larger. The judgment should be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

SNELL v. PAYNE. (S. F. 408.)

(Supreme Court of California. Dec. 7, 1896.)

APPEAL AND ERROR—SPECIFICATIONS OF ERROR—MECHANICS' LIENS—SUFFICIENCY—CLERICAL ERROR—CONDITIONS OF CONTRACT—OVERCHARGES.

1. A bill of exceptions need not contain specifications of error, except as to the ground that a finding or decision is not supported by the evidence.

2. A mechanic's lien is not invalidated by a clerical error therein as to the amount due on the building.

3. A lien which shows that the materials were to be delivered in such quantities as might be directed during the progress of construction, and that the claimant "was to be paid thereafter therefor, on demand of payment as to each delivery of any quantity on said property by him, the reasonable market value thereof," is not objectionable as not stating the terms and conditions of the contract.

4. Where lime was furnished for the construction of a building, the lien may include a charge for barrels in which the lime was sent, but which were not returned after it was used.

5. In the absence of fraud, a lien is not invalidated by the fact that it claims an amount which is greater than the value of the materials furnished.

Department 2. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by E. W. Snell against Elizabeth Payne to foreclose a mechanic's lien. From a judgment of nonsuit, plaintiff appeals. Reversed.

J. J. Burt, for appellant. E. H. Wakeman, for respondent.

McFARLAND, J. This action was brought by the plaintiff, Snell, to foreclose a lien for materials furnished for and used in the construction of certain buildings on the land of defendant, Payne. After plaintiff had introduced his evidence the defendant moved for a nonsuit. The nonsuit was granted, and judgment entered for defendant. The plaintiff appeals from the judgment upon the judgment roll and a bill of exceptions.

Respondent contends that the merits of the appeal cannot be considered because the bill of exceptions does not contain any specification of error; but this contention cannot be maintained, because it has been frequently held by this court that a bill of exceptions, except as to the ground that a finding or decision is not supported by the evidence, need not contain specifications of error. *Reay v. Butler*, 69 Cal. 572, 11 Pac. 463; *Shadburne v. Daly*, 76 Cal. 355, 18 Pac. 403; *Hagman v. Williams*, 88 Cal. 146, 25 Pac. 1111.

The grounds upon which the motion for a nonsuit was made do not appear, except so far as they may be gathered from findings which the court filed at the time the motion was granted; but these so-called findings cannot be considered where the case was decided upon a motion for nonsuit. It appears, however, from the bill of exceptions, that the court sustained an objection to the introduction of appellant's lien, and the views of the court upon the case are to a considerable extent developed by that ruling. We see no objection to the said claim of lien which appellant offered. The grounds of the objection to the offered document were as follows: (1) That the lien, in designating the amounts due on each of the three buildings which were erected, stated the amount upon each to be \$67.88%, instead of \$66.88%, which latter sum was, in fact, the true amount; (2) that the lien did not state the terms, time given, and conditions of the contract; and (3) that the appellant charged for 18 barrels, in which the lime which he furnished was packed, at 25 cents each. As to this last-named ground it appears that the lime furnished by appellant was packed in barrels; that most of the barrels were returned to appellant after the lime had been used, and a credit given by appel-

lant of the value of the barrels; but that 18 of such barrels were not returned, and no deduction was made for the value of the barrels, which were rated at 25 cents each.

With respect to the first objection, it is sufficient to say that the amount designated for each of the three buildings was upon its face a mere clerical error, and that, at most, the only penalty for such error would be a postponement of the liens to the claims of other lienholders, and such error would not invalidate the lien.

As to the second objection, the only point which seems to be made is that the lien did not designate with sufficient accuracy the time of payment for the lime; but the recorded lien showed that it was to be delivered in such quantities as might be directed during the progress of the construction of the building, and that appellant "was to be paid thereafter therefor, on demand of payment as to each delivery of any quantity on said property by him, the reasonable market value thereof"; and we think that this was a sufficient statement upon this subject.

As to the third ground, we think that, where material is usually delivered in certain packages, it is proper to charge for it as packed, although the small material constituting the package does not literally go into the construction of the building; but, at best, the matter under consideration would merely be an overcharge, and it is quite clear that a recorded lien, good in other respects, cannot be rejected because the amount claimed is somewhat larger than can be sustained by the proofs, unless it be so wilfully false as to amount to a fraud, and nothing of that kind appears here. *Parber v. Reynolds*, 44 Cal. 519; *Harmon v. Railroad Co.*, 86 Cal. 617, 25 Pac. 124; *Malone v. Mining Co.*, 76 Cal. 578, 18 Pac. 772.

The court, therefore, erred in sustaining the objections to appellant's offered claim of lien, and for this reason the judgment must be reversed. Of course, the action of a trial court in granting a nonsuit would be sustained, no matter whether the proper grounds were stated by the moving party or not, where we could see any valid ground for sustaining such action; but in the case at bar we can see no ground upon which the motion for a nonsuit can be sustained. The judgment is reversed.

We concur: TEMPLE, J.; HENSHAW, J.

LAVER et al. v. HOTALING. (S. F. 502.)
(Supreme Court of California. Dec. 7, 1896.)
CONTRACTS—SERVICES OF ARCHITECTS—EVIDENCE OF VALUE.

1. In an action by architects to recover for services, evidence of a rule of compensation of architects established by architects' institutes and associations is not admissible when not accompanied by any proof that the rule was known to defendant at the time of the alleged contract, or that it was so generally accepted by the public as to give it the standing of a custom, knowledge of which was to be imputed to him.

2. Where plaintiff testified on the direct examination as to an alleged custom, defendant did not waive his objections to such evidence by cross-examining plaintiff thereon, or calling witnesses to disprove it.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by Augustus Laver and another against A. P. Hotaling to recover for services rendered by plaintiffs as architects. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

Robert Harrison and Michael Mullany, for appellant. A. P. Van Duzer and Walter H. Levy, for respondents.

BRITT, C. Plaintiffs are co-partners in the practice of their profession of architects. They sued in this action to recover the alleged reasonable value of services performed, it is claimed, at defendant's request in the preparation of drawings, plans, and specifications for a building defendant had in mind to erect. After verdict and judgment in plaintiffs' favor, the court granted a new trial on the sole ground specified in its order that it erred at the trial "in permitting the introduction of evidence of a rule of compensation of architects established by architects' institutes or associations." Plaintiffs appeal, and contend, firstly, that the court mistook in assuming that it had allowed evidence of the character mentioned in the order granting a new trial. While it hardly appears that plaintiffs directly offered the conventional rates of compensation fixed by any society of architects for professional services, yet there was an undertone of reliance thereon in a great part of the evidence for plaintiffs as the basis on which estimates of the value of their services were founded; and it sufficiently appears that defendant ineffectually endeavored, by motion to strike out and otherwise, to exclude testimony of such value having those rates as its data. Thus, Mr. Laver, one of the plaintiffs, testified that there is a uniform rule governing the compensation of architects. On cross-examination he was asked, "Is that rule established by the Architects' Association here?" He replied, "That is established by every civilized country in the world,"—a certain percentage on the cost of the structure, payable when the specifications are finished. Another one of the plaintiffs testified that the value of their services was 2½ per cent. of the estimated cost of the building; that he based this statement upon "the custom." Mr. O'Connor, a witness for plaintiffs, stated that the estimate he gave upon the subject of value was arrived at by reference to a custom prevalent in various cities, and "published in the rules and regulations of the American Institute of Architecture." There was other testimony of similar tendency. All of it received color beyond what it possessed intrinsically from the following instruction of the court to the jury: "In order to prove the value of those services,

plaintiffs have called witnesses to show that under a rule of the Architects' Association of New York the builder or owner must pay for the architect's plans, profiles, and specifications compensation on the basis of a percentage upon the contemplated cost of the building. They say that is an arbitrary, fixed rule of those architects. If you should be satisfied that such a rule as that exists, and that plaintiffs are otherwise entitled to recover, you may award a verdict on the basis of that compensation." In this condition of the case we think the statement of the court in its order that evidence had been received "of a rule of compensation of architects established by architects' institutes or associations" was not materially inaccurate. The jury must have retired with the conviction that such evidence was before them for consideration. This evidence, standing alone, was incompetent. It was not accompanied by any proof that the rule or usage of architects was known to the defendant at the time of the alleged contract with plaintiffs, nor that it was so generally accepted and acted upon by the public as to give it the standing of a custom, reasonable, uniform, and notorious, knowledge of which was to be imputed to him. In the absence of such complementary proof, the law, as we understand it, does not allow that a rule for professional guidance, adopted by organizations or societies of the members of any profession, is competent evidence in their favor in controversies with lay employers regarding the quantum of their compensation. See 27 Am. & Eng. Enc. Law, 739; Mechem, Ag. § 963, note 1; Blake v. Stump, 73 Md. 171, 26 Atl. 791; Tallaferra v. Bank, 71 Md. 200, 17 Atl. 1036; McMasters v. Railroad Co., 69 Pa. St. 374. We do not deny the principle illustrated by Sewell v. Corp., 1 Car. & P. 302; Thomas v. Brandt (Md.) 28 Atl. 524, and other cases, that, if there is a general usage, applicable to the charges of a particular profession, it may be looked to in order to determine the compensation to be paid by one who employs an individual of that profession; but we hold that such a usage cannot be proved for that purpose against laymen by showing a rule adopted within the profession only.

It is urged that the existence of the rule or custom of architects was developed on cross-examination of plaintiffs' witnesses; also that testimony concerning the same matter was given by a witness called by defendant, and hence that the latter cannot complain of the error. But the evidence of plaintiffs related to an alleged customary rule of charges, and we think defendant might, without waiving his objections, produce evidence either by cross-examination or from his own witnesses to exhibit the source of the alleged custom, and to show more clearly the incompetence of the plaintiffs' evidence in that behalf. As nearly as we can make out, this was the purpose of the course of interrogation pursued by defendant. In our opinion, none of the objections advanced by plaintiffs to the order

appealed from are maintainable, and it should be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER OURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

In re MARSH. (Sac. 193.)

(Supreme Court of California. Dec. 8, 1896.)

INSOLVENCY — EFFECT OF PRIOR PROCEEDINGS — DISCHARGE.

One whose petition for a discharge under the insolvent act of 1880 has been denied, on the ground that his debts did not exceed the sum of \$300, as required by the act (section 2) before a debtor could claim its benefits, is not within section 49, providing that no discharge shall be granted if the debtor has received "the benefits of any act of insolvency" within three years next preceding his application for discharge.

Commissioners' decision. Department 1. Appeal from superior court, Fresno county; E. W. Risley, Judge.

Application by S. N. Marsh for a discharge in bankruptcy. The application was contested by J. A. Bell, a creditor of the insolvent. From an order denying the discharge, applicant appeals. Reversed.

M. K. Harris and A. M. Drew, for appellant. Frank H. Short and J. W. Taggart, for respondent.

BRITT, C. April 22, 1893, Marsh filed in the superior court a petition in insolvency under the insolvent act of 1880. In the accompanying schedules his debts were estimated at \$2,318, including the sum of \$2,200 on a promissory note to one J. A. Bell, for which note, it was stated, there was no consideration. A formal adjudication of insolvency was entered, and, after the expiration of three months following, Marsh applied for a discharge from his debts. Said Bell contested the application, and on July 14, 1894, after trial of the contest, the court rendered judgment declaring that on said April 22, 1893, Marsh did not owe debts amounting to \$300, and was not entitled to be discharged or to receive the benefits of the act. Afterwards, on October 9, 1894, Marsh began the present proceeding by filing a new petition in insolvency, showing liabilities amounting to \$3,104. Thereupon he was adjudged insolvent, and on January 11, 1895, he again made application to be discharged from his debts. Bell again contested his right to the same, this time on the ground that in the proceeding first instituted Marsh had had the benefit of the insolvent act, within the meaning of the provision of section 49 thereof, that no discharge shall be granted if the debtor has received the benefits of any act of insolvency within three years next preceding his application for discharge. The court made findings sustaining this view and gave judgment denying the discharge, and subsequently denied a motion for new trial.

At first blush it seems odd that, if a debtor's discharge in insolvency is denied, on the ground that he was not, when he filed his petition, entitled to receive the benefits of the act, yet, in a subsequent proceeding, his discharge may be again defeated because, in the first, he had enjoyed such benefits. And this impression is not effaced on fuller consideration of the facts here. Under the act of 1880 (section 2) no one whose debts did not exceed the sum of \$300 could invoke the action of the court for his relief. Marsh's first petition was, therefore, self-destructive. See *Friedlander v. Loucks*, 34 Cal. 24; *In re Fowler*, 1 Low. 162, Fed. Cas. No. 4,998. To say that there was no consideration for his promissory note to Bell was to say that it was no valid contract, and hence no debt. The court had no jurisdiction to entertain his petition, and he, of course, could receive no legal benefits from proceedings based thereon. In this the case differs wholly from *In re Smith*, 68 Cal. 203, 8 Pac. 881, relied on by respondent. No question existed there as to any jurisdictional infirmity in the prior proceedings taken by the insolvent. The judgment and order appealed from should be reversed.

We concur: BELOHER, C.; HAYNES, C.

PER OURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed.

MORRISON v. RODGERS. (S. F. 474.)

(Supreme Court of California. Dec. 9, 1896.)

MARRIAGE BROKERAGE.

An agreement by one engaged to be married to pay a person, if he induces the other person to the engagement to carry it into effect, cannot be enforced.

Department 1. Appeal from superior court, city and county of San Francisco; W. R. Daingerfield, Judge.

Action by Morrison against Rodgers. Judgment for defendant, and plaintiff appeals. Affirmed.

W. W. Allen, Jr., W. W. Allen, Sr., and Aylett R. Cotton, for appellant. Van R. Paterson, for respondent.

HARRISON, J. This action was brought to recover certain moneys, which it is alleged the defendant promised to pay to the plaintiff if she would use her influence in endeavoring to induce a certain person to marry the defendant, and should be instrumental in bringing about such marriage. It is alleged that, in consideration of said promise by the defendant, the plaintiff did endeavor to persuade said person to marry the defendant, and was instrumental in bringing said marriage about, and that the defendant has failed to keep her promise, and has not paid the money agreed by her to be paid. The rule that a marriage brokerage contract

is invalid, as being contrary to public policy, and that the services rendered under such contract are without legal consideration, and are incapable of forming the foundation of an action for their recovery, is so elementary that but very few cases involving the question have found their way into the reported decisions; but, whenever the question has been presented, courts have invariably declared that the action could not be maintained. Story, Eq. Jur. § 261; 2 Pars. Cont. *74; Greenh. Pub. Pol. 478; Williamson v. Gihon, 2 Schoales & L. 357; Crawford v. Russell, 62 Barb. 92; Duval v. Wellman, 124 N. Y. 159, 28 N. E. 343; Johnson v. Hunt, 81 Ky. 321.

It is sought to distinguish the present case from those in which the rule has been laid down by the fact that here there was an existing agreement for marriage between the parties, and that the agreement with the defendant was only for the purpose of promoting the carrying out of that agreement. We are of the opinion, however, that this fact does not take the case out of the above rule. The same reasons by which the rule is upheld control here. The freedom of choice essential to a happy marriage, and the voluntary selection by each spouse of the person who is to be his or her companion for life, with all that is implied in the relation of marriage, are as fully prevented by the employment of a person who is governed solely by mercenary motives to induce one of the parties to an agreement for marriage to carry it into effect, if he or she has once been disposed to abandon it, as by an endeavor to bring about such an agreement between parties who do not sustain any relation to each other. The basis of the agreement with the plaintiff in the present case is alleged to be the fact that the defendant became apprehensive that the person who had agreed to marry her would not keep his agreement, and it was for the purpose of inducing him to forego whatever purpose he had to abandon such contemplated marriage that the plaintiff rendered the services for which the action is brought. There can be no difference, in principle, between services rendered under such an employment and those rendered for the purpose of inducing one to marry another whom he did not previously know. The court properly sustained the demurrer to the complaint, and the judgment is affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

PEOPLE v. McCARTHY. (Cr. 168.)
(Supreme Court of California. Dec. 9, 1896.)
HOMICIDE—INSANITY AS A DEFENSE—WITNESSES—
• COMPETENCY—INSTRUCTIONS.

1. On a trial for a murder, on the issue of defendant's sanity, where the testimony of witnesses is introduced by the prosecution in rebuttal,

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the trial court's ruling that such witnesses are "intimate acquaintances" of defendant, so as to render them competent, under Code Civ. Proc. § 1870, subd. 10, will not be disturbed, except where there is no just room for question that his discretion has been improperly exercised.

2. Whether the facts developed upon his examination show that the witness is an "intimate acquaintance" is a question for the judge, and not for the witness.

3. The question of the mere manner or appearance of a person at a particular time does not fall within the requirement that the witness must be an "intimate acquaintance" in order to be a competent witness on the issue of the person's sanity.

4. A jailer who had an excellent opportunity to study defendant's manner and mental condition for several months, during which he had charge of defendant, may testify, on the question of insanity, to defendant's manner or appearance at the time he was committed.

5. A jailer may testify to the conduct of defendant while in jail, and to the apparent condition of his mind during that time, in rebuttal of a showing of a general and permanent state of dementia and diseased condition of mind in defendant.

6. On a trial for murder, where the defense is insanity, and no issue is made or suggested as to defendant's sanity at the time of his trial, it is proper to instruct the jury: "You are not to consider whether or not defendant is insane at the present time, but you are to consider him as now sane. * * * The defendant has presented the issue to you that at the very time of the alleged commission of the homicide he was insane. As I have already told you, the burden of proving his insanity at that time rests upon him, because the law presumes he was then sane."

7. Error must be shown, and, where the record is silent as to a fact which it is claimed is essential to sustain a given instruction, the instruction will not be held erroneous, unless it would be so held under any conceivable state of the case.

8. Whatever is proper as a matter of argument to the jury is not erroneous when submitted as a statement of law by the judge.

9. It is the duty of the judge, in his charge, to protect the jury against being misled by improper or misleading statements or claims, made in the argument, as to the law which should govern them.

10. On a trial for murder, where the defense is insanity, it is not error to instruct: "A due regard for the ends of justice, and the peace and welfare of society, no less than mercy to the accused, require that [the defense] should be thoroughly and carefully weighed. It is a plea sometimes resorted to in cases where aggravated crimes have been committed under circumstances which afford full proof of the overt acts, and render hopeless all other means of evading punishment. While, therefore, it ought to be viewed as a not less full and complete than it is a humane defense, when satisfactorily established, it yet should be satisfactorily examined into, with great care, lest an ingenious counterfeit of the malady furnish protection to guilt."

In bank. Appeal from superior court, Sonoma county; R. F. Crawford, Judge.

Dennis McCarthy was convicted of murder, and from the judgment, and from an order denying him a new trial, appeals. Affirmed.

Farquar & Hall, for appellant. Atty. Gen. Fitzgerald, for the People.

VAN FLEET, J. The defendant was convicted of murder of the first degree, committed in the killing of one George Fox, and was sentenced to be hanged. He appeals from the judgment and from an order denying him a new trial. The defense was insanity, the

homicide being admitted, and the exceptions urged are based upon certain rulings made on the admissibility of evidence, and directions in law to the jury, bearing upon that defense, which it is claimed were erroneous.

1. Of the objections to rulings upon evidence, the point most relied upon involves several exceptions of the same character arising on the admission by the trial judge of the testimony of a number of witnesses introduced by the prosecution to rebut the showing made by defendant on the subject of his sanity. The objection in each instance was that the testimony was incompetent because the witness was not an "intimate acquaintance" of defendant, under subdivision 10, § 1870, Code Civ. Proc. Each of these witnesses was examined preliminarily as to the extent and character of his previous acquaintance with the defendant, before any questions were put touching the subject of defendant's mental soundness, and, in overruling the objection made, the trial judge necessarily passed in each instance upon the sufficiency of the evidence to show that degree of intimacy which would render the witness competent. In the determination of this question, as in that of any other fact from oral evidence, he, of necessity, must be conceded to be the best judge of what the evidence shows, since he has before him many elements of fact which cannot be transmitted to paper, but which enable him to more correctly weigh the evidence, and exercise a wiser discrimination as to what it shows, than one who reads but a naked statement of the evidence, without the presence of the witness. And so it has been held, and wisely, that the trial judge is to be accorded wide discretion and latitude in this respect, and his ruling will not be disturbed, except where the evidence is so lacking as to leave no just room for question that the discretion has been improperly exercised. *People v. Pico*, 62 Cal. 53; *Estate of Carpenter*, 94 Cal. 414, 29 Pac. 1101; *People v. Lane*, 101 Cal. 518, 36 Pac. 16; *People v. Schmitt*, 106 Cal. 52, 39 Pac. 204. The appellant does not undertake to point out with any particularity the deficiencies of the evidence in any instance, but contents himself with the general statement that it is insufficient to show intimate acquaintance, within the rule laid down by this court in *Estate of Carpenter*, supra. But while that case discusses and defines what the words "intimate acquaintance," as used in the statute, mean, it does not undertake to prescribe any measure of proof by which that relationship is to be determined. And, in the nature of things, it would be difficult to do so. After a discussion of the meaning of the statute, it is there said: "Now, when we take into consideration the rule as it exists in most jurisdictions where the common law prevails, we must conclude that our Code has attempted, what has been said to be impracticable, to establish a rule as to what opportunities of ob-

servation shall entitle a witness to speak. A nonexpert may testify, but only if he has had these advantages which I have attempted briefly to specify, notwithstanding the statutory attempt. Since it requires the drawing of a definite line between things which are separated only by degrees of difference, the rule is, and must remain, more or less indefinite. A very large discretion must be conceded to the trial court. If the conclusion reached is one which can be reasonably entertained, consistently with the above idea of intimacy, this court cannot review the ruling." So it will be seen that that case leaves the question of competency practically where it found it,—a question of large discretion in the trial judge to determine whether the evidence in any instance brings the witness within the rule of the statute.

With this principle in view, we have carefully examined the testimony of each witness objected to, and, without stating it in detail, we think there was a showing in every instance which would preclude us from saying that the ruling of the learned judge of the court below was unwarranted. In each instance there was shown an acquaintance between the witness and the defendant, of a greater or less degree of intimacy, extending over a period of several weeks,—a period more than sufficient, so far as time is concerned, to afford one the opportunity of forming an intelligent judgment of the condition and bent of defendant's mind; and, as suggested in *People v. Schmitt*, supra, "something must be conceded to the intelligence of the witness, and his habits of observation, and of these qualifications the trial court can better judge." It is true that one of the witnesses (*Thurston*) stated that he did not regard himself as intimately acquainted with defendant; but that was a question for the judge, and not the witness; and the facts developed upon his examination justified, we think, the admission of his evidence.

The witness *Weise*, the jailer who received defendant at the county jail, was permitted to testify that defendant appeared "rational" at that time. The witness had had no previous acquaintance with the defendant, and it is contended that the evidence was incompetent. But under the rule declared in *People v. Lavelle*, 71 Cal. 351, 12 Pac. 226, and *Holland v. Zollner*, 102 Cal. 633, 36 Pac. 930, and 37 Pac. 231, the evidence was unobjectionable. It is there held that the question of the mere manner or appearance of a person at a particular time does not fall within the rule which requires the witness to be an "intimate acquaintance" in order to be competent to testify. Moreover, we think the opinion of the witness is to be regarded as having been formed more upon his subsequent acquaintance with and knowledge of defendant, acquired during the months that the latter remained under his charge in the county jail, than upon the mere appearance of defendant when first brought to the jail. The evidence shows that

the witness had a very excellent opportunity, of which he availed himself, to acquire an intimate knowledge, and form an intelligent judgment, of defendant's manner and mental condition; and we think, upon this ground, that the evidence was admissible. The further evidence of this witness and that of Dougherty, another jailer, as to the conduct of defendant while in the jail, and the apparent condition of his mind during that time, was clearly admissible in rebuttal of the showing of a general and permanent state of dementia and diseased condition of mind in the defendant, which the evidence in behalf of the latter had tended to establish, and was relevant and material to the issue before the jury. *People v. Lee Fook*, 85 Cal. 300, 24 Pac. 654. The objection to the question asked witness Pool was properly overruled, within the doctrine of *People v. Lavelle*, supra, above adverted to.

There are some other exceptions under this head, noted in a very general way in appellant's brief, but which counsel has not argued, either in the brief or orally. We have carefully examined them, however, more by reason of the gravity of the offense, and the extreme consequences to defendant of this appeal, than in the expectation of finding them possessed of merit. They do not demand separate notice, but it is sufficient to say that they involve no error.

2. The court correctly instructed the jury as to the character of insanity which would constitute a defense to the charge, and, in connection therewith, gave this instruction: "You are not to consider whether or not the defendant is insane at the present time, but you are to consider him as now sane. A person charged with crime cannot be legally tried for such crime unless he be sane at the time of the trial. The defendant has presented the issue to you that at the very time of the alleged commission of the homicide he was insane. As I have already told you, the burden of proving his insanity at that time rests upon him, because the law presumes he was then sane." A precisely similar instruction, from which the present one was evidently taken, was given in *People v. Schmitt*, supra; and it was contended there, as it is here, that it was erroneous, as an invasion of the province of the jury, in virtually withdrawing from them the right to consider the question of defendant's sanity at the time of the trial as a factor in determining whether he was sane at the time of the homicide. But it was held that the instruction could not be regarded as having that effect; that no question having been made, or issue submitted, as to the defendant's sanity at the time of the trial, "for the purposes of the trial he was to be considered sane, the issue being whether he was sane at the time he committed the homicide"; and, further, that the court having properly charged the jury that, in determining whether defendant was sane at the time of the homicide, they should consider all his acts and

conduct, both before, at the time of, and since the act, the instruction could not have been understood by the jury as interfering with that right. The same reasoning applies here. No issue was made or suggested as to the defendant's sanity at the time of his trial, and, as in the above case, the jury were properly charged as to their right to consider all the evidence bearing upon the question of insanity. In fact, taken in connection with the whole charge, we regard the instruction as doing no more than informing the jury that the issue submitted to them was that of defendant's sanity at the date of the homicide, and that, for the purposes of the trial, he was to be considered sane, since only a sane man can be competently put upon trial for an offense. It is further suggested in *People v. Schmitt* that the instruction was evidently given to correct an erroneous suggestion made in the argument of counsel, and for that purpose was proper. It does not appear whether any such fact occurred in this case, but, the record being silent, we should presume, if necessary to sustain the action of the court, that a like necessity existed. Error must be shown, and, where the record is silent as to the fact, an instruction will not be held erroneous unless it would be so held under any conceivable state of the case.

Defendant also objects to instructions 13 and 14, and 18 and 19, which were as follows: (13) "I instruct you that the doctrine that in some forms of insanity the patient or sufferer knows the nature of his act fully, but at the same time cannot prevent it, through paralysis of the will, power, and which is sometimes known as uncontrollable or irresistible impulse, has no legal standing in this state, and is not a legal defense to crime." (14) "In our courts of law there is no such doctrine established or recognized as moral insanity distinguished from mental derangement, as an excuse for crime, and as an exemption from punishment therefor. There is no such type of insanity recognized in our courts, as, for instance, that a person may steal your property, burn your dwelling, murder or attempt to murder you, and know at the time that the deed is a criminal act, and wrong in itself, and deserves punishment, having the ability to correctly reason on the subject, and yet be held guiltless, and not punishable, on the ground solely of a perversion of the moral sense." (18) "In prosecutions for crimes the defense of insanity is often interposed, and thereby becomes a subject of paramount importance in criminal jurisprudence. A due regard for the ends of justice, and the peace and welfare of society, no less than mercy to the accused, require that it should be thoroughly and carefully weighed. It is a plea sometimes resorted to in cases where aggravated crimes have been committed under circumstances which afford full proof of the overt acts, and render hopeless all other means of evading punishment. While, therefore, it ought to be viewed as a not less full and complete than it is a humane defense, when satisfactorily established, it yet should be satisfac-

torly examined into with great care, lest an ingenious counterfeit of the malady furnish protection to guilt." (19) "It has been urged for the prisoner that you should acquit him on the ground that, it being impossible to assign any reason for the perpetration of the offense, he must have been acting under what is called a 'powerful and irresistible influence, or homicidal tendency.' But I must remark as to that, the circumstance of an act being apparently motiveless is not a ground from which you can safely infer the existence of such an influence. Motives exist, unknown and innumerable, which might prompt the act. A morbid and restless (but irresistible) thirst for blood would itself be a motive urging to such a deed for its own relief." Appellant, in his brief, says that while the suggestions contained in instructions 13, 14, and 19 might be proper as matters of argument to the jury, they were not proper as statements of law from the judge. The basis upon which counsel draws this distinction, he does not disclose; but we apprehend that, aside from a discussion of the evidence, whatever may be correctly stated by counsel in argument to the jury as a legal guide to facilitate their deliberations must necessarily be held proper matter for instruction by the judge, since the latter is the source from which the jury are to receive their guidance in the law. But, moreover, the principles embodied in these instructions have been expressly approved of as correct statements of the law of insanity as a shield for crime. *People v. Hoin*, 62 Cal. 120. At the oral argument, appellant made the further objection to these instructions that they had no application to the circumstances or facts of this case, or the character of the defense, and hence were a mere statement of negative matter, which was misleading, and improper to lay before the jury, and calculated to prejudice defendant's case. But the statement by the judge in instruction 19 of what had been urged before the jury shows that matters of exactly the nature referred to in the instructions had been argued to them. It is as much the duty of the judge, in his charge, to protect the jury against being misled by improper or misleading statements or claims made in the argument as to the law which should govern them, as it is to correctly state the affirmative propositions of law arising upon the evidence. Instruction 18 is substantially the same as one which has received the repeated approval of this court. See *People v. Dennis*, 39 Cal. 625; *People v. Bumberger*, 45 Cal. 650; *People v. Pico*, supra; and *People v. Larrabee* (just decided) 46 Pac. 922. Appellant claims that it goes beyond the one given in those cases, but in what respect he does not point out, and we are unable to perceive wherein it transgresses the rule as there declared. While couched in language slightly different, it nevertheless expresses the same idea and means the same thing. We would suggest, however, that, where it is deemed essential by the trial judge to give an instruction upon this point, it would be the part of wisdom to follow approved language. We think, in fact, it would be better in most cases

if the instruction were omitted altogether; and, indeed, if its propriety were an open question, we should be much inclined to doubt it. While the general principles which it states are no doubt those which should control the jury in passing upon such defense, the case must be a rare one where their suggestion is really demanded. Juries are, as a rule, ready and intelligent in distinguishing between the genuine and the simulated in any defense presented for their consideration, while the danger in making such suggestions, however general in their terms, is that they may possibly be seized upon as intended by the judge to intimate and characterize his opinion of the case on trial,—a result almost necessarily prejudicial to defendant, and, in effect, a trespass upon the constitutional right of the jury to pass upon the facts free from the influence of the judge. In the present case, however, we are relieved of any anxiety as to the effect of this instruction, since we are unable to conceive, in view of the circumstances of the case, how defendant could possibly have been prejudiced thereby. The killing was an exceptionally cold-blooded and wanton one, inflicted upon a defenseless man from no other cause, so far as manifest, than a feeling of petty spite and jealousy, having no just foundation, while the evidence relied upon to establish the defense of insanity was so entirely lacking in material substance as that no unbiased jury, themselves enjoying the blessing of sane and reasoning minds, could have justly reached a different conclusion. From a review of the whole record, we are satisfied that no error exists which should operate to set the verdict aside, and the judgment and order must therefore be affirmed. It is so ordered.

We concur: HARRISON, J.; McFARLAND, J.; HENSHAW, J.; GAROUTTE, J.

I dissent: TEMPLE, J.

MILES v. WOODWARD. (S. F. 367.)

(Supreme Court of California. Dec. 14, 1896.)

MINING CORPORATIONS—STATUTORY REGULATIONS—FILING STATEMENTS—CONSTITUTIONALITY OF ACT—SPECIAL LEGISLATION—EVIDENCE—BURDEN OF PROOF—PLEADING.

1. Act April 23, 1880 (St. 1880, p. 134), requiring directors of mining corporations to make, or cause to be made and posted, the weekly reports of the superintendent, does not, by restricting the action of domestic corporations, violate Const. art. 12, § 15, providing that no foreign corporation shall be allowed to transact business within the state on more favorable terms than are prescribed by law to similar corporations organized under the laws of the state.

2. Such act is not a special law, though some of its provisions apply only to mining corporations which produce bullion from gold and silver bearing ores, since the greater part of its provisions apply to all mining corporations generally.

3. A complaint in an action to recover the liquidated damages provided in Act April 23, 1880 (St. 1880, p. 134), for failure of directors of a mining corporation to make or post the weekly reports of the superintendent, need not allege that such failure or refusal was willful, but it is

matter of defense for the directors to state that their failure was not willful.

4. In a suit against a director of a mining corporation to recover the statutory liquidated damages provided by Act April 23, 1880 (St. 1880, p. 134), for failure to make and post the weekly reports of the superintendent, certain papers, appearing to be reports made by the superintendent of the mine to its secretary, but not shown in fact to have been the superintendent's reports, or to have been the only reports which the directors caused to be posted, are inadmissible.

5. Where directors of a mining company, in the statutory action against them for failure to make out and post the weekly reports of the superintendent (Act April 23, 1880), put in an answer containing a denial of a violation of the statute, and also matter in extenuation and excuse, admissions in the latter portion of the answer will not relieve plaintiff from the burden of proving such violation, since, under Code Civ. Proc. § 441, providing that defendant may set up as many defenses and counterclaims as he may have, he may plead all his defenses, though they are inconsistent with each other.

6. After the original answer has been superseded by an amended pleading, portions of the original answer containing admissions are not admissible.

Department 2. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by William E. Miles against B. B. Woodward. Judgment for plaintiff, and defendant appeals. Reversed.

E. S. Pillsbury and F. D. Madison, for appellant. C. H. Wilson, for respondent.

HENSHAW, J. Appeals from the judgment, and from the order denying a new trial. Plaintiff, a stockholder of the Bodie Consolidated Mining Company, a corporation organized and existing under the laws of the state of California, brought this action against defendant, a director of said corporation, to recover \$1,000 liquidated damages for a violation of the provisions of the act of April 23, 1880 (St. 1880, p. 134). The violation complained of was the alleged failure, refusal, and neglect of the directors of the corporation to make, or cause to be made and posted and filed, the weekly reports of the superintendent, as required by the act.

1. It is first claimed that the act in question is unconstitutional for the reason that it operates only upon domestic corporations, and thereby allows foreign corporations to transact business within this state upon more favorable conditions than are prescribed by law to similar corporations organized under the laws of this state, in violation of article 12, § 15, of the constitution. But the act, as its title declares, is an act designed for the "better protection of the stockholders in corporations formed under the laws of the state of California, for the purpose of carrying on and conducting the business of mining." The statute is, in its nature, both penal and remedial. It is directed to the internal affairs of the corporation, and not to its outside dealings, or to the conduct of its business. The constitution was not designed to limit the powers of the legislature when dealing with the

organization and government of corporations which are created by its own will and act. Over such corporations it has and may exercise full powers of control. Over the organization and internal government of foreign corporations, however, it has no such powers. The laws of the state do not have extraterritorial force. It would be meaningless for this state to try to legislate upon the internal affairs of such foreign corporations, and it has not attempted to do so. This law is designed to protect stockholders of domestic corporations, and, to that end, has declared that the directors of those corporations, the conduct of whose internal affairs is subject to the control of the legislature, shall do specific acts, under a prescribed penalty for their failure and refusal. It does not, therefore, relate to the business of the corporation, nor impose burdens or restrictions upon domestic corporations, in the conduct of their business, from which foreign corporations are relieved, but pertains as exclusively to corporate management as do the Code provisions relating to the organization and conduct of savings and loan corporations, street-railroad corporations, and all corporations whose internal affairs are more or less carefully regulated by the laws of the state.

2. It is next contended that the act in question is unconstitutional as being a special law. Herein the argument is that a reading of the act discloses that it is made to apply—First, only to mining corporations which produce bullion, or corporations organized for the purpose of gold or silver mining; second, that it applies only to such of those corporations as produce bullion from gold or silver bearing ores or quartz; that it is, therefore, special, in that it does not apply to domestic corporations engaged in the mining of copper, lead, quicksilver, or of gold obtained by drift or hydraulic mining. Against this objection, respondent urges the authority of the case of *Hewlett v. Epstein*, 63 Cal. 184. But in that case the sole argument pressed upon the attention of the court was that the act in question was unconstitutional because it applied to mining corporations alone, and not to all corporations. The language of the opinion, in briefly disposing of this contention in a single sentence, cannot justly be considered as conclusive of the question upon this new and distinct attack. Of the numerous cases in which judgments have been obtained under this act, and appeals taken to this court, *Hewlett v. Epstein* is the only one in which the constitutionality of the act was raised. The consideration of the question thus presented is therefore not foreclosed by any of the adjudicated cases. If the construction which appellant puts upon the act, viz. that it applies only to those mining corporations which extract gold or silver from ores and quartz, were to be accepted as the true one, his attack upon the constitutionality of this law, as being arbitrary, special legislation, would certainly be powerful, if not irresistible.

But we cannot agree to that interpretation. The act provides for the doing of many things by the officers and agents of all mining corporations. Some of the things required to be done, such as keeping a complete set of books, showing all receipts and expenditures of the corporation, the source of such receipts and objects of such expenditures, and all transfers of stock, are acts which may be performed by, and the doing of which is therefore properly imposed upon, all mining corporations. The provision requiring the superintendent to report weekly the number of men employed by him, and the rate of wages paid to each, likewise applies to all mining corporations. The superintendent is also required to report the amount of ore extracted, and from what part of the mine taken, the amount sent to the mill for reduction, and its assay value. These requirements, from their nature, apply only to those mining corporations which extract the precious metal from ores; but they apply to all such corporations, and are as general as, from the varying character of mining corporations and of their operations, they could be made. The requirement that the superintendent shall certify to the amount of bullion shipped to the office of the company, or retained by him, applies, not only to corporations which extract gold or silver from ores, but equally to those which extract it by the methods of placer or hydraulic mining. In short, in the general scheme contemplated by the statute there are found many provisions applicable in their terms to all mining corporations, and others applicable only to such mining corporations as extract the precious metals from ores. But the law does not lose its general characteristic, nor fail of uniformity of operation, because it requires all corporations to report all the ores mined by them, so long as it requires all of those which mine precious ores to make such report. The very fact that gold is obtained sometimes by hydraulic mining, as free gold, and at other times by crushing quartz, shows the reason for the added provisions requiring the superintendent to report the nature and extent of new ore discoveries.

3. Appellant further contends that the trial court erred in overruling his demurrer to the complaint. The complaint averred, in precise terms, that the defendant directors, "disregarding their duty and obligation, and the rights of the plaintiff in the premises, on and at all the times and during all the weeks and periods herein mentioned, did entirely fail, refuse, and neglect to make, or cause to be made and posted or filed, the weekly reports of the superintendent required to be made," etc. It is alleged that this complaint is defective in not averring that the failure of the directors was willful and intentional, and in this regard the case of *Eyre v. Harmon*, 82 Cal. 580, 28 Pac. 779, is relied upon. In that case it is said: "In order to justify a recovery, it must appear that there has been

an intentional disregard of the law,—a willful neglect to comply with its requirements." And it is argued that as a party must allege every material fact which he is required to prove, and will be precluded from proving any fact not alleged (*Spring Valley Waterworks v. City of San Francisco*, 82 Cal. 236, 22 Pac. 910, 1046), the complaint is, in this particular, defective. In *Eyre v. Harmon* the court was not considering the sufficiency or insufficiency of a pleading. When it used the language quoted and relied upon, it was considering the question whether, upon proof of the directors' failure, they could be exculpated and relieved from the penalty by any showing whatsoever; and it was said, as a matter of common right and justice, that the law did not mean to exact impossibilities of them, nor to punish them under a penal statute for an act beyond their power to perform; that, therefore, they were liable only for a willful and intentional failure. "Impossibilities," it is further said, "are not required of them, but only that they shall in good faith direct this officer, who is at all times subject to their control, to obey the positive requirements of the law in the matter of these reports." The statute says: "In case of the failure of the directors to have the reports and accounts current made and posted as in the first section of this act provided, they shall be liable." The averment here made goes further than the language of the statute, for it is alleged that the directors did entirely fail, refuse, and neglect to make, or cause to be made and posted, the report. Upon proof following this averment of their failure or of their refusal, a prima facie case against the directors is established. It is not incumbent upon the plaintiff, under this statute, to show that their failure was willful. It is a matter of defense for the directors to prove that it was not. The opinion in *Eyre v. Harmon* is to be read in connection with that of *Schenck v. Bandmann*, 81 Cal. 231, 22 Pac. 654, where, discussing the same question, it is said: "It may be that, under possible circumstances, the directors of a corporation, when they have failed to comply strictly with the law, should be held excused. For example, the president or secretary, or both of them, might be taken sick and die, rendering it impossible for the account to be made, verified, and posted in time. But, if so, the facts must be within the knowledge of the directors who are sued, and should be set forth and proved." It is here made plainly apparent that, the failure being shown, circumstances of exculpation are matters of defense.

4. Plaintiff, over the objection and exception of defendants, introduced in evidence certain papers, appearing to be reports made by the superintendent of the mine to its secretary. No evidence preceded, accompanied, or followed the admission of these papers, to

ports which the directors caused to be posted. Upon all these matters no light is shed, and, so far as the record speaks, they are but fugitive sheets, of no meaning or import. Respondent contends, however, that, by reason of matters not appearing in the statement, they were offered as being the reports, and the only reports, received and posted by the directors. This claim cannot, of course, be considered. He further contends that the admissions of the answer relieve from the force of appellant's objection. The answer, however, contained two separate and distinct defenses. By the one, defendant rested upon a denial of a violation of the statute. By the other, defendant averred matters of extenuation, excuse, and defense, and ended by setting forth certain reports of the superintendent, which it was alleged the directors caused to be posted, and which are identical in form with those admitted in evidence. But under our system a defendant may plead any and all his defenses, and they may be inconsistent the one with the other. Code Civ. Proc. § 441; *Buhne v. Corbett*, 43 Cal. 264. And the effect of a denial in one defense is not waived by the setting up of affirmative matter in another defense. *Billings v. Drew*, 52 Cal. 565. It was therefore incumbent upon plaintiff to prove defendant's violation of the statute, and this his evidence, as disclosed by the record, unquestionably fails to do. For the reports which were offered were not generally admissible against defendant to overcome the effect of his denial of plaintiff's charges. *Miller v. Chandler*, 59 Cal. 540; *Dillon v. Center*, 68 Cal. 561, 10 Pac. 176.

5. Defendant's original answer had been superseded by an amended pleading. Over defendant's objections, portions of his original answer, containing admissions, were admitted. This was error. *Mecham v. McKay*, 37 Cal. 154; *Ralphs v. Hensler* (Cal.) 45 Pac. 1062. The judgment and order are reversed, and the cause remanded for a new trial.

We concur: TEMPLE, J.; McFARLAND, J.

THOMAS et al. v. WASON.

(Court of Appeals of Colorado. Sept. 14, 1896.)
PRINCIPAL AND SURETY—RELEASE OF PRINCIPAL—
EFFECT AS TO SURETY—INDEMNITY OF
SURETY—PAYMENT.

1. Judgment was obtained against the principal on an injunction bond, and property sufficient to satisfy the same levied on. The plaintiff then agreed to release the levy, vacate the judgment, and take a new judgment against the principal and sureties, and make the amount thereof out of the sureties. *Held* that, by the release of the levy, the sureties were relieved of all liability.

2. The fact that the sureties were indemnified by a collateral bond executed by other persons

on an injunction bond, and money belonging to the principal sufficient to satisfy the same was seized on execution. *Held*, that such levy was equivalent to a payment of the judgment, releasing the sureties from all liability on the bond.

Appeal from district court, Arapahoe county.

Action by M. V. B. Wason, receiver, against the Bachelor Transportation Company, as principal, and C. S. Thomas and W. H. Bryant, as sureties, on an injunction bond. There was a judgment for plaintiff, and the sureties appeal. Reversed.

Thomas, Hartzell, Bryant & Lee, for appellants. Carpenter & McBird, for appellee.

THOMSON, J. This suit was brought upon the following undertaking for injunction: "Petition of the Bachelor Transportation Company in the Suit of Mason B. Carpenter and William N. McBird, Plaintiffs, vs. The Wason Toll-Road Company and William H. Cochran, Defendants. Undertaking on Injunction. Whereas, the above-named petitioner has filed a petition in the above action in the district court of the Second judicial district of the state of Colorado, in and for the said county of Arapahoe, against M. V. B. Wason, receiver in said action, and has applied for and obtained a temporary restraining order against said M. V. B. Wason, as said receiver, enjoining and restraining him from the commission of certain acts, as in the petition filed in the said action is more particularly set forth and described, and as set forth in said restraining order: Now, therefore, we, the undersigned, residents of the county of Arapahoe, state of Colorado, in consideration of the premises and of the issuing of said restraining order, do jointly and severally undertake, in the sum of three thousand dollars, and promise, to the effect that, in case said order shall issue, the said plaintiff will pay to the said Wason, as receiver, all such costs and damages as shall be awarded against the complainant in case the said injunction shall be modified or dissolved, in whole or in part. Dated this 16th day of December, A. D. 1893. The Bachelor Transportation Company, by C. H. Pierce, Its Attorney. W. H. Bryant. C. S. Thomas." The injunction was dissolved, and the plaintiff, the receiver, brought this action to recover his costs and damages. The undisputed facts, as they appear from the evidence, are as follows: After the injunction was dissolved, the receiver brought suit upon the undertaking against the Bachelor Transportation Company and Thomas and Bryant, in which judgment was rendered against the transportation company alone for \$1,130. When Thomas and Bryant signed the undertaking, they exacted and received an indemnifying bond, in which the obligors covenanted to make good to them whatever loss they might sustain by reason of the undertaking which they had signed. Summons had been served on the transportation

company some time before service was had upon them, and at the time judgment was rendered against the company the period within which they were required to answer had not expired. An execution was issued upon the judgment, and by means of it the sum of \$4,300 of money belonging to the transportation company was secured. About a month after the rendition of the judgment an agreement was entered into between the attorneys representing the receiver and the company, respectively, which provided that the judgment against the company should be vacated, and the execution recalled, and another judgment entered against all the defendants, the attorneys for the receiver stipulating to make the money, if possible, out of the defendants other than the company. In accordance with this agreement, the judgment against the company was set aside, the execution recalled, the money which had been secured released, and a new judgment entered against the transportation company and the sureties, Thomas and Bryant, jointly, and an execution issued upon it against Thomas and Bryant. Until the issuance of this execution the latter had no knowledge of the agreement we have mentioned, or of any of the proceedings which were subsequently had in the case. Thomas and Bryant having received information of the agreement, and of the subsequent proceedings, upon their application the judgment was set aside as to them, and they answered, and the trial which followed resulted in a judgment against them for \$808.70, from which they have prosecuted an appeal to this court. Upon this trial the facts appeared as we have detailed them.

Several points are made for a reversal of the judgment, but the only question which we deem it important to consider concerns the effect of the proceedings of the plaintiff in relation to the judgment against the transportation company upon the liability of the sureties. In *Brandt*, Sur. § 378, we find the following general rule laid down: "If the creditor recovers a judgment against principal and surety, or against the principal alone, and execution is issued thereon, and levied upon real or personal property of the principal subject thereto, and such property is, by the act of the creditor, released from the levy, and lost as a security, the surety is discharged to the extent that he is injured thereby." The doctrine of the text is fully sustained by the adjudications. But we are met on behalf of the plaintiff by the proposition, as an exception to this general rule, that, where sureties are indemnified, they are not released by a release of the principal; and it is contended that the facts of this case bring it within the exception. As sustaining this proposition we are cited to the following adjudged cases: *Moore v. Paine*, 12 Wend. 123; *Hubbell v. Carpenter*, 5 N. Y. 171; *Chilton v. Robbins*, 4 Ala. 223; *Morrison v. Bank*, 65 N. H. 253, 20 Atl. 800; *Jones v. Ward*, 71 Wis. 152, 86 N.

W. 711. If counsel's doctrine is correct, a release of the principal debtor cannot be pleaded by the indemnified surety, no matter what may be the nature of his indemnity. We think the proposition is too comprehensive, and, except within limits outside of which this case falls, it is not sustained by the decisions to which we have been referred. In *Moore v. Paine* the sureties were secured by a bond and warrant of attorney, executed by the principal, for the payment of \$1,000, and authorizing the confession of judgment against him for the amount. The bond and warrant were executed with the intent to place money in the hands of the sureties to enable them to pay the bond on which they were sureties. They caused a judgment upon their bond to be entered, and collected upon the judgment \$750, which they retained. The amount for which they were liable as sureties was \$500. The court said: "The sureties received from the debtor the whole amount to become due on the bond in question, and after that, as between him and them, they were the principals, and owed the debt." In *Chilton v. Robbins* the sureties had obtained from the principal a deed of trust on property to secure themselves against liability on their suretyship, which was ample for that purpose. The court held that the taking of the trust deed was, in effect, an appropriation by them of that portion of the effects of the principal to the payment of the debt. The court in *Jones v. Ward* illustrated the rule by which it held the indemnified sureties liable, notwithstanding the release of the principal, as follows: "A. becomes security for B. to C. for the payment of \$1,000. B. puts property into the hands of A., worth \$1,000, to indemnify him against loss because of the obligation thus assumed by him. C. releases B., the principal debtor, from all liability on account of the debt, but receives no payment thereon. A., the surety, then sells the pledged property for \$1,000, and retains the proceeds. It is entirely reasonable and just that, notwithstanding the release of the principal debtor, C. should have his remedy against the surety for the amount realized by him in the sale of the pledged property." The decision in *Hubbell v. Carpenter* was simply that a surety, by refusing to take the control of a judgment and execution against the principal debtor, when offered to him by the creditor, might deprive himself of the right to demand subrogation, when the debt was sought to be collected from him. There was no question of indemnity in the case. The decision in *Morrison v. Bank* is equally inapplicable. Where a surety, for the purpose of his indemnification, has obtained possession or control of property or money of the principal debtor sufficient for the payment of the debt, and which would otherwise be available to the creditor for that purpose, to permit him to retain the security and repudiate the obligation would be unjust, whether the principal was released or

not; and it is in such cases that the courts have held that the release of the principal debtor does not discharge the surety. We think that the exception to the general rule must be confined to this class of cases, and that it cannot be extended to the case of an indemnifying bond executed by other sureties without abrogating the rule itself. The defendants Thomas and Bryant, as sureties on the injunction undertaking, were indemnified by a bond, executed by a number of persons, conditioned for the payment of such damages as they might sustain by reason of their suretyship on the undertaking. This bond was executed at the instance of the Bachelor Transportation Company, or persons acting in its behalf. The obligors upon this bond were sureties for the transportation company. If the company should fail to pay the damage awarded against it, they were the persons who were ultimately liable, and they would be directly affected by a release of the company from its liability. As against them, neither the receiver nor Thomas and Bryant had the right to discharge the company, or relinquish the money which had been taken by the execution. They were immediately interested in having that money applied in the payment of the judgment, and, if Thomas and Bryant had failed in this suit to avail themselves of the transaction between the receiver and the company, their right of action upon the indemnifying bond would have been lost. If they had sat idly by, and suffered judgment to which the plaintiff was not entitled to go against them by default, they could not compel reimbursement from the indemnifying bondsmen. The rights of the latter could not be wantonly sacrificed, either by the act of the receiver or the negligence of Thomas and Bryant. The defense made by Thomas and Bryant was, therefore, proper. It was one which they had the right to interpose, and which, in justice to the persons securing them, it was their duty to interpose.

But there is another ground, unconnected with any question of indemnity, upon which we can dispose of the case with equal satisfaction to ourselves. The undertaking was that the transportation company would pay to the receiver all such costs and damages as should be awarded against it, in case the injunction should be modified or dissolved, in whole or in part. To fix the liability of the sureties, there must be a judgment against the company. Code, § 161, provides that, in suing on such an undertaking, it shall not be necessary to bring suit in the first instance against the principal to ascertain the amount of damages sustained, but that principal and surety may be sued together, and damages assessed and awarded against both. Without this provision it would be necessary to obtain judgment against the principal before proceeding against the surety. The Code simply permits a joint action. It does not forbid a suit against the principal first, and

parties are at liberty to proceed in that manner if they so desire. This action was brought against the principal and the sureties jointly, but the plaintiff saw fit to take judgment against the principal alone. That judgment was regular and valid. Execution issued, and more money than sufficient to pay the judgment was secured. This money was voluntarily released by the plaintiff. When the money was levied upon, the purpose for which the undertaking was given was accomplished. As the undertaking was that the company would pay the judgment, if it had voluntarily done so, the moment the payment was made the right of action upon the undertaking was extinguished, and no subsequent return of the money to the company could revive it. Instead of being paid voluntarily, however, the money was seized by execution. It thus passed within the control of the plaintiff for the purpose of paying the judgment. It was as available for that purpose as if it had been delivered to the plaintiff by the company. Its seizure by the execution was equivalent to payment by the company, and by a payment, whether voluntary or compulsory, the condition of the undertaking was satisfied. The plaintiff released the money and suffered it to be returned to the company at his own peril. When the money, sufficient for the payment of the judgment, came within the control of the plaintiff, and might have been used to discharge the judgment, all liability upon the undertaking was extinguished, and the instrument could not thenceforth be made the foundation of an action. The judgment must be reversed. Reversed.

On Petition for Rehearing.

(Dec. 14, 1896.)

We deem it proper to bestow a few words upon the petition for a rehearing filed in this cause. The first reason given why a rehearing should be allowed is as follows: "The opinion handed down is based upon the idea that the bond in suit was the bond of the Bachelor Transportation Company, as principal, and that appellants are mere sureties for the company; whereas, in truth and fact, as shown by the pleadings and the evidence, the Bachelor Transportation Company was only a nominal party, the real parties being the persons signing the indemnifying bond to the appellants." The bond was given to enable the Bachelor Transportation Company to obtain a writ of injunction against M. V. B. Wason, receiver of the Wason Toll-Road Company. If the appellants were not sureties for that company, the instrument was not a bond, and the appellants were not sureties at all. If the transportation company was only a nominal party, or was not itself the real and only party in whose behalf the injunction was granted, the record utterly fails to disclose the fact.

The following is the second reason stated:

"The opinion assumes that the indemnifying bond was executed at the instance of the Bachelor Transportation Company, or persons acting in its behalf. The pleadings and the evidence show that the Bachelor Company never knew of the bringing of the suit or the giving of the bond until after its execution, when the indemnifying bond was given by the parties interested in obtaining the injunction." Upon the question whether the indemnifying bond was executed at the instance of the Bachelor Transportation Company, we quote the following from the plaintiff's replication: "That, as a condition precedent, and as an indemnity to them for signing said bond, said sureties, the defendants Thomas and Bryant, required the said transportation company and other persons interested to furnish them with an indemnity bond in the sum of two thousand dollars, indemnifying and protecting them against all loss or damage they might sustain by reason of their signing as such sureties, of which indemnity bond the following is a copy." Here follows a copy of the bond. Further, upon the same question, Edward Higgin, the president of the transportation company, and a witness for the plaintiff, testifying concerning the indemnifying bond, said: "As I remember, the transportation company and others were required to furnish a bond. Other people signed it." Who, besides the company, were required to furnish the bond, the evidence nowhere discloses. In view of the foregoing, we feel safe in saying that the statement in the opinion that the bond was executed at the instance of the transportation company—that is, that the company procured its execution in response to the demand of Thomas and Bryant—is not an assumption. Furthermore, when it procured the execution of the indemnifying bond, it must have known, even if it did not know before, of the bringing of the suit and the giving of the injunction bond, and, by furnishing the indemnifying bond, it at least ratified the acts of the party assuming to represent it in bringing the suit, and in subscribing its name to the injunction bond, and procuring Thomas and Bryant to sign the bond as sureties.

The remaining objection to the opinion is as follows: "The opinion assumes that the money of the transportation company was actually in hand, and voluntarily surrendered. The evidence shows that a certain amount of money due the Bachelor Company was garnished, and that no proceedings were taken to ascertain the liability of the garnishees, but that a motion was made to set aside the judgment, and vacate such garnishment proceedings, and such motion was about to prevail, when the garnishees were released by the acts of the appellee." Again we have recourse to the testimony of Mr. Higgin, the transportation company's president: "Q. And then were you served with summons in this suit? A. Yes, sir; Mr. Osborn (wasn't it?), a constable employed by Mr. Wason, served me with summons. Q. Then you did not notify Mr. Pierce,

or some one, to attend to it for you? A. I did, and the county attorneys. Q. And the next thing you knew there was a judgment rendered against you? A. Yes, sir. Q. And an execution out? A. Yes, sir. Q. A judgment for \$1,130, I believe, wasn't it? A. Yes, sir. Q. Then they levied upon a lot of your property? A. Yes, sir. Q. They secured money coming to you from the New York Chance Mining Company and the Amethyst Mining Company? A. Yes; some \$4,300 they tied up." Further on, speaking of the agreement for the vacation of the judgment and the recall of the execution, the same witness testified: "Q. Now, in pursuance of that stipulation, they released all this attachment and garnishee process against your property? A. Yes, sir. Q. And you got back your \$4,300? A. Yes, sir." It is an inference from the testimony that the money was secured by garnishment upon the execution, and it may also be inferred that a motion of some kind was interposed by the company, having for its object the relieving of the company from the garnishment. Upon all this the evidence is inferential, and not direct; but that the motion, whatever it was, was about to prevail, is a pure assumption of counsel. It is entirely clear that, by means of an execution, issued upon a judgment which, so far as the record shows, was valid and enforceable, \$4,300 of the company's money was in some manner levied upon; and it is also clear that, in virtue of the stipulation, the money was released by the plaintiff, and the company permitted to receive it. In respect to the securing of the money by means of the execution, and its subsequent voluntary release to the company by the plaintiff, we see no reason for changing, in any particular, the language of the opinion.

Objection is made in argument to the distinction taken in the opinion between an indemnity upon the principal's property and an indemnity by bond. The assertion is also made that the subscribers to the indemnifying bond were themselves the real parties in interest, and hence were not sureties, within the generally accepted meaning of the term. We can find no evidence in support of the statement. Our knowledge of the facts is, and can be, obtained only from the record; and, in so far as its disclosures are concerned, these bondsmen were sureties merely, and, as such, entitled to all the consideration and protection which the law extends to sureties. Their liability depended upon the liability of Thomas and Bryant, and the liability of the latter was contingent upon the failure of the transportation company to pay the costs and damages awarded against it in case of the dissolution of the injunction. Payment by it of these costs and damages would discharge the obligors upon the indemnifying bond, because it would extinguish liability upon the injunction bond; and any act which would operate to relieve the sureties upon the injunction bond from liability would have the same effect on the indemnifying bondsmen. Thou-

as and Bryant could not, either by collusion with the plaintiff, or by negligently suffering judgment to go against them, deprive their bondsmen of the defense that the plaintiff had, by his own voluntary act, extinguished his right of action against Thomas and Bryant, and that, by the extinguishment of the latter's liability, their liability was also extinguished. The nature of the indemnity taken by Thomas and Bryant was not such as to render them responsible, notwithstanding the release of their principal. The petition for a rehearing will be denied.

McCUNE et al. v. PEOPLE.¹

(Court of Appeals of Colorado. Sept. 14, 1896.)

CLERKS OF COURT—FAILURE TO TURN OVER MONEY
—ACTION ON BOND—JUDGMENT AS EVIDENCE.

In a suit on the bond of a clerk of court, conditioned to pay over all money received by him by reason of his office, for failure to turn over to his successor money deposited by one of the parties to an action, the record of the judgment in such action, containing a recital of the deposit with the clerk, and an order for the application thereof to the satisfaction of the judgment, is admissible.

Appeal from district court, Mesa county.

Action by the people of the state against Addison J. McCune and others, on the official bond of Arthur P. Cook as clerk of the district court of Mesa county. Judgment for plaintiff, and defendants appeal. Affirmed.

Chas. F. Caswell, for appellants. Lyman I. Henry, Dist. Atty., and Henry W. Ross, for the People.

REED, P. J. Suit brought by appellee against appellants, who were sureties upon the official bond of Arthur P. Cook, formerly clerk of the district court of Mesa county, to recover certain money received by Cook officially. The claims sued for were: (1) Fines collected, from sundry parties named, amounting to several hundred dollars, about which there is no controversy; the correctness of that portion of the judgment being apparently admitted. (2) The controverted item of \$1,047.10 will be understood from the following papers:

"It is stipulated, by and between counsel in this cause, that the \$1,047.00 heretofore paid into the hands of Arthur P. Cook, clerk of the district court by school district No. 1, in the case of Thomas Smith against School District No. 1, was never paid over by the said Cook to his successors in office, D. T. Stone or W. S. Wallace. It is further stipulated that the said suit of Smith against the school district was a civil suit, brought by said plaintiff to recover from the school district, as defendant, the said sum. It is further stipulated, by and between counsel in this case, that the whole record in the case of Thomas Smith against School District No. 1 may be considered as being introduced in testimony here, subject to

such objection as counsel for the defendant may see fit to make hereafter."

And the record and certificate as follows:

"Be it remembered, that heretofore, and on, to wit, the 11th day of October, 1892, the same being one of the judicial days of the October, A. D. 1892, term of said court, the following order was made and entered of record in said court, and in the therein-entitled cause, as follows: 'Thomas H. Smith vs. School District No. 1. The court having ordered that judgment be entered herein in accordance with the verdict of the jury, now, therefore, it is considered by the court that the plaintiff do have and recover, of and from the said defendant, the sum of nine hundred and ninety-two and sixty-five one-hundredths dollars (\$992.65), so by the jury aforesaid assessed, together with his costs in this behalf laid out and expended, to be taxed; and it appearing to the court, from the pleadings, evidence, and files in this action, that the defendant has heretofore paid into court, in said action, the sum of ten hundred and forty-seven and ten one-hundredths dollars (1,047.10), therefore it is further ordered that said moneys, or so much thereof as may be necessary to satisfy the judgment herein, shall be appropriated and used in satisfaction of said judgment.'

"State of Colorado, County of Mesa—ss.: I, B. F. Jay, clerk of the district court of Mesa county, in the state aforesaid, do hereby certify the above and foregoing to be a true, perfect, and complete copy of the judgment or order of court offered in evidence in a certain cause, pending in said court, wherein The People ex rel. D. T. Stone, clerk, are plaintiffs, and A. J. McCune et al. defendants. And I further certify that no other or further motion or order of the court or judge concerning said sum of money, to wit, the sum of ten hundred and forty-seven and ten one-hundredths dollars (\$1,047.10), or the payment of the same into the court, or to the clerk of said court, appears of record in said cause of Smith against School District No. 1. B. F. Jay, Clerk."

The case was tried to the court. The finding of the court on the item in controversy was as follows: "The court doth further find that, during the time the said Cook was clerk of this court, he did, in his official capacity, and by virtue of his office, receive, in the case of Thos. H. Smith vs. School District No. 1, a cause there pending in this court, the sum of ten hundred and forty-seven dollars (\$1,047); that final judgment has been rendered in said cause, and the money so received by the said clerk was by the provisions thereof directed to be applied thereon; that at the time the said clerk received said fines, and at the time he received the said money in the case of Smith vs. School District No. 1, and at the time of the rendition of the judgment in said action, the defendants herein were the sureties upon the official bond of said Cook as clerk of this court; that said Cook has vacated said office, and failed to turn

¹ Rehearing denied December 14, 1896.

over to his successors the fines and moneys by him so received aforesaid,"—resulting in a judgment against the defendant sureties for \$1,607, from which the appeal was prosecuted.

Upon the trial the foregoing record in the case of Smith vs. School District No. 1 was put in evidence over the objection of the defendants, and an exception taken. The supposed errors relied upon and urged by counsel are stated as follows: "The court erred in finding and holding that the judgment in the case of Thos. H. Smith vs. School District No. 1 for the sum of \$1,047 was evidence in this case to charge the bondsmen of Arthur P. Cook, clerk, or that it was evidence for any purpose whatever. (5) The court erred in ruling and finding that such judgment was evidence to charge the defendants as bondsmen on the official bond of Arthur P. Cook, and in holding that said judgment was sufficient evidence to support a judgment herein against defendants for the said sum of \$1,047." The official bond appears to be the ordinary statutory bond, containing the following provisions: "That, if the said Arthur P. Cook shall well and faithfully perform and execute the duties of the office of clerk of the district court of Mesa county, during his continuance in office, and shall pay over all moneys that may come into his hands as clerk of the district court of Mesa county, to all persons entitled to the same, and shall deliver to his successor all moneys, books, papers, and other things pertaining to his office, which may be so required by law, then the said bond should be void; otherwise, to remain in full force and effect." The contention of counsel is that the record of the judgment in Smith vs. School District was inadmissible "to charge the bondsmen of Arthur P. Cook" for the following reasons: "That the suit against school district included none of the parties to this suit, nor was it a suit against Cook. * * * To be effectual the judgment in Smith vs. School District No. 1 must have been res judicata as to the suit of People vs. McCune et al. But * * * the parties are different, the subject-matter is different, the equity of the parties is different, and the cause of action is different. We have had no opportunity to defend against the wrongful entry of such judgment. We insist that the judgment is wrong. We insist that we are not bound by it, right or wrong, neither ourselves nor Mr. Cook having been a party to the original Smith vs. School District No. 1 suit."

It is evident that counsel misapprehended the intention in introducing it, and the legal effect of such introduction. Neither the intention nor effect was to charge the defendants with that judgment, or in any way to make them responsible for it. Cook and his sureties had covenanted that Cook "should pay over all moneys that came into his hands as clerk of the district court * * * to all persons entitled to the same, and deliver to

his successor all moneys," etc., "pertaining to the office." The allegation was that this item of \$1,047 came to the hands of Cook in his official capacity, and that he had neither paid it to the party entitled nor delivered it to his successor. The inquiry was as to the amounts in which Cook was indebted, for which his sureties could be held, and the judgment was put in evidence to establish that item. It was probably considered the best evidence, and certainly fixed the amount of that defalcation beyond controversy. It was not the only method of proof. Any evidence of the official receipt and failure to pay would have been competent, and we know of no good reason why the judgment record in the case was not competent to establish the facts. Neither of the two authorities cited by counsel for appellants sustain his position. In Cooper v. Reynolds, 10 Wall. 308, the court said: "The record in this case is introduced collaterally as evidence of title in another suit, between other parties, and before a court which has no jurisdiction to reverse or set aside that judgment, however erroneous it may be. Nor can it disregard that judgment, or refuse to give it effect on any other ground than a want of jurisdiction in the court that rendered it. * * * This principle has been often held by this court, and by all courts, and it takes rank as an axiom of the law." See, also, Whart. Ev. § 823; 2 Freem. Judgm. § 417; 2 Black, Judgm. § 604; King v. Chase, 15 N. H. 9; Copp v. McDugall, 9 Mass. 1; Lee v. Clark, 1 Hill, 56.

The judgment of the district court is affirmed. Affirmed.

CONWAY et al. v. SMITH MERCANTILE CO. et al.

(Supreme Court of Wyoming. Dec. 12, 1896.)

PAYMENT—CHECK ON INSOLVENT BANK—WHEN VALID PAYMENT—INSOLVENT CORPORATIONS—PREFERENCE OF CREDITOR.

1. A check, given to a customer of a bank in payment of an indebtedness, and accepted by both the payee and the bank, operates as payment of the indebtedness, without regard to whether it is drawn against funds, or is actually paid by the bank, where the account of the payee with the bank is at the time overdrawn to an amount larger than the check.

2. A corporation, though insolvent, may give a bona fide preference to a creditor; and a transfer of property to one of its stockholders, in consideration of his assumption of debts due certain creditors, is valid, as against other creditors, where a fair price is thus realized for the property.

Error to district court, Natrona county; J. W. Blake, Judge.

Creditors' suit by Conway & Nickerbocker and others against the Smith Mercantile Company, John B. Okie, and others. Judgment in favor of defendant Okie, and plaintiffs bring error. Affirmed.

C. C. Wright and Allen G. Fisher, for plaintiffs in error. Burke & Fowler and A. T. Butler, for defendants in error.

CONAWAY, J. The petition in this case is in the nature of a creditors' bill, brought by judgment creditors of the defendant in error the Smith Mercantile Company, a corporation, to reach and subject to the payment of their judgments assets of the company which could not be reached by execution. The Smith Mercantile Company was incorporated by certificate of incorporation dated and acknowledged on February 17, 1893. The incorporators were L. Smith, E. B. Shaffner, and W. F. Louger, Jr. Article 6 of this certificate provided that the number of trustees should be three, and that L. B. Smith, E. B. Shaffner, and W. F. Louger should be trustees for the first year. The first meeting of these trustees was held on February 17, 1893. At this meeting L. Smith was elected president, W. F. Louger vice president, and E. B. Shaffner treasurer and secretary of the corporation. The corporation began business with a stated capital of \$10,000. This capital consisted of a stock of goods valued at \$3,200, contributed by L. Smith and E. B. Shaffner, and two notes, one for \$3,000 and one for \$3,800, contributed by John B. Okie. It appears, from the evidence, that John B. Okie was known as a man of considerable means, and that these notes could be made available as business capital, either by placing them as collateral security for goods, or by selling them to some bank or banks. Shaffner was mail route agent on the railroad, one of his stopping places being Casper, the place of business of the corporation. John B. Okie was a wool grower, and was at Casper occasionally. L. Smith was president of the corporation, and actual manager in charge of the business. About the time of the incorporation of the Smith Mercantile Company, the copartnership of L. Smith & Co., bankers, was formed. It had a nominal capital of \$1,000, none of which was ever paid. Of this capital \$160 was to be contributed by L. Smith, \$160 by E. B. Shaffner, and \$680 by John B. Okie, L. Smith, president and manager of the Smith Mercantile Company, was cashier of this bank. The bank used the same office room with the Smith Mercantile Company. It is claimed by plaintiffs in error and interveners that the bank was merely auxiliary to the mercantile company, and was, in effect, part of its business. In June, 1893, the Smith Mercantile Company was ascertained to be in financial straits. L. Smith & Co., bankers, were insolvent. On June 24th neither institution was open for business. They were both closed by the stockholders of the Smith Mercantile Company and the partners in L. Smith & Co., bankers. These stockholders and partners were L. Smith, E. B. Shaffner, and John B. Okie. The account of the Smith Mercantile Company was largely overdrawn. The bank was liable to depositors in considerable sums, the exact amount of which does not appear, with only about \$30 cash on hand. On the dissolution Mr. Okie received the stock of goods of the Smith Mercantile Company on consid-

eration of his assuming the indebtedness of the company to the bank of \$1,700 or \$1,800, the liabilities of the bank, a debt to Kellogg & Co. of over \$1,600, the payment of which he had already guaranteed, and claims against the Smith Mercantile Company in the hands of Attorney Butler for collection of over \$500. These liabilities were then estimated at \$3,902.43, but proved to be something more than that amount. He was owing the Smith Mercantile Company about \$1,450 for goods, which amount he paid by his check on the bank of L. Smith & Co., bankers. He had previously paid his note of \$3,000 to the Smith Mercantile Company, and had paid \$300 on the note for \$3,800, and had accepted stock in the company to the amount of \$3,300 in payment for these sums. The \$3,000 note had been surrendered to him on payment, and the \$3,800 note was surrendered to him on the dissolution of the firm. This last note had not passed out of the hands of the company at that time. The other note had been placed with D. M. Steele & Co. to secure payment for a bill of goods.

Plaintiffs in error brought this action in the district court for Natrona county. They attack the sale of the stock of goods to John B. Okie as without any consideration, and as a fraud on creditors of the Smith Mercantile Company. They ask that Okie be held to account for the value of the goods, which they allege to be \$7,500. John B. Okie mortgaged the goods to C. H. King & Co., and sold them, subject to this mortgage, to his brother, Frederick W. Okie. These transfers are also attacked as fraudulent. Plaintiffs in error also allege that the check of John B. Okie to the company in payment of his account has not been paid, and ask that he be held to account for that amount. They also allege that, at the time of the dissolution, Okie was the owner of 68 shares of the stock of the Smith Mercantile Company, of the par value of \$100 per share, and that his notes for \$6,800 were given to the company in payment for this stock, for which he had subscribed at the time of the incorporation of the company. They ask that he be held to account for the unpaid balance of these notes. Plaintiffs in error brought this action for themselves and for "all and any such creditors of said defendant the Smith Mercantile Company as may desire to join in this action." Twenty-two intervening petitions and four separate answers of other creditors of the Smith Mercantile Company are filed, setting up claims, judgments, attachment liens, etc. They also reaffirm, in substance, the principal allegations of the petition of plaintiffs in error. E. B. Shaffner also intervenes, representing that he has interests antagonistic to both plaintiffs and defendants. He alleges that his interest in the stock of goods contributed by himself and L. Smith was \$2,200; that L. Smith's interest was \$1,000; that he (Shaffner) was a route mail agent on a railway, and stopped at Casper every second

night, but that L. Smith had charge of the business, and sold the goods to Okie in fraud of his (Shaffner's) rights. The bill of sale, however, is signed by himself as secretary and treasurer of the Smith Mercantile Company, as well as by L. Smith, president, and it bears the corporate seal of the company. The Smith Mercantile Company also answers, by E. B. Shaffner, its secretary and treasurer. It admits the principal allegations of the petition of plaintiffs and of the petition of interveners, and sets up additional debts of itself, which it alleges should be paid. It also alleges that John B. Okie has misappropriated and squandered its assets. It asks that John B. Okie be required to pay into court the proceeds of the stock of goods, the amount of his account with itself for goods, the balance of his notes at one time held by the company, and that the creditors of the company shall be paid therefrom, and the remainder distributed among the stockholders. Here are a large number of parties substantially agreeing as to what should be done. John B. Okie alone dissents. He denies all liability. It is sought to require him to pay into court (1) the unpaid balance of his notes at one time held by the Smith Mercantile Company, \$3,500, with interest; (2) the amount of his account with the company, \$1,400 or \$1,450; (3) the value of the stock of goods. It is further urged that he should be required to pay the creditors of the company because he authorized certain misleading representations as to the financial condition of the company, which were made by L. Smith, and upon which the credits were obtained. The findings of fact by the trial court were in favor of John B. Okie. The question here is whether there is sufficient evidence to sustain these findings. It is not whether this court, from the written report of the evidence, would so find. The trial court had most of the principal witnesses before it, giving that court the better opportunity to judge of their character and credibility. See *Marshall v. Rugg* (Wyo.) 44 Pac. 706.

1. L. Smith and E. B. Shaffner testify that, in the negotiations leading up to the incorporation of the Smith Mercantile Company, John B. Okie agreed to take 68 shares of stock at \$100 per share, and that his notes for that amount were given in payment for the stock. John B. Okie testifies that these notes were given as accommodation notes at the time, to be used to raise the money on to buy goods or pledged as security for goods. The finding of fact on this point by the trial court was in favor of Okie, and there are circumstances indicating that the understanding of the negotiations by Smith and Shaffner or their recollection is at fault. The witnesses all agree that nothing was given in exchange for the notes at the time of the incorporation of the company. Smith and Shaffner say the reason the certificates of stock were not delivered at that time was

that they had not then procured their book of blank certificates of stock. If they are correct in this, there would seem to be no reason apparent why the certificates were not all delivered to Okie at once upon the receipt of the book. But the testimony of Smith and Shaffner shows that this was not done. The notes were used in a manner that indicates they were accommodation notes. The note for \$3,000 was pledged to D. M. Steele & Co. for goods. It was afterwards paid by Okie, and certificates of stock issued to him to that amount. Okie also paid \$300 on the other note, which was for \$3,800, and received certificates of stock to the amount of \$300, making \$3,300 in all. And the \$3,800 note was afterwards surrendered to Okie without payment of any portion of the \$3,500 remaining unpaid. If Okie had received consideration for this \$3,500,—that is, if it were not accommodation paper,—this surrender is inexplicable on any business principles. The claim that Okie forced the surrender, or could do so, is incredible. He was not an officer of the company. He was merely a stockholder; and, no doubt, used his influence as a stockholder with the officers of the company. The testimony does not show duress practiced or attempted.

2. Just before the dissolution of the Smith Mercantile Company, John B. Okie was indebted to it for goods to the amount of about \$1,450. He gave his check for the amount on the bank of L. Smith & Co., bankers. This bank at the time was insolvent. But the account of the Smith Mercantile Company with the bank was overdrawn to an amount largely in excess of \$1,450. This made the check perfectly good for the discharge of the debt of the Smith Mercantile Company to the full amount of the check. It is immaterial whether the bank was solvent or not, provided the check was paid. The check was, just as available as money to discharge a portion of the indebtedness of the mercantile company to the bank, if the check was accepted by the bank, as it appears it was. It is claimed in argument that the check was never actually paid by Okie to the bank. There is no direct evidence upon this point, but the presumptions, under the facts stated, are that it was paid to the mercantile company by a reduction of its indebtedness to the bank. The effect would have been the same if Okie had paid the Smith Mercantile Company \$1,450 in money, and the company had deposited the money in the bank. It is argued that the bank was merely an adjunct of the Smith Mercantile Company, and the business of the bank merely a part of the business of the company, and that a payment by the company of a portion of its debt to the bank was, in effect, a payment to itself, and therefore constituted no consideration. This argument is evidently without merit. The bank may have been used as an adjunct of the business of the mercantile company, but its proper business was distinct from that of

the company. Its duty to its depositors required it to collect the overdrafts of the mercantile company, as well as other debts. It is an extraordinary proposition, indeed, that the Smith Mercantile Company could draw the money of depositors from the bank and not be required or permitted to repay it. It is to be remembered that this bank had no paid-up capital. The money it used was the money of its customers.

3. At the time of the closing out of the Smith Mercantile Company it made a sale of its stock of goods and fixtures to John B. Okie. The purported consideration was the assumption by Okie of certain debts of the company. The debts which he assumed are not involved in this litigation. The books and accounts of the company were left with the officers of the company for the purpose, as Okie testifies, of making collections and paying the balance of the company's debts. There is evidence tending to show that they were amply sufficient for the purpose. In a few days, however, they were actually transferred, by informal assignment, to Gustave E. Spargur and R. E. Frazer, as security for a portion of the indebtedness of the company. These parties are now endeavoring to collect the same debts from John B. Okie. Smith testifies that the sale of the goods to Okie, as well as the surrender of his note, was forced by Okie, on the ground that he (Okie) owned a majority of the stock of the company, and, consequently, had a right to control the action of the company. This conflicts with the testimony of Okie that he never had more than 33 shares of the stock. Okie's testimony is confirmed by the stubs in the stock book, numbered consecutively from 1 to 9, showing the issue of 33 shares to John B. Okie and 67 shares to Smith and Shaffner. No transfers are shown. It is sought to discredit this book as evidence. It appears that three stubs have been torn out between Nos. 7 and 8. There is some conflicting testimony as to how two of these stubs came to be torn out. It is not satisfactory. The claim that Okie controlled the action of the company as the owner of a majority of the stock leads into difficulties. Admitting, for the purposes of this discussion, that Okie was the owner of a majority of the stock, this would not give him the right or power to compel the owners of a minority to take part of his stock off his hands. Much less would it enable him to direct what disposition should be made of the assets of the corporation after his stock was reduced to a minority, or as part of the same deal by which his stock was so reduced.

It is considered by counsel for plaintiff in error and the interveners that the sale of the stock of goods to Okie was in payment of indebtedness of the company to him, and constitutes him a preferred creditor. The only ground that appears in evidence for considering Okie a creditor of the Smith Mercantile Company is that, prior to the dissolu-

tion of the company, he had voluntarily guaranteed the payment of a claim of Kellogg & Co. against the company for over \$1,600, and some claims in the hands of Attorney Butler for collection, amounting to over \$500. It appears that these guarantees were given without the knowledge or request of the officers of the company. The contract of a guarantor is that he will pay if the principal debtor does not. Okie did not become primarily liable for the payment of these claims until he assumed that liability in the arrangements made for the dissolution of the corporation, and as part of the agreement for dissolution. Shaffner testifies that Okie threatened the company with attachment of its property if his demands were not complied with. Okie was not in a position to attach property at the time of these negotiations. The company had not requested or approved of his voluntary guarantees. He had paid nothing for the company. Neither had he assumed any liability at its request. He had very recently been a debtor, rather than a creditor, of the company. Much stress is laid upon the proposition that a director of an insolvent corporation cannot be a preferred creditor. If this be good law, it is hardly applicable to Okie, for two reasons: (1) He was not a director. (2) He was not a creditor. The attachment threatened was at the hands of Butler. The alternative seemed to be presented to the company to make such arrangements as it did make for the payment of creditors, or to suffer attachment and forced sale of its property. The company chose, and probably wisely chose, the former course. The consideration of the sale of the goods to Okie was his assumption of the debt to Kellogg & Co., the claims in the hands of Butler, and the debt of the company to the bank. He also assumed the debts of the bank. The amount of the debts of the bank is not shown in any manner. The probable explanation of this is that the payment of the debts of the mercantile company to the bank enabled the bank to pay its debts. The entire amount of the debts assumed by Okie was placed at \$3,902.48. It proved to be somewhat in excess of that amount. The value of the goods transferred to him was variously estimated at from \$3,500 to \$8,500. The latter estimate is by L. Smith, and is largely in excess of any other estimate, and is evidently extravagant. It is certainly doubtful whether as much could have been realized from the goods for the creditors in any other manner as was realized from the sale to Okie. If Smith, the manager, could have made a more advantageous disposition of the goods, he would, no doubt, have done so.

It is urged that John B. Okie should be held liable to the creditors of the Smith Mercantile Company on account of certain misleading representations made by L. Smith for the purpose of obtaining credit. Here, again, the finding of the trial court that Okie

had no knowledge of such representations is sustained by the evidence. In fact, most of Smith's representations were strictly in accordance with the facts. The only evidence tending to connect John B. Okie with any of these representations is to the effect that he was present on one occasion when Smith was preparing a statement for the commercial companies. This statement, when completed, was merely to the effect that the paid-up capital of the company was \$10,000, and that \$6,800 of this was in notes of stockholders. At the time of the dissolution \$3,300 of these notes had been paid in cash, and the company held \$3,500 in the notes of stockholders, Smith and Shaffner. It is true the transfer of the goods to Okie, thus providing for the payment of certain creditors, may be regarded as a preference of those creditors to others.

It is urged that the assets of a corporation in failing circumstances constitute a trust fund for the benefit of all creditors alike, and that no arrangement, resulting in any preference of a part of the creditors over others, will be allowed to stand. Judge Thompson takes this view in his Commentaries on the Law of Corporations. The great weight of authority is against him. The question has been discussed until it is threadbare, and another discussion here would be unprofitable. The kindred proposition is also urged that the sale of the goods to Okie was a transfer of all the assets of the corporation, and should be treated as a general assignment for the benefit of creditors. But it was not a transfer of all the assets. The assignment of the books and accounts was not contemplated at the time of the sale of the goods to Okie. It was actually made several days afterwards. Judgment affirmed.

GROESBECK, C. J., and SCOTT, J. (sitting instead of POTTER; J., disqualified), concur.

CITY OF CHEYENNE v. O'CONNELL. (Supreme Court of Wyoming. Dec. 12, 1896.)

LICENSE—OCCUPATION TAX BY CITY—WAGON USED FOR PAY.

A tax authorized by a city charter to be levied on "auctioneers, contractors, druggists, * * * omnibuses, carts, wagons and other vehicles used in the city for pay," in addition to the usual taxes assessed and collected on all property, is a tax on the occupation; and the fact that a defendant, who is the owner of a wagon, used it in one or two instances for hire will not alone support a conviction for his failure to procure a license for such wagon, but it must be shown that the vehicle is kept for hire or use for pay.

Error to district court, Laramie county; R. H. Scott, Judge.

Prosecution of Ben O'Connell by the city of Cheyenne for violation of an ordinance. A conviction before a police justice was reversed

on appeal by the district court, and the city brings error. Affirmed.

E. J. Churchill, for plaintiff in error.

POTTER, J. A complaint was filed before H. Glafcke, a police justice of the city of Cheyenne, charging defendant with having kept a certain wagon in said city, for the use of which by the defendant, on the 25th day of April, 1895, he received compensation, to-wit, the sum of \$1.25, for hauling certain rubbish, and on the 26th day of April, 1895, the sum of \$4, for hauling rubbish, without first having obtained a license for said wagon, in violation of section 1 of article 7 of "An ordinance concerning the issuing of licenses." On the trial, it was established by the testimony that one J. F. Rossman had employed the defendant to do certain work for him, which consisted in using a part of a pile of dirt and rubbish in leveling off and grading the alley in the rear of the residence of Rossman, and in hauling the remainder of the dirt away, for which work, altogether, he paid defendant \$4; and that one J. K. Jeffrey had employed defendant to haul a load of rubbish from his store building, for which he was to pay him \$1.25. It was admitted on behalf of the defendant that he had no license; that he did keep a wagon, which was used in doing the said work. The defendant was convicted, and he took an appeal to the district court, and the judgment of conviction was in that court reversed. The judgment and order of the district court is charged as error.

Section 1 of the ordinance under which the complaint was filed reads as follows: "If any person or persons shall hire out, or keep for use for hire, or cause to be kept for hire, or for the use of which, whether by themselves or others, compensation is received by such person or persons for the carrying or conveying of any article or thing whatever within the city of Cheyenne, any dray, cart, wagon, or any vehicle or vehicles of any name or description whatever, without first having obtained a license therefor, every such person or persons shall, on conviction forfeit and pay to said city a sum not less than two dollars nor more than ten dollars for each offense." Section 2 provides the amount of the license, which is \$40 per annum or \$10 for each quarter, and also the method of obtaining such license. It is provided that no such license shall be issued for a longer period than three months, and that, before the issuance of the same, the applicant shall furnish a bond, with security, conditioned for the faithful observance of the municipal ordinances, and the safe conveyance and delivery of all baggage and other property that may be intrusted to him. Section 3 requires that the name of the licensee and the number of his license shall be plainly painted in a conspicuous place upon the vehicle used by him. The defendant is not represented by counsel in this court. The record discloses, however, that the contention on the part of the defendant was that his reg-

ular calling or occupation was not that of a person who keeps for use or hire vehicles for the use of which he receives compensation, and part of the compensation received by him was for his personal labor, not requiring the use of a wagon, and that one or two acts of the kind mentioned in the testimony do not establish the defendant's guilt. The language of section 1 of the ordinance is very broad, yet it must be evident that its construction depends largely upon the charter provisions which authorize it. The charter empowers the city council "to levy and collect taxes on auctioneers, contractors, druggists, hawkers, peddlers, bankers, brokers, pawnbrokers, merchants of all kinds, grocers, confectioners, restaurants, butchers, taverns, public boarding houses, dram shops, saloons, liquor sellers, billiard tables, bowling alleys, and other gaming tables, drays, hacks, carriages, omnibuses, carts, wagons and other vehicles used in the city for pay, lumber dealers, furniture dealers, saddle or harness dealers, stationers, jewelers, and livery stable keepers, real estate agents, express companies or agencies, telegraph companies or agencies, shows, theatres, and all kinds of exhibitions for pay, and regulate the same by ordinance: Provided, however, that all scientific and literary lectures or entertainments shall be exempt from such taxation, as well also as concerts and musical or other entertainments given exclusively by citizens of the city." The charter elsewhere authorizes direct property taxes, so that all vehicles, the goods of merchants, and property of other dealers mentioned in the above provision, are subject to taxation as property for the ordinary purposes of municipal revenue. It is clear, therefore, that the paragraph, quoted above in extenso, authorizes what is essentially an occupation tax, and a regulation of the various occupations or callings therein designated. The ordinance enacted in pursuance of such authority must receive that construction which will harmonize it with the charter. Any other construction would invalidate it. The ordinance in question is thus not to be misunderstood. Its purpose and effect is to regulate and impose a license tax upon a certain occupation, viz. that of keeping a dray or wagon for the conveyance of any article or thing for hire. This is further apparent from the provisions of sections 2 and 3, which require a license fee at a certain rate per annum or quarter, the execution of a bond, and the painting of the name and number upon the vehicle. That part of the ordinance which seems to punish the keeping of a wagon for the use of which compensation is received in the conveying of any article within the city, which is apparently more particularly relied upon by counsel for the city, and with reference to which the complaint was drawn, cannot be broader in its application than the power conferred by the charter, and must, therefore, be limited, like the other language of the section, to acts which amount to

the pursuance of an occupation. It is suggested by counsel that the original ordinance, which provided that, "if any person shall hire out or keep for hire, for the carrying or conveying of any article or thing whatever, within the city or Cheyenne, any dray, cart, wagon or any vehicle or vehicles," etc., merely punished those who habitually kept a wagon for hire, and was obviously aimed at draymen and hackmen only, but that, under the section as amended, one instance of hauling for pay is as much a violation of the ordinance as fifty would be. The result of counsel's reasoning may be entirely true, and yet we are unable to attribute to the more comprehensive language of the amended ordinance an application very much broader than under the former provisions, keeping in view the charter authority and the purpose of the ordinance in question.

The question, then, arises, upon the facts brought out in the testimony and the finding of the police justice, did the district court err in reversing the judgment? The complaint seems to have been framed upon the theory that the act or acts of hauling therein mentioned constituted alone the offense punishable under the ordinance. Such acts were undoubtedly material evidence to establish the charge of a violation of the ordinance, but they were evidentiary facts only. The offense, if any, did not consist in hauling rubbish for one person one day, and for another on the day succeeding. The essential ultimate fact which renders one liable to the penalty provided by the ordinance is that he has followed the occupation of keeping a vehicle for the conveying or carrying of an article or thing for hire, or for the use of which compensation is received. Whether such calling or avocation has been pursued for one day, or less, or during a longer period, is not material. The only evidence, as disclosed by the record, which was presented, outside of the fact that no license had been issued to defendant, and that he kept a certain wagon, were the two acts of hauling rubbish. Taken alone, we would be inclined to consider such evidence insufficient; but from the record it is clearly indicated that the police justice did not pursue the inquiry along the line required by the construction of the ordinance which, in our opinion, is the only one it can sustain. The written decision or findings of such trial court embraces the following as the only determination of an ultimate fact respecting defendant's guilt: "From the evidence, the court finds that the defendant, Ben O'Connell, did keep a vehicle, for the use of which, in carrying rubbish, within the city of Cheyenne, he has received compensation, without first having obtained a license therefor." The complaint and findings together make it reasonably evident that no inquiry was considered necessary, and no determination was made, respecting the question whether or not defendant had, without a license, conducted a business which was regulated by the ordinance.

We do not hold that it was necessary to establish the guilt of defendant by proof of continuous acts of carrying for the public, or his employment for such purpose on more than one or any particular number of occasions. A single transaction of that kind, in connection with other facts, might be sufficient. What we do hold is that, the police court having determined the case upon an erroneous construction of the ordinance, an appellate court cannot conclude that defendant would have been adjudged guilty of a violation of the ordinance as we have construed its provisions, upon the testimony in the case, such testimony not pointing unerringly to his guilt. To uphold the judgment of conviction, notwithstanding the incorrect theory upon which the case was prosecuted and decided, would require this court to hold that one act of hauling rubbish for pay is of itself conclusive evidence of a violation of the ordinance. We do not understand that to be the law. *Standford v. State*, 16 Tex. App. 331; *City of Collinsville v. Cole*, 78 Ill. 114; *State v. Robinson*, 42 Minn. 107, 43 N. W. 833.

Rev. St. 1887, § 165, provides that, in case of an appeal by an accused from a judgment of conviction rendered by a police justice of the city of Cheyenne, no trial de novo shall be had in the district court. The case is tried there upon the record made up by the justice. In case the judgment is reversed by the district court, the defendant is to be discharged, and his sureties upon the bond released. The defendant in this case was so discharged. As the district court, therefore, upon reversal could not have remanded the case for a new trial, we cannot do so upon affirmance of its judgment. For the reasons indicated, the judgment of the district court is affirmed.

GROESBECK, O. J., and CONAWAY, J., concur.

**FIRST NAT. BANK OF DEADWOOD,
S. D., v. SCHOOL DIST. NO.
1, CROOK COUNTY.**

(Supreme Court of Wyoming. Dec. 12, 1896.)
**PAYMENT—DEPOSIT IN BANK—SCHOOL WARRANTS
—RIGHTS OF ASSIGNEE.**

1. Plaintiff's assignor owned warrants issued by defendant school district. The district treasurer notified an official of the bank in which the school funds were deposited, who was also agent for plaintiff's assignor, that there was sufficient money on deposit to pay the warrants and to have them sent to the bank for payment. This was not done, although the matter was brought to the agent's notice again several months later. The bank afterwards failed. *Held*, that the evidence justified a verdict for defendant on a plea of payment.

2. The warrants, being nonnegotiable and past due when assigned, were taken by plaintiff subject to all the equities then existing against them.

Error to district court, Crook county; W. S. Metz, Judge.

Action by the First National Bank of Deadwood, S. D., against school district No. 1 of

Crook county, Wyo. There was judgment for defendant, and plaintiff appeals. Affirmed.

Melvin Nichols, for plaintiff in error. J. L. Stotts, for defendant in error.

GROESBECK, O. J. The plaintiff in error brought suit in the district court for Crook county to recover on certain school orders or warrants issued by the officers of the defendant in error, and drawn upon its treasurer in the amount of \$1,004.40 and accruing interest thereon. The answer of defendant in error pleaded payment in full, to which a reply was filed denying payment. Upon this issue alone the cause was submitted to a jury, which found for the defendant in error, and judgment was entered for it upon the verdict. The undisputed evidence discloses that all of the warrants were held by the Deadwood National Bank, and upon its consolidation with the First National Bank of Deadwood they became the property of the latter bank on June 7, 1894. The warrants were issued in the years 1890-91, and the funds to pay the same were apparently raised by taxation in 1891. A notice was published in the official paper of Crook county, notifying the holders of the warrants to present the same for payment in the latter part of that year, the last call being on February 12, 1892. There is no statutory authority for the issuance of such a notice in case of school-district warrants, that we have been able to find; but it was conceded on the trial that all the warrants sued on in the action were called by publication in the *Sundance Gazette*, by the treasurer of the school district, "as required by law," in the year 1891. There is a provision of statute that school district and other public warrants shall draw interest upon the amount expressed in the warrant at the rate of 6 per cent. per annum from the date of the presentation thereof for payment at the treasury or other place where the same may be made payable until there is money in the treasury for the payment thereof; and upon presentation for payment, where there are no sufficient funds for the payment of the same, the treasurer shall indorse thereon the words, "Not paid for want of funds," and shall date and sign the same officially. Section 1815, Rev. St., as amended by chapter 22, Sess. Laws 1890. The warrants, although introduced in evidence, are not before us by copies or exhibits, but no contention is made upon that point, and it will be presumed that the warrants were presented for payment and indorsed as required by law. It seems, by reading the statute, that interest ceases on such warrants when there is money in the treasury to pay them, and that a notice is not necessary to the holder of the warrants to stop the running of interest thereon, when funds are in the treasury to pay the same. No evidence was introduced to show that this notice or call by publication was brought

home to the holder of the warrants. The district treasurer deposited the funds raised by taxation in the Crook County Bank, and notified one Higby, who was connected with that bank as an official, and also with the Deadwood National Bank, to send the warrants to the latter bank, and take the money out, for the reason, as the treasurer stated, that there was liable to be a run on the latter bank any day, and he did not want to be responsible for the warrants. Higby admitted to the treasurer that his bank at Deadwood had the warrants in controversy, and said that the Crook County Bank was "all right." This conversation occurred on October 3 or 4, 1893. A further conversation occurred between these parties, Higby, and the school-district treasurer, some time in June, 1894, when Higby directed the district treasurer to leave the money in the Crook County Bank. Higby admits that he had access to the books of the Crook County Bank, but says there was never a deposit there, that he ever discovered, to the credit of the Deadwood National Bank, or any that he was advised of; and he further testifies that at several different times, William Baird, cashier of the Crook County National Bank, was asked if the money could be raised, and the warrants paid off, and that payment was demanded of the warrants through said Baird, as cashier of the bank. The Crook County Bank failed after the warrants passed into the hands of the First National Bank of Deadwood, and the district treasurer afterwards personally accepted a dividend upon the moneys to his credit, but states that he considered the amount of such dividend "theirs," evidently meaning the holder of the warrants; and it appears that the school district received no benefit from such dividend.

The instructions to the jury were to the effect that the sole question presented by the pleadings was that of payment, and that the burden of proving payment by a preponderance of the evidence was upon the defendant. The jury was also instructed as follows: "If you believe from the evidence that the plaintiff bank or its duly-authorized agent directed the defendant to deposit the money for the payment of the warrants in question in the Crook County Bank, then, in order to constitute a payment, the funds must be under the control of the plaintiff; and if you believe from the evidence that the defendant did so deposit it, you should find for the defendant; and if you believe from the evidence that the defendant did not do so, you should find for the plaintiff." No objection was interposed to this instruction. The plaintiff in error asked an instruction directing the jury to find for the plaintiff, which was refused, and an exception was taken to this ruling. Although the instruction quoted in full was not warranted by the evidence, as the plaintiff bank was not connected with the incidents mentioned in the testimony,

which related wholly to the understanding between the district treasurer and plaintiff's assignor of the warrants, the Deadwood National Bank, yet it must have been understood by the parties litigant, as well as the jury, that the reference to the plaintiff bank meant or included the assignor of the plaintiff, as no objection was interposed to the instruction. There was a conflict of evidence upon the material facts and circumstances of the case, and the jury must have accepted the version of the district treasurer. The deposit in the bank was in the name of the school-district treasurer, and was never transferred to the Deadwood National Bank; but it clearly appears that the district treasurer and one Baird, who was cashier of the bank in which the money was deposited, understood that the latter was to pay the warrants from the fund, and this oral direction was sufficient authority to pay out the moneys to the holders of the warrants on presentation. While the bank may require some written evidence of the order of transfer, there is no necessity for giving a written instrument, except for the purpose of evidence for the protection of the bank. *Bolles, Banks*, § 86, citing *Watts v. Christie*, 11 Beav. 551; *McEwen v. Davis*, 39 Ind. 111. There was sufficient testimony to warrant the verdict, as Higby, the officer of the bank holding the warrants, understood and ratified the arrangement according to the account of the school-district treasurer, and had access to the books of the bank. It seems strange that after repeated notification the warrants were not presented for payment, particularly as we judicially know that the banks at Deadwood and those of Sundance were situated only about 50 miles apart. The holder of the warrants was put upon inquiry under the statute to know when there were funds in the treasury, so far as the right to receive interest is concerned, yet the warrants were awaiting payment for over two years. While this laches alone would not be sufficient to defeat a recovery for the principal sum of the warrants and interest thereon up to the time funds were in the treasury, yet an acceptance of the arrangement to pay the warrants from the fund deposited is, we think, sufficient to constitute a payment. The warrants were certainly nonnegotiable paper, as they were over due, and so showed upon their face, and the plaintiff bank took them subject to all equities. The question of payment is one for the jury on the testimony and acts of the parties, and, there being sufficient evidence upon which to base a verdict for the defendant in error, under repeated rulings of this court, as well as under an unbroken line of precedents elsewhere, we cannot disturb it. *Willard v. Germer*, 1 Sandf. 51; *Eyles v. Ellis*, 4 Bing. 112; *Jones v. Bobbitt*, 90 N. C. 391; *Moran v. Abbey*, 63 Cal. 56; *Knox v. Gerhauser*, 3 Mont. 267; *Crumlish's Adm'r v. Improvement Co.*, 38 W. Va. 390, 18 S. E. 456; *Hall v.*

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Stevens, 40 Hun, 578. The judgment of the district court of Crook county is affirmed.

CONAWAY and POTTER, JJ., concur.

CALDWELL et al. v. BUSH.

(Supreme Court of Wyoming. Dec. 12, 1896.)

INCLOSURE OF GOVERNMENT LANDS — EXCLUSIVE POSSESSION.

Plaintiffs inclosed with their own certain government lands, claimed under a desert land entry which was afterwards and upon due notice declared void. Subsequently another, at plaintiffs' invitation, entered upon a portion of the lands under a homestead entry. *Held*, that plaintiffs had no such exclusive possession of the lands so inclosed as would entitle them to enjoin a subsequent valid homestead entry by defendant.

On petition for rehearing. Denied.
For former report, see 45 Pac. 488.

GROESBECK, C. J. This cause was decided June 30, 1896. 45 Pac. 488. This is an application for rehearing. Counsel for the plaintiffs in error urging, with much force, that considerable space in the original opinion was devoted to the discussion of what was conceived to be the main question involved in the case, which was disposed of largely upon cases which had not been cited or referred to in argument, and which counsel had previously no opportunity to examine, an oral argument upon the application was ordered. All of the propositions discussed upon the original hearing, except one, are waived in the brief and argument, and counsel rests his case solely upon the proposition that the plaintiffs in error could not be disturbed in their possession, growing out of the inclosure of the lands in dispute, by the defendant in error, who entered under his homestead filing upon a quarter section of land inclosed in common with other lands of the plaintiffs and another, after the desert land entry of the grantor of plaintiffs had been canceled for fraud by the local government land officials, whose action was approved by the commissioner of the general land office, and from the decision of which last-named officer no appeal was taken. At that hearing, the plaintiffs were present by counsel. They now assert no claim or color of title, except that of mere naked possession, which, they assert, cannot be invaded by the defendant in error under his homestead entry, and whose continued trespasses, as they are alleged to be, were enjoined *pendente lite*. We held that the possession of plaintiffs in error of the land in dispute, based on the fact of its inclosure by themselves and others, with other lands of their own and of the government, was not an exclusive possession. Another entryman was invited to enter within the inclosure by them, and did so enter, while it is sought to exclude the defendant in error under his fil-

ing. It is vigorously asserted that such exclusion was proper, and in support of this position an illustration is made of the invitation of a guest to occupy a room in one's house, an act that could not be construed as extending a general invitation to the public to enter, or as an equivalent to throwing open the doors of the dwelling to all mankind. This illustration is not apt, as the premises inclosed in this case were not all owned or held by claim or color of right or title by the plaintiffs in error. The case is more analogous to the keeper of a common inn, who, by inviting one guest to enter, admits the public to the premises. By inviting an outsider to enter within their inclosure, if it can be called such, in view of the fact that one side of the field had been inclosed by strangers to the suit, their possession after such entry cannot be an exclusive possession to the whole tract. To lands adjudicated not to be their own, in a proceeding in which they appeared, they seek to invite one and exclude another. Such a course, if upheld by the courts, would carry the doctrine of the sanctity of an inclosure to an absurd length, and permit parties to inclose large tracts of the public lands in common with their own, and exercise such control of the government parcels as to admit some and exclude others, moved by caprice or a fastidious desire to choose their neighbors. The cases, both state and federal, relied upon by plaintiffs in error, were mainly decided upon the ground that one has no right to enter public lands, to dispossess an occupant thereof, who has in good faith, under claim or color of title, taken possession of the land, inclosed, improved, or cultivated it. Upon the land in dispute, and upon all the lands embraced in the canceled desert entry, of which they are a part, there were no improvements whatever. We do not think the decisions in this case cited as upholding the right of plaintiffs in error can be tortured into applying to the circumstances of this case, where the right of possession to the land, and adjacent lands covered by the desert land entry of the grantor of plaintiffs in error, have been determined in a proceeding lawfully and regularly conducted by the land department, in which they participated, and from the decision of which, adverse to their grantor, affirmed by the commissioner of the general land office, they took no appeal. It would seem that the doctrine that the person who has the right of possession may, by peaceable entry upon the land, acquire sufficient possession of it to enable him to maintain an action for trespass against any person who, being in possession at the time of his entry, wrongfully continues upon the land (2 Jagg. Torts, 686), has not been upset by the leading decisions in cases of entry upon the public lands, which will not permit an entry thereon, held under claim or color of right, or, perhaps, only by right

of prior possession and occupancy, where improvements have been made thereon, or where settlement has been effected, or where time and labor have been expended thereon by an innocent party with an honest belief that the occupant had a claim or title thereto. The view, announced rather timidly, in the early case of *State v. Ross, 4 Jones (N. C.) 315*, seems to be the true doctrine. After reviewing the apparent conflict in the British authorities, the court say: "Perhaps it will be found that the authorities may be reconciled on this distinction. One having a right of entry may, at common law, use force, provided it does not amount to a breach of the peace; whereas one not having a right of entry is guilty of a trespass, indictable at common law, if he enters with a strong hand, under circumstances calculated to excite terror, although the force used does not amount to a breach of the peace." Although this résumé of the law is offered merely as a suggestion, it is undoubtedly in harmony with the American cases. See notes to the case of *State v. Ross*, 69 Am. Dec. 754 et seq. (4 Jones [N. C.] 315), and particularly the case of *Low v. Elwell*, 121 Mass. 309.

There can be no question, under the testimony, that the entry was peaceably made upon the premises, and that no inclosure of the plaintiffs in error was removed or broken down to make the entry; for it was made through a gate in a fence, belonging to strangers to this suit, serving to inclose on one side the lands inclosed by plaintiffs in error, and none of the circumstances of the entry show that the acts of the defendant in error were of such a nature as to excite terror, or were done with a strong hand. He did not forcibly dispossess the plaintiffs in error; neither did he obtain or seek to obtain the fruits of their labor, or that of any person, by his peaceable entry. His permission to enter was by the license of the government, the sovereign owner of the soil, which had, in accordance with law, through its duly constituted and authorized officials, declared the land open to entry, after canceling the entry of the grantor of the plaintiffs in error, in a proceeding in which they participated, and having further allowed the entry of the defendant upon the land as vacant land and open to settlement. To warrant the interference of a court of equity in restraint of continuing trespasses, the title of the complainant must be established, or at least a superior right to the possession than is possessed by the adverse party; and if title to the locus in quo is in doubt, the injunction, if granted, should only be temporary, until the title can be determined at law. 1 High, *Inj.* § 701. In this case, the title had been determined by a tribunal clothed with full jurisdiction to try and determine the matter, before the government had parted with its legal estate. A right, as in the original opinion in the case at bar, was shown to be undisputed, before the issuance of patent,

as well as after its delivery, in a suit to cancel it for fraud in the initial or final entry. It is difficult to see what protection a court of equity could afford to the plaintiffs in error in this suit by an injunction to restrain continuing trespasses on the lands, after the defendant in error had established possession, under the evidence adduced at the trial. For the reasons herein given, as well as those set out at length in the original opinion, the judgment of the district court for Albany county will be affirmed, and the petition for rehearing denied.

CONAWAY and POTTER, JJ., concur.

McCORD, BRADY & CO. et al. v. ALBANY
COUNTY NAT. BANK OF LARA-
MIE CITY et al.

(Supreme Court of Wyoming. Dec. 12, 1896.)
CHattel Mortgages — Lien — AFTER-ACQUIRED
PROPERTY—PRIORITIES.

1. The lien of a chattel mortgage on a stock of goods and the accounts pertaining thereto, which provides, as authorized by Sess. Laws 1890-91, p. 90, § 18, that the mortgagor could sell the goods in the due course of business, and replace the same with other property of the same kind, and that such after-acquired property would be subject to the mortgage, takes priority over the lien of a second mortgage on the same goods, though the former did not and the latter did specify the goods on hand and those that might afterwards be acquired, and the accounts already owing and those that might afterwards accrue.

2. A chattel mortgage on a stock of goods and the accounts pertaining thereto which contains a provision, authorized by Sess. Laws 1890-91, p. 90, § 18, that it shall cover after-acquired property obtained in due course of trade, will cover such property if it appears that no addition was made to the capital beyond a moderate profit, and that the after-acquired goods were merely a replacement in the usual course of business of the goods and accounts originally mortgaged.

Error to District court, Albany county; J. H. Hayford, Judge.

Proceedings upon distribution of the estate of John Quann, deceased. The court awarded the Albany county National Bank of Laramie City a preference to certain moneys in the hands of the administrator found to be proceeds of property mortgaged by Quann to the bank. McCord, Brady & Co. claimed a preference right under mortgages subsequent in time, and bring error. Affirmed.

Nellis Corthell, for plaintiffs in error. M. C. Brown, for defendants in error.

CONAWAY, J. The litigation in this case is as to the personal property and accounts covered by certain chattel mortgages executed by John Quann in his lifetime in favor of the Albany County National Bank and in favor of the several plaintiffs in error. The mortgage of the Albany County Bank is prior in point of time, and it seems to be admitted that it constitutes a prior lien upon the property and accounts embraced within its terms. Its language is not so com-

prehensive as that contained in the subsequent mortgages. Quann was engaged in business as a grocery merchant, having a stock of goods in his store building, and having, also, elsewhere in the town, what is termed a grain warehouse and a hay warehouse. On January 4, 1893, John Quann gave a chattel mortgage to secure an indebtedness of \$5,800 to the Albany County National Bank upon "all his stock of merchandise, consisting of groceries, flour, feed, grain, shelf goods, canned goods, apples, fruits, woodenware, furniture, and fixtures, consisting of shelves, counters, show cases, and all goods, wares, and merchandise of every character and description whatsoever, then lying, being, situate, and contained in his certain store building at No. 113 Grand avenue; * * * also all books of account appertaining and belonging to said business, * * * and the accounts in said books." The mortgage provided that the mortgagor might "use, handle, operate, manage, and control the property mortgaged, and market, sell, and dispose of portions thereof as might be necessary in the course of business, and to preserve and care for the same, and to replace such property or parts sold with other property of like kind and character, which property replaced might be purchased either with the net proceeds of the mortgaged property or otherwise, but all of which should be subject to the operation and effect of said mortgage." This character of mortgage is expressly authorized by statute. Sess. Laws 1890-91, p. 90, § 13. The subsequent mortgages of plaintiffs in error were executed on January 11, 1893. They include the goods and accounts of the business of Quann covered by the mortgage of the Albany County Bank, and "all articles of like kind and character kept by said Quann in his warehouse," etc. They also include a horse and delivery wagon of small value, not mentioned in the first mortgage. The evidence tends to prove that at the time of the execution of this first mortgage Quann had about \$36 to \$42 worth of hay in the hay and grain warehouse, and about \$20 in money. The trial court allowed the subsequent mortgagees \$90 of the proceeds of the mortgaged property. This was evidently on account of the hay, the money, and the horse and wagon, and seems amply sufficient to cover them all.

But it is urged on behalf of plaintiffs in error that they, as subsequent mortgagees, should have been allowed a much larger sum. The subsequent mortgages specified the goods on hand and those that might afterwards be acquired, and the accounts already owing and those that might afterwards accrue. The first mortgage was not thus specific in this particular. We are of the opinion that this was not necessary. The first mortgage seems to be in the usual and in good form under the statute. The evidence seems to sustain the finding of the trial court. The several reports of the administrators of Quann show that the business was carried on by himself and the administra-

tors without addition to the capital employed in the business at the time of the execution of the first mortgage, except a very moderate profit in the business. Under these circumstances it would seem clear that the lien of the first mortgage should attach to the goods subsequently acquired, and the accounts subsequently accruing from the use of this capital. It was a replacement, in the usual course of business, of the goods and accounts originally mortgaged. It is claimed that this court has held that the lien of a mortgage follows the mortgaged property, and not the proceeds of such property. The case of *Bank v. Luman*, 38 Pac. 678, is cited to this point. In that case it was held that under a mortgage similar to the one under discussion here the mortgagee was entitled to the proceeds of the mortgaged property as against a third party receiving such proceeds with notice of the facts, and the bank was compelled to pay a large sum in consequence. The case of *Cone v. Ivinston*, 33 Pac. 31, and 35 Pac. 933, is also cited. A celebrated French diplomat is credited with the saying that language was invented to conceal thought. The language of the petition in the case of *Cone v. Ivinston* was so very efficient for this purpose that the court was not informed, either by direct averment or by any innuendo or intimation from which an inference might be drawn, whether the mortgage in the case was one under which portions of the property might be sold by the mortgagor discharged of the mortgage lien or not. As this was a material element in the plaintiff's cause of action, it was for him to allege and prove. As he did not do so, the inference would naturally be that it was a mortgage in the ordinary form, discussed by all the principal authorities, under which the mortgagor could not discharge the mortgage lien upon the property by a transfer of the property, except in certain exceptional cases. The author of this opinion filed a dissenting opinion in that case, not so much in regard to the legal principles involved as to the effect of the facts alleged. Judgment affirmed.

GROESBECK, C. J., and POTTER, J., concur.

KNIGHT et al. v. BECKWITH COMMERCIAL CO.

(Supreme Court of Wyoming. Dec. 12, 1896.)

HUSBAND AND WIFE — PLEDGE OF WIFE'S PROPERTY — PRINCIPAL AND AGENT — RATIFICATION OF UNAUTHORIZED ACT — WAREHOUSEMEN — LIEN FOR STORAGE.

1. Personal property which belonged to the wife prior to the marriage cannot be pledged by the husband, without her consent, for payment of his debts.

2. Where a defendant retains possession of personal property stored with it under an unauthorized agreement by its agent that there would be no storage charge, but does not notify the owner of the property that it repudiates such unauthorized agreement, or that compensation must be made for storage, it cannot claim the lien given

by Rev. St. § 1471, to warehousemen, for storage of goods.

3. In replevin for goods stored with defendant under an unauthorized agreement by its agent that no charge would be made for storage, where it appears that plaintiff voluntarily left the goods with defendant until the day of the demand for their return, and that defendant's detention of the goods was not accompanied by any oppressive act or any bad faith, but was merely due to plaintiff's refusal to pay a storage fee, plaintiff is not entitled to counsel fees as damages, since, in such case, exemplary damages would not be warranted.

Error to district court, Sweetwater county; Jesse Knight, Judge.

Action of replevin by Hattie J. Knight against the Beckwith Commercial Company. From a judgment against plaintiff and against Chris Juel, her surety on the delivery bond, they bring error. Reversed.

E. E. Enterline, for plaintiff in error. C. C. Hamlin, for defendant in error.

POTTER, J. In this case, Hattie J. Knight sought, by action of replevin, to obtain possession of certain household goods which were held by the defendant. She gave the delivery undertaking provided for by statute, and received the goods. Judgment was rendered against her and the surety in the undertaking for the sum of \$50 and costs; the amount of the damages assessed being the reasonable value, as determined by the court, for the storage of the property by defendant. The answer of defendant admitted its possession, and set forth, as grounds of defense, that on or about July 10, 1894, the plaintiff delivered to and left with the defendant all and singular the goods and chattels, with the request that it safely keep and store the same for her, which service, it is alleged, they performed until May 25, 1895 (this being the date when the suit was commenced), and that a reasonable charge for the storing and caring for the property was \$60; further, that on October 31, 1894, the defendant sold to one Merle S. Knight, the husband of plaintiff, a bill of merchandise, amounting to \$43.85, and that the plaintiff at that time, upon demand being made of her husband for security for the payment of said bill, deposited with the defendant the said property in pledge; that said sum had not been paid; and that payment thereof was demanded of plaintiff at the time when she requested a redelivery of the property. The case was tried without the intervention of a jury, and the court found that the plaintiff was the owner of the property at the time of the commencement of the action; that said property was not chargeable with the claim of defendant against Merle S. Knight, but that, as agent for his wife, he had placed the property in the possession of defendant; that the latter was entitled to a lien upon such property for the storage thereof, under the provisions of section 1471 of the Revised Statutes;¹ and the

court awarded the defendant the sum of \$50 to cover such lien, rendering judgment therefor. The testimony on behalf of plaintiff was to the effect that the manager of defendant's store had agreed to keep the goods without compensation; but the trial court held that any such contract had not been brought to the knowledge of defendant, and, if it had been, it would have been unconscionable, there being no limit as to time; that, on the contrary, the defendant had notice from its agent that the property was held for collateral and storage, and acted under that information for about six months after such agent had ceased to be connected with the defendant.

That much of the defense which claimed possession of the goods by way of pledge does not require consideration. The trial court determined that question adversely to defendant, and very properly so. The property was clearly that of plaintiff, which she owned prior to her marriage with M. S. Knight; and the latter could not, without her consent,—and none such was shown,—have pledged the same for an indebtedness of his own. Neither was it established that he attempted to pledge them. The undisputed testimony on behalf of plaintiff disclosed that one Minta, at that time the local manager of the business of defendant at Rock Springs, agreed to allow the goods to be placed and kept in their store without compensation; and that, on that account only, the goods were permitted to be stored there. The single item of evidence respecting this matter offered in support of the defendant's position was an entry on its books in Minta's handwriting, under date of October, 1894, showing a sale upon credit to the husband of plaintiff of a bill of merchandise amounting to \$43.85, and a memorandum as follows: "Bill of goods; security, household furniture on storage." This entry must have been made some three months after the goods were placed in the defendant's store. It was attempted to establish the absence of authority in the manager to contract for storage without charge. The business of defendant did not include, generally at least, that of storing and caring for property of others. It may be assumed that such manager, as between himself and the company, was not empowered to transact such business without charging a fair compensation therefor, and, between himself and third parties, could not enter into any contract therefor binding the defendant, which would require it to carry it out, or would render it responsible in damages for a failure or refusal to perform it, or for the absence of that diligence which is required of a gratuitous bailee had the goods been lost or damaged. In this case, however, the agreement had been completely executed on the part of defendant. It had safely kept the goods, was in possession of them, and refused to return them, unless a storage fee was paid. The contract was not unconscion-

¹ The act provides that warehousemen shall have a lien for reasonable storage fees.

able. It was capable of being terminated at any time by defendant, upon notice. It could have notified plaintiff at any time that the goods could not be further left with them, except for compensation. It matters not that the superior officers of the company were unacquainted with the facts respecting the original agreement. It had in its possession certain property obtained upon the promise of the one in charge of its store that no charge would be made if the same was left there. Having, through its regular agent, invited plaintiff to thus intrust her goods to it, whether or not the agent was either expressly or impliedly authorized to make any such promise or agreement, the defendant is not entitled to hold the goods until it has been paid the demanded fee. It can have no just or lawful charge until and after it disavows the arrangement under which they had received the property. This is an entirely different question from that arising in a case such as has been cited, where an agent, without authority, pays an indebtedness of his own by a sale of goods belonging to his principal, in which case the one so receiving the goods was held liable to pay for them at the suit of the principal, the account standing against him upon the books of the concern.

As the case must be remanded, it is proper that we accord consideration to some of the questions arising on the trial, and discussed in the briefs of counsel. We have no doubt but that defendant would have been entitled to a lien upon the property if its charge for storage was to be sustained. We conceive that the provisions of section 1471, Rev. St., cover such a case. On the trial the court refused to permit plaintiff to prove certain costs and expenses, including counsel fees which she had incurred by reason of the refusal of defendant to return her property on demand. The original taking was certainly with consent of plaintiff. She voluntarily left them with the defendant until the day of demand, which was either the same day or about the time of the commencement of the suit; and the detention of them by defendant after demand was not accompanied by any such outrage or bad faith as would authorize exemplary damages. The court did not err in excluding the testimony offered.

For the reasons already stated, the judgment must be reversed, and the case remanded for new trial.

GROESBECK, C. J., and CONAWAY, J., concur.

MERRILL v. SPENCER, County Collector.
(Supreme Court of Utah. Dec. 12, 1896.)

COUNTY SCHOOL TAX — VALIDITY AS TO CITIES OF FIRST AND SECOND CLASS — CONSTITUTIONAL LAW.

1. The proper construction of section 6, art. 10, of the constitution of the state of Utah, which

provides that "in cities of the first and second class, the public school system shall be maintained and controlled by the board of education of such cities separate and apart from the counties in which said cities are located," is that in cities of the first and second class the public school system shall be maintained by the board of education of such cities. The board of education of such cities shall bear the expenses of, keep up, supply what is needed, maintain, and control the public school system therein; and such system of public schools shall be so maintained and controlled separate and apart from the counties in which said cities are located. The intention of the framers of this section was to locate and fix geographical divisions in counties containing cities of the first and second class, and make it the duty of the board of education of such cities to support, bear the necessary expense of, maintain, and control the public school system therein, separate and apart from the control of the counties in which such cities are located. The maintenance and control of public schools in said cities are made independent, separate, and apart from the counties in which they are located, and are to be controlled by the board of education of such cities separate and apart from the control of the county commissioners.

2. The collection of the county school tax within Salt Lake City, and the subtraction of about \$30,000 from such fund so raised for various county school purposes, before the fund is distributed according to the number of children of school age, under the several acts of the state legislature, is an evasion and violation of section 6, art. 10, of the state constitution; and certain provisions added to section 88, art. 10, p. 489, Sess. Laws 1896, and section 115, art. 15, p. 497, Sess. Laws 1896, and other like provisions, are held invalid and repugnant to section 6, art. 10, of the constitution.

(Syllabus by the Court.)

Appeal from district court, Salt Lake county; M. L. Ritchie, Judge.

Action by Lydia Y. Merrill against John D. Spencer, county collector, for injunction. From an order sustaining a demurrer to the complaint, and a judgment of dismissal, plaintiff appeals. Reversed.

The plaintiff, in her complaint, alleges, in substance, that she is a resident of Salt Lake City, in Salt Lake county, and the owner of property in Salt Lake City; that a tax for county school purposes of two mills on the dollar has been levied in Salt Lake county in 1896; that said county school tax is levied for the support of the district schools within and without Salt Lake City, but all within Salt Lake county; that the total sum of said tax, if collected, would amount to \$87,012.98, and the amount thereof that would be collected from Salt Lake City alone would amount to \$71,956.26, and that of such school tax Salt Lake City would pay in excess of the amount distributed to it according to the number of school children the sum of \$30,580; that there is a board of education duly organized and in control of the public school system within Salt Lake City, and such board has been, and now is, maintaining and controlling the public school system in Salt Lake City, and has levied a city tax for the year 1896 on all taxable property, for the support and maintenance of such city public schools; that such board pays its city superintendent of schools, members of its board of examiners, its treasurer, and all

other incidental, proper, and necessary expenses from its own funds; that plaintiff is assessed for said county school purposes for the year 1896, on her land specified, the sum of \$106.38, and has paid all the taxes assessed against her except the said sum assessed as county school taxes; that during the years 1893 to 1896, both years inclusive, and prior thereto, Salt Lake City paid into the territorial school fund a large amount annually in excess of what it received from such school fund, when the same was distributed according to the number of school children; that Salt Lake City is a city of the first class; that said defendant will sell the property of plaintiff to collect said county school tax, unless restrained, and plaintiff's title thereto become thereby clouded,—and prays for an injunction, etc. To this complaint defendant filed a demurrer, alleging that the same does not state facts sufficient to constitute a cause of action, nor to entitle the plaintiff to the relief sought. The demurrer was sustained. Plaintiff elected to stand upon her complaint. Thereupon the court dismissed said plaintiff's complaint, with costs. From this judgment and order the plaintiff appeals, and alleges that the court erred in sustaining the demurrer, dismissing the complaint, and refusing to grant the injunction prayed for, and that there is no law authorizing the collection of any county school tax on property within Salt Lake City.

Williams, Van Cott & Sutherland, for appellant. C. O. Whittemore, Co. Atty., for respondent.

MINER, J., after stating the case, delivered the opinion of the court.

The only question presented by this appeal is whether there is any law in this state authorizing the levy and collection of any county school tax on property within said Salt Lake City. It is conceded that for many years before Utah became a state a school tax was levied within the territory, which constituted the territorial school fund. It was collected according to the value of the property, and distributed according to the number of school children of school age. According to the working of the system, Salt Lake City paid annually into the school fund a large sum in excess of what it received back. A county school tax was likewise levied in the county which includes Salt Lake City, in the same manner, and the fund was distributed the same. What was true of Salt Lake City with reference to the territory, was also true with reference to the county. In this way Salt Lake City paid annually large amounts into both funds in excess of what it received back. Counties having no cities of the first and second class were not subject to this system of excessive or double taxation. Section 6 of article 10 of the constitution of Utah provides that "in cities of the first and second class, the public school system shall be maintained and controlled by the

board of education of such cities, separate and apart from the counties in which said cities are located." The principal question in this case is as to the meaning of the word "maintained," as used in this section. Section 2996, Comp. Laws Utah 1888, provides that "words and phrases are construed according to the context, and the approved usage of the language. * * *" Webster, in subdivision 4, defines the word "maintain" to mean "to bear the expense of; to support; to keep up; to supply with what is needed." Section 26 of article 1 of the constitution says, "The provisions of this constitution are mandatory, and prohibitory, unless by express words they are declared to be otherwise." It is a familiar rule of construction that a word repeatedly used in a statute will be presumed to bear the same meaning throughout the statute, unless there is something to show that there is another meaning intended. Article 10 of the constitution relates to education, and provides with reference to the different educational institutions of the state. In section 1 of article 10 of the constitution the legislature is required to provide for the establishment and maintenance of a uniform system of public schools. In section 2 of article 10 it is provided that high schools shall be maintained free in all cities of the first and second class. In the latter part of the same section the word "maintain" is used in connection with moneys apportioned to support schools. In section 10 the word "maintenance" is used in connection with a fund to support the deaf and dumb asylum. The same word is used many times in this article as bearing upon and having reference to the support and maintenance of schools. In *Judson v. Blanchard*, 4 Conn. 566, the word "maintain" is held to mean "to bear the expense of." In *Rhodes v. Mummery*, 48 Ind. 217, the word "maintain" is defined as meaning "to bear the expense of." In *City of New Haven v. Whitney*, 36 Conn. 375, it is held that "a statute that prescribes that a thing shall be done in a particular way carries with it an implied prohibition against doing it any other way." "So when a statute enumerates the persons or things to be affected by its provisions, there is an implied exclusion of others."

Words in a constitution are not to be stretched beyond their fair sense, but within that range the rule of interpretation must be taken which will best follow out the apparent intention of its framers. "Every positive direction contains an implication against anything contrary to it, or which would frustrate or disappoint the purposes of that provision, as strong as if a negative was expressed in every sentence." "In a statute that which is implied is as much a part of it as that which is expressed." *North Point Consol. Irr. Co. v. Utah & S. L. Canal Co.*, 13 Utah, —, 46 Pac 824; *Suth. St. Const.* §§ 325-327; *Cooley Const. Lim.* 78-105. Section 6 of article 10 has a plain meaning. It will be noticed that

this section does not provide that the public school system within Salt Lake City shall be maintained separate and apart from the state, but simply separate and apart from the county. The plain meaning of the section is that in cities of the first and second class the public school system shall be maintained and controlled by the board of education of such cities. The board of education of such cities shall bear the expenses of, keep up, supply what is needed, maintain, and control the public school system therein. And such system of public schools shall be so maintained and controlled separate and apart from the counties in which said cities are located. The intention of the framers of this section was to locate and fix geographical divisions in counties containing cities of the first and second class, and make it the duty of the board of education of such cities to support, bear the necessary expense of, maintain, and control the public school system therein separate and apart from the control of the counties in which such cities are located, and separate and apart from the control and supervision of the board of county commissioners of the respective counties where such cities of the first and second class are located. So far as the maintenance and control of the public schools in cities of the first and second class are concerned, they are made independent, separate, and apart from the counties in which such cities are located, and are to be controlled by the board of education of such cities, separate and apart from the control of the county commissioners. No other reasonable construction can be placed upon the language used in this section.

In framing section 6 of article 10 the constitutional convention must have found that in the previous workings of the several provisions of the statute there was a mischief existing which should be suppressed. The convention sought to suppress the mischief by framing this provision of the constitution providing that the school system shall be maintained and conducted in cities of the first and second class by the board of education of such cities, separate and apart from the counties in which the said cities are located. Section 94, p. 490, Sess. Laws 1896, provides, in substance, that the county commissioners of each county shall levy a tax not to exceed two mills on the dollar for county school purposes. Section 88, art. 10, p. 489, Sess. Laws 1896, provides as follows: "The county superintendent of each county shall immediately upon receiving the appointment from the state superintendent proceed to apportion the state and county school funds to the several school districts of his county, according to the number of school children residing in each district, over six and under eighteen years of age, as appears from the last enumeration reported to his office; provided, that before making such

apportionments he shall set aside so much of said fund as the board of county commissioners shall order for the payment of the compensation of the county superintendent, members of the board of examiners, the treasurer, the expenses of the county institute, and contingent expenses of the county superintendent's office." Section 115, art. 15, p. 497, Sess. Laws 1896, provides as follows: "All cities of the first and second class shall be governed by the provisions of this article. In cities of the first and second class, the public school system shall be maintained and controlled by the board of education of such cities, separate and apart from the counties in which said cities are located; provided, that this section shall not be construed as relating to the levying, collecting or apportioning of state or county school taxes." These statutes were passed just after the adoption of the constitution, and it is apparent that the legislature, while enacting section 6 of article 10 of the constitution into section 115, above quoted, at the same time added thereto a proviso, which, if effective, would avoid the plain meaning of the constitution, and give it an interpretation which its framers did not intend it to bear. At the same session section 88 was passed, with the proviso above quoted, by which it is made the duty of the county superintendent, before making the apportionment to the several school districts of the county, to set aside from said school fund so much thereof as the board of county commissioners shall order for payment of the expenses of the county superintendent, members of the board of examiners, treasurer, expenses of the county institute, and contingent expenses of the county superintendent's office. All these expenses are defrayed by Salt Lake City out of its own fund, and yet, before it receives back its proportion of the school fund according to the number of children, the fund is depleted for the county expenses enumerated, and by this means Salt Lake City is required to pay about \$30,000 annually into the school fund more than it receives back. The collection of the county school tax within Salt Lake City, and the subtraction from such fund so raised for various county school purposes before it is distributed according to the number of children of school age under the statutes referred to, is an evasion and violation of section 6 of article 10 of the constitution of the state; and the said provisos added to said section 88 and 115, and other like provisions, are invalid, and repugnant to the constitution. The order and judgment of the court below is reversed, with instructions to grant an injunction perpetually restraining and prohibiting the defendant from collecting the county school tax referred to in the complaint within Salt Lake City.

ZANE, C. J., and BARTCH, J., concur.

1. Plaintiff brought his action upon a promissory note. The defendant set up an affirmative defense, and offered to prove that, although he had signed the note as principal, he was in fact only a surety; that at or shortly after maturity, without the knowledge or consent of defendant, the plaintiff extended the time of payment; and that plaintiff knew, at the time the payment was extended, that defendant was only a surety. *Held*, that the defense was proper, and the evidence offered admissible.

2. Where the payee of a promissory note, after having knowledge of the relation of suretyship existing between the joint makers, enters into a new agreement with the principal debtor to extend the time of payment, or do any act to continue the liability of the surety, without his consent, the surety is discharged.

3. Where a person signs a note as maker, but is in fact a surety, and there is nothing on the face of the note to show his true relation, he will be treated and considered as a principal with respect to all who have no notice of the suretyship; but, whenever it is material in his defense to an action against him on the note, he may offer and prove by parol evidence that he made the note merely as surety, without consideration, and that such fact was known to the plaintiff before the equities through which such evidence became admissible arose.

(Syllabus by the Court.)

Appeal from district court, Salt Lake county; John A. Street, Judge.

Action by Granville Gillett against Thomas E. Taylor. From a judgment for plaintiff, defendant appeals. Reversed.

Richards & Richards, for appellant. Barlow Ferguson, for respondent.

BARTON, J. This is a suit upon a promissory note, dated April 1, 1891, and signed by John W. Taylor and the appellant herein. The defendant, having set up an affirmative defense, offered to prove that, although the appellant signed the note as principal, he was in fact only a surety; that he received no part of the money for which the note was given, or any consideration for its execution or delivery; that at or shortly after its maturity the plaintiff, without the knowledge or consent of the appellant, extended the time of payment for a valuable consideration; and that the plaintiff, at the time he accepted the note, knew that this appellant was only a surety. This offer was rejected, and the proof of defendant limited to an express agreement between the payee and makers, or either of them, that the payee had accepted Thomas E. Taylor as a surety. The note was drawn up in the singular form, and there is no word of description attached to either signature. It appears that, after the note became due, John W. Taylor, the real principal, asked the plaintiff for further time, which was granted, and a new note accepted for the loan, without the knowledge of the appellant. It is also shown that the appellant's signature did not appear on the new note. The court

John W. Taylor that the new note, introduced in evidence, was accepted by the plaintiff in payment of the old note. The burden was thus upon the appellant to show, not that he was a surety within the knowledge of the payee when he accepted the note, but that there was an express agreement between the principal maker and the payee whereby the payee accepted the appellant as a surety.

Counsel for the appellant insist this was contrary to law, and the first question which we will consider is whether, upon suit brought on a promissory note, it is competent for one of two makers to aver affirmatively in his answer, and prove by parol, that he signed the note as surety, and that he was discharged by an extension of time given to the principal debtor by the payee with knowledge of the suretyship. The great importance of this question must be conceded, because of its bearings on business relations; and that there has been some confusion in the authorities regarding such a defense must be admitted. This doubtless arose from the fact that some of both the English and American courts entertained doubts whether such a defense could avail in a court of law. In *Pooley v. Harradine*, 7 El. & Bl. 431, Mr. Justice Coleridge, holding such a defense good in equity, said: "In the more recent cases at law, however, the rule in question has apparently been treated as arising out of the original contract with the creditor; and, if this was a plea of a legal defense, we would probably have felt bound by those authorities, and have left it to a court of error to consider the whole question, taking into their consideration whether the same rule in such matters ought not to exist in courts of law and equity, and to decide, if there be a difference, what the rule should be. As we are, however, called upon to deal with this case as if we were sitting in a court of equity, we think we ought to decide it according to what we believe to be the doctrine in courts of equity." In *Rees v. Berrington*, 2 Ves. Jr. 540, Lord Loughborough said that the form of the security forced these cases into equity, because, when they were bound jointly and severally, the surety could not aver, by pleading, that he was bound as surety. And Mr. Chief Justice Spencer, in *King v. Baldwin*, 17 Johns. 384, disagreeing with this proposition, said: "Now, we could not assent to his lordship's proposition that the fact of a man's being bound as a security could not be averred at law, if it became material to a legal inquiry; for we understood the rules of evidence to be the same in both courts, and we in vain sought for the principle which allowed the inquiry in a court of equity and denied it in a court of law." In *Artcher v. Douglass*, 5 Denio, 500, Mr. Chief Justice Beardsley, delivering the opinion of the court, said: "The fact, when ascertained, if sufficient in equity, is equally

The main objection urged against such a defense at law appears to be that it is an attempt to vary the terms of a written instrument; but, if this objection be sound, it will obtain equally in equity, because at law and in equity the same general rules of evidence are applied. It is true that, in an action at law, the terms of a written instrument cannot be varied by parol evidence; but this is equally true in an action in equity, except in cases where an action or defense is maintained under some recognized head of equity jurisdiction. It seems difficult to ascertain a good reason why, in a case of the character under discussion, a court of law should reject evidence which would be admissible in a court of equity. Whatever distinction may, under the old system, have obtained respecting the admission of evidence at law and in equity, it cannot be maintained in courts of both legal and equitable jurisdiction, as constituted under the Code. Without, however, invoking the rules of equity, it seems clear that the evidence admissible under such a defense does not vary the terms of a written instrument, nor change the legal effect thereof. The requirement that the payee, with knowledge of the suretyship existing between the co-makers, shall not do any act, without the knowledge and consent of the surety, which will prejudice the rights of the surety against his principal, in no way impairs the obligations of the contract. It simply prohibits the creditor who has knowledge of the suretyship from ingrafting a new agreement into the contract without the consent of him whose rights will be injuriously affected thereby. Whether a co-maker is principal or surety, the contract is the same. In either case there is a binding obligation to pay, and the presumption is that all the makers are equally liable to the creditor. This presumption, however, may be rebutted, by equities affecting the creditor, with knowledge of the true relation existing between the debtors at the time he performs the act by which he injuriously affects the rights of the surety. The rights of the surety arise out of the circumstances of the case, and do not depend upon the written instrument. The fact that one of the debtors is a surety is collateral to the contract, and hence may be shown by extrinsic evidence. If a co-maker should add the word "surety" to his signature, such signature would not affect the contract, as between him and the payee. His liability to pay would still be absolute, the same as if there were nothing on the face of the instrument to indicate his relation to the principal maker. In either case the obligation to the creditor would be effectual until, with knowledge of the relation of the debtors, the creditor had done some act which had injuriously affected the position and rights of the surety. The principal and surety being equally liable to the payee, the surety has the undoubted right, at the maturity of the note, to request the payee

may be absolutely necessary as a protection of the surety against the insolvency of the principal debtor. If the payee, with knowledge of the suretyship, has voluntarily placed himself in such a position that neither he nor the surety can enforce payment, there seems to be no sound reason why the payee should longer have recourse against the co-maker, because, under such circumstances, the case falls within the general doctrine relating to principal and surety, whereby the surety is discharged. The payee's action may deprive the surety of a valuable right,—the power to save himself by bringing suit against the real principal. In such case, whether the creditor received the note with knowledge of the suretyship is immaterial. If he had such knowledge at the time when he did the act which injuriously affected the rights and altered the position of the surety, the surety is discharged. All that justice to the creditor requires is that such contract shall not prejudice his rights against the surety until he has notice of the relation between the makers. After he has such notice, the law will not permit him to enter into a new agreement with the principal debtor to extend the time of payment, or do any act to continue the liability of the surety, without his consent. The creditor cannot keep the surety bound beyond the terms of his contract without consulting him, and this produces no inconvenience to, and imposes no hardship upon, the creditor. It follows that evidence is admissible which shows that the creditor, affected by knowledge of the true relation of the debtors, has undertaken to continue the liability of the surety beyond the terms of his contract, without his assent, by a new agreement with the principal debtor. The rule appears to be that, where a person signs a note as maker, but is in fact a surety, and there is nothing on the face of the note to show his true relation, he will be treated and considered as a principal, with respect to all who have no notice of the suretyship, but that, whenever it is material in his defense to an action against him on the note, he may aver, and prove by parol evidence, that he made the note merely as a surety, without consideration, and that such fact was known to the plaintiff before the equities through which such evidence became admissible arose.

This view of the law, herein expressed, we think, is supported by the weight of authority, both in England and in this country. In *Bailey v. Edwards*, 4 Best & S. 761, Mr. Justice Blackburn, speaking of this doctrine, said: "The principle has been imported from the courts of equity into those of law." And Mr. Justice Coleridge, in *Pooley v. Harradine*, *supra*, speaking of the right of the surety to pay the debt when due, and to be subrogated to the right of the creditor to sue the principal, said: "Now, does this right of placing himself, as it is said, in the shoes of the cred-

itor, depend on a prior contract between the creditor and surety, or on an implied duty of the creditor not to injure the surety's rights when he knows the relation subsisting between him and his principal? We do not see that, by the doctrine asserted in courts of equity, the primary liability is at all altered. In truth, the defense, either at law or in equity, does not arise by any alteration of the original contract, which, indeed, it assumes and relies on in its original terms, but that the creditor cannot fairly or equitably sue the surety where, knowing of the existence of the relation of suretyship, he has voluntarily tied up his hands from proceeding against the principal." In *Guild v. Butler*, 127 Mass. 386, Mr. Chief Justice Gray said: "The fact that one debtor is surety for the other is no part of the contract with the creditor, but is a collateral fact, showing the relation between the debtors, and, if it does not appear on the face of the instrument, this fact, and notice of it to the creditor, may be proved by extrinsic evidence." So, in *Bank v. Abbott*, 28 Me. 280, Mr. Justice Wells, delivering the opinion of the court, said: "Where the creditor makes an arrangement with one of several debtors, extending the time of payment of the debt, the others, by proving that such arrangement is injurious to them, because they are sureties, do nothing to impair the validity of the original contract, or to vary its terms. The original contract remains in full force and effect. But the right to ingraft the new matter is defeated by the proof of a relation not exhibited by the note. The testimony to show that the defendants were sureties was properly admitted. It appears to be a well-settled rule of law that, where the creditor, by a contract with the principal, extends the time of payment, upon a sufficient consideration, without the consent of the surety, the latter is discharged." In *Hubbard v. Gurney*, 64 N. Y. 457, Mr. Chief Justice Church said: "If the word 'surety' had been added to the name of the defendant, it is conceded that the defense sought to be interposed would be available in any court; and yet that word, as we have seen, would not affect the contract. The fact, proved by extrinsic evidence, and that the creditor had knowledge of it, is as potent as if added to the name of the surety; and it is potent, not in varying the contract, but in imposing certain duties and obligations upon the creditor in his subsequent dealings with the principal debtor in respect to the contract." So, in *Meggett v. Baum*, 57 Miss. 22, Mr. Justice Campbell, delivering the opinion of the court, said: "It has been the established doctrine in this state that one of several makers of a promissory note or a writing obligatory is not precluded, by the fact that he appears on the instrument to be a principal, and primarily bound, from averring and proving that he is a surety, and entitled to be discharged by the act of the creditor in so dealing with the principal as to discharge him as a surety; and this is the constant practice in courts of

law. The holder of the paper, having no knowledge except that imparted by it, may regard the parties to it as bound accordingly; but, if he has knowledge of the actual relations between the parties, he has no greater right in the one case than in the other to deal with the real principal in such way as to discharge the surety." 1 Pars. Notes & B. 234; *Wheat v. Kendall*, 6 N. H. 504; *Barron v. Cady*, 40 Mich. 259; *Harris v. Brooks*, 21 Pick. 195; *Ward v. Stout*, 32 Ill. 399; *Strong v. Foster*, supra; *Swire v. Redman*, 1 Q. B. Div. 536; *Greenough v. McClelland*, 2 El. & El. 424; *Bank v. Kent*, 4 N. H. 221; *Harmon v. Hale*, 1 Wash. T. 422; *Orvis v. Newell*, 17 Conn. 97; *Rose v. Williams*, 5 Kan. 483; *Vary v. Norton*, 6 Fed. 808; *Carpenter v. King*, 9 Metc. (Mass.) 511; *Coats v. Swindle*, 55 Mo. 31; *Barry v. Ransom*, 12 N. Y. 462; *Rees v. Berrington*, 2 Ves. Jr. 540; *Lauman v. Nichols*, 15 Iowa, 161.

In the case at bar the defense averred, and offered to show by proof, that, while the appellant had signed the note in question as maker, he was in fact only a surety; that he received no part of the money, the loan having been made for the benefit of his co-maker; and that the plaintiff, knowing the true relation which existed between him and his co-maker, for a valuable consideration extended the time of payment to the principal without the appellant's knowledge or consent. It is obvious that the evidence offered is admissible, because, if the facts indicated were established, they would show that the payee had undertaken to continue the liability of the appellant beyond the terms of his contract, and this would be a complete defense to the action; so, if it were shown that the plaintiff, with the knowledge of the suretyship, had accepted the new note, due one year after date thereof, in full payment of the old one, without the knowledge and consent of the appellant. It is apparent that the exclusion of the evidence in question was error, and an inspection of the record shows that the case was tried under a mistaken view of the law.

There are various errors assigned, but, as the cause must be reversed, a further discussion is not deemed necessary. The case is reversed, and remanded, with directions to grant a new trial and proceed in accordance with this opinion.

ZANE, C. J., and MINER, J., concur.

IN re STONE'S ESTATE.

(Supreme Court of Utah. Oct. 24, 1896.)

LESSOR'S LIEN — RIGHT OF WIDOW TO SUPPORT — PRIORITY.

1. The deceased, in his lifetime, occupied a building of the Eccles Lumber Company as a lessee from month to month. Thirty-four days after the death of the lessee, when the occupancy ceased, the lessor instituted proceedings before a justice of the peace for \$270 rent, claiming the benefit of a lien under section 1 of the act of March 8, 1894 (Sess. Laws, p. 123), which provides that the lessor "shall have a lien for the

to decree that the lessor's claim was superior to all other claims, when the total amount of the estate was only \$567.30, and that the estate, being less than \$1,500, should have been set apart, under section 4118, Comp. Laws 1888, for the use and support of the widow and minor children of deceased.

2. Where the proceedings to enforce a lessor's lien are not instituted until after the time limited by the statute, the lien is gone, and thenceforth the lessor's claim possesses no superiority over that of any other person.

(Syllabus by the Court.)

Appeal from district court, Weber county; H. H. Rolapp, Judge.

An application for the setting apart of the property of William S. Stone, deceased, for the support of the widow and minor children was denied, and applicant appeals. Reversed, with directions.

Heywood & Tait, for appellant. Evans & Rogers, for respondent.

BARTON, J. It appears from the record in this case that the property of this estate, as shown by the inventory and appraisal, was only of the value of \$567.20. Section 4118, Comp. Laws Utah 1888, among other things, provides that, if it appears from the inventory that the value of the whole estate of a deceased person is less than the sum of \$1,500, the court, upon giving certain notice therefor, and granting a hearing, and after the payment of certain expenses, in case the value is found to be less than that sum, shall, by a decree for that purpose, assign, for the use and support of the widow and minor children, the whole of the estate. The court in this case, in effect, decreed that a certain claim of the Eccles Lumber Company for rent, and for which it claimed a lien on certain personal property of the estate, was superior to all other claims, by reason of a valid and subsisting lien, and, after ordering the claim to be paid out of the proceeds of the sale of said personal property, assigned and set over the residue of the whole estate for the use and support of the widow and minor children. The two questions as to the claim of the Eccles Lumber Company, and as to the setting over of the whole estate for the use and support of the widow and minor children, were, by stipulation of counsel, tried, presented, and submitted together, and the court passed upon them at the same time and in the same decree. This appeal is from that portion of the decree and judgment relating to the claim and lien of the Eccles Lumber Company, and refusing to set over the whole estate, including the property on which the lien was claimed, for the use and support of the widow and minor children.

The material question, and the one decisive in this case, is whether the Eccles Lumber Company had a valid and subsisting lien for rent on the personal property of the estate which was in the leased building occupied by

to enforce such a lien were not commenced within the time provided by law. Section 1 of the act of March 8, 1894 (Sess. Laws, p. 123), reads as follows: "Lessors, except as hereinafter provided, shall have a lien for rent due upon all of the property of the lessee not exempt from execution, as long as the lessee shall occupy the leased premises, and for thirty days thereafter." It will be noticed that by virtue of this statute the lien provided for exists during the time that the "lessee shall occupy the leased premises, and for thirty days thereafter." The statute seems to contemplate an actual occupancy, limited to that of the lessee, and limits the existence of the lien to 30 days after such occupancy ceases. Therefore, at the expiration of 30 days from the day on which a lessee ceases, for any reason, to occupy such premises, the lien ceases to exist, and consequently to have any force or effect. In this case it is shown by the agreed statement of facts that W. S. Stone, the deceased, in his lifetime, as a lessor of the Eccles Lumber Company, from month to month, occupied a certain building designated as "No. 274, Twenty-Fifth Street, Ogden City, Utah," at the agreed monthly rental of \$30, payable in advance; that he so occupied the building from the 1st day of July, 1895, "continuously until the day of his death, which occurred on the 26th of March, 1896"; and that on the 29th of April, 1896, the said company filed a complaint before a justice of the peace, making the administrator of the estate, who was appointed April 16, 1896, the defendant, and alleging the sum of \$270 to be due from the defendant and the estate of the deceased for rent of said building, and claiming the benefit of the lessor's lien law. It will be observed, from these facts, that a period of about 34 days elapsed from the date of the death of the lessee, when his occupancy ceased, until the day when the lessor instituted the proceedings before the justice of the peace, claiming the benefit of a lien. This brought the action of the lessor without the terms of the statute, and his lien was gone. Thenceforth his claim possessed no superiority over that of any other person, and, by virtue of section 4118, it having been ascertained that the whole estate was of a value less than \$1,500, became inferior to that of the widow and the minor children. That portion of the decree appealed from was, therefore, unwarranted and erroneous, and must be set aside. Having reached this conclusion, it is not important to discuss the other points raised in the record. The cause is reversed and remanded, with directions to the court below to set aside the objectionable portion of the decree, and modify the decree so as to assign the whole of the estate of the deceased to the widow and minor children.

ZANE, C. J., and MINER, J., concur.

THOMPSON et al. v. SKEEN et al.
(Supreme Court of Utah. Oct. 31, 1896.)
SEPARATE MORTGAGES — FORECLOSURE — COSTS —
PLEADING—SUFFICIENCY OF ANSWER.

1. The plaintiffs held two mortgages, under two separate debts, on the same property. Judgment without sale of the property was had on the first mortgage, and then both causes were consolidated before the trial in the second suit, without objection. *Held* that, while the plaintiffs ought to have foreclosed both mortgages in one suit, the lien of the mortgages foreclosed in the second was not lost by reason of the first suit.

2. Where a mortgagee brings two suits to foreclose two separate mortgages on the same property, when one would be sufficient, he will be allowed costs in one only.

3. Where the legal representatives of a deceased person in their complaint allege that they are suing under the authority of the will of the deceased, which was probated in a court of record, and all necessary steps taken to enable them to sue, and in the answer the allegations are denied only on information and belief, the denial is not sufficiently specific as to the facts set up. In such case it may be assumed that the facts were admitted, and in such event no evidence of their existence is necessary.

(Syllabus by the Court.)

Appeal from district court, Weber county; H. H. Rolapp, Judge.

Action by Frank Thompson, executor of James Thompson, deceased, and Joseph R. Lane, administrator with the will annexed of James Thompson, deceased, against Moroni Skeen and others. The actions were consolidated, and judgment rendered for plaintiffs, and defendant Richard Flint appeals. Affirmed.

E. T. Hulaniski, for appellant. Whipple & Johnson, for respondents.

BARTON, J. It appears from the record in this case that on the 3d of April, 1893, the defendants Moroni Skeen and Martha I. Skeen made their promissory note to James Thompson, since deceased, in the sum of \$3,000, due in three years from date thereof, with interest at 12 per cent, payable semi-annually, and at the same time made to him six interest coupon notes, each for \$120, to represent 8 per cent. of the interest as it would accrue, and also at the same time made to him six notes of \$60 each, to represent the remaining 4 per cent. interest, due and payable at stated periods as the interest would accrue. The note given for the principal sum, and the coupon notes of \$120 each, were all secured by one mortgage on a certain tract of land, and the six interest notes of \$60 each were secured by another separate and distinct mortgage on the same land. James Thompson, the payee, died January 2, 1895, and on March 6, 1895, suit was brought to recover the last-mentioned mortgage, in which suit the parties plaintiff and defendant were the same as in the present one. The appellant herein was made a defendant in both suits, and claimed, and set up in his answer, a judgment lien upon the same land as that described in the mortgage. In the

first suit, judgment by default was rendered on the 5th of March, 1896, against all the defendants except the appellant herein; and on the day following, upon trial had, judgment was also rendered against him. On the 12th of March, 1895, the second suit was commenced to foreclose the mortgage on the principal sum and coupon notes. After judgment was rendered in the first suit, but before any sale of the property was made, the two cases were consolidated, on motion of counsel for the plaintiffs, without opposition, as far as appears from the record, from any of the defendants. Thereafter the case was tried, and judgment entered in favor of the plaintiffs and against all the defendants, and so much of the property ordered to be sold as would be necessary to pay the judgment, interest, and costs of one suit; the plaintiffs to pay the costs of the other.

Under this state of facts, the first question which is presented by this appeal is whether the first suit was a bar to the second. Counsel for the appellant insists that the respondents exhausted all their rights under their mortgages in the first action, so far as the property was concerned, and that the court ought to have dismissed the second action. It is true that section 3460, Comp. Laws Utah 1888, provides that there can be but one action for the recovery of any debt or the enforcement of any right secured by mortgage upon real estate or personal property, but we do not think that the case at bar comes within the terms and meaning of this statute. Here there were two separate mortgages, securing separate debts, although on the same property; and while the legal representatives of the mortgagee ought to have foreclosed both mortgages in one suit, still, as there was no sale under the first judgment, and both causes were consolidated before the trial in the second suit, without objection, we do not think the lien of the mortgage foreclosed in the second suit was lost by reason of the first suit. One of the strongest objections to be urged against two suits, where one will suffice, is that such a course tends to oppression, by assessing unnecessary costs against the defendant. This lost much of its force in the present instance by consolidating the two cases, and taxing the costs in one of them against the plaintiff. Where a mortgagee brings two suits to foreclose two separate mortgages on the same property, when one would be sufficient, he will be allowed costs in one only, because, in case of two or more mortgages on the same land, whenever practicable, but one suit should be brought to foreclose the same. 2 Jones, Mortg. § 1458; Wilts. Mortg. Forec. § 272; Demarest v. Berry, 16 N. J. Eq. 481; Roosevelt v. Ellithorp, 10 Paige, Ch. 415. Counsel for the appellant cites the case of Bacon v. Raybould, 4 Utah, 357, 10 Pac. 481, and 11 Pac. 510, to sustain his contention; but an examination of the

very different from the facts in this, and, in the main, the case does not conflict with the views herein expressed, and the conclusion reached was doubtless correct. There is, however, a statement in the opinion which is probably open to criticism. It reads as follows: "A party having one suit, either pending or in judgment, for a debt secured by mortgage, cannot have another action for the recovery of the same debt. His whole claim must be embraced in one suit." If by this is meant that the mere pendency of a foreclosure suit divests, without judgment and sale of the mortgaged property, the lien of another mortgage on the same property, securing another debt due, created by the same transaction as the one sued on, and not included in the same suit, then we cannot assent to the proposition; and, as the language employed is perhaps admissible of such construction, it must be disapproved, so far as it is in conflict herewith.

Counsel for the appellant also contends that there was no evidence introduced to show that the respondents were empowered to sue as the legal representatives of the deceased. Their capacity in this respect was properly alleged in the amended complaint, and denied in the answer only on information and belief, although the appellant had been informed by allegation in the complaint that the will of the deceased had been probated in Salt Lake county, Utah, and the necessary steps taken to enable the plaintiffs to sue. This was all matter of record, and positive information was therefore within reach of the appellant. Instead of obtaining the real facts respecting this question, the appellant contented himself with denying whole paragraphs of the complaint in a general way, upon information and belief. This was no denial of the specific facts set up. It may therefore be assumed that the facts were admitted, and in such event no evidence of their existence is necessary. Where, as in this case, a verified complaint points to the public record of proceedings, the facts of which are properly alleged in such complaint, the defendant will not, when he can have access to such record, be permitted to answer that he has no knowledge, or information sufficient to form a belief, and base his denial of such facts upon that ground. He cannot plead ignorance of a public record, to which he has access, and can refer and obtain positive knowledge respecting the allegations which he is to answer. *Mulcahy v. Buckley*, 100 Cal. 484, 35 Pac. 144; *Loveland v. Garner*, 74 Cal. 298, 15 Pac. 844; *Goodell v. Blumer*, 41 Wis. 436.

We do not deem a further discussion of the points presented in the record important, because there appears to be no reversible error. The judgment is affirmed.

ZANE C. J., and MINER, J., concur.

MORRISON et al. v. GAMBLE et al.
(Supreme Court of Utah. Oct. 31, 1896.)

MECHANIC'S LIEN—PLEADINGS—WHEN LIEN ATTACHES.

1. Plaintiffs, as subcontractors, pursuant to the act of the territorial legislature approved March 12, 1890, filed and served notice of intention to claim a lien on property owned by appellant, and brought suit to foreclose the lien, making no averment in the complaint of the exact amount of the contract between the owner and the original contractor, nor of the payments made under such contract, the same not being of record. *Held*, changing the rule laid down in *Teahen v. Nelson*, 23 Pac. 764, 6 Utah, 363, that in cases where the original contract is not of record it is not necessary in the pleadings to make averments of the exact amount of such contract, nor is the subcontractor required to make positive averments of the payments made under the original contract.

2. The doctrine laid down in *Morrison v. Carey-Lombard Co.*, 33 Pac. 238, 9 Utah, 70, as to when such liens attach, is here affirmed.

(Syllabus by the Court.)

Appeal from district court, Salt Lake county; M. L. Ritchie, Judge.

Action by S. W. Morrison and others, doing business as Morrison, Merrill & Co., against D. W. Gamble and others. Judgment for plaintiffs, and defendant the Inter-Mountain Salt Company appeals. Affirmed.

Richards & Richards, for appellant. J. M. Bowman, for respondents.

BARTCH, J. It appears that the Inter-Mountain Salt Company, the appellant herein, was the owner of a certain parcel of land, and contracted with D. W. Gamble to erect a storehouse and factory thereon for the manufacture of salt, and that the plaintiffs, under contract with Gamble, furnished certain materials, which were actually used in the construction of the buildings. Gamble failed to make full payment for the materials, and the plaintiffs, as subcontractors, pursuant to the act of the territorial legislature approved March 12, 1890, filed and served notice of intention to claim a lien on the property. This suit was brought to foreclose the lien. Josiah C. Williams and John Anderson were made parties defendant, and in their answers set up subcontractors' liens on the same property. After hearing the case, the court rendered judgment against the appellant company and in favor of the plaintiffs and defendants Williams and Anderson, who are also respondents herein. The appellant insists that the complaint does not state a cause of action. This question was raised at the trial by an objection to the introduction of any testimony, and the point most strongly urged in support of the objection is that there is no allegation of the amount due from the owner to the contractor at the date when the first material was furnished, and the case of *Teahen v. Nelson*, 6 Utah, 363, 23 Pac. 764, is relied on. It was there held "that the complaint should contain an allegation of

before the plaintiff commenced work or the delivery of materials on his subcontract." This rule was declared under the law as it stood prior to the act of 1890, when very material changes were made respecting mechanics' liens. If, under that act, the rule should be strictly and literally enforced in the case of subcontractors, the object of the law would, doubtless, in many cases, be defeated, because by collusion the owner and principal contractor could withhold from the subcontractor the terms of the original contract, or any information in relation thereto, he not being a party to such contract. In cases where such contract is not of record, the subcontractor is not in position to know the amount thereof. Nor is he in a position to know what payments have been made thereunder. In this case it was alleged in the complaint that at the time of "serving the notice of lien there was due the said Gamble, upon said contract, from the said Inter-Mountain Salt Company, as plaintiffs are informed and verily believe, the sum of one thousand dollars or more." It is true this allegation is based on information and belief, but, the plaintiffs being subcontractors, we cannot assume that they had positive knowledge of the exact amount due, and therefore cannot hold it bad for that reason. Nor is it alleged in express terms that \$1,000 or more was due at the time the first material was furnished by the plaintiffs, but, if such amount was due, as alleged, when notice of lien was served, it is fair to assume that it was due when the first material was furnished. While the allegation in question shows careless pleading, which should not be encouraged, still we are of the opinion that it was sufficient for the purpose of a general objection that the complaint did not state a cause of action. The complaint was doubtless subject to demurrer for being uncertain, but not subject to general demurrer on the ground that it stated no cause of action, and therefore not subject to the general objection interposed.

We are also of the opinion that the rule declared in *Teahen v. Nelson* should be so modified as not to require subcontractors, in cases where the original contract is not of record, to make positive averments in the pleadings of the amount of such contract, and to be further modified so as not to require a subcontractor to make positive averments of the payments made under the original contract.

The evidence relating to the dates when the first and last materials were furnished, and that showing the amount due from the owner at the time when the first material was furnished or first labor performed by the respondents, was properly admitted under the circumstances and pleadings in this case.

The question as to when such liens attach

disposition to depart from there-in announced. There appears to be no reversible error in the record. The judgment is affirmed.

ZANE, C. J., and MINER, J., concur.

STATE v. HOLDEN.

(Supreme Court of Utah. Nov. 11, 1896.)

CONSTITUTIONAL LAW—EMPLOYMENT OF MINERS—HOURS OF LABOR.

Held, that section 2, p. 219, Sess. Laws 1896, under which defendant was convicted, is not unconstitutional; and the section is upheld on grounds similar to those stated in the opinion rendered in the case of *Holden v. Hardy* (decided at the present term) 46 Pac. 756.

(Syllabus by the Court.)

Appeal from district court, Salt Lake county.

Albert F. Holden was convicted of violating the act regulating the hours of employment in mines, and appeals. Affirmed.

Marshall & Royle, Dickson, Ellis & Ellis, and Bennett, Harkness, Howat & Bradley, for appellant. A. C. Bishop, Atty. Gen., C. S. Varian, O. W. Powers, Chas. J. Pence, and J. H. Murphy, for the State.

ZANE, C. J. The defendant was convicted of a violation of section 2 of "An act regulating the hours of employment in underground mines, and in smelters and ore reduction works," as follows:

"Section 1. The period of employment of working men in all underground mines or workings shall be eight (8) hours per day, except in cases of emergency, where life or property is in imminent danger.

"Sec. 2. The period of employment of working men in smelters and all other institutions for the reduction or refining of ores or metals shall be eight (8) hours per day, except in cases of emergency, where life or property is in imminent danger.

"Sec. 3. Any person, body corporate, agent, manager or employer, who shall violate any of the provisions of sections 1 and 2 of this act, shall be deemed guilty of a misdemeanor."

Sess. Laws Utah 1896, p. 219.

This case is analogous to the case of *Holden v. Hardy* (decided at this term) 46 Pac. 756, except that the defendant in that case was convicted of a violation of the first section of the above act, in employing a workman in underground mining more than eight hours per day, and the conviction in this one was for the employment of one William Hooley, in his concentrating mill, for the reduction of ores, more than eight hours per day. The conditions with respect to health of laborers in underground mines doubtless differ from those in which they labor in smelters and other re-

mines and reduction works differ. Poisonous gases, dust, and impalpable substances arise and float in the air in stamp mills, smelters, and other works in which ores containing metals, combined with arsenic or other poisonous elements or agencies, are treated, reduced, and refined; and there can be no doubt that prolonged effort day after day, subject to such conditions and agencies, will produce morbid, noxious, and often deadly effects in the human system. Some organisms and systems will resist and endure such conditions and effects longer than others. It may be said that labor in such conditions must be performed. Granting that, the period of labor each day should be of a reasonable length. Twelve hours per day would be less injurious than fourteen, ten than twelve, and eight than ten. The legislature has named eight. Such a period was deemed reasonable.

The people of the state, in their constitution, made it mandatory upon the legislature to "pass laws to provide for the health and the safety of the employes in factories, smelters and mines." Const. Utah, art. 16, § 6. We do not feel authorized to hold that the statute quoted was not designed, calculated, and adapted to promote the health of the class of men who labor in smelters and other works for the reduction and treatment of ores. Nor can we say that the law conflicts with any provision of the constitution of the United States. Nor do we wish to be understood as intimating that the power to pass the law does not exist in the police powers of the state. The authority to pass laws calculated and adapted to the promotion of the health, safety, or comfort of the people, and to secure the good order of society, and the general welfare, undoubtedly is found in such police powers. The law in question is confined to the protection of that class of people engaged in labor in underground mines, and in smelters and other works wherein ores are reduced and refined. This law applies only to the classes subjected by their employment to the peculiar conditions and effects attending underground mining and work in smelters, and other works for the reduction and refining of ores. Therefore it is not necessary to discuss or decide whether the legislature can fix the hours of labor in other employments. Though reasonable doubts may exist as to the power of the legislature to pass a law, or as to whether the law is calculated or adapted to promote the health, safety, or comfort of the people, or to secure good order, or promote the general welfare, we must resolve them in favor of the right of that department of government.

For a more extended consideration of the questions raised by the assignment of errors in this case, the opinion filed in the case between the same parties, supra, is referred to. That case we now reaffirm as governing this one. The application for the discharge of the defendant is denied, and he is remanded to the

BARTCH and MINER, JJ., concur.

WASATCH MIN. CO. v. JENNINGS et al.

(Supreme Court of Utah. Dec. 8, 1896.)

MINES—BONA FIDE CLAIMANT—IMPROVEMENTS—EQUITY PRACTICE—REFERENCE—FINDINGS—NEW TRIAL—RECORD.

1. Defendants having taken possession of plaintiff's mine with its consent, and having worked it and sold ores extracted, and having received the proceeds, believing they had a right to, upon a decree returning the mine to the owner such defendants should be allowed to retain the reasonable cost of extraction, expenditures of sampling, transportation, and sale; and, in addition, they should be compensated reasonable expenditures for its preservation, development, and permanent improvement, to the extent its value was enhanced thereby.

2. The findings of a referee, and a decree of the court thereon, upon a motion for a new trial entered within the time given by the statute, may be set aside by the court at a subsequent term.

3. The trial court has the power to make the record of the case correspond with the actual ruling, notwithstanding an appeal may have been taken to the supreme court.

4. In an equity cause the court may, upon motion entered in due time, vacate a decree, and treat a verdict of a jury or the findings of a referee as advisory, and make such findings as the evidence may warrant, and enter a decree thereon.

5. Where a case has been heard by a referee, the court may, upon motion for a new trial, or exception taken in due time, hear either, or he may require the motion or exception to be submitted in the first instance to the referee, but such submission will not deprive either party of the right to have such motion or exception afterwards decided by the court.

(Syllabus by the Court.)

Appeal from district court, Salt Lake county; S. A. Merritt, Judge.

Action by the Wasatch Mining Company against Priscilla P. Jennings and others for an accounting. From a decree for plaintiff, defendants appeal. Modified.

Rawlins & Critchlow, for appellants. J. G. Sutherland, W. H. Dickson, and John M. Zane, for respondent.

ZANE, O. J. It appears from the record in this case that the plaintiff was the owner of a mine consisting of the Walker & Walker Extension and Bucky mining claims, and a part of the Pinion claim, and that they were sold upon execution against the plaintiff; that William Jennings and John Clark, two of the stockholders and directors of the plaintiff, took an assignment of the certificate of purchase, before the time of redemption had expired, for the consideration of \$864.05, and that they afterwards obtained a deed to them of the officer, and that the sum so paid, and the assignment and deed, were taken with a verbal understanding between the plaintiff and the assignees that the latter, upon reimbursement within a time named, would convey to the former; that Joseph A. Jennings and Isaac Jennings obtained Clark's in-

interest in the property; and that they, with William Jennings, took possession of it, and personally or by leases operated the same until early in 1883. This case was before the supreme court of the late territory, and the decree from which that appeal was taken was reversed; but we regard all the questions of law, and all the questions of fact, except one, as the case then stood, settled by that decision. *Mining Co. v. Jennings*, 5 Utah, 243, 15 Pac. 65. In that opinion the court held that the alleged contract, as proven, under which Jennings and Clark obtained the certificate and deed, was not within the statute of frauds, and the deed, though absolute in form, should be regarded in equity as a mortgage, and that, under the circumstances of their possession and its acquisition, the rights and liabilities of the Jenningses should be determined by the equitable rules regulating the rights and duties of trustees in possession in good faith, and that, therefore, they should be held to account to the plaintiff for the ores extracted by them from the property, and the rents and royalties received, and that they should be credited with the amount paid for the certificate, the reasonable expenditures in extracting the ores and converting them into money, and other expenditures upon the property, to the extent that they enhanced its value. The case was remanded, with directions to the court below to ascertain the amount of the expenditures of this last-mentioned class; but that court made a general reference of the case to a referee, who, upon consideration of the evidence and the report of the former referee (the late E. T. Sprague), found and reported the sum of \$34,758.61, consisting of expenditures and interest thereon, due the defendants above the receipts from the sale of ores, and of rents and royalties received by and chargeable against them; and the court entered a decree against the plaintiff. But, upon a motion for a new trial by the plaintiff, the court set the decree and findings aside, but did not grant a new trial, and without further hearing, upon consideration of the evidence reported, and of the findings of the referees, Sprague and Marshall, found the sum of \$13,715.43, principal, and a considerable sum of interest, due the plaintiff, above the expenditures credited to the defendants. While the issues were settled by the court, and a final decree ordered, the record before us does not show that it was signed or entered on the record; but, as no objection is made by either party, we are disposed to regard the order of the court appealed from as a final judgment, and that the case is before us for consideration and decision.

The action of the court in making its findings and granting a decree after setting aside the findings of the referee and the decree thereon, without granting a new trial, was excepted to by the defendants, and has been assigned as error. The referee Marshall made his report of evidence and findings to the district court of the late territory, and that court entered its decree thereon; but, by virtue of section 7 of article 24 of the constitution of the state of Utah, the case was transferred to the district court of the state

for such further proceedings as the law authorized. It appears that the motions to set aside the report of the referee and the decree thereon, and for a new trial, were made in due time; and, that being so, we are of the opinion that the district court of the state had jurisdiction of the case, and possessed the power to hear and decide the motion, and to make such further orders and decrees as the law authorized. Though the term at which a case is decided may terminate, the court may act upon a motion, made in due time, to set its decree and findings aside. *Spanagel v. Dellinger*, 34 Cal. 476.

The defendants objected and excepted to the following order, and assign it as error: "In this cause, it appearing to the court, from the record in this case, that the minutes of the decision of the court herein, made on the 11th day of April, A. D. 1896, is not correct, in the respect that it recites that the court entered an order for a new trial of this cause, it is ordered that the minutes of that day be corrected so as to correspond to the opinion and decision and finding of the court on that day rendered and entered in the cause, to the effect that the report and findings of Referee Thomas Marshall, and the judgment entered thereon, be vacated and set aside, and that a judgment be entered in this cause in accordance with the Sprague findings, so called, and the suppletory findings made and entered by this court on said last-mentioned day. It is further ordered that the decision and finding of the court, which was in writing, and was then rendered, be now filed as of said 11th day of April, 1896. Dated April 28, 1896." After the decision of the court on the 11th, and before the order of the 28th, the defendants appealed; but we are of the opinion that the court had the right to correct the record to make it correspond with the actual ruling of the court, notwithstanding the appeal; the court had the authority to make the record, which is the evidence of the decision and rulings of the court, conform to the decision and rulings as actually made; to make the evidence conform to the facts,—speak and declare the truth. *Elliott*, App. Proc. §§ 207-209.

The defendants insist that the court erred in adopting the Sprague findings, and in making the additional finding of \$4,572, as the amount of the expenditures for work and improvements that enhanced the value of the property, and not necessary to the extraction of the ores, after setting aside the Marshall findings, and the decree thereon, without a new trial. This claim of the defendants presents two questions for decision: First. Was the court authorized to make the finding and enter a decree, without a new trial, after setting aside the Marshall findings and the decree thereon? Second. Were the expenditures made upon the property, that enhanced its value, but not necessary to the extraction of the ore, correctly estimated?

As to the question whether the court was authorized to consider the evidence reported,

thereon, after the findings of the referee had been set aside, without another trial: At law, either party may demand a jury after the verdict or findings are set aside. But in equity the court may, upon motion entered in due time, set aside the decree, for sufficient reason, and treat the verdict or findings of fact as advisory, or it may wholly or in part set them aside, and make such other findings as the evidence may warrant. *Wingate v. Ferris*, 50 Cal. 105; *Basey v. Gallagher*, 20 Wall. 270. When the decree and findings are set aside because of newly-discovered evidence, an opportunity should be given to present such evidence and any rebutting evidence. The meaning of the order of reference to Referee Marshall is not plain. It says, "To hear and determine the cause, and issues thereon, as remanded by the supreme court, and to report to the court his findings of fact and conclusions of law thereon, and a decree to be entered in said cause on the testimony already taken upon the former hearing of the case." The opinion of the supreme court directed the lower court to make an additional finding,—whether work not directly contributing to the extraction of the ore, for which expenditures were made by defendants, benefited the property, and, if so, how much the property was enhanced thereby. The opinion directed the lower court to take further testimony, if necessary, but the order of reference says that the decree must be entered on the testimony already taken. We are disposed to hold that the referee, under the opinion of the supreme court and the order of reference, had the right to take additional proof, and report the evidence, with his findings of fact and conclusions of law, to the court, and that the court had authority to enter a decree upon the findings, or treat them as advisory, and make such findings as the evidence warranted, and enter a decree thereon. When a motion for a new trial is made, or exceptions taken in due time, the court may proceed to hear the motion or exceptions, or require them to be submitted in the first instance to the referee, in order that he may grant a new trial, or sustain the exceptions and make correct findings, when he has erred in the first. This, however, would not deprive either party of the right to have the motion or exceptions passed upon by the court afterwards.

With respect to the second question: Were the expenditures made upon the property, that enhanced its value, but not necessary to the extraction of the ore, correctly estimated by the court? This action was instituted more than 13 years ago, and the late E. T. Sprague made his report and findings of fact more than 10 years ago. Undoubtedly, it was made after a careful examination of the proofs, and appears to be comprehensive and accurate, except that it does not find the amount of the expenditures that benefited the property, but which did not directly con-

follows:

"(1) William Jennings and John Clark, the predecessors in interest of defendants, and mortgagees and trustees of the property involved in this action, in September, 1877, paid for said property the sum of \$864.05.

"(2) Defendants and their predecessors in interest in said mortgage and trust, between September, 1877, and the beginning of this action, received for ores extracted from said property mortgaged and held in trust, and by them sold, rents and royalties included, the sum of seventy-eight thousand and seventy-seven and 23/100 dollars (\$78,077.23). And the same was so received in the years following, to wit: In 1879, \$1,066.58; in 1880, \$479.77; in 1881, \$12,164.34; in 1882, \$56,069.78; in 1883, \$8,250.76. All said receipts for 1879 were royalties received under a lease.

"(3) Defendants and their said predecessors in interest, over and above the amounts stated in the first finding, between September, 1877, and the beginning of this action, expended in and about the working, improving, and developing said mortgaged property, and in extracting, freighting, and selling ores therefrom, the sum of \$93,510.36. And such expenditures were made in the years, and are classified and apportioned, as follows:

Years.	Labor.	Sampling and Assaying	Freight and Hauling.	All Others Including Supplies.	Totals.
1878....				\$ 97 81	\$ 97 81
1879....				191 18	191 18
1880....	\$ 2,955 60	\$ 11 80	\$ 183 10	2,875 64	5,965 34
1881....	15,292 48	592 03	2,872 23	7,047 80	25,294 37
1882....	20,504 27	4,046 86	17,619 52	11,344 14	52,414 39
1883....	4,350 11	976 86	2,001 10	1,276 70	8,604 77
	\$43,103 56	\$5,627 55	\$22,046 05	\$22,723 77	\$93,510 37

"No work upon the property, other than resetting the stake thereof, and taking care of it, was done by defendants until 1880.

"(4) The total number of tons of ore extracted by defendants and their said predecessors in interest is three thousand two hundred and fifteen (3,215). The expenditure which directly contributed to the extraction of said ore, and which, if the location of the ore bodies had been known in advance of the developing work, would have sufficed to extract and raise said ore to the surface, and with the aforesaid expenditure for hauling freight, sampling, and assaying, to convert the same into moneys received therefor as aforesaid, is eight dollars per ton, and, for said 3,215 tons, \$25,720.

"(5) Not included in the foregoing, Joseph A. Jennings, one of the defendants, rendered services as superintendent, and in assisting in

the working and developing of said property, from December 1, 1879, to October 1, 1880, 10 months, and from October 15, 1882, to May 1, 1893, 6½ months,—in all, 16½ months,—and said services were worth \$200 per month, making in the aggregate \$3,300. Isaac Jennings, another defendant, rendered services as superintendent in the same business from January 1, 1881, to October 15, 1882, 21½ months, and said services were worth \$150 per month, aggregating \$3,225.

“(6) The expenditure not connected with the extraction of ore was made principally in an endeavor to trace an ore or vein connection from said property into adjoining mining claims, the Climax and Rebellion. All the work done was reasonably adapted to the developing of the property, and to the probable enhancement of its value.”

The referee finds that the defendants received for ores extracted from the mine, rents, and royalties, the sum of \$78,077.23, and that they expended in and about working, improving, and developing the property, and for extracting, freighting, and selling ores therefrom, including the sum paid for the certificate of purchase, and the services of Joseph and William Jennings, the sum of \$100,899. In these expenditures the referee included \$25,720 paid directly for the extraction of the ore, and for the hauling, freighting, sampling, and assaying necessary for the conversion of the ore into money. The defendants having taken possession of the mine with the consent of the plaintiff, and having worked it in good faith, they were entitled to compensation for all reasonable expenditures for the preservation, development, and permanent improvement of the property, to the extent that its value was enhanced thereby. Referee Sprague made no finding as to these expenditures. Referee Marshall found that the expenditures made in running the north tunnel did not add to the value of the property. He found that this tunnel cost \$10 per foot, and that it was run 1,000 feet. The testimony, as we think, warrants the conclusion that the tunnel and drifts connected therewith were 1,500 feet, and that \$15,000 should have been deducted.

There are a number of expenditures in the Sprague report, aggregating \$22,733.09, designated “all other supplies.” How much of these supplies was used when prosecuting work that did not enhance the value of the property, we cannot know definitely. We must infer that some of it was. It also appears that a number of men were employed five weeks to hold possession of the north tunnel,—at one time, as many as 20. It is reasonable to infer that they were paid. If so, that expenditure was for the possession of the rejected tunnel, and should have been disallowed. If we allow the sum of \$7,822 for supplies used in prosecuting work that did not enhance the value of the property, and for the men in defending the tunnel, the receipts equal the expenditures. Referee Marshall’s mode was to deduct the payment for

work that did not enhance the value of the property from the entire expenditures. While the court required strict and definite proof of the expenditures not directly contributing to the extraction of the ore, but enhancing the value of the property, the conclusion reached by either course is very unsatisfactory. The line between the expenditures that enhanced the value of the property and those that did not is exceedingly difficult to draw from the evidence. The probabilities are that the court excluded some expenditures that should have been allowed, and that the referee included too much. It is certain that the property was thought to be of little value when the defendants took charge of it, and that it sold for \$50,000 at the time they ceased to operate it. We are unable to find from the evidence a balance to either party. With respect to interest, it appears that the receipts increased with the expenditures, and conversely, and that interest should not be allowed to either side.

The case is remanded to the court below, with directions to that court to make its findings conform to the above conclusions, and to enter a decree on the findings, when so changed, giving the property described in the complaint to the plaintiff, and authorizing a suitable person, as commissioner, to transfer the title to the plaintiff by a sufficient deed, and requiring the respective parties to pay their own costs, so far as they have not already been apportioned or assessed. The costs of this appeal are assessed to the respective sides in equal proportions.

BARTON and MINER, JJ., concur.

STATE ex rel. RICHARDS, State Auditor, v. STANTON, Clerk of Court.

(Supreme Court of Utah. Oct. 24, 1896.)

COUNTY CLERK—FEES—PAYMENT TO STATE—PENALTY FOR NONCOMPLIANCE—STATE AUDITOR—DUTIES—MANDAMUS.

1. Under sections 1 and 2 of article 21 of the constitution of Utah, and the enactment of the legislature passed in pursuance of the said constitutional provisions (chapter 16, p. 89, Sess. Laws 1896), making it the duty of the county clerk to pay all fees collected by him in the district court in criminal and civil cases, except probate fees, into the state treasury, said payment should begin as provided by law on the 1st day of April, 1896, and continue quarter-yearly thereafter, and include all fees collected from and after the admission of the state into the Union, January 4, 1896; and there is no ambiguity or uncertainty in these provisions of the constitution or laws of the state, and no valid reason for not enforcing them.

2. Under section 5, c. 58, p. 162, Sess. Laws 1896, the failure of the county clerk to pay into the state treasury the fees collected by him in the district court in criminal and civil cases, except probate fees, after an account has been stated with him, and demand made, entitled the state to charge said clerk 25 per cent. damages on the amount delinquent, and interest at the rate of 10 per cent. per annum, from the time of the failure to pay.

3. The fact that the county clerk, by order of the board of county commissioners, paid the

amount due the state to the county treasurer, does not release the clerk from his liability under the law; nor is it necessary in such a case that the petition for a writ of mandamus should make the county treasurer a party defendant to this action, since he is a stranger to the proceedings.

4. It is the duty of the state auditor to examine the accounts of state and county officers, and become satisfied that the accounts rendered are correct, and that the fees provided by law to be collected and paid to the state treasurer by such officers are collected, reported, and paid. If such fees are not paid as provided by chapter 58, p. 159, Sess. Laws 1896, the auditor should institute proper proceedings for the payment of the same to the state treasurer.

5. Mandamus is a proper remedy in such cases. (Syllabus by the Court.)

Mandamus by the state, on the relation of Morgan Richards, Jr., state auditor, directed to Charles E. Stanton, clerk of the Third judicial district court for Salt Lake county. Peremptory writ awarded.

A. C. Bishop, Atty. Gen., for plaintiff. O. O. Whittemore, Co. Atty., for defendant.

MINER, J. The plaintiff, as state auditor, filed his petition for a writ of mandamus requiring the defendant, as clerk of the Third judicial district court in and for Salt Lake county, to pay into the state treasury the sum of \$4,101.70, collected by him as fees in civil and criminal cases, except in probate cases, in said county, between the 4th day of January and the 4th day of June, 1896, both days inclusive, which sum he had failed to pay into the state treasury, after demand in writing, as required by law, etc. Plaintiff subsequently filed his amended and supplemental petition. This petition alleges, among other things, that from the 4th day of January, 1896, to March 31, 1896 (both days inclusive), the defendant, by virtue of his office, collected and received fees in criminal and civil cases, except probate fees, to the amount of \$2,455.95, and that from the 1st day of April to the 4th day of June, 1896 (both days inclusive), defendant likewise so collected and received fees in criminal and civil cases in said court, except probate fees, to the amount of \$1,645.57; that the law specifically enjoined upon the defendant, as a duty resulting from his office, to pay the first-named sum into the state treasury on the 1st day of April, 1896, and to pay the last-named sum on the 1st day of July, 1896; that said defendant, at the time when said payments were due, failed to render any account thereof, and make settlement with the state auditor within the time prescribed by law, and has failed and neglected to pay said fees into the state treasury of the state of Utah, or otherwise account and pay over to the state said fees so collected, or any part thereof; that on July 20, 1896, demand in writing was made upon said defendant, by the plaintiff, for a full, true, and itemized statement of all fees, except probate fees, received by him, as clerk of said court, in civil and criminal cases, from January 4, 1896, to June 4, 1896 (both days inclusive), and that he promptly pay over such

money into the state treasury; in compliance with such demand, said defendant made to plaintiff a written statement of the sum of \$4,101.70 had been collected by defendant in civil and criminal cases, except probate cases, between January 4, 1896, and June 4, 1896 (both days inclusive), the statement being an itemized statement of the amount, but that defendant refused to pay said or any fees into the state treasury, or otherwise account for the same; that on October 7, 1896, affiant made account with said defendant, and ascertained the amount of the fees, the time when the same became due and payable, with the amount of damages and interest due thereon as provided by law, and that the total amount due the state, including damages and interest, was \$5,200.02, and prays a writ of mandamus directing such defendant to pay into the state treasury the sum of \$4,101.70, and to pay for the sum of \$1,197.32, damages and interest as set forth in the account statement, and that the account statement is annexed to the petition; and that, on complaint filed, the defendant interposed a demurrer, on the ground that such complaint does not state facts sufficient to constitute a cause of action, and that said complaint is unintelligible, ambiguous, and uncertain, and that it does not set forth a detailed statement of the fees alleged to have been collected by the defendant in civil and criminal cases, except probate fees, from which the amount of fees collected by the defendant in such cases for any period of time can be ascertained. Plaintiff also filed his answer to the original complaint, admitting the facts set forth in the petition, so far as is important in this case, and, for further answer, alleged that on July 1, 1896, and prior to said demand, the defendant, as clerk, by order and instructions of the board of county commissioners of Salt Lake county, turned over to W. P. Lynn, treasurer of Salt Lake county, the full amount of \$4,101.70, being all the fees collected by the defendant as such clerk in all civil and criminal cases, except probate cases, and thereby paid said fees into the treasury of Salt Lake county, as required by the board of county commissioners. Defendant further alleged, in paragraph 7 of said answer, that said W. P. Lynn, county treasurer, should be made a party to this action, and prays that he be made a party defendant in this suit. Thereupon the state general moved to strike out all of said paragraph 7 in said answer, as being immaterial and redundant. No answer was filed by the defendant in amended supplemental petition.

The constitution of the state of Utah is in force from the 4th day of January, 1896, that being the day upon which the president of the United States issued his proclamation declaring the state of Utah admitted into the Union. Const. Utah, art. 24, § 16. Section 21 of article 21 of the constitution of Utah provides that "all state, district, city, town and school officers, excepting judges, public, boards of arbitration, court officers

sioners, justices of the peace, and constables, shall be paid fixed and definite salaries: provided, that city justices may be paid by salary when so determined by the mayor and council of such cities. * * * Section 2 of article 21 of the constitution provides that "the legislature shall provide by law the fees which shall be collected by all officers within the state. Notaries public, boards of arbitration, court commissioners, justices of the peace, and constables paid by fees shall accept such fees as their full compensation. But all other state, district, county, city, town, and school officers shall be required by law to keep a true and correct account of all fees collected by them, and pay the same into the proper treasury, and the officer whose duty it is to collect such shall be held responsible for the same." The state legislature, at its first session, February 17, 1896, in compliance with the provisions of the constitution, enacted chapter 16, found in Sess. Laws 1896, p. 89, which provided "that all state, district, county, city, town and school officers in the state, excepting notaries public, boards of arbitration, court commissioners, justices of the peace and constables, shall collect in advance for services performed, such fees as were provided for by the laws of the territory of Utah, for like or similar services at the time the constitution of this state was adopted, and pay such fees into the public treasuries as follows: All fees collected by said state officers and clerks of district courts in criminal and civil cases, except probate fees, shall be paid into the state treasury. * * * the said payments shall be made by the said officers respectively into the respective treasuries, beginning on the first day of April, 1896, and quarter yearly thereafter, and shall include all fees collected from and after the admission of this state to the Union." The legislature, at its first session in 1896, also fixed, by law, the salary of county clerks. Sess. Laws 1896, p. 364.

It is clear from these provisions of the constitution, and the statutes enacted in conformity therewith, that this proceeding is properly brought to compel the performance of a duty specifically enjoined by statute, resulting from an office, and which the defendant has failed to perform as required by law. It is equally clear from the pleadings that the complaint does state facts sufficient to constitute a cause of action, and that the same is not ambiguous, unintelligible, or uncertain. It does not follow that because the defendant has seen fit to pay the money in question to W. P. Lynn, county treasurer, with or without the order of the county court, that the plaintiff should be compelled to make Lynn a party defendant to this action. The defendant, as a public officer, should not be permitted to shift his pecuniary or official responsibilities in that way. The law holds the clerk responsible to the state for the faithful performance of his duty; and we must hold him responsible under such law. So far,

Mr. Lynn is and should be treated as a stranger to the proceeding. The order of the county court, if made as claimed, is a mere nullity. Neither the constitution nor laws of the state confer upon the county court authority to dispose of such fees belonging to the state. The payment of the fees by the county clerk to the county treasurer was a wrongful assumption of power, and a clear violation of official duty, and cannot be upheld when set up as a defense in this case. *Williams v. Clayton*, 6 Utah, 86, 21 Pac. 398; *Kendall v. Raybould* (Utah) 44 Pac. 1034. The plaintiff is not shown to be a party to, or in any way connected with, the illegal transfer of the funds in question to the custody of Mr. Lynn. It follows that the demurrer should be overruled, and that the seventh paragraph of the answer should be stricken out and disregarded.

Under section 1 of article 21 of the constitution, "all state, district, city, county, town, and school officers, excepting notaries public, boards of arbitration, court commissioners, justices of the peace, and constables, shall be paid fixed and definite salaries." This and the following section limit the compensation to be paid county clerks to such sums as the legislature shall provide by law. Under section 2 of article 21 of the constitution, all state, district, county, city, town, and school officers are required, as a part of their official duty, to keep a true and correct account of all fees collected by them, and to pay the same into the proper treasury, and the officers whose duty it is to collect such fees are held responsible for the same. Under the act of the legislature, Sess. Laws 1896, p. 89, it is made the duty of these officers to collect in advance, for services performed, such fees as were provided by law by the territory of Utah for like or similar services at the time the constitution was adopted, and pay such fees into the public treasury, as follows: All fees collected by the said state officers and clerks of district courts in criminal and civil cases, except probate fees, are to be paid into the state treasury, beginning on the 1st day of April, 1896, and quarter yearly thereafter; and said fees should include all fees collected from and after the admission of the state into the Union. There seems to be no ambiguity or uncertainty in these provisions of the constitution or laws of the state, and we find no valid reason for not enforcing them. The law makes it the duty of county clerks to keep a true and correct account of the fees collected by them, and to pay the same into the state treasury. Section 5, c. 58, p. 162, Sess. Laws 1896, provides that "whenever any person has received moneys, or has money or other personal property which belongs to the state by escheat or otherwise, or has been intrusted with the collection, management or disbursement of any moneys, bonds or interest accruing therefrom, belonging or held in trust by the state, and fails to render an account thereof to, and make settlement with,

the state auditor within the time prescribed by law, or when no particular time is specified, fails to render such account, and make settlement, or who fails to pay into the state treasury any moneys belonging to the state, upon being required so to do by the state auditor, within twenty days after such requisition, the state auditor must state an account with such person, charging twenty-five per cent. damages, and interest at the rate of ten per cent. per annum, from the time of failure. * * * Before final settlement is made with any of said officers for fees collected for the state, it is the right and imperative duty of the state auditor to carefully examine, either by himself or by expert accountants, the books and papers of each of said county or state officers, and become satisfied that the accounts as stated or rendered are correct, and that the legal fees have been duly collected and reported; and, if no account has been rendered, it is equally the duty of the state auditor to carefully examine, or cause to be examined, by competent experts, all such books and accounts, in compliance with chapter 58, p. 159, Sess. Laws 1896, and take proper steps to enforce these several provisions of the law, and recover the damages therein provided. In this manner the laws can be faithfully executed, and the revenues of the state brought into the proper treasury, in compliance with the constitution and laws of the state.

An account was stated by the plaintiff, as alleged in the petition, as follows:

"C. E. Stanton, Clerk of the Third Judicial District Court in and for the County of Salt Lake and State of Utah, in Account with the State of Utah. Dr.

To fees collected in civil and criminal cases in the Third judicial district court in and for the county of Salt Lake, except probate fees, from January 4, 1896, to March 31, 1896, both days inclusive....	\$2,455 95
To 25 per cent. damages for failure to render an account thereof to, and make settlement with, the state auditor within the time prescribed by law	613 98
To interest at the rate of ten per cent. per annum from the 1st day of April 1896, to the 7th day of October, 1896, both days inclusive....	127 57
To fees collected in civil and criminal cases in the Third judicial district court, in and for the county of Salt Lake, state of Utah, except probate fees, from the 1st day of April, 1896, to the 4th day of June, 1896, both days inclusive....	1,645 75
To damages for failure to render an account thereof to, and make settlement with, the state auditor, within the time prescribed by law, at 25 per cent	411 43
To interest at the rate of ten per cent. per annum from July 1, 1896, to October 7, 1896, both days inclusive	44 34
	<u>\$5,299 02"</u>

Section 3730, Comp. Laws Utah 1888, provides that "the writ of mandate may be issued by any court in the territory, except a justice's

or probate court, to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station. * * * It is clear that the law enjoined upon the defendant the duty of paying into the state treasury the fees collected by him at stated times named in the statute, and that the defendant has failed and neglected to pay said fees and damages, with interest, into the state treasury, after demand of payment by the plaintiff, and after a statement of the account, as required by the statute. The statute of 1896 (page 162) fixes the amount of damages to be recovered by the state in a case of this character at 25 per cent., and interest at the rate of 10 per cent. from the time of the failure to pay, and makes it the duty of the auditor to charge these stated sums as fixed damages, arising from the failure of official duty resulting from an office, in addition to the amount of fees withheld. Under the pleadings, the statement of the account, as set out in the amended supplemental petition, must be taken as the true and correct amount belonging to the state in the hands of the defendant, which he has failed to pay over, including damages and interest. No denial or answer has been filed by the defendant to the amended supplemental complaint.

We therefore find that defendant has collected, and failed to pay over to the state treasurer, after demand, and as provided by law, fees collected by him as clerk of the Third judicial district court, except probate fees, the following sums of money, to which damages of 25 per cent. are added, and interest at the rate of 10 per cent., in accordance with the statute, as follows:

Fees collected from January 4 to March 31, 1896, both days inclusive	\$2,455 95
Twenty-five per cent. damages thereon	613 98
Interest thereon at the rate of ten per cent. from April 1, 1896, both days inclusive	127 57
For fees collected from the 1st of April, 1896, to the 4th day of June, 1896, both days inclusive.....	1,645 75
Twenty-five per cent damages thereon	411 43
Interest thereon at ten per cent. from July 1, 1896, to October 7, 1896, both days inclusive.....	44 34
—Making a total sum of.....	<u>\$5,299 02</u>

It is therefore ordered that said defendant, Charles E. Stanton, forthwith pay to the state treasurer the said sum of \$5,299.02, together with interest thereon, at the rate of 10 per cent., from the 7th day of October, 1896. It is further ordered that a peremptory writ of mandate issue as prayed, and in accordance with this opinion, and that the plaintiff recover costs.

ZANE, C. J., concura.

BARTON, J. (concurring). The defendant filed no answer to the amended petition. He admitted that as clerk of the district court of

the Third judicial district, in and for Salt Lake county, he collected the principal sum of money, as provided by law, but failed to pay it into the state treasury, and, upon demand made therefor by the proper officer, refused to make payment. His own admission, therefore, fixes definitely the amount he withheld, and still withholds, from the state treasury, contrary to law, and which it was his plain duty to pay over. This being so, I concur in the conclusion reached.

MEMORANDUM DECISIONS.

In re DAILEY. (Cr. 74.) (Supreme Court of California. July 23, 1896.) In bank. Petition by W. R. Dailey, committed to custody by the superior court of San Francisco county, for a discharge on habeas corpus. Prisoner discharged. Carroll Cook, for petitioner. John M. Dickinson, for respondent.

McFARLAND, J. It is stipulated by the attorneys for petitioner and respondent that petitioner shall be ordered discharged from custody, and pursuant to said stipulation it will be so ordered. It seems to have been assumed by counsel that the discharge of the petitioner should legally follow the decision of this court in *Dailey v. Superior Court* (S. F. 209) 44 Pac. 458, but such is not necessarily the consequence of that decision. In that case it was held that the superior court could not enjoin or prohibit beforehand the future production of a certain play in a theater, but it did not follow from that decision that the court could not afterwards have punished the petitioner for having produced said play. If, therefore, the imprisonment out of which the present proceeding in habeas corpus arose was for a contempt in actually producing said play, and not for merely violating the order prohibiting its production, then the former decision would not be in point. But as counsel for both parties seem to agree that the imprisonment was for contempt in violating said order, and stipulate for the petitioner's discharge, we do not feel called upon to give the matter any further consideration. The petitioner is discharged. We concur: **GAROUTTE, J.; HENSHAW, J.; TEMPLE, J.; HARRISON, J.**

FARNSWORTH v. HINTON. (S. F. 701.) **BROWN v. SAME.** (S. F. 702.) (Supreme Court of California. Oct. 9, 1896.) In bank. Petitions by Farnsworth and Brown for writ of mandamus to Hinton, registrar. Denied. A. Ruet, for petitioners. Garret W. McEnerney, for respondent.

PER CURIAM. Upon the authority of *McDonald v. Hinton* (S. F. 684; this day decided) 46 Pac. 870, the applications for writs of mandamus in above cases are denied and the proceedings dismissed; the cases being substantially alike, and having all been considered together.

GROEZINGER, Appellant, v. SUTRO et al., Respondents. (S. F. 590.)¹ (Supreme Court of California. Sept. 16, 1896.) In bank. Appeal from superior court, city and county of San Francisco; J. M. Seawell, Judge. Action by one Groezinger against Adolph Sutro and others to enjoin the calling of an election in the city and county of San Francisco. From a judgment in favor of defendants, plaintiff appeals. Affirmed. Rodgers & Paterson, for appellant. Garrett W. McEnerney, for respondents.

¹ Rehearing denied.

PER CURIAM. The questions presented on this appeal have been considered in the case of *Kahn v. Sutro* (just decided) 46 Pac. 87, and upon the authority of that case the judgment appealed from is affirmed.

LOFTUS et al., Appellants, v. FISCHER et al., Respondents. (Sac. 123.) (Supreme Court of California. June 18, 1896.) Department 2. Action by Mariam V. Loftus and others against Jacob A. Fischer and others. Judgment for defendants, and plaintiffs appeal. Motion by appellants to tax the costs of the clerk's certificate against respondents. Decision reserved.

PER CURIAM. For the reasons given in *Loftus v. Fischer* (Sac. 84; filed June 17, 1896) 45 Pac. 828, this motion to tax the costs of the clerk's certificate against respondents cannot be determined independently of the appeal. It is therefore continued over, to be considered and decided with the appeal in *Loftus v. Fischer* (Sac. 6) Id. 1058.

McCULLY, Appellant, v. O'CONNOR, Respondent. (L. A. 145.)¹ (Supreme Court of California. Sept. 16, 1896.) Department 2. Appeal from superior court, San Diego county; W. L. Pierce, Judge. Action by Jane Mason McCully, administratrix of the estate of James L. Mason, deceased, against Andrew J. O'Connor, receiver of the Consolidated National Bank of San Diego. From a judgment denying plaintiff judgment on part of her claim, she appeals. Reversed. Trippet & Neale, for appellant. James E. Wadham and Frederic W. Stearns, for respondent.

PER CURIAM. This action was brought February 9, 1895, to recover from the defendant, receiver of the Consolidated National Bank of San Diego, upon certificate of deposit No. 17,896, dated April 2, 1892, for \$8,000, payable to the order of James L. Mason, upon which certain payments had been made, leaving a balance of \$6,168.90 as principal and interest; also, to recover the sum of \$1,841.24 due said Mason on an open account. The court below gave judgment in favor of the plaintiff, as administratrix, upon the open account, to be paid out of the assets of the bank as therein specified, and gave judgment against the plaintiff upon the amount due upon the certificate of deposit, for the reason that plaintiff had not said certificate of deposit in her possession, and is not entitled to such possession, and is not able to surrender the same for cancellation, and for the reason that plaintiff did not present said certificate of deposit to the defendant receiver at the time of presenting her claim for the sum due thereon against the assets of the bank. Plaintiff appeals from so much of the judgment as denied her recovery on the certificate of deposit. The pleadings and findings of the court show fully the amount due upon the certificate of deposit, which certificate, at the date of the filing of the claim by plaintiff, and thence continually until after the bringing of this action, was in the possession and custody of the defendant herein, with whom it had been filed, as evidence of the sum due thereon, by George H. Cooper, a foreign administrator of the estate of James L. Mason, upon whose estate the plaintiff herein is and was the administratrix of the assets and property in this state. It follows that, if plaintiff was entitled to recover upon the certificate, no bond, security, or indemnity was necessary from her to the defendant, who held the certificate. The certificate is the same involved in the action L. A. 144, in which this plaintiff, as administratrix, is plaintiff, and George H. Cooper, as administrator, is defendant and respondent, and this day decided upon appeal to this court. 46 Pac. 82. For the reasons given in the opinion in that case, the portion of the judgment appealed from here should be reversed and the court below directed to enter judgment

¹ Rehearing denied

ment in favor of appellant for the sum found due upon the certificate of deposit, with interest, to be enforced in like manner, and payable upon like terms, with the judgment rendered in favor of appellant for the residue of her demand, and it is so adjudged.

Ex parte PAULSELL. (Cr. 227.) (Supreme Court of California. Nov. 24, 1896.) In bank. Appeal from superior court. Placer county; J. E. Prewitt, Judge. Application by W. E. Paulsell to be admitted to bail. Petition granted. F. P. Tuttle and W. B. Lardner, for appellant. Jo Hamilton and G. W. Hamilton, for respondent.

PER CURIAM. Upon the hearing of the return to the writ of habeas corpus issued herein, it is ordered that the petitioner be admitted to bail, upon the charge of robbery now pending against him in the superior court of the city and county of San Francisco, in the sum of \$15,000; the undertaking and bail to be approved by the superior court of the city and county of San Francisco in the department where said cause is pending; or by the judge thereof.

PEOPLE, Respondent, v. CUMMINGS, Appellant. (Cr. 118.) (Supreme Court of California. May 30, 1896.) In bank. Caesar Cummings was convicted of murder, and appeals. Affirmed.

PER CURIAM. The questions involved in this appeal are identical with those involved in the appeal of *People v. Cummings* (No. 117; this day decided) 45 Pac. 184, and for the reasons there given the judgment herein is affirmed.

PEOPLE, Respondent, v. TALLMADGE, Appellant. (Cr. 143.) (Supreme Court of California. Oct. 3, 1896.) Department 2. Appeal from superior court, Tulare county; Wheaton A. Gray, Judge. Walter Tallmadge was convicted of the larceny of hogs, and appeals from the judgment, and from an order denying a new trial. Affirmed. Power & Alford and Forrest L. Alford, for appellant. Atty. Gen. Fitzgerald, for the People.

PER CURIAM. This case so far as the point involved in the appeal is concerned, is similar to the case of *People v. Tallmadge* (No. 138; this day decided) 46 Pac. 282. In the present case the appellant was charged with the larceny of certain hogs belonging to one Allen, and, as in case No. 138, one Lynde was the principal witness against the appellant, and an accomplice. The point for reversal is that the court below should have granted a new trial upon the ground of newly-discovered evidence, upon the affidavit of said Lynde that he had committed perjury at the trial; and, in this regard, the case is substantially the same as that in said case No. 138. Therefore, upon the authority of said case No. 138, the judgment and order denying a new trial are affirmed.

SWAIN, Respondent, v. GAVIN et al., Appellants (two cases. S. F. 65, 66.) (Supreme Court of California. July 16, 1896.) Department 2. Action by Charles J. Gavin, administrator of Ellen Gavin, and others, against Frank Swain, executor of Mary J. Holmes. Judgment for defendant, and plaintiffs appeal. Affirmed.

PER CURIAM. The single question presented by appellants for decision in each of the above causes is the same as that which was this day decided in the case of *Gavin v. Swain* (S. F. 64) 45 Pac. 677, and it is so stipulated by counsel for the respective parties. Therefore, for the reasons stated in the opinion of the commissioners in the last-mentioned case (S. F. 64), the judg-

ment in each of the above entitled causes, respectively, S. F. 65 and S. F. 66, is affirmed.

WOOLRIDGE, Respondent, v. BOARDMAN et al., Appellants. (Sac. 201.) (Supreme Court of California. Nov. 24, 1896.) Commissioners' decision. Department 2. Appeal from superior court, Placer county; J. E. Prewitt, Judge. Action by E. Woolridge, against F. Boardman & Co., against A. F. Boardman, Mary Boardman, and others to set aside transfer of stock as in fraud of creditors' judgment for plaintiff, and an order setting aside trial, defendants appeal. Affirmed. F. Boardman and W. B. Lardner, for appellants. Jo Hamilton and G. W. Hamilton, for respondents.

BRITT, C. In this case the court set aside, because of fraud as to creditors, the judgment of the superior court in *Boardman*, a voluntary conveyance by him on September 3, 1894, to his wife, Mary Boardman, of certain stock in the Auburn Orange Company, a corporation. The legal questions presented are substantially the same as those in *Sac. 201* (45 Pac. 868), and on the grounds stated in our opinion there we recommend that the order denying the motion of defendants Boardman and Boardman for a new trial be affirmed. We affirm. **HAYNES, C.; SEARLS, C.**

PER CURIAM. For the reasons given in the foregoing opinion the order denying the motion of defendants Boardman and wife for a new trial is affirmed.

FARMERS' HIGH LINE CANAL & RESERVOIR CO., Appellant, v. STEPPE, Appellee. (Supreme Court of Colorado. June 1, 1896.) Appeal from Jefferson county court. Proceedings in eminent domain by the Farmers' High Line Canal & Reservoir Company against William L. Steppe. From a judgment in favor of defendant, petitioner appeals. Reversed. **McPHERSON & Taylor**, for appellant. **William L. Steppe**, in pro. per.

PER CURIAM. This case was argued in connection with cause No. 3304 (*Reservoir Co. v. Moon*, 45 Pac. 437). The same briefs were filed in the two cases, and, as counsel concede, they involve the same questions of law, arising out of substantially the same state of facts. Hence, the decision in that case is decisive of this. The judgment, therefore, is reversed, and the case remanded for further proceedings in conformity with this opinion. Reversed.

MULNIX, State Treasurer, Plaintiff in Error, v. MUTUAL BENEFIT LIFE INS. CO., Defendant in Error. (Supreme Court of Colorado. June 29, 1896.) Error to district court, Arapahoe county. Petition by the Mutual Life Insurance Company for a writ of mandamus to compel Harry E. Mulnix, state treasurer of the state of Colorado, to pay a certain state warrant drawn by the state auditor upon him, in favor of Graham & Webber, on account of furniture supplied by them to the secretary of state, and by them transferred to petitioner. There was a judgment in favor of petitioner, and the state treasurer brings error. Reversed. **Byron L. Carr**, Atty. Gen., and **Calvin E. Reed**, Asst. Atty. Gen., for plaintiff in error. **F. A. Williams**, **A. M. Stevenson**, and **A. S. Blake**, for defendant in error.

PER CURIAM. The warrant involved in this proceeding, the payment of which the defendant in error, as petitioner below, seeks to enforce by a writ of mandamus, was drawn by the state auditor upon the state treasurer, in favor of Graham & Webber, on account of furniture supplied by them to the secretary of state for the legislative department of the government. Before it was presented for payment to the treasurer by the petitioner, to whom it had theretofore been indorsed, the general assembly had made a

and received injuries in precisely the same way. The cases were tried together, but, of necessity, separate judgments were entered. In this case the judgment was \$250. from which a separate appeal was taken. The decision in this case must be the same as in the former. Judgment affirmed.

FARMERS' HIGH LINE CANAL & RESERVOIR CO., Plaintiff in Error, v. PEOPLE ex rel. McPHEE et al., Defendants in Error. (Court of Appeals of Colorado. June 8, 1896.) Error to district court, Jefferson county. Petition on relation of Charles D. McPhee and another against the Farmers' High Line Canal & Reservoir Company for writ of mandamus. From a judgment for plaintiffs, defendant brings error. Reversed. Osborne & Taylor, for plaintiff in error. R. H. Gilmore, for defendants in error.

RISSELL, J. This case pertains to another part of the same section of land involved in the preceding suit of Reservoir Co. v. Standart, 45 Pac. 543, and is an attempt to enforce, on behalf of McPhee and McGinnity, a water right acquired, if at all, under and by virtue of the Bomberger contract, which is set out at length and referred to in that opinion. This case and the preceding one were tried together, and by stipulation, and under the order of the court, the evidence taken was applied to both. On the conclusion of the testimony, the court entered a like judgment in this case, and decreed the petitioner entitled to the amount of water which he claimed under that contract. For the reasons expressed in the foregoing opinion, we conclude that the petitioner was not entitled to his writ, or to the judgment which he obtained, which must therefore be reversed. Reversed.

CITY OF KANSAS CITY v. JERSCHE. (Supreme Court of Kansas. Nov. 7, 1896.) Appeal from district court, Wyandotte county; H. L. Alden, Judge. Frank Jersche was tried for the violation of city ordinances. From an order quashing the complaint, the city appeals. Reversed. K. P. Snyder and T. A. Pollock, for appellant. Moore & Berger, for appellee.

PER CURIAM. The complaint, which was quashed by the district court on motion of the defendant, appears to us sufficient, and no sound objection to the validity of the ordinance is apparent. We have no brief on behalf of the defendant, and the record fails to show the grounds of the district court's decision. Those suggested in the brief of counsel for the city are insufficient. The judgment of the court below is reversed, with directions to overrule the motion to quash the complaint.

SHEARS et al. v. PRICE et al. (Supreme Court of Kansas. July 11, 1896.) Error from district court, Reno county: L. Houk, Judge. Action between George Shears & Son and George H. Price and others. From a judgment for the latter, the former bring error. Affirmed. O. M. Williams and R. A. Campbell, for plaintiffs in error. F. F. Prigg, for defendants in error.

PER CURIAM. The contention of the plaintiffs in error that their contract, though in form one with the defendant Rice, was in fact with the board of education, is not sustained by the record. They were ordinary subcontractors. The demurrer interposed by the board of education was properly sustained by the court, and its judgment is affirmed.

DODGE, Plaintiff in Error, v. GIRARD FIRE & MARINE INS. Co.,¹ Defendant in Error. (Court of Appeals of Kansas, Southern Department. C. D. Sept. 5, 1896.) Error from district court, Sedgwick county: C. Reed, Judge. Action by John L. Dodge against the Girard

CITY OF DENVER, Appellant, v. HAMILTON, Appellee. (Court of Appeals of Colorado. Oct. 12, 1896.) Appeal from district court, Arapahoe county. Action by George Hamilton against the city of Denver for personal injuries. From a judgment in favor of plaintiff, defendant appeals. Affirmed. F. A. Williams and G. Q. Richmond, for appellant. W. W. Pardee and Doud & Fowler, for appellee.

PER CURIAM. The facts in this case are the same as in City of Denver v. Johnson, 48 Pac. 621. Both parties were in the same wagon,

¹ Rehearing pending.

Fire & Marine Insurance Company on a policy of fire insurance. From a judgment for defendant, plaintiff brings error. Reversed. Bentley & Hatfield and Holmes & Haymaker, for plaintiff in error. Bentley & Ferguson, for defendant in error.

DENNISON, J. The facts in this case are very similar to the facts in the case of *Dodge v. Insurance Co.* (just decided) 46 Pac. 25, and the opinion will be the same. The judgment of the district court is reversed, and the cause remanded, with instructions to render judgment upon the pleadings and agreed statement of facts against the defendant in error, and in favor of the plaintiff in error. All the judges concurring.

HASKETT, Plaintiff in Error, v. OSBORNE, Defendant in Error. (Court of Appeals of Kansas, Northern Department, C. D. June 4, 1896.) Error from district court, Marshall county; R. B. Spilman, Judge. Replevin by O. T. Haskett against G. D. Osborne. From a judgment for defendant, plaintiff brings error. Affirmed. E. A. Berry and Mann & Redmond, for plaintiff in error. W. J. Gregg, for defendant in error.

GARVER, J. The facts in this case are the same as those considered in *Haskett v. Aubl*, 45 Pac. 608, and upon the authority of the decision made in that case the judgment herein will be affirmed. All the judges concurring.

LANDER, Plaintiff in Error, v. POLLARD, Sheriff, Defendant in Error. (Court of Appeals of Kansas, Southern Department, C. D. Dec. 3, 1896.) Error from district court, Harvey county; F. L. Martin, Judge. Action by Phillip Lander, as assignee of the Kansas Savings Bank of Newton, against E. E. Pollard, Sheriff of Harvey county. Judgment for defendant, and plaintiff brings error. Dismissed. Peters & Nicholson, for plaintiff in error. A. L. Greene, for defendant in error.

JOHNSON, P. J. This case involves substantially the same state of facts as are contained in *Lander v. Pollard* (just decided by this court) 46 Pac. 975, and on the authority of that case this case is dismissed. All the judges concurring.

STATE, Plaintiff, v. SCHWARTZ, Defendant. (Court of Appeals of Kansas, Northern Department, C. D. July 9, 1896.) Appeal from district court, Saline county; R. F. Thompson, Judge. E. A. Schwartz was convicted of violating the prohibitory liquor law, and appeals. Reversed in part, and in part affirmed. Mohler & Hiller, for appellant. W. H. Bishop and F. B. Dawes, for the State.

GARVER, J. The questions raised in this case are substantially the same as those considered in the case of *State v. Nield*, 45 Pac. 623. As in that case, the defendant in this case was convicted, under an information containing four counts, for illegal sales of intoxicating liquor, and a fifth count, charging the keeping of a place where such liquors were sold and kept for sale in violation of law. Upon the authority of the case of *State v. Nield*, the judgment in this case is reversed as to the first, second, third, and fourth counts of the information, and is affirmed as to the fifth count, and the case remanded to the district court of Saline county for further proceedings in accordance with the views expressed in that opinion. All the judges concurring.

BECK, Respondent, v. NORTHERN PAC. R. CO., Appellant. (Supreme Court of Montana, May 25, 1896.) Appeal from district court, Gallatin county; Frank K. Armstrong, Judge. Action by William Beck against the Northern Pacific Railroad Company. Plaintiff had judgment, and defendant appeals. Affirmed.

Fred M. Dudley and Toole & Wallace, appellants. **Hartman, Stewart & Hartman**, respondents.

PER CURIAM. The record in this case presents exactly the same facts, issues, and questions involved in *Colburn v. Railroad Co.*, 13 Mont. 476, 34 Pac. 1017, and *Moore v. E. Co.* (just decided) 45 Pac. 215. Upon the authority of these cases, the judgment appealed from in this case is affirmed.

SALES, Respondent, v. NORTHERN PAC. R. CO., Appellant. (Supreme Court of Montana, May 25, 1896.) Action by Charles Sales against the Northern Pacific Railroad Company. Plaintiff had judgment, and defendant appeals. Affirmed.

PER CURIAM. The record in this case presents exactly the same facts, issues, and questions involved in *Colburn v. Railroad Co.*, 13 Mont. 476, 34 Pac. 1017, and *Moore v. Railroad Co.* (just decided) 45 Pac. 215. Upon the authority of these cases, the judgment appealed from in this case is affirmed.

STATE ex rel. LAUGHLIN, Petitioner, v. BAILEY, County Clerk, Respondent. (Supreme Court of Montana, Oct. 22, 1896.) Petition by H. M. Laughlin for an injunction to restrain D. J. Bailey, county clerk of Missoula county, from printing on the official ballot for the county the nominees of the Citizens' Silver Party. Temporary writ of injunction made permanent. T. J. Walsh, for petitioner. M. S. Gunn, respondent.

PER CURIAM. The petition shows that the petitioner is the regular nominee of the Democratic party of Missoula county for the office of sheriff, to be voted for at the general election to be held on the 3d day of November of this year. The petitioner brings this suit for himself and the other nominees of the Democratic party for the several county offices to be filled in said county at said election. The parties in interest are all electors in said county. The petition alleges that on the 23d day of last September a regular county convention of the Republican party was held in Missoula county for the purpose of nominating a county ticket of said party, to be voted for at the general election in November next; that said convention was properly and legally called, and was in all respects regular; that said convention nominated candidates for the various county offices; and that a certificate of the nomination of such candidates of said party was duly filed with the county clerk of said county by the proper officers of said convention. It is alleged that said convention, after completing its business, adjourned sine die. After the adjournment of said convention, it is alleged, a portion of the delegates to such convention, including the presiding officer and secretary thereof, assembled as a convention of the Silver Republican party, and said delegates assembled as the convention of the Silver Republican party proceeded to nominate the same candidates that had been nominated for county offices by the Republican convention, which had just adjourned sine die as aforesaid, and thereafter the officers of said pretended convention of the Silver Republican party filed with the county clerk a certificate of the nomination of the candidates of said Silver Republican convention. The nominees of the Republican convention and of the Silver Republican convention are identically the same persons. This proceeding is instituted to enjoin the county clerk of Missoula county from placing the ticket nominated by said Silver Republican convention on the ballot, under the head of the "Silver Republican Party." It is alleged in the petition that the Silver Republican party is a regularly organized political party in the state, and has been since the 10th day of last September, that no call for the holding of said alleged convention of

the Silver Republican party was ever issued or published by any one, and that no delegates were ever elected by any constituency to such convention. These facts are admitted. The only question for determination by us is as to whether this assemblage was a convention, as defined by our statutes, with authority to nominate a ticket. The facts in this case are substantially the same as involved in *State v. Johnson* (just decided by this court) 46 Pac. 533. In that case this court held that the action of an assemblage of persons, met together under facts and circumstances like those disclosed in this case, in assuming or attempting to nominate a ticket of the party in existence, was void and of no force or effect whatever. Upon the authority of that case, the writ of injunction issued in this case is made permanent.

STATE ex rel. MATTS, Relator, v. FISHER, County Clerk, Respondent. (Supreme Court of Montana. Oct. 22, 1896.) Petition by E. D. Matts to enjoin John B. Fisher, county clerk of Deer Lodge county, from placing the name of Theodore Brantley on the official ballot, as a candidate for district judge, under the head of the "Silver Republicans." Writ of injunction made permanent.

PER CURIAM. The questions, of both law and fact, involved in this case are identical with those determined by this court in *State v. Reek*, 46 Pac. 438; and, upon the authority of that case, it is ordered that the writ of injunction issued in this case be made permanent.

STATE ex rel. STEVENS v. REEK. (Supreme Court of Montana. Oct. 22, 1896.) Application, on relation of C. B. Stevens, for an injunction against G. J. Reek, county clerk and recorder of Granite county, to restrain him from placing certain names on the official ballot. Dismissed. McConnell & McConnell, for relator. J. W. Kinsley, for respondent.

PER CURIAM. For the reasons set forth in *State ex rel. Sligh v. Reek* (just decided) 46 Pac. 442, we shall decline to consider this case, and we shall dismiss the application. This case is even in a worse condition, as to laches and negligence, than the *Sligh Case*. The application was made only last night, and made then after office hours. It involves some of the questions, if not all of them, which are contained in the *Sligh Case*. We also here reserve any opinion as to the merits, and dismiss it for the reasons stated.

VOGEL, Respondent, v. NORTHERN PAC. R. CO., Appellant. (Supreme Court of Montana. May 25, 1896.) Appeal from district court, Gallatin county; Frank K. Armstrong, Judge. Action by Rudolph Vogel against the Northern Pacific Railroad Company. Plaintiff had judgment, and defendant appeals. Affirmed. Fred M. Dudley and Toole & Wallace, for appellant. Hartman, Stewart & Hartman, for respondent.

PER CURIAM. The record in this case presents exactly the same facts, issues, and questions involved in *Colburn v. Railroad Co.*, 13 Mont. 476, 34 Pac. 1017, and *Moore v. Railroad Co.* (just decided) 45 Pac. 215. Upon the authority of these cases, the judgment appealed from in this case is affirmed.

SAINT, Plaintiff in Error, v. FOLSOM, Defendant in Error. (Supreme Court of New Mexico. Sept. 1, 1896.) Error to district court, Bernillo county; before Justice N. C. Collier. Action between J. E. Saint, receiver, and S. M. Folsom. From a judgment for Folsom, the receiver brings error. Affirmed. W. B. Childers, for

plaintiff in error. F. W. Clancy, for defendant in error.

SMITH, C. J. The facts in this case, and the questions of law arising thereon, are essentially the same as in the case of *Schofield v. Folsom*, reported in 38 Pac. 261, and is controlled by it. We, being satisfied with the conclusion arrived at in that case, affirm this. There being no error, this case is affirmed, and it will accordingly be so ordered. LAUGHLIN, HAMILTON, and BANTZ, JJ., concur.

STEIL v. TERRITORY. (Supreme Court of Oklahoma. Sept. 4, 1896.) Appeal from district court, Kingfisher county; before Justice John L. McAtee. Henry Steil was convicted of murder, and brings error. Dismissed. J. O. Roberts and Hobbs & Kane, for plaintiff in error. J. B. Moffit and O. A. Galbraith, for defendant in error.

DALE, C. J. The appellant was at the February, 1894, term of the district court of Kingfisher county, Okl., charged with the crime of murder, and at the October term following was tried, and convicted of manslaughter in the first degree, and by the court sentenced to serve a term in the penitentiary for a period of 20 years. To reverse the case, the defendant below appeals, and the entire record of the proceedings in the court below was filed in the supreme court of this territory December 24, 1895. No briefs having been filed by counsel for appellant, on June 1, 1896, a motion to dismiss for failure to file briefs was presented by C. A. Galbraith, attorney general, and at the June sitting of this court it was decided to assign the case for examination, and if, after such examination, it was found that no prejudicial error appeared on the face of the record, the motion should be allowed. Upon examination of the record, it is found that a motion to quash the indictment was filed, overruled, and exception allowed; that a demurrer was filed to the indictment, which was also overruled, and exception allowed. The indictment fails to charge the crime of murder, under our statutes, but does contain averments sufficient to place the defendant upon his trial for the crime of manslaughter in the first degree, and consequently sustains the verdict of the jury. The evidence clearly justified a conviction of the crime of manslaughter in the first degree, and, after a careful examination of the entire proceedings had in the trial court, we fail to find wherein the court below committed prejudicial error in any of his rulings, or upon any matter coming before the court in the trial of the case. We therefore sustain the motion to dismiss, and affirm the judgment of the court below. McATEE, J., having presided at the trial of the cause below, not sitting; the other justices concurring.

WAGONER et al., Plaintiffs in Error, v. EVANS et al., Defendants in Error. (Supreme Court of Oklahoma. Sept. 4, 1896.) Error from district court, Canadian county; before Justice John H. Burford. Action by D. Wagoner and others against Neil W. Evans and others. From a judgment for the latter, the former bring error. Affirmed. Horace Speed and W. W. Flood, for plaintiffs in error. C. A. Galbraith, Atty. Gen., Thos. R. Reid, Co. Atty., and W. W. Bush, for defendants in error.

PER CURIAM. This case is, in the view we take of it, identical with the case of *Gay v. Thomas* (decided at this term of court) 46 Pac. 578, and the judgment of the trial court in this case is the same as that of the trial court in the case we have just decided; and, without elaboration upon the questions presented, the judgment of the court below is affirmed.

Ex parte CHILDS. (Supreme Court of Oregon. Dec. 7, 1895.) John L. Childs on Novem-

ber 26, 1895, filed with the county clerk of Josephine county his resignation as attorney of the state of Oregon, under Hill's Ann. Laws, § 1045. Resigned.

CORBETT v. COMMERCIAL NAT. BANK. (Supreme Court of Oregon. Nov. 18, 1895.) Replevin by Thomas F. Corbett against the Commercial National Bank. Judgment for defendant, and plaintiff appeals. Motion to dismiss. Granted. George H. Durham and Harrison Gray Platt, for the motion. William L. Nutting, opposed.

PER CURIAM. The motion is well taken. The appeal cannot be sustained. Dismissed.

DENNY v. THOMPSON. (Supreme Court of Oregon. Oct. 29, 1895.) Appeal from circuit court, Multnomah county; E. D. Shattuck, Judge. Action by O. N. Denny, receiver of the Portland Savings Bank, against David R. Thompson. Judgment for plaintiff. Defendant appeals. Dismissed. Dolph, Nixon & Dolph, for appellant. Dolph, Mallory & Simon, for respondent.

PER CURIAM. Pursuant to the stipulation of the parties hereto, the appeal in this cause will be dismissed. Dismissed.

Ex parte GARRIGUS. (Supreme Court of Oregon. Nov. 12, 1895.) Complaint filed by the attorney general, at the relation of the grievance committee of the Oregon State Bar Association, against Lewis C. Garrigus, charged with embezzling funds of clients. Resignation of Mr. Garrigus had been filed before the charges had been filed with the attorney general, with the clerk of the county court of Multnomah county. Complaint dismissed.

HARTMAN v. BACK. (Supreme Court of Oregon. Sept. 3, 1895.) Appeal from circuit court, Multnomah county. Action by J. L. Hartman, as receiver of the Northwest Loan & Trust Company, against William Dunbar and Seid Back. Judgment for plaintiff, and Back appeals. Dismissed. William H. Adams, for appellant. Ossian Franklin Paxton, for respondent.

PER CURIAM. The motion of Mr. Adams, attorney for appellant, to dismiss this appeal, is granted, and it is so ordered. Dismissed.

MATASCE v. MATASCE. (Supreme Court of Oregon. Feb. 5, 1896.) Bill by one Matasce against his wife for divorce. From a judgment denying either party relief, plaintiff appeals. Motion to dismiss for failure of appellant to file brief. Dismissed. W. R. Bilyeu and Patrick J. Bannon, for the motion. Weatherford & Wyatt, opposed.

PER CURIAM. Upon considering this case, we have concluded to allow the motion for dismissal, and it is so ordered. Dismissed.

Ex parte PILKINGTON. (Supreme Court of Oregon. Dec. 24, 1895.) Application by the attorney general, at the request of the grievance committee of the State Bar Association, for the disbarment of Harold Pilkington, convicted of embezzlement. Before time to answer, defendant filed with the clerk of the county court of Multnomah county his resignation. Proceedings dismissed.

REMILLARD v. MULTNOMAH ST. RY. CO. (Supreme Court of Oregon. July 22, 1895.) Appeal from circuit court, Multnomah county;

E. D. Shattuck, Judge. Action by Rhoda Remillard against the Multnomah Street-Railway Company, for personal injuries. Judgment for plaintiff. Defendant appeals. Motion to dismiss for failure of complainant to file brief. Granted. O. F. Paxton, for appellant. Cake & Cake, for respondent.

PER CURIAM. The motion will be allowed. Allowed.

STATE v. ALLEN. (Supreme Court of Oregon. Aug. 1, 1895.) Appeal from circuit court, Washington county; T. A. McBride, Judge. John H. Allen was convicted of forgery, and appeals. Dismissed. Thomas H. Tongue, for appellant. Cicero M. Idleman, Atty. Gen., for the State.

PER CURIAM. Pursuant to the written stipulation of the parties herein, the appeal in this cause is now dismissed. Dismissed.

STEPHENS, Respondent, v. CONTINENTAL INS. CO. OF CITY OF NEW YORK. Appellant. (Supreme Court of Utah. Oct. 22, 1896.) Appeal from district court, Weber county; H. H. Rolapp, Judge. Action by Elizabeth J. Stephens against the Continental Insurance Company of New York. Judgment for plaintiff. Defendant appeals. Affirmed. Twomey & Twomey, for appellant. Evans & Rogers and A. G. Horn, for respondent.

BARTCH, J. This is an action on a fire insurance policy to recover for loss sustained by fire. The defendant demurred to the complaint on the ground that it does not state facts sufficient to constitute a cause of action. The demurrer was overruled, and judgment entered in favor of the plaintiff for the sum of \$503.85 and costs of suit. This appeal is from the order overruling the demurrer, and from the judgment. The legal questions which we are asked to determine in this case are precisely the same as those raised and determined in the case of *Stephens v. Insurance Co.* (decided at this term) 47 Pac. 83. The pleadings in both cases are also the same, except that the amount sued for is less in this case than in that. We therefore refer to the opinion in that case for our decision of all the questions raised by the record in this case, and, on the authority of that case, we hold that the action of the court in overruling the demurrer and entering judgment herein was proper. The judgment is affirmed. ZANE, C. J., concurs.

MINER, J. I dissent for the reasons given in my dissenting opinion in *Stephens v. Insurance Co.*

STEPHENS, Respondent, v. HOME INS. CO. OF CITY OF NEW YORK. Appellant. (Supreme Court of Utah. Oct. 22, 1896.) Appeal from district court, Weber county; H. H. Rolapp, Judge. Action by Elizabeth J. Stephens against the Home Insurance Company of the City of New York. Judgment for plaintiff. Defendant appeals. Affirmed. Twomey & Twomey, for appellant. Evans & Rogers and A. G. Horn, for respondent.

BARTCH, J. This is an action on a fire insurance policy to recover for loss sustained by fire. A general demurrer to the complaint was overruled, and judgment entered in favor of the plaintiff for the sum of \$2,021.55, and for costs of suit. This appeal is from the order overruling the demurrer, and from the judgment. The same legal questions presented for our determination in this case were raised and determined in the case of *Stephens v. Insurance Co.* (decided at this term) 47 Pac. 83. The pleadings are also the same in both cases, except that the amount sued for in that is less than in this. We therefore refer to the opinion in that case for our decision of

all the questions raised by the record in this, and on the authority of that case, we hold that the action of the court in overruling the demurrer and entering judgment herein was proper. The judgment is affirmed. ZANE, O. J., concurs.

MINER, J. I dissent for the reasons given in my dissenting opinion in *Stephens v. Insurance Co.*

CITY OF TACOMA, Appellant, v. TACOMA LIGHT & WATER CO., Respondent. (Supreme Court of Washington. Nov. 13, 1896.) Appeal from superior court, Pierce county; W. H. Pritchard, Judge. Action by the city of Tacoma against the Tacoma Light & Water Company, a corporation, to obtain possession of certain real property which plaintiff claimed to have purchased of defendant. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

SCOTT, J. This action was brought to obtain possession of certain real property which the city claims to have purchased of the light and water company at the time it purchased its electric light plant and waterworks, which were involved in a former case before this court between said parties. 13 Wash. 115, 42 Pac. 533. The decision there rendered seems to us to clearly settle this controversy in favor of the defendant, as found by the lower court. The ordinance under which the purchase was made, and the property in question claimed, was referred to in the case cited, and was published in *Seymour v. City of Tacoma*, 6 Wash. 138, 32 Pac. 1077. Section 1 of said ordinance limited the property purchased to such as was owned or operated by the defendant as a part of its water and electric light plant. The property in controversy in this case was not so owned or operated, but was used for an entirely different purpose. Affirmed. HOYT, C. J., and ANDERS, GORDON, and DUNBAR, JJ., concur.

LOVEDAY, Appellant, v. NORTON et al., Respondents. (Supreme Court of Washington. Sept. 30, 1896.) Appeal from superior court, Pierce county; W. H. Pritchard, Judge. Action by Walter Loveday, as receiver of Reese, Crandal & Redman, a corporation, against P. D. Norton, as trustee for the Traders' Bank of Tacoma, and others, to set aside a preference. From a judgment in favor of defendants, plaintiff appeals. Affirmed. John D. Fletcher, for appellant. Fred. A. Brown, W. A. Peters, and Herbert S. Griggs, for respondents.

PER CURIAM. It is not claimed that the findings of fact made by the superior court do not justify its conclusions of law founded thereon, but it is earnestly contended that some of the findings of fact are not supported by the evidence. A careful examination of the voluminous record has failed to satisfy us that such was the case. On the contrary, we think that every material finding of fact was not only sustained by competent testimony, but was in accordance with a fair preponderance of all the evidence offered. The reasons which have led us to this conclusion could not be satisfactorily given without a recital of much of the voluminous evidence introduced upon the trial, and this could not properly be done in this opinion. Hence we shall content ourselves with saying that the questions of fact presented, upon which a reversal of the judgment is sought, have been determined by us adversely to the contention of the appellant. The judgment will be affirmed.

RANDS, Appellant, v. CLARKE COUNTY et al., Respondents. (Supreme Court of Washington. Sept. 25, 1896.) Appeal from superior court, Clarke county; A. L. Miller, Judge. Action by E. M. Rands against the county of Clarke and others to enjoin the issuance of funding bonds

by the county. There was a judgment for defendants, and plaintiff appeals. Affirmed. W. W. McCredie, for appellant. Moody, Coovert & Stapleton, for respondents.

PER CURIAM. This case falls substantially within the rule announced by this court in *State v. Hopkins*, 44 Pac. 134, and the further opinion filed in that case March 31, 1896, and reported on page 550, 44 Pac. Hence, in accordance with the rule there announced, the judgment will be affirmed.

STATE, Appellant, v. DILLON, Respondent. (Supreme Court of Washington. May 25, 1896.) Appeal from superior court, Asotin county; R. F. Sturdevant, Judge. Jackson Dillon was indicted for carnally abusing a female child. From a judgment of acquittal, the state appeals. Affirmed. Walter Brooks, M. F. Gose, and James W. Reed, for appellant.

PER CURIAM. This case falls squarely within the rule announced by this court in the case of *State v. Halbert* (decided March 21, 1896) 44 Pac. 538, and the judgment is therefore affirmed.

STATE ex rel. MULLEN, Respondent, v. DOHERTY, Appellant. (Supreme Court of Washington. Oct. 8, 1896.) Appeal from superior court, Pierce county; W. H. Pritchard, Judge. Proceeding by the state, on relation of Robert B. Mullen, against Thomas E. Doherty, Governor Teats, J. P. Judson, and W. H. H. Kean, for appellant. Claypool, Cushman & Cushman, for relator.

PER CURIAM. For reasons announced in the opinions recently filed by this court in the cases of *Fawcett v. Superior Court of Pierce Co.*, 46 Pac. 389, and *State v. Superior Court of Pierce Co.*, Id. 402, the writ applied for will be denied.

STATE, Respondent, v. SMITH, Appellant. (Supreme Court of Washington. Sept. 28, 1896.) Appeal from superior court, Spokane county. George Smith was convicted of carnally abusing a child, and appeals. Reversed. Houghton & Ridpath and S. Aug. Johnston, for appellant. James E. Fenton, for the state.

PER CURIAM. This case involves the same question that was decided by this court in *State v. Halbert* (March 21, 1896) 44 Pac. 538. Upon the authority of that case, the judgment herein is reversed, and the cause remanded, with directions to the lower court to sustain the demurrer to the information.

STONE, Respondent, v. SO RELLE, Appellant. (Supreme Court of Washington. June 19, 1896.) Appeal from superior court, Whatcom county; John R. Winn, Judge. Action by George B. Stone against George M. So Relle, Belle So Relle, and others. Judgment for plaintiff, and defendant Belle So Relle appeals. Affirmed. Nicholson & Hurlbut, for appellant. Jere Neterer, for respondent.

PER CURIAM. Every material question presented by this record was presented in the case of *Mortgage Co. v. Hersner*, and, in the opinion filed therein May 20th (45 Pac. 40), decided adversely to the contention of the appellant in the case at bar, and upon the authority of that case the judgment herein is in all things affirmed.

WARBURTON, Respondent, v. BACON et al., Appellants. (Supreme Court of Washington. Nov. 16, 1896.) Appeal from superior court, Pierce county; W. H. Pritchard, Judge. Action by Stanton Warburton against E. G. Bacon and Ellen T. Nelson, formerly Ellen T. Bacon, to set aside a deed made by E. G. Bacon to Ellen T. Bacon. From a judgment in favor of plaintiff, defendants appeal. Affirmed. Coiner & Shaez

leford and Joseph C. Dillow (L. P. Shackelford, of counsel), for appellants. Stanton Warburton, in pro. per.

PER CURIAM. The errors complained of in this case relate, in substance, to the facts found by the lower court. After a consideration of the proofs, and the able argument of appellants' counsel, we are not satisfied that such findings should be materially set aside or modified, however we might have found thereon as an original proposition. A discussion of the proofs would serve no purpose in the published Reports, and the judgment is affirmed.

WYANT, Appellant, v. WYANT et al., Respondents. (Supreme Court of Washington. May 19, 1896.) Appeal from superior court, Spokane county; James Z. Moore, Judge. Petition by John F. Wyant for distribution to him of the estate of John Wyant, deceased. D. W. Wyant and others answered and contested the petition. Judgment dismissing the petition, and plaintiff appeals. Reversed. Jones, Belt & Quinn, for appellant. Fitzgerald & Hopkins, for respondents.

PER CURIAM. One John Wyant, of Spokane county in June, 1892, left there. Appellant claims said estate of deceased. Respondents claim the brothers and sisters of deceased, or assignment from some of them. Various questions of law have been raised relating to the admission of certain evidence, allowance of an amendment by the court, the main controversy is over the finding that appellant is not a son of the deceased that deceased died childless. Several witnesses testified at the trial, and the deposition of others, taken in the states of Virginia, were read. Owing to the length of all the testimony, it is not possible to decide any of the questions raised with regard to the admissibility of some of it, as well as with appellant's further contention that the court erred in finding that appellant was not the son of the deceased. We are so well satisfied with regard to this that we are bound to reverse the finding of the court on this question of fact, and, as this settles the case in favor of the appellant, any further discussion is unnecessary.

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Under Civ. Code, § 656, one has rights in wild birds in his game preserve, entitling him to protect them from trespassers. — *Kellogg v. King* (Cal.) 166.

A second election under the herd law (St. 1893, c. 2, art. 2, § 4) held not a resubmission to the voters unless a majority of resident electors have previously voted to put in effect a regula-

tion permitting stock to run at large. — *People of Com'rs of Washita County v. Haines* 561.

ANSWER.

See "Pleading."

APPEAL AND ERROR.

See, also, "Certiorari"; "New Trial."

From justice, see "Justices of the Peace."

In criminal cases, see "Criminal Law."

In habeas corpus proceedings, see "Habeas Corpus."

Vested right to appeal, see "Constitutional Law."

Where certain defendants give notice, and not serve it on the other defendants, and then give notice, and serve it on all necessary parties, the first appeal may be abandoned. — *Wrightson v. Masterson* (Wash.) 1041.

Where error is predicated on the admission of testimony, appellant's brief must cite the record in which such evidence is to be found. If respondent denies that it was introduced. — *Mcgrath v. Gilmore* (Wash.) 1032.

The weight of evidence and matters occurring on the trial will not be reviewed in the absence of a motion for a new trial. — *Carroll v. Butt* (Okla.) 596.

Appeals lie from the district courts of the territory of Utah when the decisions are rendered in cases appealed from justices of the peace, though such appeals were perfected after the hearing. — *Hodson v. Union Pac. R. Co.* (Utah) 1047.

Jurisdiction.

A private party has no such interest in the dismissal of a petition for the disbarment of a lawyer as will sustain an appeal. — *In re* (Wash.) 644; *Appeal of Interstate Savings Loan Ass'n, Id.*

In an action on a note signed by a firm and the individual partners one of them may appeal. — *Cox v. Alexander* (Or.) 794.

A respondent in mandamus proceedings against whom the writ issued, and a judgment for costs was rendered, is entitled to appeal under Comp. Laws 1888, § 3034. — *Estlin v. Pratt* (Utah) 763.

Where the amount in controversy is less than \$100, that the case belongs to the exceptions may be shown by the certificate of the trial judge. — *Lander v. Pollard* (Kan. App.) 975.

To give jurisdiction over an appeal from judgment of the district court, it must be shown that the amount in controversy exceeds \$100, the case belongs to the excepted class. — *Smith v. Duvall* (Kan. App.) 323.

An appeal does not lie to the superior court from a decision of the board of equalization. — *Knapp v. King County* (Wash.) 1047.

— Appealable judgments and orders.

An order of the probate court requiring tributees to deliver to an administrator property in their hands under a decree of distribution held not appealable. — *Iversen v. Superior Court* (Cal.) 817.

An order granting a temporary injunction is appealable. — *North Point Consolidated Irr. Co. v. Utah & Salt Lake Canal Co.* 824.

An order vacating a judgment for plaintiff's election is not appealable. — *Eastman v. Galt* (Utah) 828.

Where the record shows no final judgment, an appeal will be dismissed on motion. — *Thiers v. Riggs* (Idaho) 829.

Notices.

Question of excessive damages cannot be raised on appeal unless specified as a ground.

error in the notice of appeal.—Osmun v. Winters (Or.) 780.

An appeal will not be dismissed because of failure to serve notice on one who is not shown by the record to have been a party to the proceedings below.—In re Bullard's Estate (Cal.) 297.

One of two defendants, against whom a default is taken, *held* not an adverse party so as to require notice of appeal.—McKeaney v. Black (Cal.) 881.

Service of a notice of appeal on an attorney as attorney for one party is not service on another party, though the attorney represents both.—Cornell University v. Denny Hotel Co. of Seattle (Wash.) 654; Potvin v. Same, *Id.*

The return of the sheriff that service of a notice of appeal cannot be made on either a party or his attorney within the county is the sole evidence upon which substituted service can be based.—Cornell University v. Denny Hotel Co. of Seattle (Wash.) 654; Potvin v. Same, *Id.*

Under Rev. St. 1887, § 8141, a summons in error issued five months after petition filed, but within one year after judgment was rendered, is in time.—Kuhn v. McKay (Wyo.) 853.

Under Comp. Laws, § 531, service of notice on a resident attorney need not be made in the county in which he resides.—Long Creek Bldg. Ass'n v. State Ins. Co. (Or.) 866.

Bond.

Where, after notice of exceptions to sufficiency of a bond on appeal, appellant has had time to have sureties justify, the appeal will be dismissed.—Holcomb v. Reed (Idaho) 1019.

A single undertaking is sufficient on appeals from a judgment and an order denying a new trial, where it refers to both.—Granger v. Robinson (Cal.) 604.

An appeal is perfected after notice is served and filed and an undertaking is given and filed.—Hattabaugh v. Vollmer (Idaho) 831.

Practice in general.

The superior court, on transfer from a justice's court of a case involving title to land, may allow an amendment of the complaint under Code Civ. Proc. § 838.—Baker v. Southern California Ry. Co. (Cal.) 604.

On appeal to the district court from a decree of the probate court disallowing a claim against a decedent's estate, claimant must prove his claim by competent testimony as in the lower court.—Morgan v. Saline Valley Bank (Kan. App.) 61.

An appeal in a matter of probate, from the probate to the district court, by one party interested, takes the whole matter to the district court.—In re Walker's Estate (Ariz.) 67.

The appellate court cannot take notice of the length of terms of district courts.—Dudley v. Barney (Kan. App.) 178.

On appeal from a refusal of county commissioners to appoint a deputy sheriff there must be a *trial de novo*.—Campbell v. Board of Com'rs of Canyon County (Idaho) 1022.

Parties.

Where actions have been consolidated, all parties who have appeared must be joined on an appeal by any party.—Cornell University v. Denny Hotel Co. of Seattle (Wash.) 654; Potvin v. Same, *Id.*

A receiver of an insolvent bank is a necessary party in error to reverse a judgment rendered in favor of the bank before his appointment.—Scanell v. Felton (Kan. Sup.) 948.

A person not served, against whom a personal judgment is entered, is not a necessary party on appeal, the judgment as to him being a nullity.—Munsell v. Beale (Kan. App.) 984.

It is not necessary to bring all persons named as parties into the supreme court on appeal.—Munsell v. Beale (Kan. App.) 984.

On substitution of parties, an appeal from the order of substitution will not lie where the original parties were not parties in the appeal.—Hendrickson v. Harvey (Kan. App.) 1003.

Where all necessary parties were served, failure to serve others *held* no ground for dismissal.—Day v. Sines (Wash.) 1048; Alford v. Same, *Id.*

Assignments of error.

A general assignment of error on a ruling of the court overruling a demurrer is sufficient.—Phelps v. City of Tacoma (Wash.) 400.

Specifications of error as to the admission of evidence must state the full substance of the evidence.—Tatum v. Roberts (Kan. App.) 983.

An assignment that evidence was improperly admitted, without reference to any specific instance, is insufficient.—Clifford v. L. Wolff Manufacturing Co. (Colo. App.) 214.

Assignment of errors in appellant's brief *held* insufficient.—Perkins v. Mitchell, Lewis & Staver Co. (Wash.) 1039.

An indefinite assignment of error will not be considered.—Atchison, T. & S. F. R. Co. v. Todd (Kan. App.) 545.

Where a specification of error is to an order of the court sustaining a motion for new trial containing 17 grounds, plaintiff must show that none of the grounds were sufficient.—Atchison, T. & S. F. R. Co. v. Todd (Kan. App.) 545.

An assignment that the court erred in overruling a motion for new trial raises for review all questions raised on that motion.—Richardson v. Mackay (Okla.) 546.

Record.

The record must affirmatively show that the court of appeals has jurisdiction of a case brought before it for review.—Van De Mark v. Jones (Kan. App.) 53.

To entitle an appellant to urge error in excluding papers as evidence, they must be set out in the abstract.—Michigan Fire & Marine Ins. Co. v. Wich (Colo. App.) 687.

Where the record does not show the grounds on which a motion for default was refused, it must be presumed that it was justified.—Plummer v. Weil (Wash.) 648.

Where the bill of exceptions is not in the record, it will be presumed that the facts warranted the judgment.—Board of Com'rs of Otero County v. First Nat. Bank (Colo. App.) 618.

Everything intended to be incorporated in a case made must precede the signature of the judge settling it.—Kelley v. Stevens (Kan. Sup.) 948.

Under Rev. St. §§ 4889, 4990, the transcript may be served by mail.—Hattabaugh v. Vollmer (Idaho) 831.

An amended statement on motion for new trial must be engrossed.—Hattabaugh v. Vollmer (Idaho) 831.

Where the record does not contain the evidence, it will be presumed that a refusal to admit certain evidence was proper.—Benham v. Lemhi Mining, Milling & Reduction Co. (Mont.) 816.

An additional abstract, filed by an appellee, stricken from the files as presenting matter not pertinent to the issue.—Colorado Fuel & Iron Co. v. Rio Grande Southern R. Co. (Colo. App.) 845.

Admission in evidence of files in another case presumed correct, where the papers do not appear in the record.—Nelson v. First Nat. Bank (Colo. App.) 879.

On appeal from a judgment dismissing a writ of certiorari, the petition is no part of the

record.—*Rauer v. Justices' Court of City and County of San Francisco* (Cal.) 870.

Where the district court fails to direct that the settlement of a case be attested, and it is not done, the appeal will be dismissed.—*Longwell v. Harkness* (Kan. Sup.) 307.

An appeal will not be dismissed on the ground that the statement of facts was not properly settled, where no specific errors are pointed out.—*Payne v. Spokane St. Ry. Co.* (Wash.) 1054.

Abstract on appeal held to sufficiently set out the general nature of the pleading, under supreme court rule 4 (37 Pac. vi.).—*Cox v. Alexander* (Or.) 794.

The denial of a motion for a bill of particulars will not be disturbed where the bill of exception does not show upon what evidence the court made the order.—*Shain v. Maxwell* (Cal.) 1069.

Verdict for plaintiff for goods sold will not be disturbed on the ground that the verdict was too great, if the record does not show the evidence.—*Shain v. Maxwell* (Cal.) 1069.

Where a case comes up on conclusions of fact and of law, a conclusion of law deducible from the conclusions of fact will be regarded, though there are other independent conclusions of law more specific in character.—*Douglass v. Walker* (Kan. Sup.) 318.

Matters contained in a motion to discharge an attachment, which relate to the merits of the action, held immaterial, as being surplusage.—*Moffett v. Boydston* (Kan. App.) 24.

If the case-made does not show that the trial judge considered and settled the same, and that the parties were present at the time, the appeal will be dismissed.—*Phillips v. Love* (Kan. App.) 55.

An appeal dismissed for failure to file a transcript within the required time, no sufficient excuse being shown.—*Hart v. Kimberly* (Cal.) 618.

Unless it affirmatively appears that all the testimony is preserved, the sufficiency of the evidence will not be reviewed.—*Ferguson v. Willig* (Kan. Sup.) 936.

Parties to a record cannot, by stipulation, extend the time for making and serving a case-made.—*Horner v. Christy* (Okla.) 561.

The district court cannot extend the time for serving a case-made after the extension of the time originally granted has expired.—*Polson v. Purcell* (Okla.) 578.

A plaintiff in error, to be entitled to a consideration of his case, must comply with the rules of court relating to abstracts.—*Wieland v. Potter* (Colo. App.) 370.

Questions dependent on the evidence cannot be reviewed where there is no bill of exceptions.—*Wieland v. Potter* (Colo. App.) 370.

Where no copy of a motion for new trial accompanies the proceedings, it will be presumed that no written motion as provided in the statute was filed.—*Rogers v. Bonnett* (Okla.) 599.

Review.

A ruling on appeal is not res judicata on a second trial as to new material facts.—*Madrox v. Tague* (Mont.) 535.

The decision of an appellate court on a question of fact is not conclusive as to such question on a retrial on new evidence, and it should be submitted to the jury.—*Robinson v. Thornton* (Cal.) 79.

A party at whose request special findings are made cannot object that they are outside the issues.—*Michigan Fire & Marine Ins. Co. v. Wich* (Colo. App.) 687.

It is for the district court, on appeal, to determine whether bias on the part of the town prevented a fair election.—*Corbin* (Colo. App.) 224.

An assignment that the findings will support the judgment cannot be considered on appeal from an order denying a new trial.—*Ward v. Wallace* (Cal.) 301.

Where a verdict has been set aside and trial granted a refusal to render judgment finding cannot be reviewed.—*Atchison v. S. F. R. Co. v. Todd* (Kan. App.) 545.

Averments which might have been amended below on motion will be deemed to have been amended.—*Carson v. Butt* (Okla.) 596.

A party cannot complain of an order in response to his own motion.—*Scatena v. California Canneries Co.* (Cal.) 737.

Error in a judgment for usurpation of office that relator be restored to office cannot be reviewed on appeal from an order denying a trial, though the office has been abolished.—*People v. Rodgers* (Cal.) 740.

It will be presumed the court properly instructed the jury to amend his return, where there is nothing in the record to show why the amendment was made, or why it was objected to.—*Nelson v. First Nat. Bank* (Colo. App.) 579.

It is presumed that a sheriff proceeded lawfully in the levy of a tax warrant.—*Perry v. H.* (Kan. App.) 993.

— Objections not raised below.

A finding, not excepted to, held conclusive.—*Hill v. Lowman* (Wash.) 1042.

A failure of a trial court to make a finding on a fact not put in issue by the pleadings, though bearing on the issues made, cannot be reviewed on appeal unless such finding was requested, and an exception saved.—*Harsch* (Or.) 141.

The question whether the discretion of a court, in granting a writ of mandamus, was affected by matters of defense, cannot be considered where such matters were not pleaded.—*Board of Com'rs of Grand County v. People* (Colo. App.) 107.

Objections that a bill of exceptions was served in time cannot be made for the first time on appeal.—*Horton v. Jack* (Cal.) 920.

A complaint attacked for the first time on appeal will be liberally construed to sustain the judgment.—*Mosher v. Bruhn* (Wash.) 387.

In a cause tried by the court, the judgment will not be reviewed on the evidence unless exceptions to the judgment were preserved.—*Nelson v. First Nat. Bank* (Colo. App.) 579.

That no exceptions to the judgment were preserved will not prevent the review of errors appearing in the record.—*Nelson v. First Nat. Bank* (Colo. App.) 579.

Where findings of fact are not excepted to, they will not be considered on appeal.—*McLean v. Whitworth* (Wash.) 1045.

— Discretion of trial court.

An order setting aside a judgment by default will seldom be disturbed on appeal.—*Goodrich v. Loupe* (Cal.) 77.

An assignment based on the denial of a new trial will not be considered in the absence of an abuse of discretion.—*Port Townsend South R. Co. v. Weir* (Wash.) 1044.

— Weight and sufficiency of evidence.

Where the only question is one of fact, and the evidence is conflicting, the verdict will not be disturbed.—*Curry v. Holland* (Cal.) 4.

Where the evidence supports the findings, and they are approved by the court, the judgment will not be disturbed.—*MacIellan v. Seim* (Kan. Sup.) 959.

Findings of the jury not sustained by the evidence will be set aside.—*Acme Harvester Co. v. Madden* (Kan. App.) 819.

A judgment will be reversed where there is no conflict of evidence, and it is not sustained by the testimony.—*Commercial Bank of Moscow v. Lieualten* (Idaho) 1020.

An order sustaining an attachment will not be reversed on appeal where the evidence is conflicting.—*Slosson v. Glosser* (Cal.) 276.

An order refusing to permit an heir to revoke a renunciation of his right to appointment as administrator, and denying his request for the appointment of another, when based on conflicting evidence, will not be disturbed on appeal.—*In re Silvar's Estate* (Cal.) 295.

Where appellants claim that the verdict is sustained only by incompetent evidence, but do not point it out, the evidence will not be reviewed.—*Congdon v. Olds* (Mont.) 281.

The rule that a verdict on conflicting evidence will not be disturbed relates only to substantial conflict.—*State v. Virginia & T. R. Co.* (Nev.) 723.

A finding on motion to dissolve an attachment held conclusive of all questions of fact.—*Tootle v. Brown* (Okla.) 550.

A verdict will be set aside where one of the findings is wholly without evidence to support it.—*Ottison v. Edmonds* (Wash.) 398.

A verdict or finding of fact on conflicting evidence will not be reviewed.—*Dewey v. Burton* (Kan. App.) 321; *Cannon v. McGrew* (Cal.) 463; *Ellison v. Beannabia* (Okla.) 477; *Darlington-Miller Lumber Co. v. Lobitz* (Okla.) 481; *Maddox v. Tague* (Mont.) 535; *Phenicie v. Powell* (Colo. App.) 844.

— Harmless error.

Where the decision was correct on the law, it was immaterial that the court decided it on an erroneous theory.—*Scattergood v. Johns* (Kan. Sup.) 935; *Ellis v. Martin*, Id.

Rulings on evidence will not be reviewed where they could not have changed the result.—*Cannon v. McGrew* (Cal.) 463.

The admission of incompetent evidence, when harmless, is no ground for reversal.—*Union Transp. Co. v. Bassett* (Cal.) 907.

Excluding an answer to a question asked to show that witness was unfriendly to defendant, held harmless.—*Tonini v. Cevasco* (Cal.) 103.

The admission of evidence after a case is closed, without any showing or claim of prejudice therefrom, will not authorize a reversal.—*Newkirk v. Noble* (Colo. App.) 15.

Error in rejecting evidence is cured by its subsequent admission.—*Hayford v. Wallace* (Cal.) 293.

Error in disallowing defendant's challenges is not ground for reversal when no other verdict could stand.—*Poncin v. Furth* (Wash.) 241.

An assignment based on the admission of evidence will not be considered where the record shows the objection to the evidence sustained.—*Port Townsend Southern R. Co. v. Weir* (Wash.) 1044.

Error in the admission of evidence in support of a count for forcible detainer is without prejudice where the judgment may stand on another count, fully established, for forcible entry.—*Amador Gold Mine v. Amador Gold Mine* (Cal.) 80.

Effect of appeal.

A perfected appeal stays all proceedings in the court below upon the judgment or order appealed from.—*Peycke v. Keefe* (Cal.) 78.

After defendant in quo warranto has appealed, the court cannot issue an order requiring relator to surrender the office to defendant.—*State v. Superior Court of Pierce County* (Wash.) 402.

A party appealing from a judgment of the probate court sitting as a justice of the peace may dismiss such appeal in the district court at any time before trial.—*Darlington-Miller Lumber Co. v. Hall* (Okla.) 493.

A temporary injunction is operative pending an appeal from the order granting it.—*State v. Stallcup* (Wash.) 251.

The trial court may amend the record to correspond with the facts pending the appeal.—*Wasatch Min. Co. v. Jennings* (Utah) 1103.

Decision—Dismissal.

The fact that an order in probate is made without service on parties necessary to give the court jurisdiction is not a ground for the dismissal of an appeal therefrom.—*In re Bullard's Estate* (Cal.) 297.

Failure of the affidavit of the surety on appeal to state that he is worth the required amount held not ground for dismissal.—*Horton v. Donohoe-Kelly Banking Co.* (Wash.) 409.

Where a reversal will affect persons not parties, the appeal will be dismissed.—*Breneman v. Burr* (Kan. App.) 968.

A motion to dismiss denied, notwithstanding appellant's failure to file his points and authorities within the time required by the supreme court rules.—*Niosi v. Empire Steam Laundry* (Cal.) 153.

An action to enjoin the payment of a state warrant will not be dismissed on appeal because it does not appear whether or not the holder of the warrant is a party, where the questions involved are of law only.—*State v. Metschan* (Or.) 791.

On appeal by a corporation, a motion to dismiss by the stockholders for want of authority to take the appeal must establish the facts alleged.—*Woodbury v. Nevada Southern Ry. Co.* (Cal.) 862.

Where a necessary party dies after petition in error filed, and the action is not revived, the petition must be dismissed.—*Larkin v. Lane* (Kan. App.) 997.

— Reversal.

On reversing a judgment, the court cannot order judgment for the other party, where the findings will not support such a judgment, though they are not supported by the evidence.—*Kellogg v. King* (Cal.) 166.

Where judgment is reversed, with leave to amend, the trial court cannot impose costs as a condition precedent.—*Dixon v. Risley* (Cal.) 5.

— Mandate.

The proper practice on remanding a case held not to order judgment on the verdict, but to order a new trial.—*Luse v. Union Pac. Ry. Co.* (Kan. Sup.) 768.

Where judgment in a personal injury case, tried to a jury, is reversed because of error in instructions, it will be remanded for a new trial.—*Colorado Fuel & Iron Co. v. Cummings* (Colo. App.) 875.

Liabilities on appeal bonds.

An appeal bond executed by a guardian ad litem held not so defective as to be void, so that the sureties were liable.—*Freeman v. McAttee* (Kan. App.) 40.

In an action against a surety on an appeal bond, plaintiff must prove nonpayment of judg-

Code, § 13, providing that all persons jointly liable may be included in the same action, applies to actions on appeal bonds.—*Wilson v. Welch* (Colo. App.) 106.

APPEARANCE.

Entry of appearance by attorneys *held* sufficient.—*Cornell University v. Denny Hotel Co. of Seattle* (Wash.) 654; *Potvin v. Same*, *Id.*

Where a defendant, after default has been entered against him, participates by counsel in the proceedings in the cause, and is served with notice of motions by plaintiff, he is to be considered as in court, and entitled to notice of an appeal by plaintiff.—*Cornell University v. Denny Hotel Co. of Seattle* (Wash.) 654; *Potvin v. Same*, *Id.*

APPLICATION.

For injunction, see "Injunction."
For insurance, see "Insurance."
For mandamus, see "Mandamus."
For new trial, see "New Trial."
For public lands, see "Public Lands."
For removal of cause, see "Removal of Causes."

APPOINTMENT.

Of executor or administrator, see "Executors and Administrators."

APPRAISAL.

Of loss under policy, see "Insurance."

ARGUMENT OF COUNSEL.

See "Criminal Law"; "Trial."

ARRAIGNMENT.

See "Criminal Law."

ARTICLES.

Of partnership, see "Partnership."

ASSAULT AND BATTERY.

Jurisdiction of city court, see "Courts."
With intent to kill, see "Homicide."

ASSESSMENT.

Of benefits arising from public improvements, see "Municipal Corporations."
Of taxes, see "Taxation."

ASSIGNMENTS.

See, also, "Assignments for Benefit of Creditors."

Of error, see "Appeal and Error."
Of mortgage, see "Mortgages."

A payment to the assignor of a nonnegotiable instrument, without notice of the assignment, *held* valid.—*Lockrow v. Cline* (Kan. App.) 720.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

See, also, "Insolvency."

The award of compensation to an assignee will not be disturbed unless there is a clear abuse of discretion.—*Branch v. American Nat. Bank* (Kan. Sup.) 305.

the same time.—*Marshall v. Van De Mar* (Kan. Sup.) 308.

A creditor may sue an assignor and recover a personal judgment where the assignee has disallowed his claim and an appeal is pending.—*Western Nat. Bank v. Long* (Kan. App.) 543.

A creditor may sue an assignor and recover a personal judgment where the assignee has disallowed his claim and an appeal is pending.—*Western Nat. Bank v. Simmons* (Kan. App.) 543.

A mortgage by a surviving partner on the entire stock of merchandise of the firm does not constitute a general assignment.—*Burchinell v. Koon* (Colo. App.) 932.

A provision in an assignment inconsistent with the statute will not avoid the conveyance.—*Reese v. Platt* (Kan. App.) 960.

Evidence *held* to show no such delivery of an assignment as to make it effective against a chattel mortgage.—*Day v. Sines* (Wash.) 1048; *Alford v. Same*, *Id.*

ASSOCIATIONS.

See "Corporations"; "Religious Societies."

ASSUMPTION.

Of mortgage debt, see "Mortgages."
Of risks, see "Master and Servant."

ATTACHMENT.

See, also, "Execution"; "Exemptions"; "Garnishment."

Discharge, power of judge at chambers, see "Courts."

To secure preference, see "Insolvency."

Where the affidavit does not sufficiently state the facts, the attachment will be dissolved, though they are alleged in the complaint.—*Fisk v. French* (Cal.) 161.

Where the affidavit in attachment falsely states the facts, the attachment will be dissolved.—*Fisk v. French* (Cal.) 161.

The fact that a debt is secured by a bond executed by the debtor, with sureties, will not defeat an attachment thereon under the statute.—*Slosson v. Glosser* (Cal.) 276.

It is a good defense to an indemnity bond given by plaintiff in attachment, that the plaintiff levying officer negligently permitted judgment to be entered against him in favor of a third party for the property.—*Armour Packing Co. v. Orrick* (Okla.) 573.

Where judgment was obtained against a levying officer on account of the levy, *held* that he could recover on an indemnity bond given by plaintiff in attachment, without first paying the judgment against him.—*Armour Packing Co. v. Orrick* (Okla.) 573.

In an action against plaintiff for wrongful attachment of defendant's property, the plaintiff may show seizure by testimony of eyewitnesses.—*Riethmann v. Godsmann* (Colo. Sup.) 684.

In an action for wrongful attachment, a written protest *held* admissible, as well as an oral protest made at the time of the levy.—*Riethmann v. Godsmann* (Colo. Sup.) 684.

One justifying an attachment of goods sold by the attachment debtor has the burden of proving that the sale was fraudulent.—*Riethmann v. Godsmann* (Colo. Sup.) 684.

Recovery can be had for wrongful attachment of property of another than the attachment debtor.—*Riethmann v. Godsmann* (Colo. Sup.) 684.

An attachment creditor is liable for wrongful taking, though he did not direct the officer to levy on the particular property, where he ratified such act.—*Riethmann v. Godsmann* (Colo. Sup.) 684.

The falsity of an affidavit in attachment held not cured by a subsequent amendment of the petition stating the facts truly.—*Fisk v. French* (Cal.) 161.

An equitable interest in lands is subject to attachment.—*Shanks v. Simon* (Kan. Sup.) 774.

A creditor whose claim is secured by chattel mortgage acquires no valid lien by attaching the property before exhausting his remedy under the mortgage.—*Chicago Title & Trust Co. v. O'Marr* (Mont.) 809.

Complaint on a redelivery bond held to sufficiently state that defendant was in fault for the damaged condition of the property returned.—*Creswell v. Woodside* (Colo. App.) 842.

Complaint on redelivery bond must allege that plaintiff recovered judgment, and that the attachment was not dissolved.—*Creswell v. Woodside* (Colo. App.) 842.

A redelivery bond is not satisfied by the return of the property in a depreciated condition, due to defendant's neglect.—*Creswell v. Woodside* (Colo. App.) 842.

ATTORNEY AND CLIENT.

Appearance by attorneys, see "Appearance."
Argument of counsel, right to open and close, see "Trial."

Attorneys' fees as costs, see "Costs."
— **in divorce cases, see "Divorce."**
— **in suit to foreclose mortgage, see "Mortgages."**

Powers of attorney, see "Principal and Agent."
Service of notice of appeal on attorney, see "Appeal and Error."

A 10 per cent. attorney's fee for suing on a note and foreclosing a mortgage held not excessive.—*Cooper v. Bank of Indian Territory* (Okla.) 475.

A motion of stockholders to substitute an attorney on appeal by the corporation must show that the stockholders control the action.—*Woodbury v. Nevada Southern Ry. Co.* (Cal.) 862.

A motion for substitution of attorneys on appeal must be made in the trial court.—*Woodbury v. Nevada Southern Ry. Co.* (Cal.) 862.

A client may ratify the act of his attorney in commencing suit.—*Roberts v. Denver, L. & G. R. Co.* (Colo. App.) 880.

It is no objection to disbarment proceedings that the matter charged constitutes a felony, and that the attorney has not been tried therefor.—*In re Wharton* (Cal.) 172.

An attorney having an account for collection has no power to release the debtor, and look to a purchaser from such debtor for payment.—*Richardson Drug Co. v. Dunagan* (Colo. App.) 227.

AUTHENTICATION.

Of bill of exceptions, see "Exceptions, Bill of."

BAIL.

An appeal from a conviction will not be dismissed because the conditions of the recognizance are more onerous than required by the constitution.—*City of Kansas City v. Hescher* (Kan. App.) 1006.

A recognizance held not void where it can be ascertained that the sureties undertook that defendant should appear before the proper court for trial for the offense charged.—*City of Kansas City v. Hescher* (Kan. App.) 1006.

A recognizance in a prosecution for violation of a city ordinance held not void because the city is named as recognizee.—*City of Kansas City v. Hescher* (Kan. App.) 1006.

On a recognizance on conviction of a violation of a city ordinance, the recognizance need not be executed in the presence of the police court, or acknowledged before such court.—*City of Kansas City v. Fagan* (Kan. App.) 1009.

A recognizance failing to definitely designate the offense held valid nevertheless, where the complaint which was transmitted with it sufficiently described the offense.—*City of Kansas City v. Garnier* (Kan. Sup.) 707.

A bond by defendant in a criminal case taken and approved by the clerk held not a recognizance upon which, in case of default, execution may issue under Gen. St. 1883, § 966.—*Fahey v. People* (Colo. App.) 836.

A recognizance given on appeal from a conviction in a city police court for violation of an ordinance may be executed to the city.—*City of Kansas City v. Garnier* (Kan. Sup.) 707.

BAILMENT.

See "Banks and Banking"; "Carriers"; "Pledges."

BALLOTS.

See "Elections."

BANKS AND BANKING.

Where a collection is placed with a bank, with authority to employ another bank to collect it, the second bank is the subagent of the customer of the first.—*Beach v. Moser* (Kan. App.) 202.

A judgment creditor of an insolvent bank may proceed under Gen. St. 1889, par. 1192, to subject the property of the stockholder to his judgment, though 60 days have not elapsed since execution issued.—*Buist v. Citizens' Sav. Bank* (Kan. App.) 718.

The contingent liability of stockholders can be enforced only by the receiver.—*Watterson v. Masterson* (Wash.) 1041.

Failure to show a demand in an action to recover a deposit held not ground for reversal of judgment against the bank.—*Wheeler v. Commercial Bank of Moscow* (Idaho) 830.

In an action on drafts which were not accepted by the payee, held, that the failure to present them at the drawee bank, and to have them protested, was not ground for reversing a judgment in favor of the drawer against the bank which issued the drafts.—*Wheeler v. Commercial Bank of Moscow* (Idaho) 830.

BASTARDS.

Inheritance by bastard, see "Descent and Distribution."

Prosecution for maintenance of an illegitimate child can be maintained only by an unmarried woman.—*Blush v. State* (Kan. App.) 185.

BENEFICIARIES.

See "Trusts."

BENEFITS.

Assessment of benefits, see "Municipal Corporations."

BEQUEST.

See "Wills."

BEST AND SECONDARY EVIDENCE.

See "Evidence."

BIGAMY.

Evidence is inadmissible that defendant believed his first marriage had been annulled at the time he made the second.—*State v. Zichfeld* (Nev.) 802.

BILL.

Of interpleader, see "Interpleader."
Of particulars, see "Pleading."

BILLS AND NOTES.

Alteration, see "Alteration of Instruments."
Release of surety on notes, see "Principal and Surety."
Sureties on notes, see "Principal and Surety."

A delay of eight months by the payee to declare a mortgage note due for nonpayment of interest is not a waiver of the provision in the note giving the option to the payee.—*Glas v. Glas* (Cal.) 667.

An agreement to assign a life policy held not to constitute a gift, so as to be a consideration for a note subsequently given on failure to do so.—*Hayford v. Wallace* (Cal.) 301.

The absolute guarantors of a note waiving demand, etc., are not entitled to have the note presented for payment.—*Donnerberg v. Oppenheimer* (Wash.) 254.

Indorsement and transfer.

A guaranty of payment waiving demand by the payee, indorsed on the note, is an indorsement with an enlarged liability.—*Donnerberg v. Oppenheimer* (Wash.) 254.

A purchaser of a note after maturity, from a bona fide indorsee, acquires the rights of the indorsee.—*Donnerberg v. Oppenheimer* (Wash.) 254.

Transfer of a note to a bank for collection gives the bank such ownership that it can sue on the note.—*First Nat. Bank v. Hughes* (Cal.) 272.

Possession of the note, the subject of the action, is prima facie evidence of ownership.—*Carnahan v. Lloyd* (Kan. App.) 823.

Nonnegotiable county warrants, past due when assigned, are subject to equities then existing.—*First Nat. Bank v. School Dist. No. 1, Crook County* (Wyo.) 1090.

The burden of proof held to devolve on plaintiff to prove that the note in suit was transferred to him.—*Morris v. Case* (Kan. App.) 54.

Actions on.

An allegation in an action on a note that the note was for value sold and delivered to plaintiff, may be put in issue by an unverified pleading.—*Morris v. Case* (Kan. App.) 54.

Where a verified answer denies the execution of a note it is incompetent against defendant without evidence to establish its execution.—*McCormick Harvesting-Mach. Co. v. Reiner* (Kan. App.) 539.

Evidence examined and held to justify a finding that defendant was an accommodation maker for the benefit of plaintiff.—*Eppinger v. Kendrick* (Cal.) 613.

In an action on a note, admission of statements by defendant as to his understanding on signing a renewal note, held error without prejudice.—*Eppinger v. Kendrick* (Cal.) 613.

In an action on a note, answer construed, and held that a motion for judgment on pleadings was properly denied.—*Eppinger v. Kendrick* (Cal.) 613.

Instructions in an action on a note which defendant claimed to have made for the accommodation of the plaintiffs, held proper.—*Eppinger v. Kendrick* (Cal.) 613.

In an action on a note which defendant alleged was for accommodation of plaintiffs, an allegation that the note was executed at the request of the manager of plaintiff, held sufficient as to the fact of such agency.—*Eppinger v. Kendrick* (Cal.) 613.

A finding that plaintiff bank was not the owner of the note in suit, indorsed by the payee, held not sustained by the evidence.—*First Nat. Bank v. Hughes* (Cal.) 272.

An unverified general denial puts the burden of proof of ownership on the plaintiff in an action on a note payable to order, and not transferred by indorsement.—*Carnahan v. Lloyd* (Kan. App.) 823.

In an action on a note providing for attorney's fees, where their amount is in issue, and none are included in the verdict, the court cannot render judgment for such fees.—*Cox v. Alexander* (Or.) 794.

Complaint held to sufficiently state ownership of the note in plaintiff, an indorsee.—*D. M. Osborne & Co. v. Stevens* (Wash.) 1027.

Where defendant pleaded failure of consideration and fraud, a motion for judgment on the pleading was properly denied.—*Port Townsend Southern R. Co. v. Weir* (Wash.) 1044.

A plea in an action on a note that a memorandum reciting a right to an extension had been torn off is no defense, in the absence of an allegation of a demand for an extension.—*Mater v. American Nat. Bank* (Colo. App.) 221.

BLACKMAIL.

Evidence in action for breach of marriage promise, see "Breach of Marriage Promise."

BONA FIDE PURCHASERS.

See "Bills and Notes."

Of mortgage, see "Mortgages."

BONDS.

See, also, "Principal and Surety."

Liabilities on appeal bonds, see "Appeal and Error."

Of indemnity by plaintiff in attachment, see "Attachment."

Of justice, see "Justices of the Peace."

On appeal, see "Appeal and Error."

Railroad bonds, see "Railroads."

A negotiable bond which refers to a mortgage containing a stipulation which, if inserted in the bond, would render it nonnegotiable, held nonnegotiable.—*Lockrow v. Cline* (Kan. App.) 720.

BOUNDARIES.

Of judicial district, alteration, see "Constitutional Law."

BREACH OF MARRIAGE PROMISE.

Acts committed after the commencement of the action are admissible to show animus of defendant.—*Osmun v. Winters* (Or.) 780.

Evidence held admissible in proof of executory promise of marriage.—*Osmun v. Winters* (Or.) 780.

Evidence held inadmissible to show a conspiracy to blackmail defendant.—*Osmun v. Winters* (Or.) 780.

Held not error to instruct the jury that, where defendant has made allegations attacking plaintiff's character, and has failed to prove them, "it is a worse case than if there had been a simple denial" of plaintiff's case.—*Osmun v. Winters* (Or.) 780.

On a trial for breach of marriage promise, an unproved charge of plaintiff's unchastity may be considered in aggravation of damages.—*Osmun v. Winters* (Or.) 780.

BRIEFS.

See "Appeal and Error."

BROKERS.

A complaint in an action for commission by real-estate agent *held* insufficient.—*Booth v. Moody* (Or.) 884.

BURDEN OF PROOF.

See "Evidence."

BURGLARY.

Evidence *held* insufficient to show that the taking was done in the nighttime.—*State v. Gray* (Nev.) 801.

Evidence *held* sufficient to show that defendant had possession of the stolen property.—*People v. Harris* (Cal.) 602.

Testimony *held* sufficient to prove corpus delicti and justify admission of defendant's statements.—*People v. Harris* (Cal.) 602.

CANALS.

See "Waters and Water Courses."

CANCELLATION OF INSTRUMENTS.

An absolute deed, to be delivered in case of the nonpayment of a mortgage, will be set aside where the property is double the value of the debt.—*Bradbury v. Davenport* (Cal.) 1062.

A party asking a cancellation of a deed *held* not required to first return benefits obtained thereunder.—*Ellison v. Beannabia* (Ok.) 477.

In an action to cancel a contract for fraud, the burden of proof is on plaintiff.—*Ferguson v. Willig* (Kan. Sup.) 936.

CARRIERS.

See, also, "Railroads."

Measure of damages for breach of carriage contract, see "Damages."

Instruction as to the care required of carriers *held* erroneous.—*Payne v. Spokane St. Ry. Co.* (Wash.) 1054.

Of goods and live-stock.

A common carrier cannot compel a prospective shipper to agree to a limitation of its liability.—*Atchison, T. & S. F. R. Co. v. Mason* (Kan. App.) 31.

A demurrer to evidence in an action against a carrier for injuries to stock shipped *held* properly overruled.—*Atchison, T. & S. F. R. Co. v. Mason* (Kan. App.) 31.

A petition in an action against a carrier for injuries to stock shipped *held* sufficiently definite and certain.—*Atchison, T. & S. F. R. Co. v. Mason* (Kan. App.) 31.

A connecting carrier limiting his liability to his own line *held* liable for delay caused by failure to notify successive connecting roads of the conditions of its contract.—*Colfax Mountain Fruit Co. v. Southern Pac. Co.* (Cal.) 668.

In an action against a contracting carrier for delay, the burden is on defendant to show notice to successive connecting carriers of the conditions

of the contract.—*Colfax Mountain Fruit Co. v. Southern Pac. Co.* (Cal.) 668.

Under Civ. Code, § 2201, a provision that a carrier's responsibility as to freight shall cease at a connecting point *held* valid.—*Colfax Mountain Fruit Co. v. Southern Pac. Co.* (Cal.) 668.

Of passengers.

Where a person riding on a street car steps off the car upon the street, the relation of passenger and carrier ends.—*Smith v. City & Suburban Ry. Co.* (Or.) 136.

A railroad company *held* negligent in starting a train before a passenger had alighted.—*Luse v. Union Pac. Ry. Co.* (Kan. Sup.) 768.

A passenger who refuses to pay fare to a station beyond that to which he wants to go, but at which the train does not stop, may be ejected.—*Noble v. Atchison, T. & S. F. R. Co.* (Ok.) 483.

Evidence examined, and *held*, that the question whether a passenger, in alighting from a train, was negligent, was for the jury.—*Carroll v. Burleigh* (Wash.) 232.

A purchaser of a ticket from an agent at a union depot *held* entitled to rely on the agent's statements as to the time of arrival of the train at its destination.—*Turner v. Great Northern Ry. Co.* (Wash.) 243.

Where a carrier is unable to take a passenger to his destination because of a washout, and the passenger takes a train, on another line, which is also delayed, the first carrier *held* liable for such second delay.—*Turner v. Great Northern Ry. Co.* (Wash.) 243.

Evidence examined, and *held* sufficient to sustain a judgment for injuries received by a passenger.—*Atchison, T. & S. F. R. Co. v. Elder* (Kan. Sup.) 310.

In an action for the death of a passenger, plaintiff need only show the accident, that death occurred thereby to the decedent, and that he left a widow or kindred surviving him.—*Atchison, T. & S. F. R. Co. v. Elder* (Kan. Sup.) 310.

Evidence *held* not to show an agreement that a train which was not scheduled to stop at the station to which plaintiff bought a ticket should stop there to permit plaintiff to alight.—*Noble v. Atchison, T. & S. F. R. Co.* (Ok.) 483.

In an action of tort for wrongful ejection from defendant's train, plaintiff cannot recover as for a breach of contract.—*Noble v. Atchison, T. & S. F. R. Co.* (Ok.) 483.

An instruction as to exemplary damages, in an action for negligence, which did not explain upon what conditions negligence would have entitled plaintiff to such damages, *held* erroneous.—*Atchison, T. & S. F. R. Co. v. Chamberlain* (Ok.) 499.

A passenger injured in alighting from a train *held* not entitled to exemplary damages under the evidence.—*Atchison, T. & S. F. R. Co. v. Chamberlain* (Ok.) 499.

Refusal to submit special questions requiring the jury to state what amounts they find as actual damages and what amount they assess as punitive damages, *held* erroneous.—*Atchison, T. & S. F. R. Co. v. Chamberlain* (Ok.) 499.

CASE MADE.

See "Appeal and Error."

CERTIFICATE.

Of recorder of deeds, see "Registers of Deeds."

CERTIFICATION.

Of nominations, see "Elections."

CERTIORARI.

The return to a writ to review an order discharging a defendant from prosecution under a city liquor ordinance need not set out the ordinance.—*City of Seattle v. Pearson* (Wash.) 1053.

A special administrator, who has been ordered by the district court to pay out money of the estate, is "a party beneficially interested," and entitled to a writ of review.—*State v. Second Judicial District Court* (Mont.) 259.

An order of a district court, made without jurisdiction, may be reviewed and annulled by a writ of review.—*State v. Second Judicial District Court* (Mont.) 259.

The writ lies to review an order of a municipal court discharging a defendant from a prosecution for violation of a city liquor ordinance.—*City of Seattle v. Pearson* (Wash.) 1053.

CHALLENGE.

See "Jury."

CHANCERY.

See "Equity."

CHANGE OF VENUE.

See "Criminal Law"; "Venue."

CHARITIES.

A trust for the founding of an astronomical observatory for a university held not void as a trust for a private corporation, nor as creating a perpetuity.—*Spence v. Widney* (Cal.) 463.

CHARTER.

Of city, see "Municipal Corporations."

CHATTEL MORTGAGES.

See, also, "Fraudulent Conveyances."

Alteration, see "Alteration of Instruments."

Change of possession, see "Fraudulent Conveyances."

Effect on assignment, see "Assignments for Benefit of Creditors."

On firm property, see "Partnership."

A subsequent mortgagee, with notice of a prior mortgage, is not a subsequent mortgagee in good faith, within Gen. St. 1889, par. 3905.—*Casner v. Crawford* (Kan. App.) 41.

A mortgagee is not bound by a sale on credit by the sheriff without his knowledge or ratification.—*Maddox v. Tague* (Mont.) 535.

Failure to file a mortgage given in good faith does not render it void as against subsequent purchasers and mortgagees with notice.—*American Lead-Pencil Co. v. Champion* (Kan. Sup.) 696.

A chattel mortgage given for a greater sum than is owing by the mortgagor to secure a present indebtedness and future advances held valid.—*Bane v. Hartzell* (Kan. Sup.) 961.

A mortgage of a stock of clothing and furnishing goods held not to include boots, shoes, etc.—*Bane v. Hartzell* (Kan. Sup.) 961.

One taking a third chattel mortgage to secure an antecedent debt, with full knowledge of the other mortgages, held estopped to contest its validity.—*Dodge v. Smith* (Kan. App.) 990.

Validity of mortgage on after-acquired property determined.—*Dodge v. Smith* (Kan. App.) 990.

An assent of a mortgagee in a chattel mortgage presumed.—*Day v. Sines* (Wash.) 1048; *Alford v. Same*, *Id.*

Lien of first chattel mortgage on stock of goods held to take priority over second mortgage on the same goods, though the latter was more specific.—*McCord, Brady & Co. v. Albany County Nat. Bank* (Wyo.) 1093.

Chattel mortgage covering after-acquired property is good if such property was not obtained by use of additional capital.—*McCord, Brady & Co. v. Albany County Nat. Bank* (Wyo.) 1093.

The fact that a mortgagor continued to dispose of the mortgaged stock for his own benefit, after execution of the mortgage, does not invalidate the mortgage, unless the mortgagee consented thereto.—*Fisher v. Kelly* (Or.) 146.

The statutory provision that as to third persons the lien of a chattel mortgage is extinguished on the removal of the property to another county, unless the mortgage is recorded in such county within 30 days, is absolute.—*Turner v. Caldwell* (Wash.) 235.

Under Code Civ. Proc. 1887, § 358, a chattel mortgagee cannot waive his security, sue on the debt, and attach his debtor's property.—*Largey v. Chapman* (Mont.) 808.

A chattel mortgage referring to a prior recorded mortgage for a detailed description held sufficiently definite.—*Chicago Title & Trust Co. v. O'Marr* (Mont.) 809.

A creditor does not waive his lien by attaching his debtor's property while the mortgage is in force.—*Chicago Title & Trust Co. v. O'Marr* (Mont.) 809.

A defect in the affidavit held not to invalidate the mortgage as against third parties, where the mortgagee takes actual possession.—*Chicago Title & Trust Co. v. O'Marr* (Mont.) 809.

Priority of liens between chattel mortgages determined.—*Chicago Title & Trust Co. v. O'Marr* (Mont.) 809.

A chattel mortgage is notice to third persons, though the affidavit thereto is not signed by the mortgagor or mortgagee.—*Lutz v. Kinney* (Nev.) 257.

A chattel mortgagee deeming himself unsafe held entitled to take possession though the debt was not due, if he could obtain such possession peaceably.—*First Nat. Bank v. Teat* (Okla.) 474.

Where a chattel mortgagee converts the mortgaged property, the measure of recovery is the value thereof, less the debt.—*Burton v. Randall* (Kan. App.) 326.

Where a chattel mortgagee in possession of the property disposes of the same in denial of the mortgagor's rights, it is a conversion.—*Burton v. Randall* (Kan. App.) 326.

Where defendant, interveners, and plaintiff were in joint possession of goods under a chattel mortgage, defendant, by attaching the property, and selling the same, held liable to the other mortgagees for the conversion.—*Chicago Title & Trust Co. v. O'Marr* (Mont.) 809.

A mortgagee of personal property in possession may recover for its conversion against a sheriff who seized it under attachments against the mortgagor.—*Burchinell v. Koon* (Colo. App.) 932.

CHECKS.

Forgery of, see "Forgery."

CHILD.

Custody after divorce, see "Divorce."

CITY.

See "Municipal Corporations."

CITY COURTS.

See "Courts."

CLAIM AND DELIVERY.

See "Replevin."

CLAIMS.

Against assigned estate, see "Assignments for Benefit of Creditors."
—decendent's estate, see "Executors and Administrators."
For liens, see "Mechanics' Liens."

CLERKS OF COURTS.

It did not excuse the failure of the clerk of court to pay over fees to the state treasury that by order of the county board he paid them into the county treasury.—State v. Stanton (Utah) 1109.

The payment of fees into the state treasury by a county clerk should begin on April 1, 1896, and continue quarter-yearly thereafter, and include all fees collected after the admission of the state into the Union.—State v. Stanton (Utah) 1109.

Where the clerk fails to pay into the state treasury fees collected by him, the state may charge him 25 per cent. damages on the amount delinquent, with interest.—State v. Stanton (Utah) 1109.

CLOUD ON TITLE.

See "Quieting Title."

COLLATERAL ATTACK.

On judgment, see "Judgment."

COLLATERAL SECURITY.

See "Pledges."

COLLECTION.

See "Banks and Banking."

COLLISION.

With street car, see "Street Railroads."

COMMERCIAL PAPER.

See "Bills and Notes."

COMMISSION.

Of brokers, see "Brokers."

COMMISSIONER.

County commissioners, see "Counties."

COMMON CARRIERS.

See "Carriers."

COMMON LAW.

Marriage, see "Marriage."

The presumption held to be that the common law is in force in Indian Territory.—Arkansas City Bank v. Swift (Kan. Sup.) 950.

COMPENSATION.

Of assignee, see "Assignments for Benefit of Creditors."
Of attorney, see "Attorney and Client."
Of county officers, see "Counties."
Of tax collector, see "Taxation."

COMPETENCY.

Of evidence, see "Evidence."

Of juror, see "Jury."

Of witness, see "Witnesses."

COMPLAINT.

See "Pleading."

COMPOSITIONS WITH CREDITORS.

See "Assignments for Benefit of Creditors."

COMPROMISE AND SETTLEMENT.

See "Accord and Satisfaction"; "Payment."

CONDEMNATION PROCEEDINGS.

See "Eminent Domain."

CONDITION.

In policy, see "Insurance."

CONNECTING LINES.

See "Carriers."

CONSIDERATION.

Of contract, see "Contracts."

CONSOLIDATION.

Of actions, see "Action."

CONSPIRACY.

To blackmail, see "Breach of Marriage Promise."

Evidence held admissible to show criminal conspiracy.—Borrego v. Territory (N. M.) 349.

CONSTABLE.

See "Sheriffs and Constables."

CONSTITUTIONAL LAW.

A statute changing the effect of a tax deed as evidence does not impair the obligation of the contract between the state and a prior purchaser at tax sale.—Harris v. Harsch (Or.) 141.

Sess. Laws 1895, c. 74, which provides for the sending of indigent inebriates to an institute for treatment at the expense of the county, is constitutional.—In re House (Colo. Sup.) 117; Williamson v. Board of Com'rs of Arapahoe County, Id.

Sess. Laws 1885, p. 49, authorizing the secretary of state to make contracts for supplies without advertising for bids is unconstitutional.—Muniz v. Mutual Ben. Life Ins. Co. (Colo. Sup.) 123.

Laws 1896, p. 219 (Eight-Hour Law), forbidding the employment of men in mines for more than eight hours a day, held within the police power.—Holden v. Hardy (Utah) 756.

Laws 1896, p. 219 (Eight-Hour Law), forbidding the employment of men in mines more than eight hours a day, does not deprive one of liberty without due process of law.—Holden v. Hardy (Utah) 756.

Laws 1896, p. 219 (Eight-Hour Law), forbidding the employment of men in mines more than eight hours a day, is not a denial by the state of the equal protection of its laws.—Holden v. Hardy (Utah) 756.

State v. Searns (Or.) 785.

The act authorizing the establishment and maintenance by the state of an insane asylum in eastern Oregon is in violation of the constitutional provision requiring all public institutions to be located at the seat of government.—State v. Metschan (Or.) 791.

Act April 23, 1880, providing for the recovery of damages against directors of mining corporations for failure to post weekly reports, is constitutional.—Miles v. Woodward (Cal.) 1076.

Sess. Laws 1896, p. 219, § 2, regulating hours of employment in mines, is constitutional.—State v. Holden (Utah) 1105.

An ordinance prohibiting barbers from working on Sunday, held unconstitutional.—City of Tacoma v. Krech (Wash.) 255.

Laws 1895, p. 304, authorizing formation of diking districts, and for special assessments on property benefited, is constitutional.—Hansen v. Hammer (Wash.) 332.

Statute prohibiting the maintenance of public ferries within a certain distance from others previously established does not confer special privileges, and is constitutional.—Fortain v. Smith (Cal.) 381.

Act changing the boundaries of judicial districts held constitutional.—State v. Rusk (Wash.) 387.

Act March 25, 1874, providing that, if either a husband or wife becomes hopelessly insane, the probate court, on application, may permit the applicant to sell or mortgage the homestead, is constitutional.—Rider v. Regan (Cal.) 820.

A party has no vested right in the statutory privilege of appeal.—North Point Consolidated Irrigation Co. v. Utah & Salt Lake Canal Co. (Utah) 824; Eastman v. Gurrey, Id. 828.

CONSTRUCTION.

Of contract, see "Contracts."

Of deed, see "Deeds."

Of lease, see "Landlord and Tenant."

Of will, see "Wills."

CONTEMPT.

Contempt proceedings against a respondent for disregarding a judgment of ouster from an office are not stayed by the giving of a bond on appeal from such judgment.—Fawcett v. Superior Court of Pierce County (Wash.) 389.

CONTINUANCE.

In criminal cases, see "Criminal Law."

Necessary absence of one of a party's counsel, in a county where but two terms of court are held a year, does not entitle the party to a continuance as a matter of law.—Reynolds v. Campling (Colo. Sup.) 639.

In the absence of a showing of cause, it is proper to refuse to continue, on the amendment of an answer so as to set up a new defense.—Diebold Safe & Lock Co. v. Holt (Okla.) 512.

CONTRACTS.

See, also, "Assignments"; "Assignments for Benefit of Creditors"; "Bills and Notes"; "Bonds"; "Cancellation of Instruments"; "Carriers"; "Chattel Mortgages"; "Deeds"; "Frauds, Statute of"; "Fraudulent Conveyances"; "Insurance"; "Interest"; "Landlord and Tenant"; "Master and Servant"; "Mortgages"; "Part-

dor and Purchaser."

By county, see "Counties."

By state, see "States."

Cancellation, see "Cancellation of Instruments."

Consideration of note, see "Bills and Notes."

Construction of guaranty, see "Guaranty."

Creating monopolies, see "Monopolies."

Law impairing obligation, see "Constitutional Law."

Measure of damages for breach of, see "Damages."

Specific performance of unilateral contract, see "Specific Performance."

In an action for breach of a contract, a part only of which is in writing, plaintiff should allege execution of a parol agreement.—American Bridge & Contract Co. v. Bullen Bridge Co. (Or.) 138.

Where a loss occurs from the failure of one party to fulfill its part of a contract, it cannot recover the loss from the other party.—McCormick Harvesting-Mach. Co. v. Reiner (Kan. App.) 539.

A contractor held not required to pay for services rendered him under contract until he received payment.—Cassidy v. Taylor (Okla.) 560.

The relinquishment of a preferment right of entry on public lands, and an agreement to sell personal property, held a valid consideration for a contract.—Tecomseh State Bank v. Maddox (Okla.) 563.

A contract for reducing ores held not to render the contractor liable for mineral left in the tailings.—Guild Gold-Min. Co. v. Mason (Cal.) 901.

Where a building contract refers to plans signed by the parties for a description of the building, and there are no plans signed by the parties, the contract is incomplete, and will not support a recovery, and cannot be completed by parol evidence.—Donnelly v. Adams (Cal.) 916.

A borrower of money could not defend an action on note and mortgage given to secure the loan on the ground that the money did not belong to the lender, and that he had no authority to loan it.—Marshall v. Murphy (Kan. App.) 973.

An agreement by one engaged to be married to pay a third person, if he induces the carrying out of the contract, cannot be enforced.—Morrison v. Rodgers (Cal.) 1072.

If a cause of action is based on a contract, the contract must be pleaded.—Atchison, T. & S. F. R. Co. v. Phelps (Kan. App.) 183.

A suspension of work under a contract, contrary to its terms, if rendered excusable by act of God, is not a breach of the contract.—Asplund v. Mattson (Wash.) 341.

A contract giving an option for the purchase of a mine held based on a sufficient consideration.—Clarno v. Grayson (Or.) 426.

CONTRIBUTION.

Basis of an action for contribution between stockholders in a distilling corporation, on account of taxes on spirits distilled by the corporation, collected by the United States from plaintiffs, considered.—Wolters v. Henningsan (Cal.) 277.

In an action to enforce contribution, a judgment against plaintiffs, on an indebtedness for which plaintiffs and defendants were jointly and severally liable, together with an execution issued thereon, and levied on property of plaintiffs, is admissible.—Wolters v. Henningsan (Cal.) 277.

CONVENTION.

See "Elections."

Wrongful conversion, see "Trove and Conversion."

CONVEYANCES.

See "Chattel Mortgages"; "Deeds"; "Fraudulent Conveyances"; "Mortgages"; "Sales"; "Vendor and Purchaser."

CONVICTS.

Competency as witnesses, see "Witnesses."

CORPORATIONS.

See, also, "Banks and Banking"; "Carriers"; "Insurance"; "Municipal Corporations"; "Railroads."

Contribution between stockholders, see "Contribution."

Damages for conversion of stock, see "Trove and Conversion."

Venue of action against, see "Venue."

Stockholders may sue to restrain a corporation from misappropriating its funds.—*People's Sav. Bank v. Colorado Min. Exch. Bldg. Co.* (Colo. App.) 620.

Two or more creditors of an insolvent corporation may proceed together against the stockholder to enforce his statutory liability.—*Buist v. Citizens' Sav. Bank* (Kan. App.) 718.

A corporation may legally receive its own stock in payment of a debt due it, when taken in good faith to protect it from loss.—*Barto v. Nix* (Wash.) 1033.

A director of an insolvent bank cannot set up in an action to collect payment for stock held by him a secret agreement between him and the bank that he should not pay for the stock, but hold it for the corporation.—*Barto v. Nix* (Wash.) 1033.

A stock subscription construed, and held to provide for a cash payment and certain balance on call.—*Ventura & O. V. Ry. Co. v. Collins* (Cal.) 287.

Equity will follow corporate assets fraudulently diverted, and apply them to the payment of corporate creditors.—*Craig v. California Vineyard Co.* (Or.) 421.

Unpaid subscriptions to the stock of a corporation are in equity a trust fund for the benefit of creditors.—*Albright v. Texas, S. F. & N. R. Co.* (N. M.) 448.

CORPUS DELICTI.

Proof of, see "Criminal Law."

COSTS.

In divorce cases, see "Divorce."

In the absence of statute, costs on appeal in a criminal case cannot be taxed against the county.—*Boykin v. People* (Colo. Sup.) 635.

Under Code 1887, § 407, the supreme court cannot authorize taxation of costs in a criminal case against a county.—*Boykin v. People* (Colo. Sup.) 635.

An attachment creditor who refuses to surrender the attached property to a receiver on the setting aside of his attachment will not be allowed costs.—*Compton v. Schwabacher Bros. & Co.* (Wash.) 338.

On appeal from a judgment to enforce a mechanic's lien the supreme court cannot direct the superior court as to attorney's fees incurred on the appeal.—*San Joaquin Lumber Co. v. Welton* (Cal.) 1057.

The refusal of the court to require creditors objecting to the allowance of an assignee's account to give security for costs, held not reversible error.—*Branch v. American Nat. Bank* (Kan. Sup.) 305.

COUNSEL.

See "Attorney and Client."

COUNTERCLAIM.

See "Set-Off and Counterclaim."

COUNTIES.

County warrant, see "Bills and Notes."

Mandamus to compel commissioners to levy tax to pay judgments, see "Mandamus."

Under a statute requiring contracts for public buildings to be let to the lowest bidder, on plans and specifications adopted by the board, a contract let on bids in which each bidder furnished, and bid on, his own specifications, is illegal.—*Ertle v. Leary* (Cal.) 1.

A contract by the supervisors with the county clerk to pay the latter a commission for collecting claims of the county held void, as an attempt to increase the clerk's compensation.—*Power v. May* (Cal.) 6.

The supervisors have power to employ an attorney to collect a claim due the county from the state.—*Power v. May* (Cal.) 6.

The cells of a jail are a part of the building, and a contract for their construction must be let in accordance with the provisions of statute for constructing public buildings.—*Ertle v. Leary* (Cal.) 1.

The county government act of 1893 does not apply to the city and county of San Francisco, so far as municipal officers, justices of the peace, and judges of the police court are concerned.—*Kahn v. Sutro* (Cal.) 87.

An appeal lies from a decision of the county board that an election under the herd law is a resubmission to the voters.—*Board of Com'rs of Washita County v. Haines* (Okla.) 561.

A county cannot sue to prevent action under a tax law on the ground that the law discriminates against individual taxpayers of the county.—*Board of Com'rs of Arapahoe County v. McIntire* (Colo. Sup.) 638.

County treasurer's indorsement of school-district warrant, under Act March 10, 1893, § 7, is not a guaranty of its genuineness, on which he is liable to an assignee of the warrant.—*Roberts v. Prescott* (Wash.) 642.

It is not essential that the signers of a petition to a county board, asking the creation of a new justices' precinct, should describe themselves therein as voters.—*Morris v. People* (Colo. App.) 691.

When county commissioners cannot be enjoined from issuing a duplicate certificate of county indebtedness where the original has been lost.—*Hayes v. Davis* (Nev.) 888.

An adjudication as to the indebtedness of a county created out of another county held not a bar to a future action for a demand not submitted.—*Orange County v. Los Angeles County* (Cal.) 173.

Fees and other compensation of county clerks under the statute considered and determined.—*Leonard v. Board of Com'rs of Garfield County* (Colo. App.) 216.

In determining a county indebtedness, there should be deducted the cash assets of the county, the amount of taxes assessed for the current year, and the amount of unpaid taxes on rolls for prior years.—*Kelley v. Pierce County* (Wash.) 253.

See *County v. Schram* (Okla.) 490.

After an adjudication by commissioners as to the indebtedness on division of a county, the courts have no jurisdiction to determine as to an asset omitted by mistake.—*Orange County v. Los Angeles County* (Cal.) 173.

A board of county supervisors may employ an expert to examine the books of county officers.—*Harris v. Gibbins* (Cal.) 292.

Compensation of supervisor of county of the forty-second class limited to \$400 per annum for all services in any one year, both as per diem and mileage.—*Chapin v. Willcox* (Cal.) 457.

COUNTY BOARD.

See "Counties."

COURT OF APPEALS.

See "Courts."

COURTS.

See, also, "Justices of the Peace"; "Removal of Causes."

Changing boundaries of judicial districts, see "Constitutional Law."

Control over state harbor commissioners, see "Navigable Waters."

Discretion of court, see "Appeal and Error."

Improper remark by the court, see "Trial."

Leave of court to sue, see "Receivers."

Mandamus to, see "Mandamus."

Trial by the court, see "Trial."

The superior court has jurisdiction of an action where the sum for which judgment is prayed exceeds \$300, though the separate items sued for are each less than that sum.—*Ventura County v. Clay* (Cal.) 9.

A district judge may discharge an attachment at chambers.—*Moffett v. Boydstun* (Kan. App.) 24.

The municipal court of Spokane held to have jurisdiction to try a person for assault and battery.—*State v. Gleason* (Wash.) 1043.

The Kansas court of appeals has no jurisdiction of a writ of error on a judgment refusing to discharge petitioner on habeas corpus.—*Stevens v. Moore* (Kan. App.) 1011.

Jurisdiction in divorce over property awarded the wife will be presumed in the absence of a showing to the contrary.—*Carney v. Simpson* (Wash.) 233.

The district court, as a court of probate, is without jurisdiction to direct the payment of a claim against an estate by a special administrator.—*State v. Second Judicial District Court* (Mont.) 259.

Under Comp. Laws, §§ 542, 543, proceedings at the special term are not invalid because it is continued beyond the time fixed for the regular terms of other counties of the district.—*Borrego v. Territory* (N. M.) 349.

The supreme court, by granting a writ of error in a criminal case, and a supersedeas on condition that defendant enter into a recognizance, acquires sole jurisdiction.—*People v. District Court of Arapahoe County* (Colo. App.) 844.

Where a person is convicted of the violation of a city ordinance which is unconstitutional as a regulation of state commerce, the district court, sitting with the powers of the district court of the United States, has jurisdiction to discharge him from imprisonment on habeas corpus.—*Baxter v. Thomas* (Okla.) 479.

The probate court has no jurisdiction to render a judgment declaring an assignment under the statute null and void.—*Parlin & Orendorff Co. v. Schram* (Okla.) 490.

An appeal lies to the district court from the finding of the county court, under Act 1893, § 8, in annexation proceedings.—*Phillips v. Corbin* (Colo. App.) 224.

Parties, by waiving all questions raised below, except a constitutional question, cannot give the supreme court jurisdiction when the case might be disposed of on other grounds.—*Board of Com'rs of Arapahoe County v. McIntire* (Colo. Sup.) 638.

COVENANTS.

See "Deeds"; "Vendor and Purchaser."

COVERTURE.

See "Husband and Wife."

CREDIBILITY.

Of witness, see "Witnesses."

CREDITORS.

See "Assignments for Benefit of Creditors"; "Creditors' Suit."

CREDITORS' SUIT.

A creditor who has obtained an attachment lien not yet reduced to judgment is a proper party to a creditor's suit, whose rights may be protected by the decree.—*Shanks v. Simon* (Kan. Sup.) 774.

Where an attachment is held void as to subsequent attaching creditors who were joined in a suit to set it aside, the funds will be distributed among them pro rata.—*Craig v. California Vineyard Co.* (Or.) 421.

Unless otherwise provided by statute, a creditors' bill must set forth a judgment, and execution returned unsatisfied, or show that it was impossible to obtain judgment in any court within the jurisdiction where the bill is filed.—*Albright v. Texas, S. F. & N. R. Co.* (N. M.) 448.

CRIMINAL LAW.

See, also, "Bail"; "Indictment and Information"; "Jury"; "Witnesses."

Criminal libel, see "Libel and Slander."

Illegal liquor sales, see "Intoxicating Liquors."

Particular crimes, see "Bastards"; "Bigamy";

"Burglary"; "Conspiracy"; "Cruelty to Animals";

"Embezzlement"; "False Pretenses";

"Forgery"; "Homicide"; "Larceny"; "Lascivious Cohabitation";

"Obscenity"; "Rape"; "Receiving Stolen Goods";

"Robbery."

Recognizance on appeal, see "Appeal and Error."

Taxation of costs, see "Costs."

Train wrecking, see "Railroads."

Verdict in robbery case, see "Robbery."

Under Act Cong. March 3, 1885, an Indian is amenable to state jurisdiction for the murder of another Indian outside of the reservation.—*Pablo v. People* (Colo. Sup.) 636.

Indorsement of the name of a witness on the information after swearing of the jury held not ground for reversal.—*State v. Holedger* (Wash.) 652.

The hearing of a motion to quash must be made in the presence of the defendant.—State v. Clifton (Kan. Sup.) 715.

The officer taking charge of the jury must be sworn as required by Cr. Code, § 237.—State v. McCormick (Kan. Sup.) 777.

The fact that, when an information was filed, the record of the defendant's preliminary examination and commitment had not been filed, is not a fatal objection to the information, where the examination had been held, and the order of commitment had been entered on the docket of the magistrate.—People v. Tarbox (Cal.) 896.

The jurisdiction of officers who are made ex officio examining magistrates, as such, is derived from the constitution and statutory provisions on that subject, and not from the statutes relative to their various offices.—People v. Crespi (Cal.) 863.

On a conviction of making and passing a fictitious check with intent to defraud, a judgment of conviction of forgery cannot be entered.—People v. Eppinger (Cal.) 97.

Arraignment and pleas.

It is error to place defendant on trial for felony without arraignment or plea where he does not waive the same.—State v. Baker (Kan. Sup.) 947.

There need not be the same fullness of statement in the warrant or preliminary papers charging a public offense that is required in the information.—State v. Baker (Kan. Sup.) 947.

Amendment of the record in a criminal case to show arraignment and pleas of not guilty held warranted.—Borrego v. Territory (N. M.) 349.

Venue.

A district court of the county where the felony had been committed had jurisdiction to try the defendant, though originally arrested in another county without a warrant.—State v. May (Kan. Sup.) 709.

Refusal of a change of venue because of alleged prejudice of a community held justified.—State v. Pomeroy (Or.) 797.

The granting of an order for a change of venue is in the discretion of the court.—State v. Pomeroy (Or.) 797.

Continuance.

Refusal of a continuance in a murder case held not an abuse of discretion.—State v. Asbell (Kan. Sup.) 770.

Where a year elapsed between an indictment and the trial, during which both prosecution and defense searched without success for certain witnesses, it was not error to refuse a further continuance.—People v. Sanders (Cal.) 153.

Conduct of trial.

Refusal to admit evidence in rebuttal in a criminal case is in the discretion of the court.—Borrego v. Territory (N. M.) 349.

Under St. 1893, § 5237, it was error to permit a jury to take to their rooms, while deliberating, the arms used by defendant, and the clothing worn by deceased, with bullet holes therein.—Hansing v. Territory (Okla.) 509.

A defendant cannot complain of an order excluding the public from his preliminary examination, which was made at his request.—People v. Tarbox (Cal.) 896.

Objections to evidence held insufficient.—State v. Asbell (Kan. Sup.) 770.

The exclusion from the court room during the trial of all except members of the bar, law students, officers of the court, and witnesses does not prevent the trial from being a public one.—Benedict v. People (Colo. Sup.) 637.

The correction, by a nunc pro tunc order, of an omission or false entry in a record, is not lim-

ited to the term at which the transaction occurred.—Borrego v. Territory (N. M.) 349.

The order in which evidence is admitted in a criminal trial is largely discretionary with the trial court.—People v. Whiteman (Cal.) 99.

Permitting special counsel to assist in a prosecution is not a ground for reversal.—State v. Elsworth (Wash.) 727.

The prosecuting attorney may properly remark that defendant's flight might be considered by the jury in determining his guilt.—People v. Ross (Cal.) 1059.

Counsel may properly comment in argument upon any evidence which is properly before the jury.—People v. Sanders (Cal.) 153.

It is improper for counsel for the prosecution to comment in argument on the failure of a defendant to testify on any particular point.—People v. Sanders (Cal.) 153.

Evidence.

Where a statute forbids the doing of a certain act, and says nothing about intent, proof of criminal intent is unnecessary.—State v. Zichfeld (Nev.) 802.

Testimony of witnesses shown to have been in the vicinity that they did not see a team and vehicle claimed by defendant to have been in a certain place is admissible.—People v. Sanders (Cal.) 153.

Evidence in rebuttal held admissible, the objection going only to its weight.—People v. Crespi (Cal.) 863.

In a criminal trial, evidence which is material to the issue is not rendered inadmissible by the fact that it tends to prove defendant guilty of another crime.—People v. Sanders (Cal.) 153.

The defense in a murder case being suicide, and the hair around the bullet hole in deceased's head not being singed, a witness who made experiments by shooting at human hair with a pistol found near deceased might testify to the results.—State v. Asbell (Kan. Sup.) 770.

Where the existence of a person testified to by a defendant is questioned by the prosecution, it may show that efforts to find such person have been made, and were unsuccessful.—People v. Sanders (Cal.) 153.

Evidence offered by a defendant held erroneously excluded.—People v. Sanders (Cal.) 153.

A medical expert who examined the body of deceased may give his opinion as to whether the wound was produced by a near shot, the defense being suicide.—State v. Asbell (Kan. Sup.) 770.

When circumstantial evidence alone is relied on, it must satisfy the jury beyond reasonable doubt.—Territory v. Lermo (N. M.) 16.

Proof of the corpus delicti, to authorize proof of admissions to be received, need not connect the defendant with the commission of the offense.—People v. Tarbox (Cal.) 896.

— Accomplice testimony.

Uncorroborated testimony of accomplice held insufficient to convict.—People v. Main (Cal.) 612.

Evidence, on trial for robbery, held a sufficient corroboration of that of an accomplice to warrant conviction.—People v. Barker (Cal.) 601.

Facts otherwise in evidence held to corroborate the evidence of an accomplice.—People v. Armstrong (Cal.) 611.

Flight of defendant, as a circumstance corroborative of an accomplice's testimony, is for the jury.—People v. Armstrong (Cal.) 611.

Instructions held to inform the jury that there could be no conviction on the uncorroborated evidence of an accomplice.—People v. Armstrong (Cal.) 611.

Error cannot be predicated on a failure to give unrequested instructions.—*Miller v. People* (Colo. Sup.) 111.

"To which instructions and each and all thereof, and to each and every paragraph thereof, the defendants then and there duly excepted," as an exception, is too general.—*Miller v. People* (Colo. Sup.) 111.

A refusal of an instruction which had already been given in substance is no ground for reversal.—*Benedict v. People* (Colo. Sup.) 637.

The refusal of an instruction giving the established and approved definition of reasonable doubt, and the giving of one instead, stating that such doubt must be one based on "common sense," is error.—*People v. Paulsell* (Cal.) 734.

An instruction that the jury have no right to reject the testimony of the wife of the accused because she would have a strong motive to give the most favorable coloring to the facts held prejudicial error.—*State v. Pomeroy* (Or.) 797.

Instruction as to a defense of insanity held proper.—*People v. Larrabee* (Cal.) 922.

Instructions as to the testimony of an accomplice held without prejudicial error.—*State v. McDonald* (Kan. Sup.) 966.

It is not necessary in a charge to use all the words of the statutory definition of the offense.—*State v. McDonald* (Utah) 872.

Where no evidence is introduced by defendant, and the evidence shows conclusively that defendant is guilty, possible error in the instructions is without prejudice.—*State v. Witherow* (Wash.) 1035.

An instruction with reference to the credit to be given respective witnesses held not a comment on evidence.—*State v. Carey* (Wash.) 1050.

Charge on reasonable doubt held proper.—*People v. Ross* (Cal.) 1059.

The use of the words "wholly satisfied" in defining reasonable doubt are not ground for reversal where they could not mislead the jury when taken with the rest of the charge.—*People v. Ross* (Cal.) 1059.

A charge that the question of self-defense is not in the case held not ground for reversal.—*People v. Worthington* (Cal.) 1061.

Instructions, where defendant has pleaded insanity, held properly given on that issue.—*People v. McCarthy* (Cal.) 1073.

Instruction in a prosecution for forgery held properly refused.—*People v. Sanders* (Cal.) 153.

The fact that the genuineness of a letter in evidence is not directly impeached does not warrant an instruction that it must be considered as genuine where other evidence tended to establish facts disproving its genuineness.—*People v. Sanders* (Cal.) 153.

Where instruments executed before defendant as a notary are claimed by the prosecution to have been forged, and their genuineness has been testified to by defendant, it is not error to refuse to instruct as to the presumption of genuineness arising from defendant's certificate as notary.—*People v. Sanders* (Cal.) 153.

An instruction as to the weight of evidence required to establish an alibi on the part of the defendants, held proper.—*Borrego v. Territory* (N. M.) 349.

New trial.

The fact that a juror stated, while the jury were deliberating, that defendant had been convicted on a former trial, and had defrauded a

ney held ground for new trial.—*State v. Baker* (Kan. Sup.) 947.

A new trial asked on the ground of newly-discovered evidence held properly refused.—*People v. Eppinger* (Cal.) 97.

A new trial held properly denied on affidavit of a witness for the state that his testimony as against defendant was false, and induced by promises of the district attorney.—*People v. Tallmadge* (Cal.) 282.

A grant of a new trial where the evidence was conflicting will not be disturbed.—*People v. Fugitt* (Cal.) 379.

Appeal and error.

Where the appeal is from a judgment as to costs in a criminal action, and the party charged with the crime is not before the court, the cause will be dismissed.—*Territory v. Brady* (Okla.) 573.

Papers used in the trial court in support of motions, etc., must be brought into the record, if at all, by bill of exceptions or statement of facts settled on notice.—*State v. Howard* (Wash.) 650.

An appeal from an order fixing the day for the execution of a death sentence will be dismissed when the day has long since passed.—*People v. Thompson* (Cal.) 907.

Defendant may prosecute appeals both from the judgment of conviction and from an order denying a new trial.—*People v. Thompson* (Cal.) 912.

An order denying a new trial may be reviewed on an appeal from the judgment of conviction.—*People v. Thompson* (Cal.) 912.

Where the evidence as to insanity was conflicting, the finding of the jury is conclusive.—*People v. Larrabee* (Cal.) 922.

Instructions become a part of the record only by being incorporated in the bill of exceptions.—*State v. Blunk* (Kan. App.) 998.

On appeal from a police court of a city of the first class defendant has 10 days in which to perfect it.—*City of Kansas City v. Fagan* (Kan. App.) 1009.

An assignment that the evidence does not sustain the verdict will not be sustained unless it is plain that the verdict could only have been rendered through passion or prejudice.—*People v. Ross* (Cal.) 1059.

The writ of coram nobis cannot be invoked after conviction on a showing that the prosecuting witness has admitted that her testimony was false.—*State v. Superior Court of Pierce County* (Wash.) 399.

Review.

On appeal from a judgment of conviction where defendant fails to bring up the evidence, the supreme court will assume that the evidence fully justifies the verdict.—*Miller v. People* (Colo. Sup.) 111.

The question of the weight and sufficiency of corroborating evidence is for the jury.—*People v. Barker* (Cal.) 601.

On motion for new trial or on appeal, defendant can urge those errors only to which he has saved exceptions during the trial.—*State v. Owens* (Wash.) 1039.

Error in sustaining an objection by the prosecuting attorney to questions put to a witness is cured if the witness is thereafter called and testifies in regard to the matter without objection.—*People v. Ross* (Cal.) 1059.

The court may amend its record after removal of the cause of appeal.—*Borrego v. Territory* (N. M.) 349.

The power to correct a record by a nunc pro tunc order extends to criminal cases.—*Borrego v. Territory* (N. M.) 349.

Question as to whether officers or defendant said anything to prosecuting witness about the things that were stolen, *held* without prejudice.—*People v. Harris* (Cal.) 602.

CROPS.

Lien for rent, see "Landlord and Tenant."

CROSS COMPLAINT.

See "Pleading."

CROSS-EXAMINATION.

See "Witnesses."

CROSSINGS.

Accidents at, see "Railroads."

CRUELTY.

As ground for divorce, see "Divorce."

CRUELTY TO ANIMALS.

A person shooting doves from a trap for amusement *held* guilty of cruelty to animals, within Mills' Ann. St. § 104.—*Waters v. People* (Colo. Sup.) 112.

CUSTOMS AND USAGES.

Evidence of custom *held* inadmissible where there was no proof that it was known to the parties, or generally accepted by the public.—*Laver v. Hotelling* (Cal.) 1070.

DAMAGES.

Excessive damages for injury to passenger, see "Carriers."

For breach of marriage promise, see "Breach of Marriage Promise."

For conversion, see "Trove and Conversion."

For destruction of hay by fire, see "Railroads."

For land taken by eminent domain, see "Eminent Domain."

For libel or slander, see "Libel and Slander."

In action for injury to passenger, see "Carriers."

Recovery of exemplary damages, see "Replevin."

Damages for breach of contract to purchase material, *held* the difference between the contract price, and what it would have cost the party contracting to furnish it to perform his obligation.—*American Bridge & Contract Co. v. Bullen Bridge Co.* (Or.) 138.

Probable damages which are the proximate result of the act complained of need not be specially averred in a suit for personal injuries.—*Edgerton v. O'Neill* (Kan. App.) 206.

Measure of damages for breach of contract to convey land defined.—*Marsh v. Cavanaugh* (Wash.) 239.

In an action for breach of contract to carry a passenger to his destination, damages for anxiety for delay cannot be recovered.—*Turner v. Great Northern Ry. Co.* (Wash.) 243.

On the question of damages for loss of time by a lawyer, evidence as to the value of practicing attorneys' time is inadmissible.—*Turner v. Great Northern Ry. Co.* (Wash.) 243.

An agent selling on commission cannot recover damages for failure to fill his orders, unless he shows the orders were for sales to persons to whom, under the contract, he could sell.—*Acme Harvester Co. v. Madden* (Kan. App.) 319.

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Instructions as to measure of damages for breach of a building contract by the contractor approved.—*De Mattos v. Jordan* (Wash.) 402.

Where a party binds itself in a fixed sum for the performance of a contract, and the contract is such that it may be partially performed and partially violated, such fixed sum is penal, and not liquidated damages.—*City of El Reno v. Cullinane* (Okla.) 510.

In an action for personal injuries, plaintiff may, under a general allegation of damages, recover all damages which are a natural result of the injury.—*City of Abilene v. Wright* (Kan. App.) 715.

The reasonable cost of medical attendance *held* recoverable in an action for personal injuries, though actual payment therefor was not made before suit.—*City of Abilene v. Wright* (Kan. App.) 715.

Refusal to compel plaintiff to submit to a physical examination *held* not error.—*Southern Kansas Ry. Co. v. Michaels* (Kan. Sup.) 938.

On an issue of damages for loss of a wife's services, it was proper to exclude a petition of the wife showing that she claimed damages which were included in plaintiff's petition.—*Southern Kansas Ry. Co. v. Pavey* (Kan. Sup.) 909.

On an issue of damages for loss of a wife's services, it was error to introduce the syllabus and opinion affirming a judgment for the wife on account of injuries from which the loss of services resulted.—*Southern Kansas Ry. Co. v. Pavey* (Kan. Sup.) 909.

Damages assessed on the bond of a superintendent of streets for neglect to see that a sewer was properly constructed *held* excessive.—*Goodsell v. Ashworth* (Cal.) 1066.

DANGEROUS PREMISES.

See "Negligence."

DEATH.

Of agent, see "Principal and Agent."

Of partner, see "Partnership."

Of party, see "Abatement and Revival."

Of passenger, see "Carriers."

Of surety, see "Principal and Surety."

DECEDENTS.

See "Executors and Administrators"; "Wills."

DECEIT.

See "Fraud."

DECLARATIONS.

As evidence, see "Evidence."

DECREE.

See "Equity"; "Judgment."

DEEDS.

See, also, "Fraudulent Conveyances"; "Vendor and Purchaser."

Absolute as mortgages, see "Mortgages."

Cancellation, see "Cancellation of Instruments."

Estoppel by, see "Estoppel."

Registration, see "Registers of Deeds."

A conveyance of lots abutting on a vacated highway *held* not to convey the grantor's interest in the highway.—*Sanchez v. Grace Methodist Episcopal Church* (Cal.) 2.

A deed *held* inoperative for want of delivery.—*Atwood v. Atwood* (Wash.) 240.

possession of property arising from the grantee's possession of the deed.—Rohr v. Alexander (Kan. Sup.) 699.

Possession of a deed by the grantee is presumptive evidence of delivery.—Rohr v. Alexander (Kan. Sup.) 699.

DEFAULT.

Judgment by, see "Judgment."

DEFECT

Of parties, see "Parties."

DEFECTIVE APPLIANCES.

See "Master and Servant."

DEFECTIVE SIDEWALKS.

See "Municipal Corporations."

DELIVERY.

Of assignment, see "Assignments for Benefit of Creditors."

Of deed, see "Deeds."

DEMAND.

On depositary, see "Depositaries."

DEMURRER.

See "Pleading."

To evidence, see "Trial."

DEPOSITARIES.

A demand by an administrator on a depositary for money of his decedent *held* sufficient.—Northrop v. Knott (Cal.) 599.

DEPUTIES.

See "Sheriffs and Constables."

DESCENT AND DISTRIBUTION.

See, also, "Executors and Administrators"; "Wills."

Marriage between a white person and an Indian being prohibited by statute, a child of a pretended marriage between a white man and Indian woman, celebrated on a reservation within the territory according to the laws of the tribe of which the woman was a member, does not inherit from the father.—In re Walker's Estate (Ariz.) 67.

The statute providing that the issue of marriages deemed null in law shall be legitimate does not apply to a child of an Indian marriage, not celebrated in accordance with the laws of the territory.—In re Walker's Estate (Ariz.) 67.

Heirs of the grantor in the deed *held* liable on his covenants of warranty six years after distribution of the estate.—Rohrbaugh v. Hamblin (Kan. Sup.) 705.

When, after the assets have been distributed, an obligation of the ancestor matures, the heir may be compelled to refund enough to satisfy the obligation.—Rohrbaugh v. Hamblin (Kan. Sup.) 705.

DILIGENCE.

In discovering evidence, see "New Trial."

DIRECTING VERDICT.

See "Trial."

DIRECTORS.

Of corporation, see "Corporations."

DISBARMENT.

Of attorney, see "Attorney and Client."

DISCHARGE.

Of teacher, see "Schools and School Districts."

DISCRETION OF COURT.

See "Appeal and Error."

In allowing attorney's fees, see "Divorce."

In awarding fees to assignee, see "Assignments for Benefit of Creditors."

In granting continuance, see "Criminal Law."

DISMISSAL AND NONSUIT.

Dismissal of appeal, see "Appeal and Error."

Effect of motion on plea in abatement, see "Abatement and Revival."

Though, in an action to enforce a lien for labor done on a mining claim, the claim was insufficient because it failed to state by whom claimant was employed, it was error to nonsuit.—Ascha v. Fitch (Cal.) 298.

Where, on reaching a divorce case for trial, plaintiff fails to offer any evidence, it is properly dismissed.—Patterson v. Patterson (Kan. Sup.) 304.

Under 2 Hill's Code, § 409, court may dismiss an action for failure to comply with an order to furnish an amended bill of particulars.—Plummer v. Well (Wash.) 648.

A refusal to set aside a dismissal *held* not an abuse of discretion.—Rauer v. Wolf (Cal.) 902.

Plaintiff *held* entitled to dismissal, though, on refusal of the clerk to enter, defendant filed a cross bill.—Kaufman v. Superior Court (Cal.) 904.

The evidence as to contributory negligence being conflicting, a nonsuit on such ground is not warranted.—McAlpine v. Laydon (Cal.) 865.

An action for usurpation in office should not be dismissed, though the office is abolished, as judgment against defendant may subject him to a fine.—People v. Rodgers (Cal.) 740.

Where plaintiff establishes a *prima facie* case, it is error to grant a nonsuit.—Kansteiner v. Clyne (Idaho) 1019.

DISSOLUTION.

Of attachment, see "Attachment."

DISTRICT AND PROSECUTING ATTORNEYS.

Improper remarks by, see "Criminal Law."

DISTRICT COURT.

See "Courts."

DIVORCE.

Execution on judgment, see "Execution."
Presumption of jurisdiction, see "Courts."

Jurisdiction of an action for divorce by the wife of a nonresident, who acquired a residence in Kansas, *held* not divested by a finding that the wife left the husband without just cause.—*Johnson v. Johnson* (Kan. Sup.) 700.

The wife of a nonresident may move into Kansas, and acquire a residence sufficient to give the court jurisdiction of an action by her for divorce.—*Johnson v. Johnson* (Kan. Sup.) 700.

Where the husband contests the wife's right to a divorce, the power of the court over the property of the parties is limited to that owned by them at the time judgment is rendered.—*Johnson v. Johnson* (Kan. Sup.) 700.

A party to a decree of divorce is not single until six months after the date of rendition of the decree.—*Blush v. State* (Kan. App.) 185.

On a decree of divorce, the custody of a child four years of age should be awarded to the mother if she is a suitable person.—*Smith v. Smith* (Wash.) 234.

Where, on service by publication in divorce suit, the affidavit required by Civ. Code, §§ 73, 641, was fatally defective, and there was no evidence that any order had been filed, a motion to vacate *held* properly granted.—*Patterson v. Patterson* (Kan. Sup.) 304.

Evidence *held* to show that plaintiff resided 90 days in the territory solely for the purpose of obtaining a divorce, and not in good faith.—*Beach v. Beach* (Okla.) 514.

Residence of plaintiff in the territory for 90 days *held* a jurisdictional fact.—*Beach v. Beach* (Okla.) 514.

Grounds.

When divorce will not be granted under 2 Hill's Code, § 764, subd. 7, for failure to live peaceably together.—*Colvin v. Colvin* (Wash.) 1029.

A husband *held* not entitled to a divorce because of false accusations of unchastity made by the wife, where he had already abandoned her.—*Beach v. Beach* (Okla.) 514.

False accusations of unchastity made by one spouse against the other, if based on reasonable grounds, *held* not ground for divorce.—*Beach v. Beach* (Okla.) 514.

False accusations of unchastity made by one spouse against the other, to constitute extreme cruelty, must actually produce injury to the physical system, through operating on the mental faculties.—*Beach v. Beach* (Okla.) 514.

False accusations of unchastity made by a wife against a husband, while they were living in separation, *held* not extreme cruelty entitling him to a divorce.—*Beach v. Beach* (Okla.) 514.

Alimony and costs.

A court has power to make a decree for alimony a lien on specific property of the husband.—*Gaston v. Gaston* (Cal.) 609.

A court may award alimony payable monthly, for the support of the wife, though the husband has no property from which payment can be enforced.—*Gaston v. Gaston* (Cal.) 609.

The jurisdiction of a court to award alimony is not dependent on allegations of a husband's ability.—*Gaston v. Gaston* (Cal.) 609.

On a plaintiff wife being denied a divorce, she cannot obtain permanent alimony in the form of a quarterly allowance.—*Johnson v. Johnson* (Kan. Sup.) 700.

Where the husband merely defends an action for divorce, without asking relief, on refusal of

a divorce, plaintiff is not entitled to attorney's fees and costs.—*Johnson v. Johnson* (Kan. Sup.) 700.

Allowance of \$300 as attorney's fees *held* not to show an abuse of discretion.—*Colvin v. Colvin* (Wash.) 1029.

DRAFT.

See "Banks and Banking."

DUE PROCESS OF LAW.

See "Constitutional Law."

EJECTMENT.

See, also, "Quieting Title."

A complaint alleging the execution by defendant to plaintiff of a deed to the premises, without allegation of ownership or right of possession, is demurrable.—*McCaughy v. Schuette* (Cal.) 666.

Where the defense is fraud, and defendant seeks affirmative relief, and makes tender of consideration paid, and, on acceptance, withdraws it, so much of the answer as sets up an equitable defense is properly stricken out.—*Andola v. Picott* (Idaho) 928.

Title of one claiming under foreclosure sale, *held* not defeated by a showing that after execution of the mortgage, and before foreclosure, the mortgagor was declared a bankrupt, and his property conveyed to an assignee in bankruptcy.—*Robrecht v. Reid* (Cal.) 101.

ELECTIONS.

Municipal elections, see "Municipal Corporations."
Under herd law, see "Animals."

At an election for annexation the voter need not be registered.—*Phillips v. Corbin* (Colo. App.) 224.

Under Gen. St. § 1272, special judges cannot be appointed, while the regular judges of election are in office, to hold a special election.—*Phillips v. Corbin* (Colo. App.) 224.

Under Act 1893, § 5, a person is not qualified to vote at an election for annexation unless he has paid a property tax in the year preceding the election.—*Phillips v. Corbin* (Colo. App.) 224.

Const. art. 7, § 1, which requires a voter to "reside in the state," means that he shall have a fixed habitation.—*Sharp v. McIntire* (Colo. Sup.) 115.

On an issue of residence, declarations of voters, made at the time of voting, in the presence of the judges of election, are admissible as a part of the *res gestæ*.—*Sharp v. McIntire* (Colo. Sup.) 115.

Controversy between representatives of two factions of the People's party *held* a controversy between officials charged with duties under the election laws, within Act 1894.—*People v. District Court of Arapahoe County* (Colo. Sup.) 681.

A court will not attempt to determine which of two rival factions of a political party is entitled to represent the party.—*State v. Johnson* (Mont.) 440.

Party conventions.

A party convention of a single county, which is one of two or more composing a judicial district, has no authority to place in nomination a candidate for district judge.—*State v. Rotwitt* (Mont.) 370.

Evidence examined, and *held*, that a meeting of a Silver Republican club was not a party convention, within Pol. Code, § 1310.—*State v. Tooker* (Mont.) 530.

whether there has been a convention with authority to nominate candidates is, under conditions of fact, one that must be determined by applying the statute law of the state.—*State v. Johnson* (Mont.) 533.

Nominations.

Nomination by a regular existing party cannot be made by a certificate of electors.—*State v. Reek* (Mont.) 438.

When the last day on which a certificate of nomination could be filed ordinarily falls on Sunday or a legal holiday, it must be filed on the day before.—*Griffin v. Dingley* (Cal.) 457.

A candidate for vice president, who has not declined the nomination, nor withdrawn as a candidate in the state, cannot forbid the use of his name on the electoral ticket nominated by his party in the state.—*Breidenthal v. Edwards* (Kan. Sup.) 469.

After the overruling of objections to the nomination certificate filed by the state convention, the secretary of state has no discretion to refuse to certify the candidate's names.—*Breidenthal v. Edwards* (Kan. Sup.) 469.

An elector who has participated in the convention of one party may join in the certificate of nomination of the candidate of another party for the same office.—*State v. Burdick* (Wyo.) 854.

Duty of secretary of state, in certifying nominations to the county clerks, as to the designation of political parties in the certificate, determined.—*State v. Burdick* (Wyo.) 854.

Where certificates are presented from each of two conventions, claiming to represent the same political party, the registrar must determine which represents the party.—*McDonald v. Hinton* (Cal.) 870.

The powers and duties of the secretary of state relative to certification of nominations were not enlarged by the act of 1894.—*People v. McGaffey* (Colo. Sup.) 930.

Written agreements of candidates to withdraw on the happening of a certain event cannot be enforced by the county officer whose duty it is to consider objections to certificates of nomination.—*Sims v. Daniels* (Kan. Sup.) 962.

A certificate purporting to certify to the nominations of persons whose names appear thereon, as by the central committee of the Silver Republican party, no convention of which has delegated such power to a committee, does not entitle them to a place on the official ballot.—*State v. Tooker* (Mont.) 530.

A petition filed with the county clerk and recorded, nominating certain persons as candidates of a certain party, does not entitle them to be placed on the official ballot.—*State v. Tooker* (Mont.) 530.

Under the Australian ballot law a ballot doubly marked with an X is invalid.—*Helskell v. Landrum* (Colo. Sup.) 120.

Ballots.

A person placed in nomination for an office by petition of electors cannot be designated on the official ballot as the candidate of a regularly organized political party.—*State v. Rotwitt* (Mont.) 370.

Candidate nominated as a silver Republican by a certificate of electors cannot be placed on the ballot as an independent candidate.—*State v. Reek* (Mont.) 438.

Method of certification, by the secretary of state, of presidential electors to the county clerks, and arrangement of names on the ballots, determined.—*State v. Burdick* (Wyo.) 854.

(Wyo.) 854.

The party designation, "National Democratic," on the official ballot, is not calculated to deceive.—*Craig v. Brown* (Cal.) 870.

Secretary of state held to have no authority to exclude nominations of the Republican party from the official ballot on the ground that it had been superseded by the Silver Republican party.—*People v. McGaffey* (Colo. Sup.) 930.

The county officer whose duty it is to consider objections to certificates of nomination cannot determine which set of candidates nominated by opposing factions of a party represent the party, nor exclude either set from the ballot.—*Sims v. Daniels* (Kan. Sup.) 962.

The county officer whose duty it is to consider objections to certificates of nomination has no power to consider or enforce agreements by candidates and committees of opposing factions of a party for the settlement of differences as to which set of candidates is entitled to a place on the ballot.—*Sims v. Daniels* (Kan. Sup.) 962.

Provision of an ordinance for election on the question of annexation that the ballots shall be prepared according to the Australian ballot law conflicts with such law, and with the provisions of Act 1893, § 6, in relation to such election.—*Phillips v. Corbin* (Colo. App.) 224.

The writing by a voter on his ballot of the party designation of a candidate after the name, which was also written in, does not constitute a distinguishing mark.—*Jennings v. Brown* (Cal.) 77.

EMBEZZLEMENT.

See, also, "Larceny."

An information charging a county clerk and ex officio clerk of the superior court with embezzlement held sufficient, under Pen. Code, § 57.—*State v. Downing* (Wash.) 646.

Instructions on prosecution of a county clerk and ex officio clerk of the superior court held proper.—*State v. Downing* (Wash.) 646.

EMINENT DOMAIN.

One for whom a railroad switch was constructed held liable for damages, though he had nothing to do with the running of trains over it.—*Patton v. Olympia Door & Lumber Co.* (Wash.) 237.

The construction of a track in a street so close to the curb as to prevent a team from standing there entitled the owner of abutting dwelling-house property to damages.—*Patton v. Olympia Door & Lumber Co.* (Wash.) 237.

A lumber company, organized also for the construction of a railroad, held entitled to exercise the right of eminent domain.—*Bridal Veil Lumbering Co. v. Johnson* (Or.) 790.

In a proceeding to condemn land covered by water, only the value of the land taken, and the resulting damage to the balance of the owner's land, is recoverable.—*Siedler v. Seely* (Colo. App.) 848.

Laws 1895, p. 304, authorizing the taking of land to establish a diking system, held constitutional.—*Hansen v. Hammer* (Wash.) 332.

Where, in an action to condemn land, defendant demands a jury, it is too late to ask for appointment of commissioners to determine the necessity of the condemnation.—*Siedler v. Seely* (Colo. App.) 848.

ENTRY.

Of judgment, see "Judgment."

EQUALIZATION.

See "Taxation."

EQUITY.

See, also, "Cancellation of Instruments"; "Divorce"; "Fraudulent Conveyances"; "Injunction"; "Mortgages"; "Partnership"; "Quieting Title"; "Specific Performance"; "Subrogation"; "Trusts."

Attachment of equitable interest, see "Attachment."

Partnership accounting, see "Partnership."

Leave to file an amended bill on condition that defendants be served with notice of the amendment will not sustain a decree taken pro confesso on the same day without serving process.—*Albright v. Texas*, S. F. & N. R. Co. (N. M.) 448.

Where defendant fails to answer, complainant must prove his case, or take a decree pro confesso.—*Albright v. Texas*, S. F. & N. R. Co. (N. M.) 448.

In an action to establish a trust, and to follow the funds into the hands of the trustee's administrators, insufficiency of the evidence as to following the fund does not preclude a judgment for such sum as is due.—*McClure v. Board of Com'rs of La Plata County* (Colo. Sup.) 677.

The court, in its discretion, may order issues of fact to be tried by the jury.—*MacIellan v. Seim* (Kan. Sup.) 959.

A judgment in equity is not controlled by the prayer for relief.—*State v. Tooker* (Mont.) 530.

The remedy for violation of the provisions of a decree where no change of parties or interest appears, is not by bill to enforce the decree.—*Raft River Land & Cattle Co. v. Langford* (Idaho) 1024.

In an equity case, the court may vacate a decree, and treat a verdict and findings of a referee as advisory, and make such findings as the evidence warrants, and enter a decree thereon.—*Wasatch Min. Co. v. Jennings* (Utah) 1106.

ESTATES.

See "Deeds"; "Life Estates"; "Wills"

ESTOPPEL.

By judgment, see "Judgment."

Of life tenant to acquire title under tax sale, see "Life Estates."

To allege error, see "Appeal and Error."

A bank accepting city warrants, for which it gives the city credit, *held* estopped to plead the illegality of the warrants without an offer to return them.—*City of Tacoma v. German-American Safe-Deposit & Savings Bank* (Wash.) 256.

A state, by accepting the benefit of an unauthorized contract with an individual, is not estopped to deny its validity.—*Mullan v. State* (Cal.) 670.

A judgment plaintiff, who purchases property sold on execution thereon, is estopped to deny the title of the judgment defendant in replevin for the property after vacation of the judgment.—*Benney v. Clein* (Wash.) 1037.

The acceptance by a lender of an unsecured note of the borrower after the money has been paid over by a custodian, who, by false representations, induced the making of the loan, and who agreed to take security before paying the money, does not estop the lender to recover from the custodian for the false representations.—*Goodale v. Middaugh* (Colo. App.) 11.

EVIDENCE.

See, also, "Witnesses."

Burden of proving fraud, see "Attachment."

Demurrer to, see "Trial."

Harmless error in rulings on, see "Appeal and Error."

In action on bills and notes, see "Bills and Notes." Incorporation in record on appeal, see "Appeal and Error."

In criminal cases, see "Burglary"; "Conspiracy"; "Criminal Law"; "False Pretenses"; "Forgery"; "Larceny"; "Rape."

In particular actions, see "Breach of Marriage Promise"; "Ejectment"; "Libel and Slander."

Laws establishing rules of, see "Constitutional Law."

Newly-discovered, as ground for new trial, see "New Trial."

Objections to, see "Trial."

Of accord and satisfaction, see "Accord and Satisfaction."

Of agency, see "Principal and Agent."

Of custom, see "Customs and Usages."

Of delivery, see "Deeds."

Of fraud, see "Fraud."

Parol evidence to show that deed was mortgage, see "Mortgages."

Pleading and proof, see "Pleading."

Presumption of delivery of deed, see "Deeds."

Proof of loss under policy, see "Insurance."

Reception of, see "Trial."

Weight and sufficiency, see, also, "Appeal and Error."

In an action on a contract against the state, the court is bound to take judicial notice of the fact that it is invalid.—*Mullan v. State* (Cal.) 670.

Pleadings in an action to compel a county treasurer to pay a warrant, *held* to make a prima facie case for plaintiff.—*Kelley v. Sersanous* (Cal.) 299.

The possession of a receipt for money deposited, by the administrator of the depositor, casts the burden of proving its repayment on the depository.—*Northrop v. Knott* (Cal.) 599.

Prosecutrix may testify to her own age.—*People v. Ratz* (Cal.) 915.

Family Bible record *held* admissible to prove name and age of a child.—*People v. Ratz* (Cal.) 915.

Best and secondary.

Admission of copy of instrument without accounting for the original, *held* reversible error.—*Reynolds v. Campling* (Colo. Sup.) 639.

Evidence of the owner of books that he turned them over to his attorney, and had no control of them, in connection with evidence of the attorney that he had lost the books, and could not find them, *held* to authorize secondary evidence of the contents of the books.—*Johnson & Larimer Dry-Goods Co. v. Cornell* (Okla.) 860.

Declarations and admissions.

Admissions in original answer which had been superseded by amended pleading are not admissible against defendant.—*Miles v. Woodward* (Cal.) 1078.

Conversations in the absence of plaintiff *held* inadmissible.—*Chapman v. Neary* (Cal.) 867.

In an action on a certificate of deposit, *held*, that a conversation with a person assuming to be receiving teller was admissible against defendants.—*Fiore v. Ladd* (Or.) 144.

Evidence of a conversation with a third person, there being nothing to show that he was connected with defendants, *held* inadmissible against him.—*Union Transp. Co. v. Bassett* (Cal.) 907.

Declarations of an agent are inadmissible against his principal, when relating to a past transaction.—*Acme Harvester Co. v. Madden* (Kan. App.) 319.

Opinion evidence.

A question to plaintiff asking him whether he believed the instrument in suit to have been a conveyance or security *held* not to ask for an opinion as to its legal effect.—*Pottkamp v. Buss* (Cal.) 169.

Testimony *held* properly excluded, as calling for a conclusion of law based on facts in evidence.—*Pottkamp v. Buss* (Cal.) 169.

Witnesses *held* competent to testify to the amount of damages done a fireproof safe by having holes punched in it during transportation.—*Diebold Safe & Lock Co. v. Holt* (Ok.) 512.

A jaller, who had an excellent opportunity to study defendant's mental condition, may testify as to the same.—*People v. McCarthy* (Cal.) 1073.

The question of the mere manner of a person at a particular time does not fall within the requirement that the witness must be an "intimate acquaintance" (Code Civ. Proc. § 1870, subd. 10), to be competent on the issue of the person's sanity.—*People v. McCarthy* (Cal.) 1073.

Whether witness is an "intimate acquaintance" and a competent witness on the issue of defendant's sanity, under Code Civ. Proc. § 1870, subd. 10, is to be determined by the trial judge.—*People v. McCarthy* (Cal.) 1073.

Before a witness can give his opinion on a proper subject of opinion, he must show himself qualified.—*Atchison, T. & S. F. R. Co. v. Mason* (Kan. App.) 31.

When facts are to be established from appearances and circumstances, the witness must describe the appearances and circumstances, and leave the conclusion to be drawn by the jury.—*Atchison, T. & S. F. R. Co. v. Mason* (Kan. App.) 31.

Witnesses who are not architects, builders, or contractors may state their opinions as to the worth of a building, from a general knowledge thereof.—*Springfield Fire & Marine Ins. Co. v. Payne* (Kan. Sup.) 315.

A nonexpert cannot testify as to whether a person is insane.—*Territory v. Padilla* (N. M.) 346.

The opinion of a person that a witness at a coroner's jury seemed stupid and uncertain as to facts *held* admissible.—*Territory v. Padilla* (N. M.) 346.

Parol evidence.

Though a contract is *prima facie* the contract of a person signing it, parol evidence is admissible to show that such person acted for another in so doing.—*Lewis v. Mutual Life Ins. Co.* (Colo. App.) 621.

Parol evidence *held* admissible to ingraft a condition on a contract.—*American Bridge & Contract Co. v. Bullen Bridge Co.* (Or.) 138.

A joint and several maker of a note may show by parol that he is a surety only, to the knowledge of the payee.—*Bank of British Columbia v. Jeffs* (Wash.) 247.

Competency and relevancy.

Photographs of the locality where the accident in suit occurred *held* admissible.—*Dederichs v. Salt Lake City R. Co.* (Utah) 656.

To establish the value of a stock of merchandise, an inventory and appraisal, properly authenticated, is admissible.—*Burchinell v. Koon* (Colo. App.) 932.

A receipt for money, though not stating for what purpose the money was paid, is admissible in an action to recover money deposited.—*Northrop v. Knott* (Cal.) 599.

time.—*Continental Divide Min. Inv. Co. v. Bille* (Colo. Sup.) 633.

Proof of handwriting.

A witness *held* competent to testify as to whether the signature on a note was that of a decedent.—*Poncin v. Furth* (Wash.) 241.

Letters in the handwriting of the adverse party *held* admissible for purposes of comparison with a material letter, alleged to be written by such party.—*Munkers v. Farmers' & Merchants' Ins. Co.* (Or.) 850.

Genuineness of a letter introduced in evidence *held* properly left to the jury, to be determined by comparison with signature conceded to be genuine.—*Osmun v. Winters* (Or.) 780.

EXAMINATION.

Of juror, see "Jury."

Of witness, see "Witnesses."

EXCEPTIONS.

Necessity of exception below, see "Appeal and Error."

To instructions, see "Trial."

EXCEPTIONS, BILL OF.

As part of record, see "Appeal and Error."

A bill of exceptions must be authenticated by the trial judge.—*Wieland v. Potter* (Colo. App.) 870.

A bill of exceptions stating, at the bottom of an offer of evidence, that the defendant objects, without showing grounds, *held* insufficient.—*Nelson v. First Nat. Bank* (Colo. App.) 879.

Bill of exceptions not settled, as required by Act March 8, 1893, § 9 (Sess. Laws, p. 114), must be stricken.—*State v. Howard* (Wash.) 650.

Where a bill of exceptions was settled by the trial judge without objection, attorneys for both parties being present, it cannot thereafter be objected that no notice of the time of settlement was given.—*Horton v. Jack* (Cal.) 920.

A bill of exceptions need not contain specifications of error except as to the ground that a finding or decision is not supported by the evidence.—*Snell v. Payne* (Cal.) 1069.

Where the evidence is not in the bill of exceptions, and plaintiff inserts a recital "that the testimony was conflicting," the judge cannot be compelled to sign the bill because of such recitals.—*People v. Boughton* (Colo. Sup.) 132.

EXCESSIVE DAMAGES.

See "Damages."

EXECUTION.

See, also, "Attachment"; "Exemptions"; "Garnishment."

Injunction against, see "Injunction."

A sale on execution sued out without revival of the judgment by an assignee of the judgment creditor after his death is not void.—*Christ v. Flannagan* (Colo. Sup.) 683.

The fact that an execution was issued against a deceased defendant and another does not render the sale of such other's land void.—*Christ v. Flannagan* (Colo. Sup.) 683.

In an action to compel the application of the proceeds of a sale under execution to a claim for

wages, the complaint must allege that notice was given to the execution debtor.—Taylor v. Hill (Cal.) 922.

A set of abstract books may be levied on.—Washington Bank of Walla Walla v. Fidelity Abstract & Security Co. (Wash.) 1036.

The right to an execution on a judgment for the payment of alimony in monthly installments does not become barred in five years from its entry.—Gaston v. Gaston (Cal.) 609.

A patent right is not subject to execution.—Peterson v. Sheriff of City and County of San Francisco (Cal.) 1060.

EXECUTORS AND ADMINISTRATORS.

See, also, "Wills."

Appealable probate order, see "Appeal and Error."

A verification to a claim in 1894 *held* sufficient, if in compliance with 2 Hill's Code, § 980.—Poncin v. Furth (Wash.) 241.

The powers of a special administrator are limited to the collection and preservation of the estate, and he has no power to allow or pay debts.—State v. Second Judicial District Court (Mont.) 259.

An ancillary administratrix in California is entitled to recover possession from the general administrator, appointed in another state, evidences of local debts due the estate, on which payment has been refused, and on which the general administrator cannot maintain an action.—McCully v. Cooper (Cal.) 82.

The lien of a lessor, who did not proceed against the estate of a deceased tenant until after 30 days from the death, *held* subject to the right of the widow and minor children to support out of the estate.—In re Stone's Estate (Utah) 1101.

A sale of property by an executor, not confirmed by the probate court, conveys no title, and a subsequent administrator can recover from the purchaser for its conversion.—Horton v. Jack (Cal.) 920.

Where defendant dies pending his appeal from a judgment, and his executors are substituted, and obtain a reversal, the claim need not be presented to his executors before a retrial.—Megraith v. Gilmore (Wash.) 1032.

An administratrix *held* entitled to a credit of attorney's fees paid without order of court.—Filbeck v. Davies (Colo. App.) 214.

Where chattels are sold by decedent without delivery, an administrator cannot defeat recovery by the purchaser where the sale was valid against decedent and his heirs.—Murphy v. Clayton (Cal.) 460.

Appointment.

A second cousin of a decedent, who left surviving him a father and brother residing in a foreign country, is not entitled to appointment as administrator as against the public administrator.—In re Eggers' Estate (Cal.) 380.

A surviving wife may nominate an administrator for the estate of her deceased husband, as authorized by Comp. St. 1887, p. 289, § 55, though she be a minor.—In re Stewart's Estate (Mont.) 806.

Comp. St. p. 290, § 58, which provides that, if the person entitled to letters of administration is a minor, letters must issue to his or her guardian, does not apply to a surviving wife.—In re Stewart's Estate (Mont.) 806.

An heir who requests the appointment of another as administrator of an estate will not be permitted to revoke such request without reason.—In re Silvar's Estate (Cal.) 296.

Actions.

In an action on a decedent's note, plaintiffs can show that no vouchers had been required from them.—Poncin v. Furth (Wash.) 241.

In an action on a note against an administrator, the production of the note and proof of execution are evidence of consideration, delivery, and nonpayment.—Poncin v. Furth (Wash.) 241.

An action brought in the district court after one year from the issuance of letters is not barred by Mills' Ann. St. §§ 4780, 4792, but the judgment therein rendered can be satisfied only from the uninventoried property of the estate.—McClure v. Board of Com'rs of La Plata County (Colo. Sup.) 677.

Defense to an action by an administrator for the conversion of property, against a purchaser from a former executrix, *held* insufficient.—Horton v. Jack (Cal.) 920.

Where legal representatives in a complaint alleged that they are acting under a duly-probated will, an answer denying the allegations on information and belief is insufficient.—Thompson v. Skeen (Utah) 1103.

EXEMPTIONS.

See, also, "Homestead."

Horses bought to be used in the business of drayman *held* exempt, though the purchaser had not actually entered on such business.—Cleveland v. Andrews (Idaho) 1025.

EXPERT TESTIMONY.

See "Criminal Law"; "Evidence."

FACTORIZING PROCESS.

See "Garnishment."

FALSE IMPRISONMENT.

Liability of city, see "Municipal Corporations."

FALSE PRETENSES.

See, also, "Fraudulent Conveyances."

A person obtaining land by false pretenses is not punishable under Pen. Code, § 532.—People v. Cummings (Cal.) 284.

A book containing a list of depositors at a bank *held* admissible to show that defendant, who obtained money on a worthless check, had no account there.—State v. McCormick (Kan. Sup.) 777.

False representations, made in defendant's presence without objection, which, in effect, affirmed defendant's false pretenses, *held* admissible.—State v. McCormick (Kan. Sup.) 777.

On a prosecution for obtaining property by means of a worthless check, it is not necessary to show that defendant was insolvent.—State v. McCormick (Kan. Sup.) 777.

The cashier of a bank on which was drawn a worthless check *held* competent to testify that defendant had no account with the bank.—State v. McCormick (Kan. Sup.) 777.

The certificate of protest of a worthless check, on which defendant obtained money, was competent evidence of presentment, demand, and refusal to pay.—State v. McCormick (Kan. Sup.) 777.

A particular description of a check, which is given only as a step in obtaining property under false pretenses, *held* not indispensable in the information.—State v. Baker (Kan. Sup.) 947.

See "False Pretenses"; "Fraudulent Conveyances."

FEEES.

Collected by clerk, see "Clerks of Courts."
Of attorney, see "Attorney and Client."
Of juror, see "Jury."

FELLOW SERVANT.

See "Master and Servant."

FENCES.

Duty of railroad company to fence tracks, see "Railroads."

FERRIES.

Regulation, see "Constitutional Law."

FILING.

Lien, see "Mechanics' Liens."

FINDINGS.

See "Trial."

FIRE INSURANCE.

See "Insurance."

FIRES.

Set by locomotive, see "Railroads."

FLOWAGE.

See "Waters and Water Courses."

FORCIBLE ENTRY AND DETAINER.

All defenses may be interposed under a general denial; hence it was not reversible error to strike a special defense.—City of Oklahoma City v. Hill (Okla.) 568.

A notice to vacate, addressed to a person as mayor of defendant city, *held* sufficient.—City of Oklahoma City v. Hill (Okla.) 568.

The action lies against the true owner if he forcibly ousted plaintiff from peaceable possession.—City of Oklahoma City v. Hill (Okla.) 568.

The notice to vacate need not state the names of the parties who claim the premises if they are signed at its close.—City of Oklahoma City v. Hill (Okla.) 568.

Where city officers as such permitted plaintiff to be forcibly ousted, *held* that the city was liable in forcible entry and detainer.—City of Oklahoma City v. Hill (Okla.) 568.

Where a complaint under Code 1890 sets out the interest of plaintiff in the property, describing it, and alleges that defendant unlawfully obtained and holds possession, *held*, the complaint was sufficient.—Carson v. Butt (Okla.) 596.

Evidence *held* to show defendant guilty of forcible detainer.—Lasserot v. Gamble (Cal.) 917.

Evidence of title in defendant is inadmissible.—Lasserot v. Gamble (Cal.) 917.

FORECLOSURE.

Of mortgage, see "Mortgages."

FORGERY.

Admission in evidence of a certificate of protest of a check charged to have been forged

In a prosecution for forging and uttering a check, other checks issued by defendant are not admissible to prove guilty knowledge, without proof that they were forgeries.—People v. Whiteman (Cal.) 99.

FORTHCOMING BOND.

See "Attachment."

FRAUD.

Misrepresentations as to the character of a mine, though made to third persons, *held* admissible to show fraud.—Oudin v. Crossman (Wash.) 1047.

Allegations *held* insufficient to constitute a cause of action by a purchaser against his vendor for fraudulent representations.—Kennah v. Huston (Wash.) 236.

A joint purchaser of land will not be permitted to gain an advantage over his co-purchaser by a misrepresentation to him of the price paid.—Kennah v. Huston (Wash.) 236.

One who makes a positive representation of a fact to induce the action of another, which is acted upon, is liable for the deceit if such representation is false, without regard to whether its falsity was known at the time to the one making it.—Goodale v. Middaugh (Colo. App.) 11.

FRAUDS, STATUTE OF.

Specific performance of parol agreement relating to land, see "Specific Performance."

Delivery of a quantity of wood to a purchaser *held* sufficient under the statute of frauds.—Dubois v. Spinks (Cal.) 95.

Held, that there was a valid contract for the purchase of lands, as against the statute of frauds.—Underwood v. Stack (Wash.) 1031.

FRAUDULENT CONVEYANCES.

Transfers invalid.

A conveyance to secure a surety on obligations already assumed, and for the assumption of other debts, is not per se fraudulent.—Tudor v. De Long (Mont.) 258.

A transfer by an insolvent to prevent the property from being distributed among his creditors, *held* void.—Salisbury v. Burr (Cal.) 270.

A conveyance of land held in trust by a father for his minor son, to the son after the father's insolvency, *held* not fraudulent.—Hayford v. Wallace (Cal.) 293.

An attachment and a bill of sale, parts of the same transaction, *held* void as against subsequent attaching creditors of the debtor.—Craig v. California Vineyard Co. (Or.) 421.

A grantee in a fraudulent conveyance *held* not chargeable with fraud, where he had no knowledge of any fraudulent intent.—Riethmann v. Godsmann (Colo. Sup.) 684.

Fraud of the mortgagor being shown, knowledge thereof by the mortgagee may be proved by any competent evidence, it not being necessary to show that the mortgagee had notice of each fraudulent act of the mortgagor.—Sherman County Bank v. McDonald (Kan. Sup.) 703.

Held, that an unequivocal and substantial change of possession followed the sale.—Levy v. Scott (Cal.) 892.

The presumption of fraud arising from continued possession of the mortgagor may be rebutted.—Arkansas City Bank v. Swift (Kan. Sup.) 950.

Actions to set aside.

Evidence examined and held to justify a finding that the grantor was insolvent when the conveyance was made.—*Hayford v. Wallace* (Cal.) 301.

Findings held to support a conclusion that a chattel mortgage was void as against prior attaching creditors.—*Fisher v. Kelly* (Or.) 146.

Evidence held to sustain a finding that a purchaser inserted the name of his wife in the deed for the purpose of defrauding his creditors, and that the wife did not purchase in good faith.—*Shanks v. Simon* (Kan. Sup.) 774.

Evidence held sufficient to authorize the setting aside of a judgment against a corporation at the suit of its receiver.—*Compton v. Schwabacher Bros. & Co.* (Wash.) 338.

Acts and declarations of the mortgagor at the time of the alleged fraudulent conveyance held admissible.—*Sherman County Bank v. McDonald* (Kan. Sup.) 703.

Evidence held to justify a finding that a debtor was insolvent at the time of transfer of his stock.—*Woolridge v. Boardman* (Cal.) 868.

Where a sale is attacked for fraud, the buyer can show all the circumstances connected with the sale.—*Levy v. Scott* (Cal.) 892.

In an action to set aside a transfer of stock as fraudulent, a tax list made out by the debtor held admissible to show what property he owned.—*Woolridge v. Boardman* (Cal.) 868.

Evidence as to whether the mortgagor remained in possession of the property held for the jury.—*Arkansas City Bank v. Swift* (Kan. Sup.) 950.

FREIGHT.

See "Carriers."

GAME.

Injunction against trespass on game preserve, see "Injunction."

Jurisdiction of justice over violations of game laws, see "Justices of the Peace."
Property rights in wild game birds, see "Animals."

Trespass on game preserve, see "Animals."

GARNISHMENT.

Plaintiff in garnishment proceedings has no further rights in the property attached than his debtor.—*Morgan v. Saline Valley Bank* (Kan. App.) 61.

Property attached in garnishment proceedings in justice court should be disposed of as property otherwise attached.—*Morgan v. Saline Valley Bank* (Kan. App.) 61.

GENERAL ASSIGNMENT.

See "Assignments for Benefit of Creditors."

GOOD WILL.

See "Partnership."

GOVERNOR.

See "States."

GUARANTY.

Of goods sold, see "Sales."

A cause of action on a guaranty of indemnity against loss from nonpayment of a debt does not accrue until it is shown that the debt is not collectible.—*Burton v. Dewey* (Kan. App.) 325.

Where a guaranty has attached to it a notation that it is subject to a contract, the guar-

anty and contract must be construed together.—*McCormick Harvesting-Mach. Co. v. Reiner* (Kan. App.) 539.

GUARDIAN AND WARD.

Appeal bond by guardian, see "Appeal and Error."

A guardian held not liable for the default of his collection agent.—*Beach v. Moser* (Kan. App.) 202.

Right of court to set aside guardian's sale for inadequacy of price determined.—*In re Jack's Estate* (Cal.) 1067.

HABEAS CORPUS.

No appeal lies in a habeas corpus proceeding, under Act Cong. March 3, 1885.—*In re Borrego* (N. M.) 211.

An imprisonment is not illegal, so as to authorize discharge on habeas corpus, because the order under which a party is held has been irregularly issued.—*In re Chapman* (Kan. App.) 1014.

Where a debtor has been arrested under civil process under Civ. Code, § 148, he will not be discharged because an attachment may have been previously issued in the same case, and levied on sufficient property to satisfy the claim.—*In re Chapman* (Kan. App.) 1014.

HANDWRITING.

Proof of, see "Evidence."

HARBOR COMMISSIONERS.

See "Navigable Waters."

HARMLESS ERROR.

See "Appeal and Error."

In instructions, see "Trial."

HEARSAY EVIDENCE.

See "Evidence."

HERD LAW.

See "Animals."

HIGHWAYS.

Mills' Ann. St. § 3962, does not require bridges over ditches running parallel to a highway.—*Farmers' High Line Canal & Reservoir Co. v. Westlake* (Colo. Sup.) 134.

Mills' Ann. St. § 3962, applies only to ditches constructed after the passage of the act.—*Farmers' High Line Canal & Reservoir Co. v. Westlake* (Colo. Sup.) 134.

HIRING.

See "Master and Servant."

HOMESTEAD.

Entries under federal laws, see "Public Lands."

Under Civ. Code, § 1241, subd. 4, a husband, after executing a mortgage to his wife, cannot defeat her right to foreclose it by filing a declaration of homestead.—*Glas v. Glas* (Cal.) 667.

HOMICIDE.

Evidence examined, and held that the question as to the degree of murder was for the jury.—*Territory v. Padilla* (N. M.) 346.

—Territory v. Lucero (N. M.) 18.

Duty of the person who commences the affray to retreat, where the person assaulted makes a deadly assault.—State v. Hatch (Kan. Sup.) 708.

Indictment.

An indictment examined, and *held* sufficient.—Borrego v. Territory (N. M.) 349.

In an indictment for assault with intent to kill, *held*, that the words "malice aforethought" were not necessary.—State v. McDonald (Utah) 872.

Indictment for assault with intent to kill *held* to sufficiently describe the offense.—State v. McDonald (Utah) 872.

Evidence.

Declarations of defendant *held* inadmissible, as being self-serving.—State v. Asbell (Kan. Sup.) 770.

The burden of proof as to malice never shifts to defendant.—Territory v. Lucero (N. M.) 18.

Evidence that defendant killed two others at the time he was alleged to have killed defendant *held* admissible as part of the *res gestæ*.—State v. Hayes (Utah) 752.

Circumstantial evidence *held* to sustain a conviction.—State v. Hayes (Utah) 752; State v. Asbell (Kan. Sup.) 770.

Defendant's efforts to prevent search in the place where deceased's body was found, and his condition of mind when viewing the body, and what he then said, *held* admissible.—State v. Hayes (Utah) 752.

Trial.

Case *held* triable at the term at which the indictment was found, though defendant was not arrested until after the commencement of the term.—State v. Asbell (Kan. Sup.) 770.

An erroneous remark, inadvertently made in an instruction, *held* not ground for reversal.—State v. Asbell (Kan. Sup.) 770.

Evidence examined, and *held* error to charge only on murder in the first degree.—Aguilar v. Territory (N. M.) 342.

An instruction on the trial of officers for murder as to the effect of false statements by such officers *held* erroneous.—Territory v. Lucero (N. M.) 18.

An instruction that false statements of defendants as to the killing tend to establish their guilt is an invasion of the province of the jury.—Territory v. Lucero (N. M.) 18.

An instruction that one standing by and not protesting when a killing is being done is guilty of murder in the first degree *held* erroneous.—Territory v. Lucero (N. M.) 18.

An instruction *held* properly refused where it had been given in substance.—State v. Carey (Wash.) 1050.

Instructions as to the right of self-defense *held* erroneous.—State v. Hatch (Kan. Sup.) 708.

Appeal and error.

A homicide case, under Comp. Laws N. M. 1884, § 2193, may be reviewed by a writ of error.—Borrego v. Territory (N. M.) 349.

On appeal by defendant in a homicide case under Comp. Laws, §§ 2476, 2483, the clerk must send up the transcript without regard to payment of fees therefor.—Aguilar v. Territory (N. M.) 342.

Admission of evidence as to deceased's whereabouts before he was killed *held* harmless.—People v. Worthington (Cal.) 1061.

Evidence that witness received from deceased certain papers after he was shot *held* harmless,

HUSBAND AND WIFE.

A wife may join with her husband in making a note for his debt.—Cooper v. Bank of Indian Territory (Okla.) 475.

A wife may bind herself by a provision that a note signed by herself and husband may be extended at the request of one of the signers.—Cooper v. Bank of Indian Territory (Okla.) 475.

Community personality is liable on a judgment against the husband for his separate debt.—Gund v. Parke (Wash.) 408.

Community real estate *held* not liable for the satisfaction of a judgment against the husband on an accommodation note.—Gund v. Parke (Wash.) 408.

In an action on a married man's note his wife may intervene to have it adjudged that the debt is not a community debt.—Gund v. Parke (Wash.) 408.

A husband holding *stock* for the benefit of the community, and becoming surety for the corporation, creates a liability enforceable against the community estate.—Horton v. Donohoe-Kelly Banking Co. (Wash.) 409.

A levy on the husband's interest in the community property on a judgment against the community authorizes a sale of the property standing in the husband's name.—Horton v. Donohoe-Kelly Banking Co. (Wash.) 409.

A deed of land to a married woman, reciting that it is conveyed as the separate estate of the grantee, *prima facie* makes it her separate property.—Sanchez v. Grace Methodist Episcopal Church (Cal.) 2.

Land deeded to a married woman in exchange for land owned by her becomes her separate property.—Sanchez v. Grace Methodist Episcopal Church (Cal.) 2.

A husband *held* entitled to recover for loss of his wife's services.—Southern Kansas Ry. Co. v. Pavey (Kan. Sup.) 969.

Deeds by a husband to his children by a former wife of all his real estate will be set aside in so far as they deprive his second wife, on his death, of more than one-half of his property.—Smith v. Smith (Colo. Sup.) 128.

Where there is a community contract, the wife is bound by act of the husband which is for the benefit of the community interest.—McKee v. Whitworth (Wash.) 1045.

Where a pretended title to a mine which has no existence is in a wife, and is sold through fraudulent representations, the community property is liable.—Oudin v. Crossman (Wash.) 1047.

Personal property which belonged to the wife prior to the marriage cannot be pledged by the husband without her consent for payment of his debts.—Knight v. Beckwith Commercial Co. (Wyo.) 1094.

IMPEACHMENT.

Of witness, see "Witnesses."

IMPLIED REPEAL.

See "Statutes."

INDEMNITY.

By plaintiff in attachment, see "Attachment."

INDIANS.

Jurisdiction of crime, see "Criminal Law."
Taxation of reservation land, see "Taxation."

TESTIMONY AND INFORMATION.

ar crimes, see "Embezzlement"; "False
uses."

ective verification *held* waived by the
of a recognizance, the consenting to a
ince, and the giving of a new recogni-
State v. Hook (Kan. App.) 44.

e the thing stolen is described in the
tion as the property of Sam Sisler, and
lence shows that the owner's full name
uel, there is no material variance.—Peo-
Armstrong (Cal.) 611.

ance between information and evidence
material.—People v. Main (Cal.) 612.

mation for rape *held* sufficient.—State v.
nd (Wash.) 727.

ndictment under Gen. St. § 701, for failing
ent a crime, is insufficient where it falls
w that defendant could have done so with-
icing himself in danger.—Farrell v. People
App.) 841.

information may be amended as to a Chris-
ame or an initial, with leave of court, after
nd before trial.—State v. McDonald (Kan.
966.

ere the prosecuting officer surprises defend-
y indorsing on the information at the trial
ames of witnesses whom he intended before-
to call in chief, there should be a postpone-
at defendant's request.—State v. McDonald
Sup.) 966.

indictment alleging commission of the
e by striking with a weapon, a more par-
ar description of which is unknown, *held*
cient, where the evidence does not show that
description was known to the prosecuting at-
ey.—State v. Carey (Wash.) 1050.

INDORSEMENT.

"Bills and Notes."

names of witnesses on information, see "Crim-
al Law."

INJUNCTION.

ainst commissioner, see "Counties."

pealable order, see "Appeal and Error."
ect of appeal, see "Appeal and Error."

The construction of tracks over land owned
a street-railway company will not be enjoined
at the instance of an abutting owner, since
remedy at law is complete.—Haskell v. Den-
er Tramway Co. (Colo. Sup.) 121.

Injunction will lie to prevent trespassing on
game preserve.—Kellogg v. King (Cal.) 166.

The prevention of a multiplicity of suits is
ound for injunction in case of repeated tres-
passes.—Kellogg v. King (Cal.) 166.

Injunction will not be granted to restrain the
enforcement of an execution where plaintiff has
adequate remedy at law.—Treat v. Wilson (Kan.
pp.) 322.

Where an injunction restraining performance
under a contract is dissolved after many years,
defendant will be allowed time to perform.—
Davis v. Ford (Wash.) 303.

An application for an injunction against an
officer charged with the preparation of the offi-
cial ballot, which, through the laches of re-
lator, is not presented to the court until too
late for the questions involved to be given prop-
er consideration, will be dismissed.—State v.
Reek (Mont.) 442.

A mandatory injunction will not lie to re-
move one having settled upon and improved
public lands pending a final determination in a
contest as to title between the parties.—Proctor
v. Stuart (Okla.) 501.

The discharge of a teacher will not be enjoined,
as he has an adequate remedy at law under a
contract to teach for a given length of time.—
School Dist. No. 1, Pitkin County, v. Carson
(Colo. App.) 846.

INSANE PERSONS.

Evidence of the general reputation of a person
as to sanity is inadmissible.—Territory v. Padil-
la (N. M.) 346.

A judgment against an insane person, without
the appointment of a guardian, is irregular, but
not void.—Dunn v. Dunn (Cal.) 5.

INSOLVENCY.

See, also, "Assignments for Benefit of Credit-
ors"; "Fraudulent Conveyances."

Transfers by insolvents, see "Fraudulent Convey-
ances."

A sheriff, as custodian of property pending ap-
pointment of assignee under the insolvent act,
does not represent the insolvent debtor in liti-
gated matters.—Taylor v. Hill (Cal.) 922.

An insolvent corporation may prefer a creditor.
—Conway v. Smith Mercantile Co. (Wyo.) 1084.

A creditor of a corporation, knowing it to be
insolvent, cannot obtain a preference by attach-
ment.—Compton v. Schwabacher Bros. & Co.
(Wash.) 338.

A preference secured by a creditor by mort-
gage *held* valid.—Bane v. Hartzell (Kan. Sup.)
961.

An insolvent whose application for a discharge
has been denied is not prevented from obtaining
a subsequent discharge under Insolvent Act 1880,
§ 49.—In re Marsh (Cal.) 1072.

Action by assignee to set aside conveyances by
insolvent *held* not maintainable where creditors
had not complained of the transfers.—McNeil v.
Hansen (Cal.) 1066.

INSPECTION.

Of records, see "Records."

INSTRUCTIONS.

See "Criminal Law"; "Trial."

INSURANCE.

A change of title *held* not to affect a mort-
gagee named in the subrogation clause in the
policy.—Dodge v. Hamburg-Bremen Fire Ins.
Co. (Kan. App.) 25.

A change of title increasing the interest of the
insured from that of a lien claimant to that of
an absolute owner *held* not to require a notice
to the company.—Dodge v. Hamburg-Bremen
Fire Ins. Co. (Kan. App.) 25.

The petition in an action on a policy need not
negative a disagreement as to the amount of
loss, requiring an appraisal before suit.—
Long Island Ins. Co. v. Hall (Kan. App.) 47.

On appraisal of a loss under a fire policy,
the award is not binding where the appraiser
had no evidence of the items of the loss.—Spring-
field Fire & Marine Ins. Co. v. Payne (Kan.
Sup.) 315.

Where an appraisal is agreed upon, the
burden of proof of the invalidity of the award is
upon the person challenging it.—Springfield Fire
& Marine Ins. Co. v. Payne (Kan. Sup.) 315.

A return of proofs by insurance company *held*
to estop them from pleading that no builder's
certificate was attached to the proofs and insuf-
ficiency of notary's certificate.—Schmurr v.
State Ins. Co. (Or.) 363.

though the policy provided that there should be no waiver except in writing.—Schmurr v. State Ins. Co. (Or.) 363.

The acceptance of premiums and failure to cancel policy *held* to waive a condition that no building should be erected near the insured property.—Schmurr v. State Ins. Co. (Or.) 363.

Authority of agent to receive payment of premium note not in his possession determined.—Long Creek Bldg. Ass'n v. State Ins. Co. (Or.) 366.

In an action on a policy, an instruction submitting to the jury the question of fact as to the existence of the agency, and a question of law as to the extent of the agent's authority, *held* error.—Long Creek Bldg. Ass'n v. State Ins. Co. (Or.) 366.

Where plaintiff pleads that he has furnished proofs, it is error to permit him to show a waiver by the company.—Long Creek Bldg. Ass'n v. State Ins. Co. (Or.) 366.

Statements as to the title of property insured, made to an agent, *held* to be binding on the company.—Michigan Fire & Marine Ins. Co. v. Wich (Colo. App.) 687.

The equitable owner of property may insure it as owner.—Michigan Fire & Marine Ins. Co. v. Wich (Colo. App.) 687.

Where a policy of insurance is issued without any application or agreement to make one, an application subsequently made at the request of the agent of the insurer is no part of the contract of insurance.—Michigan Fire & Marine Ins. Co. v. Wich (Colo. App.) 687.

Where an action on a policy is defended on the ground that the fire was set by plaintiff, evidence as to his general good character *held* inadmissible.—Munkers v. Farmers' & Merchants' Ins. Co. (Or.) 850.

INTEREST.

Alteration of note as to interest, see "Alteration of Instruments."

A vendee of goods is entitled to interest from the time of suing for the price, in the absence of agreement to pay the price at a specified date.—Lane v. Turner (Cal.) 290.

INTERPLEADER.

One filing a bill of interpleader, and depositing a fund with the clerk of court, is entitled to be discharged from liability only to the extent of the sum actually paid into court.—Bellingham Bay Boom Co. v. Briscois (Wash.) 238.

A complaint in interpleader *held* sufficient, under 2 Hill's Code, § 153.—Mosher v. Bruhn (Wash.) 397.

INTERPRETATION.

Of contract, see "Contracts."

INTERVENTION.

See "Parties."

INTOXICATING LIQUORS.

A county board, in fixing saloon licenses, may lawfully discriminate between saloons within and without incorporated towns.—Ex parte Stephen (Cal.) 86.

A provision of a county ordinance prescribing the punishment for conducting a saloon without a license, which is void as in contravention of the statute fixing such punishment, does not invalidate the other provisions; hence, on a conviction

be imposed.—Ex parte Stephen (Cal.) 86.

Evidence *held* sufficient to sustain a conviction for an illegal sale.—State v. Mitchell (Kan. App.) 541.

Under Laws 1892, p. 57, c. 52, a liquor license can be revoked only in the exercise of a sound discretion based on the merits.—Pehrson v. City Council of City of Ephraim (Utah) 657.

Under Laws 1892, p. 57, c. 52; the revocation of a liquor license by a city council, without charges being preferred, or an opportunity to be heard being given, is void.—Pehrson v. City Council of City of Ephraim (Utah) 657.

A complaint charging defendant with maintaining a place where intoxicating liquors were sold, failing to designate the place, *held* insufficient.—City of Kansas City v. Smith (Kan. Sup.) 710.

Under St. 1895, in a precinct where the vote was in excess of 150, though there was included in the precinct a town, a village, or a city, the number of votes cast is the criterion of the amount of the license.—Normoyle v. Latah County (Idaho) 831.

Evidence *held* to sustain a conviction for an illegal sale.—State v. Blunk (Kan. App.) 998.

A city ordinance providing penalties for conducting liquor traffic contrary to its provisions *held* not to conflict with the general misdemeanor law.—City of Seattle v. Pearson (Wash.) 1053.

An ordinance regulating liquor sales, though void in part, may be sustained as to the valid portion if it is severable.—City of Seattle v. Pearson (Wash.) 1053.

Ordinance providing for revocation of liquor license *held* not to conflict with another ordinance on the same subject.—City of Seattle v. Pearson (Wash.) 1053.

IRRIGATION.

See "Waters and Water Courses."

ISSUES.

See "Pleading"; "Trial."

JAILS.

Contract for construction, see "Counties."

JOINDER.

Of parties, see "Parties."

JOINT TENANCY.

Joint tenancies and estates in entirety are recognized in Kansas, and until Sess. Laws 1891, c. 203, the right of survivorship under the common law was in full force.—Wilson v. Johnson (Kan. App.) 833.

Where a husband and wife own an estate in entirety, they can be divested and become tenants in common only by a regular conveyance or a contract legally entered into.—Wilson v. Johnson (Kan. App.) 833.

JUDGES.

See, also, "Courts"; "Justices of the Peace"; "Removal of Causes."

Authentication of bill of exceptions, see "Exceptions, Bill of."

Of elections, see "Elections."

Act Cong. Sept. 9, 1850, does not prevent one of the judges in a territory acting in a case in another district than his own.—Borrego v. Territory (N. M.) 349.

cial judge *held* presumed to have been appointed, and to have jurisdiction to cause.—*Ellison v. Beannabla* (Okl.) 477.

JUDGMENT.

Insane persons, see "Insane Persons."
 Final judgment, see "Appeal and Error."
 Judgment on appeal as res judicata, see "Appeal and Error."
 Judgment on in setting aside default, see "Appeal and Error."
 Judgment before justice, see "Justices of the Peace."
 Final cases, see "Criminal Law."
 Replevin, see "Replevin."
 Judgment to compel entry, see "Mandamus."
 Judgment on judgments owned by nonresidents, see "Taxation."

Judgments *held* sufficient to show rendition of judgment.—*Fisher v. Kelly* (Or.) 146.

Complaint in an action to have a judgment set aside a superior lien *held* insufficient for failure to allege the judgment defendants to be indebted, or that an execution issued against them had been returned unsatisfied.—*Howard v. DeVaah*.) 235.

Judgment in attachment against a party *held* pending the action, *held* not void, but voidable.—*Mosely v. Southern Manuf'g Co.* 508.

An erroneous denial by a justice of a change of venue does not render the judgment void.—*Man v. Burnham* (Cal.) 379.

Default.

A party is not in default so long as he has a pending on file which makes an issue requiring judgment by the opposite party.—*Millikan v. Booth* 489.

A petition to set aside a judgment by default, which shows a good excuse for the default, and which answers showing a meritorious defense, should be granted.—*Lawler v. Bashford-Burmister Co.* (Ariz.) 72.

Judgment by default for want of a pleading *held* not authorized where both parties had appeared, and the pleadings filed had been treated both the court and the parties as sufficient.—*Lawler v. Bashford-Burmister Co.* (Ariz.) 72.

It is in the discretion of the district court to set aside a judgment for plaintiff by default, on a proper showing being made by defendant.—*Board of Education of City of Hutchinson v. National Bank of Commerce* (Kan. App.) 36.

Res judicata.

Where evidence was conflicting as to the issues passed on in a former action, the question as for the jury.—*Wolverton v. Glasscock* (Nash.) 253.

A petition *held* invalid as showing that the matters involved were previously decided.—*McKinley-Lanning Loan & Trust Co. v. Bassett* (Kan. App.) 999.

An adjudication that defendant was ineligible to office because not a citizen *held* conclusive in an action against him for usurpation of office.—*People v. Rodgers* (Cal.) 740.

Judgment between a surety on a contractor's bond and the obligee, as to payments made to laborers by the surety, *held* not a bar to an action on the bond.—*De Mattos v. Jordan* (Wash.) 402.

A decree setting aside a homestead to the widow of a decedent is binding on all persons interested in the estate, without personal notice of the proceeding.—*Hanley v. Hanley* (Cal.) 736.

Where a vendor recovers, as against the assignee of his vendee, a decree canceling the contract, *held*, that such decree was res judicata in a subsequent action by the vendee.—*Isensee v. Austin* (Wash.) 394.

The fact that a motion by a receiver for a corporation to discharge an attachment against it is overruled will not bar his right to sue to set aside the attachment on the ground of the insolvency of the corporation.—*Compton v. Schwabacher Bros. & Co.* (Wash.) 338.

Collateral attack.

The correctness of an order to a receiver to collect unpaid stock subscriptions from stockholders of a corporation cannot be questioned in an action by the receiver against them.—*Barto v. Nix* (Wash.) 1033.

A judgment can be collaterally attacked for fraud only where such fraud is extrinsic or collateral to the matter tried.—*Hanley v. Hanley* (Cal.) 736.

A judgment in a case in which the court had jurisdiction of the subject-matter and of the persons *held* not void and subject to collateral attack.—*McKinley-Lanning Loan & Trust Co. v. Bassett* (Kan. App.) 999.

A judgment in an action of foreclosure, regular on its face, though voidable in direct proceedings or between the parties, cannot be collaterally attacked after the land sold thereunder has passed into the hands of innocent purchasers.—*Dunn v. Dunn* (Cal.) 6.

A judgment of a court of general jurisdiction, when a question of fact upon which jurisdiction depends has been litigated and decided, cannot be attacked collaterally by one of the parties thereto.—*Ex parte Stephen* (Cal.) 86.

Opening and vacating.

A judgment will not be set aside where, on new trial, the judgment must be the same.—*Richardson Drug Co. v. Dunagan* (Colo. App.) 227.

A petition to vacate a judgment entered against a deceased party *held* insufficient for failing to set forth the judgment, and grounds of vacation and of defense.—*Mosely v. Southern Manuf'g Co.* (Okl.) 508.

A vacation of a judgment for irregularity in obtaining it, as between the parties, vacates a sale of personal property made thereunder.—*Benney v. Clein* (Wash.) 1037.

The findings of a referee, and a decree based thereon, on a motion for new trial, entered within the time prescribed, may be set aside by the court at a subsequent term.—*Wasatch Min. Co. v. Jennings* (Utah) 1106.

JUDICIAL NOTICE.

See "Evidence."

JUDICIAL SALES.

See "Execution"; "Executors and Administrators."

JURISDICTION.

See "Courts."

In criminal cases, see "Criminal Law."

In divorce, see "Divorce."

Jurisdictional amount, see "Appeal and Error"; "Courts."

On appeal, see "Appeal and Error."

Of justice, see "Justices of the Peace."

JURY.

Custody in criminal cases, see "Criminal Law."
 Harmless error in rejecting challenge, see "Appeal and Error."

Province of, negligence, see "Negligence."

Taking case from jury, see "Trial."

Trial of issue of fact in equity, see "Equity."

Under Laws 1889, p. 26, § 24, it is reversible error, when less than 12 jurors are in the box.

and the regular panel becomes exhausted, to compel defendant to pass on such jurors before a special venire is issued.—Territory v. Lermo (N. M.) 16.

Under Code Civ. Proc. § 848, a defendant may waive his right to further challenge as to jurors in the box when he is called to exercise his first challenge.—Poncin v. Furth (Wash.) 241.

In an action to foreclose a mortgage, where the validity thereof is attacked because of the insanity of one of the makers and the duress of the other, either party is entitled to a jury trial.—Myers v. Knabe (Kan. App.) 472.

In an action against a city, the court may excuse from the jury all residents or taxpayers of the city.—City of Oklahoma City v. Meyers (Okla.) 552.

A juror cannot be asked, "Would you attach more credit to the testimony of a minister than that of any one else?"—State v. Holedger (Wash.) 652.

Act March 19, 1895, requiring the jurors to be householders, is constitutional.—Redford v. Spokane St. Ry. Co. (Wash.) 350.

The state is not required to pay mileage and attendance fees of jurors in civil cases.—Salt Lake County v. Richards (Utah) 659.

A juror having no definite opinion as to the merits of the case held competent.—State v. Carey (Wash.) 1050.

JUSTICES OF THE PEACE.

A justice of the peace has no jurisdiction of a violation of the game laws which is punishable by a fine of not less than \$100, or imprisonment for not less than 100 days.—Ex parte Anear (Cal.) 172.

An action against a chattel mortgagee for removing a windmill from the land held not to involve title to real estate so as to affect jurisdiction of the justice.—Vaughn v. Grigsby (Colo. App.) 624.

A justice of the peace is liable on his official bond to his successor for fees received while wrongfully withholding the office after the expiration of his term.—Morris v. People (Colo. App.) 691.

The statute authorizing county boards to create new justices' precincts (Gen. St. p. 284, § 146) is constitutional.—Morris v. People (Colo. App.) 691.

The entry of a judgment in a justice's docket, regular on its face, is prima facie evidence that it was rendered.—Rauer v. Justices' Court of City and County of San Francisco (Cal.) 870.

An appeal from a judgment of a justice vacates the judgment.—Rossi v. Superior Court of San Joaquin County (Cal.) 177.

Right of plaintiff on appeal from a justice's court to a superior court to have all the issues of fact tried anew.—Rossi v. Superior Court of San Joaquin County (Cal.) 177.

On appeal by plaintiff from a judgment in a suit before a justice in favor of defendant, and also of an intervener, plaintiff properly served notice on both defendant and intervener.—Rossi v. Superior Court of San Joaquin County (Cal.) 177.

JUSTIFICATION.

For libel or slander, see "Libel and Slander."

LANDLORD AND TENANT.

Notice to vacate, see "Forcible Entry and Detainer."

A lien on the crops made on a rented farm exists independently of a seizure thereof.—Scully v. Porter (Kan. Sup.) 313.

No writing is required to give force to a landlord's lien on the crops.—Scully v. Porter (Kan. Sup.) 313.

Where a landlord's lien on crops has not been lost, it is paramount to the claim of a purchaser thereof.—Scully v. Porter (Kan. Sup.) 313.

A lease examined, and held to give the lessee exclusive rights in certain premises as a hunting preserve.—Kellogg v. King (Cal.) 166.

Lease of land irrigated by a ditch construed, and held not to require the lessor to maintain the ditch.—Stevens v. Wadleigh (Ariz.) 70.

LARCENY.

See, also, "Robbery."

Evidence held sufficient for conviction of larceny as bailee.—State v. Skinner (Or.) 368.

LASCIVIOUS COHABITATION.

An indictment held insufficient.—State v. Hook (Kan. App.) 44.

Both parties to the offense must be joined in the indictment.—State v. Hook (Kan. App.) 44.

The offense is joint, under the statute.—State v. Hook (Kan. App.) 44.

LAW OF THE CASE.

See "Appeal and Error."

LAWS.

See "Statutes."

LEADING QUESTIONS.

See "Witnesses."

LEASES.

See "Landlord and Tenant."

LEGACIES.

See "Wills."

LEVY.

Of execution, see "Execution."
Of taxes, see "Taxation."

LIBEL AND SLANDER.

Instruction in a prosecution for criminal libel approved.—People v. Crespi (Cal.) 863.

It is not reversible error to permit a prosecuting witness, in a trial for criminal libel, to testify that he is a married man, and has a family.—People v. Crespi (Cal.) 863.

An instruction leaving the jury to determine the meaning of the publication, held not erroneous as against plaintiff.—Tonini v. Cevasco (Cal.) 103.

A publication held libelous per se, so that special damages need not be averred.—Tonini v. Cevasco (Cal.) 103.

Defendant's evidence of misconduct by plaintiff held not to authorize proof of his good reputation.—Hall v. Elgin Dairy Co. (Wash.) 1049.

Defendants, to justify publication that plaintiff had admitted appropriation of money, need only prove the admission.—Hall v. Elgin Dairy Co. (Wash.) 1049.

LICENSES.

To sell liquor, see "Intoxicating Liquors."

A city of the second class may license photographers, and the fact that a larger tax is requir-

ed from traveling photographers than from residents does not render the ordinance invalid.—City of Caldwell v. Prunelle (Kan. Sup.) 949.

Evidence held insufficient to support a conviction of defendant for a violation of a city ordinance requiring payment of an occupation tax.—City of Cheyenne v. O'Connell (Wyo.) 1088.

LIENS.

See, also, "Mechanics' Liens."

For work in mines, see "Mines and Minerals."

Of attachment, see "Attachment."

Of landlord, see "Landlord and Tenant."

Of mortgage, see "Chattel Mortgages."

On crops for rent, see "Landlord and Tenant."

A vendor, who retains title to the property sold, and also takes a lien on other land as collateral security, may be compelled by a junior lienholder to exhaust the property sold before proceeding to enforce the collateral lien.—Kent v. Williams (Cal.) 462.

LIFE ESTATES.

Adverse possession by life tenant, see "Adverse Possession."

A life tenant held estopped to acquire title under a sale for taxes during the continuance of the life estate.—Menger v. Carruthers (Kan. Sup.) 712.

LIMITATION.

Of liability, see "Carriers."

LIMITATION OF ACTIONS.

On guaranty, see "Guaranty."

Running of statute.

The statute does not commence to run in favor of a trustee until there is a renunciation of the trust.—Kansas City Inv. Co. v. Fulton (Kan. App.) 188.

Person claiming title under a tax deed to land in possession of another must sue to recover within two years from the time the action might have been brought.—Greenlee v. Smith (Kan. App.) 548.

The statute does not commence to run against a cause of action accruing in another state until the debtor becomes a resident of the territory.—Richardson v. Mackay (Okla.) 546.

The statute of limitations adopted from Nebraska did not begin to run until May 2, 1890.—Schnell v. Jay (Okla.) 598.

When the time in which an action may be brought has not expired, the legislature may extend it.—Schnell v. Jay (Okla.) 598.

Where the limitations were for two years, and the complaint was filed September 30, 1890, and summons issued April 5, 1892, and served such day, the action was commenced under the statute of May 2, 1890, and was not barred by two years' limitations.—Schnell v. Jay (Okla.) 598.

A statute does not run in favor of a non-resident corporation which neglects to comply with the laws under which it is permitted to do business in the state, by which neglect it is saved from service of process.—Johnson & Larimer Dry-Goods Co. v. Cornell (Okla.) 860.

A cause of action for failure of a vendor to convey held to accrue when the last payment for the land was due.—Thomas v. Pacific Beach Co. (Cal.) 899.

An action by a vendee to recover the purchase price must be brought within two years, under Code Civ. Proc. § 339.—Thomas v. Pacific Beach Co. (Cal.) 899.

An action to recover a personal judgment for taxes must be brought within three years.—City of San Diego v. Higgins (Cal.) 923.

A petition for relief on account of fraud, showing that the transaction complained of occurred more than two years before suit was brought, is demurrable, unless it alleges that the fraud was not discovered until within that time.—McCalla v. Daugherty (Kan. App.) 30.

Where no demand is made that a mortgage which has been paid be discharged for more than a year after it should have been made, the action to recover the penalty for failure to discharge is barred.—Travelers' Ins. Co. v. Stucki (Kan. App.) 42.

Where stockholders give a note to pay a judgment against the corporation, the corporation agreeing to protect them, a cause accrues against the corporation when the note is paid.—Frantz v. Idaho Artesian Well & Drilling Co. (Idaho) 1026.

Acknowledgment.

A writing to revive a debt barred must show that the party recognized the debt as one upon which he is still liable.—Andrew v. Kennedy (Okla.) 485.

Pleading and practice.

Limitations, to be available, must be pleaded.—Frantz v. Idaho Artesian Well & Drilling Co. (Idaho) 1026.

A city held not entitled to set up incorporation under a certain act in order to avoid a plea of limitations against its action to foreclose assessment liens where it had previously pleaded incorporation under prior unconstitutional acts.—City of Ballard v. West Coast Imp. Co. (Wash.) 1055.

The court cannot presume that the statute of limitations of another state, where the debtor resided, is the same as that of the territory.—Richardson v. Mackay (Okla.) 546.

LIQUOR SELLING.

See "Intoxicating Liquors."

LIVE STOCK.

Killed or injured on track, see "Railroads."
Shipment by carrier, see "Carriers."

LOCAL ACTIONS.

See "Venue."

LOCATION.

Of mining claim, see "Mines and Minerals."

LOGS AND LOGGING.

A complaint in an action to enforce a logging lien held to sufficiently allege the amount due.—Mason v. McGee (Wash.) 237.

Testimony of plaintiff that he had filed a lien notice held sufficient proof of its recording.—Mason v. McGee (Wash.) 237.

MAGISTRATE.

See "Justices of the Peace."

MALICE.

See "Homicide"; "Libel and Slander."

MANDAMUS.

Appeal from decree, see "Appeal and Error."

An application for mandamus to compel a court to entertain an appeal from a justice's

court is too late if made four months after the ruling complained of.—*State v. Superior Court of Whatcom County (Wash.)* 232.

Mandamus will not lie to compel the entry of a judgment of ouster as for default in quo warranto where defendant orally pleaded not guilty.—*People v. Superior Court of City and County of San Francisco (Cal.)* 383.

Mandamus will not be granted where the relator has an adequate remedy at law.—*Steward v. Territory (Okla.)* 487.

A petition to require the trial court to allow an amendment in accordance with the judgment on appeal need not set out the cause of action.—*Dixon v. Risley (Cal.)* 5.

A judgment to compel county commissioners to levy a tax to pay a judgment, in the absence of proof to support the averment of a refusal to make the levy, cannot be sustained.—*Board of Com'rs of Grand County v. People (Colo. App.)* 107.

A mandamus will lie to compel county commissioners to levy a tax and pay outstanding judgments.—*Board of Com'rs of Grand County v. People (Colo. App.)* 107.

An alternative writ of mandamus must recite the facts relied on as the ground of relief.—*State v. Moore (Wash.)* 647.

An owner of city property, against which a special assessment was irregularly made, who delayed objection for two years, *held* not entitled to mandamus to compel a reapportionment of the cost of the improvement.—*Arends v. City of Kansas City (Kan. Sup.)* 702.

Where the secretary of state refuses to certify nominations of a de facto political party, mandamus will lie to compel him.—*People v. McGaffey (Colo. Sup.)* 930.

A city having a right to control expenditures of its part of the amount collected for the road districts in the county cannot compel the county treasurer to pay the same to it till an apportionment is made under Hill's Ann. Laws, § 4085.—*City of Oregon City v. Moore (Or.)* 1017.

Mandamus is the remedy to compel a clerk of court to pay into the state treasury, as required by statute, fees collected by him.—*State v. Stanton (Utah)* 1109.

MANDATE.

See "Appeal and Error."

MANDATORY INJUNCTION.

See "Injunction."

MARRIAGE.

See, also, "Breach of Marriage Promise."

Contract to secure performance of contract to marry, see "Contracts."
Evidence of promise to marry, see "Breach of Marriage Promise."

A common-law marriage by contract *held* valid.—*State v. Zichfield (Nev.)* 802.

MARRIED WOMAN.

See "Husband and Wife."

MASTER AND SERVANT.

See, also, "Principal and Agent."

Regulation of hours of work, see "Constitutional Law."

Master's liability for injuries to servant.

Evidence of a customary disregard of the rules of an employer with his knowledge is competent

to show that the rule was waived.—*W. Southern Pac. Co. (Utah)* 374.

In order that rules adopted for the employes should avail the employer must have been known to the employe, and servance must not have been waived.—*W. Southern Pac. Co. (Utah)* 374.

Where a rule of an employer has been disobeyed to the knowledge of the employer, it will be regarded as waived.—*W. Southern Pac. Co. (Utah)* 374.

The question as to defendant's *voir dire* held one for the jury.—*McAlpine v. (Cal.)* 865.

A brakeman knocked from the ladder side of a freight car by the arrow on a stand near the track *held* entitled to recover.—*Southern Kansas Ry. Co. v. Michener (Sup.)* 988.

Disobedience of a rule by an employe to bar his right of action.—*Atchison, T. & S. F. R. Co. v. Slattery (Kan. Sup.)* 941.

Where employes placed a push car a safe distance from the track, and blocked it in an ordinary way, *held*, that the company was not liable for injuries resulting from the car being wards placed near the track by third persons connected with the company.—*Atchison, T. & S. F. R. Co. v. Slattery (Kan. Sup.)* 941.

A railroad employe, injured by coal from a passing engine, *held* entitled to recover.—*Croll v. Atchison, T. & S. F. R. Co. (Sup.)* 972.

Fellow servants.

Where the negligence of the employer's fellow servant produced an injury to a servant, the employer will be liable.—*Wright v. Southern Pac. Co. (Utah)* 374.

A section hand is a fellow servant of a section boss and of an engineer employed by the company.—*Hastings v. Montana Union Ry. (Mont.)* 264.

A foreman of men employed by a railroad company to quarry rock for its use *held* not a fellow servant of such employes.—*McDonough v. Northern Ry. Co. (Wash.)* 334.

Actions.

A locomotive repairer suing for personal injuries, resulting from a co-employe's negligence, *held* to have failed to establish negligence.—*Union Pac. Ry. Co. v. Mahaffy (Kan. App.)* 187.

In an action by a switchman for personal injuries, *held*, that a motion for nonsuit was properly denied.—*Wright v. Southern Pac. Co. (Utah)* 374.

Evidence *held* insufficient to sustain a cause of action for the personal injury of an employe.—*Colorado Fuel & Iron Co. v. Cummings (Colo. App.)* 875.

Evidence *held* insufficient to show employer's liability for an accident to employe.—*Stiles v. Richie (Colo. App.)* 694.

Evidence *held* insufficient to show that the track repairer was injured by the negligence of defendant railroad company.—*Anderson v. Union Pacific, D. & G. Ry. Co. (Colo. App.)* 840.

Evidence as to whether the engineer of a switch engine kept a proper lookout for obstructions on the track *held* for the jury.—*Atchison, T. & S. F. R. Co. v. Slattery (Kan. Sup.)* 941.

Risks of employment and contributory negligence.

The risk of injury incident to defective appliances *held*, under the evidence, to have been assumed by an employe.—*Colorado Fuel & Iron Co. v. Cummings (Colo. App.)* 875.

A switchman assumes the risks ordinary to his employment, including hazards which ob-

servation would bring to his knowledge.—*Wright v. Southern Pac. Co. (Utah)* 374.

Question whether, under all the circumstances, the employé was guilty of negligence which was the proximate cause of the injury, is for the jury.—*Wright v. Southern Pac. Co. (Utah)* 374.

Whether an employé was guilty of contributory negligence in violating a rule of the employer was for the jury.—*Wright v. Southern Pac. Co. (Utah)* 374.

A brakeman, knocked from the ladder on the side of a freight car by the arrow on a switch stand, held not guilty of negligence as a matter of law.—*Southern Kansas Ry. Co. v. Michaels (Kan. Sup.)* 938.

MEASURE OF DAMAGES.

See "Damages."

MECHANICS' LIENS.

A lien for work by plastering a building held superior to a mortgage given after its commencement under Gen. Laws 1887, div. 5, § 1374.—*Murray v. Swanson (Mont.)* 441.

Act March 14, 1889, providing for attorney's fees in mechanic's lien cases, relates to the trial court only.—*Murray v. Swanson (Mont.)* 441.

A subcontractor who furnished lumber to the contractor held not entitled to a lien.—*Darlington-Miller Lumber Co. v. Lobitz (Okla.)* 481.

A claim of lien held admissible over the objection that it did not correctly state the names of either the owners or reputed owners of the premises.—*Kelly v. Lemberger (Cal.)* 8.

A finding that one was the reputed owner of premises, as alleged in a claim of mechanic's lien, is not impaired by the fact that conveyances to other persons were on record.—*Kelly v. Lemberger (Cal.)* 8.

A lien of one who states in his claim that a certain person is owner and reputed owner of the premises is not impaired by proof that such person was the reputed owner only.—*Kelly v. Lemberger (Cal.)* 8.

Under Act 1893, § 15, an employé of a subcontractor failing in his lien cannot have a personal judgment against the owner of the land.—*Lowrey v. Svard (Colo. App.)* 619.

Complaint held sufficient, on default of defendants, to admit proof and finding of a fact alleged.—*San Joaquin Lumber Co. v. Welton (Cal.)* 735.

Evidence held to show that the lien was not filed in the statutory time.—*Forest Grove Door & Lumbering Co. v. McPherson (Or.)* 884.

When personal judgment in favor of material men having no lien is invalid against the owner.—*Kennedy & Shaw Lumber Co. v. Priest (Cal.)* 903.

Clerical error in amount of lien will not invalidate it.—*Snell v. Payne (Cal.)* 1069.

Lien for furnishing lime held to properly include charge for the barrels.—*Snell v. Payne (Cal.)* 1069.

In the absence of fraud, a lien is not invalidated by the fact that it claims an amount greater than the value of the materials furnished.—*Snell v. Payne (Cal.)* 1069.

A subcontractor's lien attaches when he commences to do the work and furnish the materials.—*Morrison v. Gamble (Utah)* 1104.

Where the original contract is not of record, it is not necessary to aver the exact amount of the contract, nor need the subcontractor make positive averments as to payments made.—*Morrison v. Gamble (Utah)* 1104.

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See "Jury."

MILEAGE.

MINES AND MINERALS.

A lien claim based on work performed on a mining claim, which fails to state by whom claimant was employed, is fatally defective.—*Ascha v. Fitch (Cal.)* 298.

A lien claim for labor performed on a mining claim, held to state by whom claimant was employed.—*Ascha v. Fitch (Cal.)* 298.

A lien claim for work performed on a mining claim, held to sufficiently contain the terms, time given, and conditions of the contract under which the work was done.—*Ascha v. Fitch (Cal.)* 298.

The precise words of the statute giving a lien for work done on a mining claim need not be used by claimant in his claim of lien.—*Ascha v. Fitch (Cal.)* 298.

A laborer working in a mine for one who he knows is neither the owner nor working as the agent or representative of the owner is not entitled to a lien on the mining claim for such work.—*Jurgenson v. Diller (Cal.)* 610.

Extracting ore from a mine for one not the owner, and not in improvement of the property, held not to entitle the laborer to a lien.—*Jurgenson v. Diller (Cal.)* 610.

The failure of a partner in a mining lease to pay his proportion of the expense of working the property for 90 days does not work a forfeiture of his interest in the partnership.—*Continental Divide Min. Inv. Co. v. Bliley (Colo. Sup.)* 633.

Where one of the partners in a mining lease surrenders it before its expiration and takes a new lease to himself, the new one will, as to the other partner, be considered a continuation of the old.—*Continental Divide Min. Inv. Co. v. Bliley (Colo. Sup.)* 633.

Under Rev. St. U. S. § 2324, the record of the location of a mining claim must have such a description by reference to a natural object or permanent monument as will indemnify it.—*Brown v. Levan (Idaho)* 661.

Where permanent monuments are erected to tie a mining claim thereto, courses and distances to some object on the ground must be stated with reasonable accuracy.—*Brown v. Levan (Idaho)* 661.

Certain evidence held not admissible in action against directors of mining corporation for failure to post statutory reports.—*Miles v. Woodward (Cal.)* 1076.

Complaint against directors of mining corporation for failure to post statutory reports need not state that such failure was intentional.—*Miles v. Woodward (Cal.)* 1076.

One who took possession of a mine with the owner's consent held entitled, on being dispossessed, to be reimbursed for expenditures, and to be compensated.—*Wasatch Min. Co. v. Jennings (Utah)* 1106.

MISTAKE.

Payment under, see "Payment."

MONOPOLIES.

A combination or association formed to impose an unreasonable restraint on trade is unlawful.—*Greer v. Payne (Kan. App.)* 190.

A member of a monopoly is not entitled to equitable relief to enable him to retain his membership.—*Greer v. Payne (Kan. App.)* 190.

Contract held not to create a monopoly to unduly restrict the business of stevedoring, in contravention of public policy.—*Herriman v. Menzies (Cal.)* 730.

See, also, "Chattel Mortgages"; "Fraudulent Conveyances."
As preference, see "Insolvency."
Attorneys' fees in foreclosure, see "Attorney and Client."
By agent, see "Principal and Agent."
Collateral attack on decree of foreclosure, see "Judgment."
Evidence of satisfaction, see "Accord and Satisfaction."
On homestead entry, see "Public Lands."
On railroads, see "Railroads."
Priority over mechanics' liens, see "Mechanics' Liens."
Subrogation to rights of mortgagee, see "Subrogation."

A mortgagee of the holder of the legal title, while the equitable owner was in open and exclusive possession of the land, *held* not a bona fide mortgagee.—*Kansas City Inv. Co. v. Fulton* (Kan. App.) 188.

Assignment of mortgage by vice president under corporate seal *held* sufficient for purposes of foreclosure.—*Atlantic Trust Co. v. Behrend* (Wash.) 642.

A bona fide indorsee of a mortgage *held* not affected by alleged fraudulent representations of the original payee.—*Converse v. Bartels* (Kan. Sup.) 940.

In an action to have an absolute deed decreed a mortgage, a tender of the mortgage debt *held* unnecessary.—*Bradbury v. Davenport* (Cal.) 1062.

In an action to have an absolute deed declared a mortgage, complaint *held* to sufficiently allege that the interest of the mortgagor was of a certain value.—*Bradbury v. Davenport* (Cal.) 1062.

It may be shown that a deed of conveyance, absolute on its face, was by mutual understanding a mortgage.—*Barnes v. Crockett* (Kan. App.) 967.

Parol evidence *held* admissible to show that a certain instrument is a mortgage, and not an absolute sale.—*Stith v. Peckham* (Okla.) 664.

Transfer of property mortgaged.

A record of a mortgage *held* constructive notice, though it fails to show whether the figures of the description refer to section and township or block and lot.—*Malbon v. Grow* (Wash.) 330.

Where the grantee of mortgaged premises assumes the mortgage debt, no cause of action accrues until the debt assumed becomes due and payable.—*Carnahan v. Lloyd* (Kan. App.) 323.

The mere recital in a deed that the grantee assumes a mortgage *held* not of itself to require a personal decree against the grantee on foreclosure.—*Rutland Sav. Bank v. White* (Kan. App.) 29.

The liability of a grantee to assume payment of a mortgage depends upon the personal liability of his grantor.—*Morris v. Mix* (Kan. App.) 58.

Where an absolute deed is given, accompanied by a bond of defeasance, by surrendering the bond, *held* that the estate vested unconditionally in the grantee in the deed.—*Seawell v. Hendricks* (Okla.) 557.

A mortgagor who sold the property subject to the mortgage *held* discharged by the mortgagee's extending the time of paying the mortgage debt without his consent.—*Bunnell v. Carter* (Utah) 755.

A grantee who assumes payment of a mortgage is not liable for a deficiency unless his grantor was so liable.—*New England Trust Co. v. Nash* (Kan. App.) 987.

A mortgagee is not compelled to accept a grantee of the mortgagor who assumes the mortgage.

Payment.

An action to recover a penalty for failure to discharge a mortgage which has been paid cannot be maintained unless a demand for discharge has been made.—*Travelers' Ins. Co. v. Stucki* (Kan. App.) 42.

An attachment *held* properly issued under Laws 1889, c. 175, against the property of a foreign corporation for a failure to release a mortgage which had been paid.—*Travelers' Ins. Co. v. Stucki* (Kan. App.) 42.

Foreclosure.

Defendants in a foreclosure suit *held* to have waived irregularities in the issuance and service of the summons.—*Sparks v. Beyer* (Kan. App.) 980.

In an action to foreclose a mortgage, and for a personal judgment on a coupon bond, the clerk of court need not indorse on the summons the amount claimed or the nature of the claim.—*Sparks v. Beyer* (Kan. App.) 980.

The court *held* to have acquired jurisdiction of defendants in an action to foreclose a mortgage by proper service of process.—*Sparks v. Beyer* (Kan. App.) 980.

On foreclosure a decree for attorney's fees may be entered on a stipulation therefor contained in the mortgage introduced in evidence and foreclosed.—*Ames v. Bigelow* (Wash.) 1046.

Where a mortgagee brings two suits to foreclose mortgages on the same property, he will be allowed costs in one only.—*Thompson v. Skeen* (Utah) 1103.

Where plaintiffs held two mortgages for separate debts on the same property the foreclosure of one *held* not to release the lien of the other.—*Thompson v. Skeen* (Utah) 1103.

MOTIONS.

For new trial, see "New Trial."

For substitution of attorneys, see "Attorney and Client."

To make more definite, see "Pleading."

To quash, see "Criminal Law."

To strike out, see "Pleading."

MULTIPLICITY OF SUITS.

Injunction to prevent, see "Injunction."

MUNICIPAL CORPORATIONS.

See, also, "Counties."

Certiorari to review order discharging defendant from prosecution under ordinance, see "Certiorari."

Occupation tax, see "Licenses."

Ordinances regulating liquor traffic, see "Intoxicating Liquors."

Recognizance after conviction for violating ordinance, see "Bail."

Removal of city officer, see "Quo Warranto."

Special election, within the meaning of the constitutional provision relating to amendment of city charters, defined.—*People v. Davie* (Cal.) 150.

An act authorizing city officers to pay money for which there is no legal claim is a gift and void.—*Conlin v. Board of Sup'rs of City and County of San Francisco* (Cal.) 279.

Where a city extends its limits to include a bridge purchased by the county from a private corporation, it thereafter is liable for repairs.—*Cascade County v. City of Great Falls* (Mont.) 437.

Incorporation and powers.

A settlement *held* to constitute a village.—*People v. McCune* (Utah) 658.

Under the consolidation act (St. 1856, p. 145) the city and county of San Francisco, in matters of government, must be regarded as a city.—*Kahn v. Sutro* (Cal.) 87.

The city of Monterey *held* authorized to lease a portion of the water front to a steamship company for its special use.—*Pacific Coast S. S. Co. v. Kimball* (Cal.) 275.

It is within the power of the legislature to authorize a municipal corporation to assume and pay a claim not legally binding upon it.—*State v. Winter* (Wash.) 644.

Under Gen. St. 1889, par. 555, a city of the first class may require pawnbrokers to keep a record of property purchased.—*City of Kansas City v. Garner* (Kan. Sup.) 707.

Ordinances.

An ordinance *held* not invalid because it prohibits acts made penal by the laws of the state, where the legislature has authorized said municipal legislation.—*City of Kansas City v. Grubel* (Kan. Sup.) 714.

An ordinance requiring an occupation tax *held* illegal as to one soliciting the sale of goods for a firm doing business in another state.—*Baxter v. Thomas* (Okla.) 479.

Officers and agents.

A formal election as chief of police by one ineligible *held* not to end the term of the incumbent.—*People v. Rodgers* (Cal.) 740.

The term of an incumbent of a city office may be shortened by an amendment of the city charter abolishing the office, or transferring its duties to another officer.—*People v. Davis* (Cal.) 150.

The chief of police of Salt Lake City *held* entitled to suspend subordinates for disobeying his rules, though the board of police and fire commissioners made no rules in the premises.—*Eslinger v. Pratt* (Utah) 763.

Liability for torts.

A person knowing of a dangerous place in a sidewalk, and using the walk at night, *held* guilty of contributory negligence.—*Pittman v. City of El Reno* (Okla.) 495.

A city *held* liable for injuries caused by an excavation which it permitted to exist in close proximity to a street.—*City of Oklahoma City v. Meyers* (Okla.) 552.

Instructions as to the city's duty to care for its streets *held* proper in an action against the city for injuries received in an excavation in close proximity to a street.—*City of Oklahoma City v. Meyers* (Okla.) 552.

Cities are not liable for false imprisonment for illegal acts of their officers.—*City of Caldwell v. Prunelle* (Kan. Sup.) 949.

Public improvements.

Where it is impossible for a town to give a notice of a street assessment by publication as provided by statute, personal service of the notice will be *held* sufficient.—*Town of Tumwater v. Pix* (Wash.) 388.

A failure to appeal from an assessment of a lot for street improvements is a waiver of an error in the amount of the assessment.—*Wells v. Wood* (Cal.) 96.

Description of a street improvement in the resolution of intention and subsequent proceedings *held* sufficient.—*Wells v. Wood* (Cal.) 96.

In the absence of statute fixing the mode of making special assessments for local improvements, a municipal corporation may tax in proportion to the value of the local lots taxed without improvements.—*Douglas v. Craig* (Kan. App.) 187.

A town is without authority to discount its warrants.—*Million v. Soule* (Wash.) 234.

Failure of superintendent of streets to record contract for street improvement *held* not to affect contractor's right to enforce assessment.—*Wells v. Wood* (Cal.) 96.

Evidence *held* to show the existence of a street.—*City of Abilene v. Wright* (Kan. App.) 715.

Fiscal management and taxation.

Where the fund out of which a claim against a city can be paid is exhausted, the claimant cannot have mandamus to compel the board of supervisors to order a judgment thereon paid.—*Goldsmith v. Board of Sup'rs of City and County of San Francisco* (Cal.) 816.

Under power to regulate the collection of taxes a city may legally provide by ordinance for refunding money paid on illegal sales of property for municipal taxes made after, but not on sales made before, the passage of the ordinance.—*Phelps v. City of Tacoma* (Wash.) 400.

Under Sess. Laws 1893, p. 97, where a county tax collector collects taxes levied by a city, he must pay over, on demand, the money thus collected to the city treasurer.—*City of Moscow v. Latah County* (Idaho) 874.

Indebtedness incurred for necessary purposes by municipal corporations under the laws of the territory prior to the taking of the first assessment *held* valid if issued within 4 per cent. of the value of the taxable property.—*Sauer v. McMurtry* (Okla.) 576.

Action of a town in recognizing and assuming indebtedness incurred under a prior and illegal organization *held* valid.—*State v. Winter* (Wash.) 644.

An action cannot be maintained for the recovery of a special assessment collected by the city and county of San Francisco, though paid under protest.—*Davis v. City and County of San Francisco* (Cal.) 863.

Actions.

The fact that a city is indebted beyond the constitutional limit is no defense to an action to recover money paid on an illegal sale of property for taxes by the city, under an ordinance providing for the refunding of the money paid on such sales.—*Phelps v. City of Tacoma* (Wash.) 400.

Facts *held* not to entitle a citizen to maintain an action in behalf of a city.—*Dunn v. Long Beach Land & Water Co.* (Cal.) 607.

A citizen and taxpayer of a city can only maintain an action in behalf of the city where the bringing of such action is a duty which is not discretionary with the city authorities, and which they refuse to perform.—*Dunn v. Long Beach Land & Water Co.* (Cal.) 607.

A complaint under one clause of an ordinance *held* not required to negative a proviso in a subsequent clause of the ordinance.—*City of Kansas City v. Garner* (Kan. Sup.) 707.

MUNICIPAL COURTS.

See "Courts."

MURDER.

See "Homicide."

NAMES.

Of defendant, variance between indictment and proof, see "Indictment and Information."

NAVIGABLE WATERS.

A regulation of the state harbor commissioners, changing the landing place of steamboats, *held* unreasonable.—*Union Transp. Co. v. Bassett* (Cal.) 907.

missioners, changing the docking place of a steamboat company, is unreasonable, is a question of law.—Union Transp. Co. v. Bassett (Cal.) 907.

NECESSARY PARTIES.

See "Parties."

NEGLIGENCE.

Contributory negligence of person injured by street car, see "Street Railroads."
— of servant, see "Master and Servant."
Of carrier, see "Carriers."
Of guardian, see "Guardian and Ward."
Of master, see "Master and Servant."
Of railroad company, see "Railroads."
Of street-car company, see "Street Railroads."

Open, unprotected ditch along the side of a street *held* to be the proximate cause of accident to the driver of a vehicle.—City of Denver v. Johnson (Colo. App.) 621.

Evidence examined, and *held*, that the running away of a horse on a highway, and not a ditch running parallel thereto, was the proximate cause of the accident.—Farmers' High Line Canal & Reservoir Co. v. Westlake (Colo. Sup.) 134.

One acting erroneously through fright, induced by another's negligence, or adopting a perilous alternative in trying to avoid an injury threatened by such negligence, or acting mistakenly in endeavoring to avoid an unexpected danger negligently caused by another, is not guilty of contributory negligence, as a matter of law.—Edgerton v. O'Neill (Kan. App.) 206.

Whether one injured on dangerous premises was negligent *held* a question for the jury.—Kinchlow v. Midland Elevator Co. (Kan. Sup.) 703.

Whether the owner of dangerous premises was negligent *held* a question for the jury.—Kinchlow v. Midland Elevator Co. (Kan. Sup.) 703.

NEGOTIABLE INSTRUMENTS.

See "Bills and Notes."

NEWLY-DISCOVERED EVIDENCE.

As ground for new trial, see "New Trial."

NEW TRIAL.

Discretion of court, see "Appeal and Error."
Granted by appellate court, see "Appeal and Error."

In criminal cases, see "Criminal Law."
Necessity for motion, see "Appeal and Error."

When the record fails to show that a new trial was moved for during the term at which the verdict was rendered, it will be presumed that it was overruled because not moved for in time.—Dudley v. Barney (Kan. App.) 178.

An order of the court granting a new trial *held* not erroneous.—Atchison, T. & S. F. R. Co. v. Todd (Kan. App.) 545.

A specification of error that the assessment of the amount recovered is too large, and that the findings are not sustained by the evidence, challenges the correctness of the amount of the judgment, and raises the question whether there was sufficient evidence to support findings of fact on a particular question.—Richardson v. Mackay (Okl.) 546.

set aside a verdict of which he does not approve.—Myers v. Knabe (Kan. App.) 472.

Application for new trial on the ground that the evidence is insufficient, *held* to sufficiently set forth in what particulars the evidence was insufficient.—Live-Stock Gazette Pub. Co. v. Union Stock-Yard Co. (Cal.) 286.

The court may direct a remittitur instead of granting a new trial because of excess in the verdict.—McDonough v. Great Northern Ry. Co. (Wash.) 334.

Newly-discovered evidence, in an action on a lost bond, consisting of the bond itself, *held* material.—McMullen v. Winfield Building & Loan Ass'n (Kan. App.) 410.

Newly-discovered evidence, in an action on a lost bond, consisting of the bond itself, *held* merely cumulative.—McMullen v. Winfield Building & Loan Ass'n (Kan. App.) 410.

Whether diligence was used by an applicant for new trial on the ground of newly-discovered evidence, *held* a question for the court.—McMullen v. Winfield Building & Loan Ass'n (Kan. App.) 410.

A new trial for newly-discovered evidence *held* properly granted.—Manning v. Gignoux (Nev.) 886.

An exception to the denial of a new trial is saved by Rev. St. § 4427, without an exception being actually made.—Hattabaugh v. Vollmer (Idaho) 831.

A notice of motion for new trial *held* defective when not signed by the attorney of record for the moving party.—McMahon v. Thomas (Cal.) 732.

Though the court orders a motion for new trial or exceptions to be heard in the first instance by a referee, it does not deprive either party of the right to have them afterwards considered by the court.—Wasatch Min. Co. v. Jennings (Utah) 1106.

Where it is clear that the instructions as to damages have been disregarded, the court may order a new trial.—Wright v. Southern Pac. Co. (Utah) 374.

NOMINATION.

To office, see "Elections."

NONSUIT.

See "Dismissal and Nonsuit."

NOTICE.

From records of mortgage, see "Mortgages."

Of appeal, see "Appeal and Error."

Of application for school lands, see "Public Lands."

Of assignment, see "Assignments."

Of motion for new trial, see "New Trial."

To settle bills of exceptions, see "Exceptions, Bill of."

To tenant to vacate, see "Forcible Entry and Detainer."

NOVATION.

A contract by a purchaser of goods to pay outstanding indebtedness of the seller *held* not to constitute a novation.—Richardson Drug Co. v. Dunagan (Colo. App.) 227.

NUISANCE.

Liquor nuisance, see "Intoxicating Liquors."

Construction of tracks by a street-railway company over its own land does not per se con-

stitute a nuisance as to an abutting owner.—*Haskell v. Denver Tramway Co.* (Colo. Sup.) 121.

OBJECTIONS.

First raised on appeal, see "Appeal and Error."
To pleading, waiver, see "Pleading."

OBSCENITY.

Information charging defendant with knowingly editing, selling, and printing a certain obscene newspaper, *held* sufficient.—*State v. Hoedger* (Wash.) 652.

OFFICERS.

Action to try title to office, see "Quo Warranto."
Nominations to office, see "Elections."
Of city, see "Municipal Corporations."
Of county, see "Counties."
Of school district, see "Schools and School Districts."
Of state, see "States."

An inadequate assessment of property by an assessor does not constitute a refusal or neglect to perform his official duty, authorizing the superior court to entertain a private accusation against him.—*Siebe v. Superior Court, City and County of San Francisco* (Cal.) 456.

In an action on official bond of clerk of court for failure to turn over money deposited with him, the judgment in an action in which the deposit was made is admissible.—*McCune v. People* (Colo. App.) 1083.

OFFSET.

See "Set-Off and Counterclaim."

OPINION.

Evidence, see "Evidence."

ORDERS.

Appealable orders, see "Appeal and Error."

ORDINANCE.

See "Municipal Corporations."

PARISH.

See "Counties."

PAROL.

Contract, see "Frauds, Statute of."
Evidence, see "Evidence."

PARTIES.

Appeal from order of substitution, see "Appeal and Error."
Death of party, see "Abatement and Revival."
On appeal, see "Appeal and Error."
To creditors' suit, see "Creditors' Suit."

A contract *held* a several contract, and that either of the second parties could sue thereon for breach without joining the others.—*Consolidated Canal Co. v. Peters* (Ariz.) 74.

A lessee who, under the lease, is a trustee of an express trust, may sue to enjoin trespass, without joining the beneficiaries.—*Kellogg v. King* (Cal.) 166.

Complaint in intervention in an action to determine water rights *held* sufficiently definite as to intervenor's interest.—*West Point Irrigation Co. v. Moroni & Mt. Pleasant Irrigating Ditch Co.* (Utah) 762.

An order bringing in a necessary party defendant without service of process *held* erroneous.—*State v. Superior Court of King County* (Wash.) 1031.

A motion to dismiss for defect of parties is waived by going to trial without a ruling thereon.—*Wilson v. Welch* (Colo. App.) 106.

PARTNERSHIP.

Abatement of suit for accounting, see "Abatement and Revival."

Instruction as to what constitutes a general partnership *held* erroneous.—*Congdon v. Olde* (Mont.) 261.

It is not necessary that a bill by a partner for a partnership accounting should contain an offer to pay any balance found due defendant from plaintiff.—*Continental Divide Min. Inv. Co. v. Bliley* (Colo. Sup.) 633.

The commencement of an action by a partner to recover from a carpenter his interest in the firm property is equivalent to a demand for such property.—*Continental Divide Min. Inv. Co. v. Bliley* (Colo. Sup.) 633.

Contract construed, and *held* to provide, on the death of one of the parties, for a sale of his interest to the survivors.—*Rankin v. Newman* (Cal.) 742.

Partnership construed, and *held*, that the good will of the firm passed to the surviving partners on the death of one partner, and formed no asset of the deceased's partner's estate.—*Rankin v. Newman* (Cal.) 742.

Partnership contract construed, and *held* not void, as placing it within the power of surviving partners to fix their own price on the interest of the deceased partner.—*Rankin v. Newman* (Cal.) 742.

Partnership contract construed, and *held* that, on the death of one of the partners, his executor could transfer deceased's interest to the surviving partners.—*Rankin v. Newman* (Cal.) 742.

A surviving partner has power to execute a chattel mortgage on the firm assets to secure a partnership debt.—*Burchinell v. Koon* (Colo. App.) 932.

A partnership contract for the purchase and cultivation of farm lands construed.—*Von Schmidt v. Von Schmidt* (Cal.) 1056.

Sureties on the bond of a surviving partner *held* not liable for transactions prior to the formation of the partnership, nor for individual liabilities outside the partnership business, nor for an amount greater than the amount of the partnership estate in the hands of the survivor when the bond was given.—*Carter v. Christie* (Kan. Sup.) 964.

PASSENGERS.

See "Carriers."

PATENTS.

Execution against patent right, see "Execution."

Creditor of patentee can have patent right subjected to satisfaction of judgment in equity.—*Peterson v. Sheriff of City and County of San Francisco* (Cal.) 1060.

PAWN.

See "Pledges."

PAYMENT.

Of mortgages, see "Mortgages."

The payment of illegal taxes under protest *held* not voluntary, and recoverable.—*Board of Com'rs*

of Wyandotte County v. Kansas City, Ft. S. & M. R. Co. (Kan. App.) 1013.

The acceptance in payment of a debt of a check drawn on a bank with which the creditor has an account overdrawn to an amount larger than the check constitutes a payment if the check is also accepted by the bank.—*Conway v. Smith Mercantile Co.* (Wyo.) 1084.

Notice to agent that moneys were in bank to pay county warrants held to justify a verdict of payment on subsequent failure of the bank.—*First Nat. Bank v. School Dist. No. 1, Crook County* (Wyo.) 1090.

Taxes voluntarily paid on property by a purchaser at tax sale, under a mistaken belief in the validity of the sale, cannot be recovered.—*Phelps v. City of Tacoma* (Wash.) 400.

PENALTIES.

For conducting saloon without license, see "Intoxicating Liquors."

PERFORMANCE

Of contract, see "Contracts."

PERJURY.

A prosecution for perjury cannot be predicated on testimony of a witness who simply gives his opinion.—*In re Howell* (Cal.) 159.

A false answer of the defendant in a criminal prosecution that he had never been convicted of a certain felony held to constitute perjury.—*State v. Park* (Kan. Sup.) 713.

PERPETUITIES.

Rule against, see "Charities."

PERSONAL INJURIES.

See "Carriers"; "Counties"; "Damages"; "Master and Servant"; "Municipal Corporations"; "Negligence"; "Railroads."

PETITION.

See "Pleading."

For public lands, see "Public Lands."

PHOTOGRAPHS.

Licenses, see "Licenses."

PHYSICAL EXAMINATION.

Of person injured, see "Damages."

PHYSICIANS AND SURGEONS.

Privileged communications, see "Witnesses."

Under Laws 1891, p. 134, a license from the board of dental examiners is not necessary, where a practitioner has the required diploma or license from the board of examiners in another state.—*Robinson v. People* (Colo. Sup.) 676.

PLEADING.

See, also, "Interpleader."

Amendment as ground for continuance, see "Continuance."

—on appeal, see "Appeal and Error."

Damages, see "Damages."

Dismissal of action for failure to furnish bill of particulars, see "Dismissal and Nonsuit."

Fraud, see "Fraud."

Harmless error in rulings on, see "Appeal and Error."

In action on bills and notes, see "Bills and Notes."

—on contract, see "Contracts."

—to enforce lien, see "Mechanics' Liens."

In ejectment, see "Ejectment."

In equity, see "Equity."

Limitations, see "Limitation of Actions."

Mandamus to compel amendment, see "Mandamus."

Pendency of other suit, see "Abatement and Revival."

Defendants held entitled to an affirmative decree without a cross complaint having been filed.—*Brighton & N. P. Irrigation Co. v. Little* (Utah) 268.

COMPLAINT.

Allegation of ownership in a pleading held sufficient.—*Fortain v. Smith* (Cal.) 381.

Complaint held not objectionable as stating two causes of action.—*Barto v. Nix* (Wash.) 1033.

Complaint in an action for death of plaintiff's husband by employer's negligence held not to state a cause of action.—*Stiles v. Richie* (Colo. App.) 694.

Allegation of the service of a notice held sufficient.—*Town of Tumwater v. Pix* (Wash.) 336.

A complaint in an action on a subscription held not inconsistent because the promise to pay on demand alleged is merely implied in the subscription set out as an exhibit.—*Ventura & O. V. Ry. Co. v. Collins* (Cal.) 287.

Failure of a complaint to state a cause of action may be availed of by demurrer, by objection to evidence, by motion for judgment, or by motion for new trial.—*Consolidated Canal Co. v. Peters* (Ariz.) 74.

In an action by a county against a county treasurer to recover sums alleged to have been illegally paid out, the complaint need not set out the contents of the warrants paid, when, from the facts alleged, they must, if drawn in conformity to law, have shown their illegality on their face.—*Ventura County v. Clay* (Cal.) 9.

DEMURRER.

A demurrer for want of necessary parties must point out those who should have been, but were not, made parties.—*State v. Metschan* (Or.) 791.

Where the allegations of a complaint clearly show the grounds on which the right to recover is based, it is not demurrable because in the prayer a penalty is asked not authorized in such action.—*Ventura County v. Clay* (Cal.) 9.

ANSWER.

Defendant may plead any and all defenses which he may have, though they are inconsistent with each other.—*Miles v. Woodward* (Cal.) 1076.

An averment in a complaint of the execution of a lease by plaintiff to defendants held denied by the averments in the answer.—*Stetson v. Briggs* (Cal.) 603.

Where two inconsistent defenses are pleaded together, one inconsistent defense is not an admission so as to defeat the other.—*Eppinger v. Kendrick* (Cal.) 613.

Leave to file an amended answer, which presents a new issue, or to strike out allegations from the original, is discretionary.—*Osmon v. Winters* (Or.) 780.

MOTIONS.

Motion to strike out an answer in an action on a note as sham held properly granted on affidavits showing the absolute liability on the part of the defendant.—*Simpson v. Langley* (Colo. Sup.) 119.

A motion to strike out a replication as a departure held properly overruled where it did not show in what the departure consisted.—*Maddox v. Tague* (Mont.) 535.

Where a petition is indefinite, it is error to overrule a motion to make it more certain.—*Smith v. McCool* (Kan. App.) 988.

Amendment.

Allowance of an amendment to an answer during trial held within the discretion of the court.—*Davis v. Hannon* (Or.) 785.

Leave to file an amended complaint after close of testimony held proper, where it did not change the cause of action or prejudice the other party.—*McDonough v. Great Northern Ry. Co.* (Wash.) 324.

A declaration in an action by a levying officer on an indemnity bond, brought for the use of the pledgee, held amendable so as to allege a cause of action in the officer's own name.—*Armour Packing Co. v. Orrick* (Okla.) 573.

Allowing an amended complaint to be filed without notice held not ground for reversal.—*Baker v. Southern California Ry. Co.* (Cal.) 604.

A demand for relief in the prayer in a petition may be amended.—*Carson v. Butt* (Okla.) 596.

The making of an amendment to a declaration held not to require a new summons, where cost bond was filed, and summons previously issued and served, and appearance made.—*Armour Packing Co. v. Orrick* (Okla.) 573.

Where the trial court imposes costs as a condition precedent to amendment, it should not stay proceedings till costs are paid.—*Dixon v. Risley* (Cal.) 5.

Where a case is remanded for new trial, with leave to amend, plaintiff may file, without leave of the trial court, an amended complaint.—*Pottkamp v. Buss* (Cal.) 169.

The court can allow plaintiff to amend his declaration after his evidence is in, and defendant has moved to dismiss for variance.—*Consolidated Canal Co. v. Peters* (Ariz.) 74.

A demurrer to an amended complaint, on the ground that it does not show how the cause of action is connected with that in the original complaint, is insufficient, which simply alleges that the amended complaint is unintelligible and uncertain.—*Pottkamp v. Buss* (Cal.) 169.

A demurrer to an amended pleading does not raise the question of the right to so amend.—*Tecumseh State Bank v. Maddox* (Okla.) 563.

Where executors have been substituted for appellant, and the judgment is reversed, an amended complaint, alleging defendant's death, and substitution of executors, need not be filed before retrial.—*Megrath v. Gilmore* (Wash.) 1032.

Bill of particulars.

Filing of motion for bill of particulars extends the time for answering.—*Plummer v. Weil* (Wash.) 648.

The insufficiency of a bill of particulars cannot be excused on the ground that plaintiff kept no books.—*Plummer v. Weil* (Wash.) 648.

Court can order a further and amended bill of particulars, where the one already furnished is insufficient.—*Plummer v. Weil* (Wash.) 648.

The refusal of a bill of particulars is in the discretion of the court.—*Turner v. Great Northern Ry. Co.* (Wash.) 243.

Pleading and proof—Variance.

Where the allegation was that defendants entered on premises July 14th, and the proof was that they entered June 26th, there was no material variance.—*Amador Gold Mine v. Amador Gold Mine* (Cal.) 80.

When the testimony tends to establish the allegations of the petition in its general scope and meaning, plaintiff cannot recover.—*Wilmer v. Borer* (Kan. App.) 181.

Where plaintiff declares on a cost bond as executed for \$2,500, and the bond is shown to have been for \$1,500, no recovery can be had without an amendment.—*Chicago, K. & W. R. Co. v. Evans* (Kan. Sup.) 303.

A technical variance may be cured by amendment.—*Carnahan v. Lloyd* (Kan. App.) 323.

A plaintiff in an action to recover rent, who declares on an assignment of a lease to defendant, cannot recover on proof of an agreement by defendant to pay the rent due from the lessee.—*Jacobs v. First Nat. Bank* (Wash.) 396.

Under a complaint declaring on a contract, proof of an estoppel against defendant to deny the contract, which is not pleaded, constitutes a variance.—*Jacobs v. First Nat. Bank* (Wash.) 396.

Judgment held erroneous on the ground of variance from plaintiff's alleged cause of action.—*Elmore v. Elmore* (Cal.) 458.

On complaint to recover the purchase price of lots, on proof that the transaction was a mortgage to secure a contract, and not a sale, recovery cannot be had for breach of the contract.—*Suth v. Peckham* (Okla.) 664.

Defendants cannot complain of a judgment in favor of plaintiff which is supported by a contract which they have pleaded, and in which they have admitted, plaintiff alone is interested.—*Megrath v. Gilmore* (Wash.) 1032.

An objection on the ground of a variance may properly be raised by motion for nonsuit.—*Elmore v. Elmore* (Cal.) 458.

Waiver of objections.

Pleading to the merits waives the objection that the action is prematurely brought.—*Flore v. Ladd* (Or.) 144.

Failure to deny allegations in an answer renders unnecessary evidence of the facts alleged, or findings thereon.—*Fisher v. Kelly* (Or.) 146.

The correctness of plaintiff's account is not admitted by a failure to deny under oath, when the petition contains no allegation of its correctness.—*Dewey v. Burton* (Kan. App.) 321.

Where, after demurrer to the complaint, defendant proceeds to trial without asking a ruling, he waives it.—*Moaser v. Bruhn* (Wash.) 397.

A plea of tender held sufficient in the absence of demurrer.—*Diebold Safe & Lock Co. v. Holt* (Okla.) 512.

A defendant who goes to trial without objection to a reply cannot object to its sufficiency for the first time on appeal.—*Asplund v. Mattson* (Wash.) 841.

An objection that complaint is substantially defective may be made for the first time on appeal.—*Creswell v. Woodside* (Colo. App.) 842.

PLEDGES.

A pledge defined.—*Jackson v. Kincaid* (Okla.) 587.

Where a debt evidenced by a note is reduced to judgment, the creditor can take possession of property pledged to secure its payment.—*D. M. Osborne & Co. v. Connor* (Kan. App.) 327.

A pledge held void as against creditors of the debtor, where there was no change of possession.—*Jackson v. Kincaid* (Okla.) 587.

The pledgee must hold the property exclusively, to render the pledge valid as against creditors.—*Jackson v. Kincaid* (Okla.) 587.

POLICE POWER.

See "Constitutional Law."

POLICY.

See "Insurance."

POWERS.

Of attorney, see "Principal and Agent."

PRACTICE IN CIVIL CASES.

See "Abatement and Revival"; "Appeal and Error"; "Appearance"; "Certiorari"; "Continuance"; "Dismissal and Nonsuit"; "Equity"; "Justices of the Peace"; "Process"; "Removal of Causes"; "Stipulations"; "Trial"; "Venue."

PREFERENCES.

See "Insolvency."

PRESENTMENT.

For payment, see "Bills and Notes."

PRESUMPTIONS.

See "Appeal and Error."

Of service of process, see "Process."

PRINCIPAL AND AGENT.

Insurance agent, see "Insurance."

Evidence *held* admissible to establish agency.—*Bergtholdt v. Porter Bros. Co.* (Cal.) 738.

The authority conferred on an agent by a power of attorney is not to be extended by construction.—*Golinsky v. Allison* (Cal.) 295.

The fact that one who by false representations induces another to make a loan of money is at the time the custodian of the money, and is to receive the note and security from the borrower and deliver them to the lender, *held* not to constitute him the agent of the lender.—*Goodale v. Middaugh* (Colo. App.) 11.

Death of the agent *held* to terminate a contract of agency for the sale of machinery, so that the contract did not apply to his administrators.—*Hayner v. Trott* (Kan. App.) 37.

Under a contract whereby an agent for the sale of machinery was to refund commissions allowed on notes taken for the price which should prove worthless, *held* that the agent was not liable, except to refund commissions actually received in cash.—*Hayner v. Trott* (Kan. App.) 37.

An agent selling goods on four months' time *held* unauthorized to agree to an extension of the note given in payment.—*Mater v. American Nat. Bank* (Colo. App.) 221.

Failure of principals to object to the execution of a mortgage in their names by an agent to secure an antecedent debt *held* not to constitute a ratification.—*Golinsky v. Allison* (Cal.) 295.

A principal accepting benefits of an unauthorized contract by his agent must accept the burdens imposed thereby.—*McKinstry v. Citizens' Bank* (Kan. Sup.) 302.

Agent to collect rents cannot bind his principal by a credit on an indebtedness of the agent to the tenant.—*Stetson v. Briggs* (Cal.) 603.

Principal retaining goods stored by his agent under unauthorized agreement that there would be no storage charges cannot claim a warehouseman's lien without repudiating the agreement.—*Knight v. Beckwith Commercial Co.* (Wyo.) 1094.

PRINCIPAL AND SURETY.

Liabilities of sureties on appeal bonds, see "Appeal and Error."

—on recognizance, see "Bail."

A surety signing a bond, and leaving it with the principal to be delivered only on condition, *held* estopped to deny his obligation, though the principal delivered it without reference to the condition.—*Doorley v. Farmers' & Mechanics' Lumber Co.* (Kan. App.) 195.

A contract of suretyship will receive a strict construction in favor of the surety.—*Merrimack River Sav. Bank v. Curry* (Kan. App.) 204.

Death of a surety, the principal surviving, does not release the surety's estate.—*Donnerberg v. Oppenheimer* (Wash.) 254.

In case of a joint guaranty of a note, the release of the principal guarantor, by failure to present the note against his estate, does not release the surety.—*Donnerberg v. Oppenheimer* (Wash.) 254.

Bond of a building contractor *held* not to be without consideration as to the sureties thereon.—*De Mattos v. Jordan* (Wash.) 402.

Deduction from payments due a contractor under his contract for construction of a building for debts due from the contractor in the hands of the owner for collection *held* not to constitute a breach of the contract by the owner, which would release the contractor's sureties from liability.—*De Mattos v. Jordan* (Wash.) 402.

Facts *held* not to constitute advance payments to a contractor for the construction of a building which would release the sureties on his bond.—*De Mattos v. Jordan* (Wash.) 402.

Variations from the plans for a building by the owner in completing the construction after its abandonment by the contractor *held* not to release the sureties from liability on the contractor's bond.—*De Mattos v. Jordan* (Wash.) 402.

The fact that a bank, while holding a past-due note of a customer, makes him a temporary loan, which is placed to his credit, and checked out, does not entitle a surety to have the amount of the deposit credited on the note.—*Bank of British Columbia v. Jeffs* (Wash.) 247.

The acceptance by the payee of interest in advance on a past-due note operates as an extension, which releases a surety.—*Bank of British Columbia v. Jeffs* (Wash.) 247.

Defendant may show that, though he signed as principal, he was merely a surety, and that plaintiff was aware of that fact when he extended the time of paying note without defendant's knowledge.—*Gillett v. Taylor* (Utah) 1099.

Failure of the holder of a note to apply payments made by the maker, *held* to release the surety from liability to that extent.—*Eppinger v. Kendrick* (Cal.) 613.

Evidence construed in an action on a note, and *held* that the renewal thereof by defendant, and payments made, were not sufficient to render him liable as surety on the note.—*Eppinger v. Kendrick* (Cal.) 613.

Where one obtains judgment against the principal of a bond, and levies execution, and releases the levy, and vacates the judgment, the sureties are released, though indemnified by collateral security.—*Thomas v. Wason* (Colo. App.) 1079.

The surety on a note is discharged by an extension of the time of payment, granted without his knowledge.—*Gillett v. Taylor* (Utah) 1099.

PRIORITIES.

See "Chattel Mortgages."

PRIVILEGED COMMUNICATIONS.

See "Witnesses."

PROBATE COURTS.

See "Courts."

PROCESS.

Summons in error, see "Appeal and Error."

The original process being lost, *held*, that a presumption arises from the appearance docket that service was made. — *Stunkle v. Holland* (Kan. App.) 416.

To overthrow the presumption of the validity of service of original process which has been lost, positive testimony is required. — *Stunkle v. Holland* (Kan. App.) 416.

Where a material matter in a notice for publication is insufficiently set forth, the service is merely voidable, and cannot be collaterally attacked. — *Garrett v. Struble* (Kan. Sup.) 943.

Where the petition and praecipe filed are not signed by plaintiff or his attorney, they can be corrected by amendment without issuance or service of new summons. — *Manspeaker v. Bank of Topeka* (Kan. App.) 1012.

PROOF.

Of loss, see "Insurance."

PROPERTY.

In wild birds, see "Animals."

PROXIMATE CAUSE.

See "Damages"; "Negligence."

PUBLICATION.

Of libel or slander, see "Libel and Slander."
Service of process by, see "Divorce"; "Process."

PUBLIC IMPROVEMENTS.

See "Municipal Corporations."

PUBLIC LANDS.

An applicant for the purchase of school lands need not publish his notice 10 days before filing petition. — *Beedy v. State* (Kan. App.) 65.

A notice of an applicant for the purchase of school lands *held* to sufficiently describe the land desired. — *Beedy v. State* (Kan. App.) 65.

A purchaser liable for improvements made by a lessee of school lands, as appraised before sale of the lands, cannot object to an irregularity in the making of the lease. — *J. F. Hart Lumber Co. v. Rucker* (Wash.) 728.

A purchaser of school lands subject to stated appraisal of improvements cannot take advantage of the fact that some portion of the improvements were upon tide land in front of the upland purchased by him. — *J. F. Hart Lumber Co. v. Rucker* (Wash.) 728.

Assignment of claim for improvements made on school lands under lease *held* prima facie to entitle assignees to sue for their value, as appraised on sale of the lands. — *J. F. Hart Lumber Co. v. Rucker* (Wash.) 728.

At a sale of school lands, where a lot is bid off by one person for another, and the second person's name is entered as purchaser, and he pays a part of the price, he cannot avoid the contract on the ground that he was not in fact the pur-

chaser at the sale. — *J. F. Hart Lumber Co. v. Rucker* (Wash.) 728.

That improvements on school lands were appraised by the board of county commissioners before sale may be shown by the county records, and by proof as to what transpired at the time of the sale. — *J. F. Hart Lumber Co. v. Rucker* (Wash.) 728.

That there was fraud in the county commissioners' appraisal of improvements on school lands at the time of sale is a matter of defense in an action to recover from the purchaser their appraised value. — *J. F. Hart Lumber Co. v. Rucker* (Wash.) 728.

A mortgage on land occupied under the homestead laws before final proof is void. — *Biddle v. Adams* (Kan. App.) 986.

Interest acquired under the United States homestead law *held* not defeated by the wife's moving to another part of the county because of differences between her and her son. — *New England Trust Co. v. Nash* (Kan. App.) 987.

Evidence *held* to show that plaintiffs had no such exclusive possession of public lands as would entitle them to enjoin a subsequent valid homestead entry. — *Caldwell v. Bush* (Wyo.) 1092.

QUALIFICATION.

Of jurors, see "Jury."

QUIETING TITLE.

See, also, "Ejectment."

Plaintiff *held* to have such a title as to enable her to maintain suit to quiet the same. — *Hayford v. Wallace* (Cal.) 293.

Evidence of fraudulent conveyances by plaintiff's grantor *held* inadmissible. — *Hayford v. Wallace* (Cal.) 293.

When trial court's finding that plaintiff has proved possession at the time the suit was begun as required by Civ. Code, § 255, will not be disturbed. — *Reynolds v. Campling* (Colo. Sup.) 639.

QUO WARRANTO.

Quo warranto is the proper remedy of a city officer removed by the mayor, to review the proceedings resulting in such removal. — *State v. Kirkwood* (Wash.) 331.

In proceedings by one removed from a city office, against his successor, the relator cannot object to the sufficiency in form of the charges preferred against him, after having gone to trial thereon without objection. — *State v. Kirkwood* (Wash.) 331.

In an action to try title to office, a judgment of ouster *held* not suspended by an appeal. — *State v. Superior Court of Pierce County* (Wash.) 402.

A judgment of ouster in quo warranto proceedings against the incumbent of a public office is self-executing, and is not suspended by the giving of an appeal bond. — *Fawcett v. Superior Court of Pierce County* (Wash.) 389.

A proceeding in the nature of quo warranto, under the statute, cannot be maintained where its purpose is to protect private interests only. — *People v. Colorado El. Ry. Co.* (Colo. App.) 219.

RAILROADS.

See, also, "Carriers"; "Street Railroads."

Defendant railroad company *held* not liable for animals killed on track through the contributory negligence of plaintiffs. — *McDonald v. Great Northern Ry. Co.* (Idaho) 766.

Under Act May 20, 1861, the public has no right to travel free on railroad trains within the city limits.—*Buswell v. Southern Pac. Co. (Cal.)* 291.

A grant of a right of way held in present, so that subsequent homestead settlers took subject to the grant, though the right of way was not located.—*Churchill v. Choctaw Ry. Co. (Okla.)* 503.

A railroad company is not liable for damages for killing stock, unless it appears that plaintiff is an abutting owner, and has constructed a fence on all sides of his land but that abutting on the track, and that the railroad company has neglected to fence.—*McCook v. Bryan (Okla.)* 506.

There is no common-law obligation on a railroad company to fence its track.—*McCook v. Bryan (Okla.)* 506.

A grant of a right of way held a present absolute grant, to which a homestead settlement was subsequent, though made before location of the road.—*Whaley v. Choctaw Ry. Co. (Okla.)* 506.

A complaint for killing cattle held to leave it uncertain as to whether the cause of action is founded on a failure to fence or on failure to ring at crossing, or on other negligent management.—*Baker v. Southern California Ry. Co. (Cal.)* 604.

An allegation in a complaint for killing cattle that defendant's railroad "is" not fenced is not an allegation that it was not fenced at the time of the accident.—*Baker v. Southern California Ry. Co. (Cal.)* 604.

A holder of overdue coupons of railroad mortgage bonds cannot enforce a judgment thereon against the income of the railroad company.—*Roberts v. Denver, L. & G. R. Co. (Colo. App.)* 880.

A railroad company and a trustee of its mortgage can enjoin the enforcement, by a bondholder, of a judgment on overdue coupons against the income of the company.—*Roberts v. Denver, L. & G. R. Co. (Colo. App.)* 880.

Instructions on trial of defendant charged with offense of train wrecking held erroneous.—*People v. Thompson (Cal.)* 912.

A purchaser of a railroad on foreclosure is not liable for the value of life passes agreed to be given by the company in consideration of a parol license to build and operate a road over the donee's premises, where the purchaser had no knowledge thereof, and did not ratify or assume the contract.—*Missouri Pac. Ry. Co. v. Henrie (Kan. App.)* 976.

A railroad company held not liable for damages caused by fire set by a locomotive.—*Home Ins. Co. v. Atchison, T. & S. F. R. Co. (Kan. App.)* 179.

A railroad company held liable for the killing of a horse, resulting from its failure to fence its track.—*Chicago, R. I. & P. Ry. Co. v. Green (Kan. App.)* 200.

Measure of damages defined, in an action against a railway company for destruction of hay by a fire set by a locomotive.—*Watt v. Nevada Cent. R. Co. (Nev.)* 52.

RAPE.

A defendant may be convicted of an assault with intent to commit a rape on the person of a girl under the age of consent, though she actually consented to the assault.—*People v. Laurintz (Cal.)* 613.

Evidence held insufficient to sustain a conviction for rape.—*People v. Tarbox (Cal.)* 896.

Defendant cannot urge as a defense that he believed that the prosecutrix was above the age of consent.—*People v. Ratz (Cal.)* 915.

RATIFICATION.

Of act of attorney, see "Attorney and Client."
Of unauthorized acts of agent, see "Principal and Agent."

REAL ESTATE.

Attachment of equitable interest, see "Attachment."

RECEIVERS.

Of bank, see "Banks and Banking."

It is not necessary for a receiver, in a complaint filed by him in his name as receiver, to allege that he brings the action by leave of court.—*Compton v. Schwabacher Bros. & Co. (Wash.)* 338.

A petition in an action against a railroad company and the receiver held to sufficiently allege a right to bring the suit.—*Colorado Fuel & Iron Co. v. Rio Grande Southern R. Co. (Colo. App.)* 845.

RECEIVING STOLEN GOODS.

The fact that defendant secreted thieves, rendering him amenable as accessory, is no defense.—*State v. Pomeroy (Or.)* 797.

The question of defendant's concealment of the goods, and his knowledge that they were stolen, held for the jury.—*State v. Pomeroy (Or.)* 797.

RECOGNIZANCE.

See "Bail."

RECORDS.

Amendment pending appeal, see "Appeal and Error."

Of lien, see "Logs and Logging."

Of mortgage, see "Chattel Mortgages."

On appeal, see "Appeal and Error."

— in criminal cases, see "Criminal Law."

Written instructions to a sheriff as to the enforcement of an execution is not a public record or matter in the sheriff's office, which, under Pol. Code, § 1032, is open to public inspection.—*Whelan v. Superior Court of City and County of San Francisco (Cal.)* 468.

During the term the court can amend the record to show that accused was furnished with a copy of the information and list of the state witnesses.—*Benedict v. People (Colo. Sup.)* 637.

REDELIVERY BOND.

See "Attachment."

REFERENCE.

Where a statement of account occupies 26 printed pages, the cause will be referred.—*Craig v. California Vineyard Co. (Or.)* 421.

REGISTERS OF DEEDS.

The certificate of the recorder of the receipt of a mortgage for record need not be under seal.—*Glas v. Glas (Cal.)* 667.

REGISTRATION.

Of mortgage, see "Chattel Mortgages."

Of voters, see "Elections."

RELEASE.

Authority of attorney, see "Attorney and Client."

Of surety, see "Principal and Surety."

RELIGIOUS SOCIETIES.

Land deeded to trustees of a church society, which erects a church edifice thereon, is presumed to be in possession of the society.—*Sanchez v. Grace Methodist Episcopal Church* (Cal.) 2.

REMEDY AT LAW.

See "Injunction"; "Mandamus."

REMOTE AND PROXIMATE CAUSE.

See "Damages."

REMOVAL OF CAUSES.

Application *held* properly denied when made after an extension of time for answering.—*Northwestern & Pacific Hypotheek Bank v. Suksdorf* (Wash.) 1027.

In an action to foreclose, *held* there was no such separable controversy as would entitle the mortgagor to remove to the federal court.—*Northwestern & Pacific Hypotheek Bank v. Suksdorf* (Wash.) 1027.

RENT.

See "Landlord and Tenant."

REPEAL.

Of statute, see "Statutes."

REPLEVIN.

Plaintiff in replevin *held* not entitled to recover counsel fees by way of exemplary damages.—*Knight v. Beckwith Commercial Co.* (Wyo.) 1094.

Plaintiff *held* entitled to recover actual damages for wrongful detention of property without proving fraud or malice.—*Live-Stock Gazette Pub. Co. v. Union Stock-Yard Co.* (Cal.) 286.

Replevin will not lie by one not at the time entitled to the possession of the goods.—*People's Sav. Bank v. Jones* (Cal.) 278.

Requisites of a valid judgment in replevin stated.—*Horn v. Citizens' Savings & Commercial Bank* (Oto. App.) 838.

A petition and affidavit should specifically describe the property sought to be replevied.—*Smith v. McCoole* (Kan. App.) 988.

Where, pending an action by a husband to recover community property, the wife obtains a divorce awarding her the property, the husband is only entitled to damages for its detention.—*Carney v. Simpson* (Wash.) 233.

REPLY.

See "Pleading."

REPRESENTATIONS.

See "False Pretenses."

REPUTATION.

Proof on issue as to sanity, see "Insane Persons."

RESIDENCE.

As affecting right to divorce, see "Divorce."

—right to vote, see "Elections."

Taxation of judgments owned by nonresidents, see "Taxation."

RES JUDICATA.

See "Judgment."

RETROSPECTIVE EFFECT.

See "Constitutional Law."

RETURN.

To writ of certiorari, see "Certiorari."

REVERSAL.

See "Appeal and Error."

REVIEW.

On appeal, see "Appeal and Error."

—in criminal cases, see "Criminal Law."

Writ of, see "Certiorari."

REVOCATION.

Of agency, see "Principal and Agent."

Of license, see "Intoxicating Liquors."

RIGHT OF WAY.

See "Railroads."

RIPARIAN RIGHTS.

See "Waters and Water Courses."

RISKS OF EMPLOYMENT.

See "Master and Servant."

ROBBERY.

Where defendant is charged with robbery from the person, a verdict finding him "guilty as charged" *held* insufficient to support a defense for robbery in the first degree.—*State v. Pickering* (Kan. Sup.) 814.

SALES.

See, also, "Fraudulent Conveyances"; "Vendor and Purchaser."

By guardian, see "Guardian and Ward."

Effect of statute of frauds, see "Frauds, Statute of."

Illegal liquor sales, see "Intoxicating Liquors."

On execution, see "Execution."

Under chattel mortgage, see "Chattel Mortgages."

—order of court, see "Executors and Administrators."

A guaranty of the article sold in one respect, *held* an exclusion of guaranty in other respects.—*First Nat. Bank v. Hughes* (Cal.) 272.

The buyer cannot rescind for a breach of warranty not intended as a condition, his remedy being an action for damages.—*First Nat. Bank v. Hughes* (Cal.) 272.

Where the seller agreed to give another article in exchange for the one sold, if the latter did not fulfill the guaranty, the buyer's remedy for breach of the guaranty was limited.—*First Nat. Bank v. Hughes* (Cal.) 272.

The fact that the goods sold were charged to another than the one to whom they were delivered is not conclusive evidence that such other was the real purchaser.—*Lane v. Turner* (Cal.) 290.

Contract of sale construed and *held* to show an absolute sale, with a retention by the seller of the title and right of possession by way of security for the purchase price.—*D. M. Osborne & Co. v. Connor* (Kan. App.) 327.

Right of conditional vendor in another state to recover possession of the property when

brought into Kansas and sold to a bona fide purchaser, where the original contract was not recorded, determined.—*Baldwin v. Hill* (Kan. App.) 329.

The title to property sold will pass to the purchaser when such is the intention of the parties, though the price remains to be determined.—*Pacific Lounge & Mattress Co. v. Rudebeck* (Wash.) 392.

Vendors of personal property *held* entitled to rescind sale and bring replevin against the vendee's receiver to recover possession of goods.—*Craig v. California Vineyard Co.* (Or.) 421.

Complaint in an action by a purchaser against a sheriff, for conversion of property seized on attachment against the seller, *held* insufficient to show delivery under the statute of frauds.—*Harmon v. Hawkins* (Mont.) 439.

The seller *held* liable for damages to the goods sold because of negligence in crating them for shipment.—*Diebold Safe & Lock Co. v. Holt* (Okla.) 512.

In an action for price, *held* that the evidence sufficiently showed a sale, though denied by the purchaser.—*Mount Lincoln Coal Co. v. Lane* (Colo. Sup.) 632.

Transaction transferring a stock of goods in consideration of a release from creditors *held* to be an absolute sale.—*Levy v. Scott* (Cal.) 892.

SALOONS.

See "Intoxicating Liquors."

SCHOOLS AND SCHOOL DISTRICTS.

Injunction against discharge of teacher, see "Injunction."
Sale of school lands, see "Public Lands."

The majority required under Laws 18th Leg. Assem. Act No. 32, to create a union high school district, is a majority of those voting.—*Sharp v. George* (Ariz.) 212.

Where, in an election to form a union high school district out of several districts, one district does not vote, the election is not void when, if all the voters in such district had voted against the school, a majority would have remained in its favor.—*Sharp v. George* (Ariz.) 212.

The law authorizing a county school tax is invalid in so far as it authorizes the collection thereof in cities of the first and second classes, since the school systems in those cities is maintainable by their boards of education, under Const. art. 10, § 6.—*Merrill v. Spencer* (Utah) 1096.

A deputy school superintendent, appointed by the superintendent, *held* under Mills' Ann. St. §§ 3981, 3989, to be paid by the superintendent.—*Board of Com'rs of El Paso County v. Finch* (Colo. App.) 629.

Under Sess. Laws 1891, p. 312, the superintendent is not authorized to hire a deputy at the expense of the county.—*Board of Com'rs of El Paso County v. Finch* (Colo. App.) 629.

The power to fill a vacancy in the office of superintendent of public schools in San Francisco belongs to the board of education.—*People v. Babcock* (Cal.) 818.

Under Gen. St. § 3046, giving the school board power to discharge teachers, injunction will not lie by a taxpayer to restrain the discharge of a teacher.—*School Dist. No. 1, Pitkin County, v. Carson* (Colo. App.) 846.

SEALS.

To certificate of recorder, see "Registers of Deeds."

SECONDARY EVIDENCE.

See "Evidence."

SECURITY.

For costs, see "Costs."

SELF-DEFENSE.

See "Homicide."

SENTENCE.

See "Criminal Law."

SERVICE.

Of notice of appeal, see "Appeal and Error."
Of transcript, see "Appeal and Error."

SET-OFF AND COUNTERCLAIM.

The willful and malicious ordering of cars in which to ship stock, and failure to take them, to the railroad company's injury, is a tort, which cannot be pleaded in set-off, in an action on contract.—*Atchison, T. & S. F. R. Co. v. Phelps* (Kan. App.) 183.

Unadjusted items of indebtedness growing out of partnership transactions *held* not subject to set-off in assumpsit by one partner against the other.—*Lane v. Turner* (Cal.) 290.

SETTLEMENT.

Of bill of exceptions, see "Exceptions, Bill of."

SHERIFFS AND CONSTABLES.

An officer sued for conversion, who justifies under an attachment, *held* entitled to attack, as in fraud of creditors, the mortgage under which plaintiff claims, without showing indebtedness of the mortgagor to plaintiff in attachment.—*Fisher v. Kelly* (Or.) 146.

A sheriff cannot appoint a deputy unless empowered by the board of county commissioners.—*Campbell v. Board of Com'rs of Canyon County* (Idaho) 1022.

The order of a board of county commissioners refusing to appoint a deputy sheriff may be reviewed by the district court.—*Campbell v. Board of Com'rs of Canyon County* (Idaho) 1022.

SIDEWALKS.

Liability for defects, see "Municipal Corporations."

SIGNATURES.

To bill of exceptions, see "Exceptions, Bill of."
Proof of handwriting, see "Evidence."

SLANDER.

See "Libel and Slander."

SOCIETIES.

See "Corporations"; "Religious Societies."

SPECIAL.

Administrator, see "Executors and Administrators."
Elections, see "Elections."
Judge, see "Judges."
Laws, see "Statutes."

SPECIFIC PERFORMANCE.

A unilateral contract to convey land on payment of a certain sum *held* a mere offer, which will not be specifically enforced.—*Smith v. Bateman* (Colo. App.) 218.

Plaintiff *held* not entitled to specific performance in the absence of a tender of a balance due on the price, or an allegation of a willingness to pay.—*Clarno v. Grayson* (Or.) 426.

Specific performance of a contract to convey land to two cannot be enforced for a conveyance of an undivided half on payment by one of the parties of the one-half of the price.—*Neuforth v. Hall* (Kan. App.) 982.

A parol gift of land enforced where the donee had entered into possession, and made valuable improvements.—*Burris v. Landers* (Cal.) 162.

STATEMENT.

Of facts on appeal, see "Appeal and Error."

STATES.

Estoppel to deny contract, see "Estoppel."
Harbor commissioners, see "Navigable Waters."

Mandamus to state officers, see "Mandamus."

It is the duty of a state auditor to compel clerks of court to pay into the state treasury, as required by statute, fees collected by them.—*State v. Stanton* (Utah) 1109.

Pol. Code, § 380, subd. 5, does not authorize the governor to employ one not an attorney as an agent to collect a claim against the United States.—*Mullan v. State* (Cal.) 670.

Under Const. art. 4, §§ 15, 32, the legislature cannot, by resolution, ratify the unauthorized employment of an agent to collect a claim in favor of the state.—*Mullan v. State* (Cal.) 670.

An action may be maintained by the state, on relation of a district attorney, to enjoin the payment of a state warrant issued under a law claimed to be unconstitutional.—*State v. Mettschan* (Or.) 791.

A contract by the secretary of state, invalid because executed by him in express violation of the statute, cannot be ratified by the state.—*Mulnix v. Mutual Ben. Life Ins. Co.* (Colo. Sup.) 123.

Under the constitution and statutes a contract by the secretary of state for supplies not let to the lowest bidder *held* invalid.—*Mulnix v. Mutual Ben. Life Ins. Co.* (Colo. Sup.) 123.

The presumption is that a state warrant, regular and valid on its face, was lawfully issued for a valid state indebtedness.—*Mulnix v. Mutual Ben. Life Ins. Co.* (Colo. Sup.) 127.

STATUTE OF FRAUDS.

See "Frauds, Statute of."

STATUTE OF LIMITATIONS.

See "Limitation of Actions."

STATUTES.

A provision in a city charter giving it authority to control expenditures of funds for improvement of roads within the city, collected under the General Laws, *held* not a special law.—*City of Oregon City v. Moore* (Or.) 1017.

Act March 28, 1895, directing the board of supervisors of San Francisco to pay a certain sum of money, *held* invalid as a special act.—*Conlin v. Board of Suprs of City and County of San Francisco* (Cal.) 279.

Title of act *held* sufficient to express the subject-matter of the act.—*State v. Rusk* (Wash.) 387.

Act March 22, 1895, relating to the validation of debts of irrigation districts, does not sufficiently express its subject in its title.—*Percival v. Cowychee & Wide Hollow Irrigation Dist.* (Wash.) 1035.

Act April 23, 1880, providing for the recovery of damages against directors of mining corporations for failure to post weekly reports, is not a special act.—*Miles v. Woodward* (Cal.) 1076.

The repeal of the statute authorizing the recovery back of usurious interest, *held* not to defeat a right to recover already accrued.—*Seawell v. Hendricks* (Okla.) 557.

A statute relating to persons or things as a class is a general law.—*Gay v. Thomas* (Okla.) 578.

Act April 8, 1893, amending Mills' Ann. St. § 8346, *held* not to affect actions for partition of property commenced before its passage.—*Brown v. Challis* (Colo. Sup.) 679.

Proclamation of governor calling a special session of the legislature, and mentioning the objects thereof, *held* to render valid an amendment relating to the jurisdiction of district courts as to controversies between officials under the election laws.—*People v. District Court of Arapahoe County* (Colo. Sup.) 681.

On the adoption of the statute of another state, the construction placed thereon by the courts of such state will govern.—*Largey v. Chapman* (Mont.) 808.

Sess. Laws 1885, p. 49, construed, and *held*, that a provision allowing the secretary of state to make contracts for supplies without advertising for bids is not within the title of the act.—*Mulnix v. Mutual Ben. Life Ins. Co.* (Colo. Sup.) 123.

Act March 2, 1891, relating to superior court judges, was repealed by implication by Act March 19, 1895, on the same subject.—*State v. Rusk* (Wash.) 387.

Act Cong. March 3, 1885, relating to writs of error and appeals, repeals Act 1874 (Rev. St. § 1909).—*In re Borrego* (N. M.) 211.

Act 1874, fixing the compensation of officers in Sacramento county, repeals Act March 5, 1870, relating to the commissions of a tax collector in said county.—*Sacramento County v. Colgan* (Cal.) 175.

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Of proceedings by appeal, see "Appeal and Error."

— in contempt, see "Contempt."

STEALING.

See "Larceny"; "Robbery."

STIPULATIONS.

To extend time for serving case, see "Appeal and Error."

Agreement that a letter might be introduced in evidence held not to admit its genuineness.—*Osmun v. Winters* (Or.) 780.

Stipulation to abide the event of another suit held binding on the party, though he sought to avoid it on the day after.—*Southern Kansas Ry. Co. v. Pavey* (Kan. Sup.) 969.

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STOCKHOLDERS.

See "Corporations."

Of bank, see "Banks and Banking."

STREET RAILROADS.

See, also, "Carriers"; "Railroads."

Tracks as nuisance, see "Nuisance."

That one driving along a street stops so near a street car that there was not room enough for the car to pass held not negligence contributing to a collision.—*Redford v. Spokane St. Ry. Co.* (Wash.) 650.

Question whether a person injured on the track was guilty of contributory negligence held one for the jury.—*Smith v. City & Suburban Ry. Co.* (Or.) 790.

Where one stepping off a car passed behind it onto another track without looking, and was struck by an approaching car, he was guilty of contributory negligence.—*Smith v. City & Suburban Ry. Co.* (Or.) 780.

A street-railroad company has not the exclusive right to use the ground over which its tracks are laid.—*Edgerton v. O'Neill* (Kan. App.) 206.

It is the duty of a person to look and listen before attempting to cross the track of a street railroad.—*Smith v. City & Suburban Ry. Co.* (Or.) 138.

SUBCONTRACTORS.

See "Mechanics' Liens."

SUBROGATION.

Rights of insurer, see "Insurance."

An indorser of a note, out of whose property a judgment against him and the maker is satisfied by execution, is subrogated to the rights of the holder of the note only for the amount actually credited on the execution.—*March v. Barnett* (Cal.) 152.

A purchaser of standing timber, agreeing to pay mortgages on the land as they fall due, *held* not subrogated to the rights of the mortgagee.—*Isensee v. Austin* (Wash.) 394.

A person not paying any part of the money used in paying a mortgage *held* not entitled to be subrogated to the rights of the mortgagee.—*Mahanes v. Dartmouth Sav. Bank* (Kan. App.) 412.

SUBSCRIPTIONS.

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TAXATION.

Action to recover taxes voluntarily paid, see "Payment."

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Estoppel of life tenant to acquire title under tax sale, see "Life Estates."

For city purposes, see "Municipal Corporations."

For school purposes, see "Schools and School Districts."

Occupation tax, see "Licenses."

Of costs, see "Costs."

Taxes levied against the personal property of an owner subsequent to the execution of an incumbrance on land in favor of a third party are not a lien superior in right to that security.—*Gifford v. Callaway* (Colo. App.) 626.

Under Sess. Laws 1893, p. 97, a county tax collector cannot retain any part of city taxes collected as compensation.—*City of Moscow v. Latah County* (Idaho) 874.

A guarantor of a note and mortgage obtains no lien on the premises against the mortgagee by purchasing at tax sale.—*Howard Investment Co. v. Benton Land Co.* (Kan. App.) 989.

A failure to transmit to the treasurer directly the affidavit of publication of the delinquent tax list *held* immaterial, where the treasurer, nevertheless, acted upon it.—*Douglas v. Craig* (Kan. App.) 197.

A tax deed including a fee for printing *held* voidable if the printer's affidavit of publication is not transmitted to the county treasurer within 14 days.—*Douglass v. Walker* (Kan. Sup.) 318.

Where a tax deed is void because of insufficiency of description, the owner, in an action by the holder of such deed, need not tender taxes paid, under Hill's Ann. Laws, § 2823.—*Jory v. Palace Dry-Goods & Shoe Co.* (Or.) 786.

Taxable persons and property.

Judgments owned by nonresidents are not taxable.—*Board of Com'rs of Kingman County v. Leonard* (Kan. Sup.) 960.

Taxes levied by Trego county in 1888 on property in Wallace county, then unorganized, *held* valid.—*Perry v. Hogan* (Kan. App.) 996.

Taxation of personal property alone in a district where there is no real estate subject to taxation is not discriminating.—*Gay v. Thomas* (Okla.) 578.

Indian reservations and unorganized country attached to Kay county for judicial purposes were made a taxing district by Act March 5, 1895.—*Gay v. Thomas* (Okla.) 578.

Property on an Indian reservation attached to a county for judicial purposes, cannot be taxed for county or school and road purposes of the county, but only for territorial and judicial purposes.—*Gay v. Thomas* (Okla.) 578.

Taxation of cattle belonging to white men and grazing upon Indian reservations in the territory under leases from Indians, *held* not taxation of any right or property of the Indians.—*Gay v. Thomas* (Okla.) 578.

The court will interfere with the exercise of the power of taxation only when the constitution or some fixed rule is clearly violated.—*Gay v. Thomas* (Okla.) 578.

The legislative power of the territory is absolute in Indian reservations within the territory, except so far as it interferes with persons or property of Indians under the protection of the United States.—*Gay v. Thomas* (Okla.) 578.

The listing and assessing of personal property in Indian reservations and unorganized territory at a different time from that fixed for listing and assessing it in organized counties is not invalid for want of uniformity.—*Gay v. Thomas* (Okla.) 578.

Equalization.

Board of equalization has jurisdiction of property assessed, but not properly listed on the assessment roll.—*State v. Meyers* (Nev.) 51.

Board of equalization, under St. 1893, p. 47, has jurisdiction to equalize a valuation without complaint.—*State v. Meyers* (Nev.) 51.

The state board of equalization has no power to increase proportionately the valuation of the property in the several counties of the state.—*State v. State Board of Equalization* (Mont.) 266.

Appeal does not lie to the superior court from an order made by the county board of equalization.—*Buchanan v. Adams County* (Wash.) 643.

Assessment and levy.

Agreed statement that assessor made a uniform and equal valuation of the kind, character, and species of merchandise of defendant does not show that the valuation of defendant's property as made by the assessor was uniform with other personal property on the assessment roll.—*State v. Meyers* (Nev.) 51.

Findings held to show the invalidity of an assessment of land.—*Harris v. Harsch* (Or.) 141.

Evidence of the assessor who valued a railroad for taxation held insufficient to create a substantial conflict with evidence introduced, showing an overvaluation.—*State v. Virginia & T. R. Co.* (Nev.) 723.

In estimating the net earnings as a basis for ascertaining the value of the railroad, the cost of replacing a bridge should be deducted.—*State v. Virginia & T. R. Co.* (Nev.) 723.

Under St. 1891, relating to taxation, the value of the railroad must be determined by its net earnings, capitalized at the current rate of interest, taking into consideration any prospect of an increase or decrease in the earning capacity of the road.—*State v. Virginia & T. R. Co.* (Nev.) 723.

A description of land as a "fraction of lot No. 2" in a certain block, held insufficient.—*Jory v. Palace Dry-Goods & Shoe Co.* (Or.) 786.

Under Hill's Ann. Laws, § 2770, where land to be taxed cannot be described by legal subdivision, it must be described by metes and bounds.—*Jory v. Palace Dry-Goods & Shoe Co.* (Or.) 786.

It is essential the property be entered for taxation on the proper roll, and that the location and valuation of the same should be shown.—*Dykes v. Lockwood Mortg. Co.* (Kan. Sup.) 711.

Where property not returned is entered for taxation, failure to give notice to the tax payer renders the tax illegal.—*Dykes v. Lockwood Mortg. Co.* (Kan. Sup.) 711.

TENANCY IN COMMON.

Creation by will, see "Wills."

A tenant in common, in sole possession, may maintain an action to protect the property from injury.—*Fortain v. Smith* (Cal.) 381.

The consent of a husband to a will of his wife, one of the owners of an estate in entirety, held not such a contract or conveyance as to create the estate of tenant in common as to him.—*Wilson v. Johnson* (Kan. App.) 833.

TENDER.

Where a chattel mortgagee wrongfully converts the property, and its value exceeds the debt, the mortgagor need not pay or tender payment before suing for the conversion.—*Burton v. Randall* (Kan. App.) 326.

TERMS.

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Common law in Indian Territory, see "Common Law."

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To support ejectment, see "Ejectment."
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Liability of city, see "Municipal Corporations."

Measure of damages, see "Damages."

Pleading tort as set off, see "Set-Off and Counterclaim."

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Of commercial paper, see "Bills and Notes."

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TRESPASS.

Injunction against, see "Injunction."

On game preserve, see "Animals."

It is sufficient to show bona fide possession of the premises under claim and color of title.—*Kellogg v. King* (Cal.) 166.

Evidence in an action for removing a windmill from certain land held to support a judgment for plaintiff.—*Vaughn v. Grigsby* (Colo. App.) 624.

The beneficiary in a trust deed can sue for injury to the land described in the deed though not in possession or entitled to it.—*Vaughn v. Grigsby* (Colo. App.) 624.

TRIAL.

See, also, "Appeal and Error"; "Appearance"; "Certiorari"; "Dismissal and Nonsuit"; "Evidence"; "Judgment"; "Jury"; "New Trial"; "Pleading"; "Stipulations"; "Witnesses."

Conduct in criminal cases, see "Criminal Law."

De novo on appeal, see "Appeal and Error."

Disregard of instructions as ground for new trial, see "New Trial."

Instructions on measure of damages, see "Damages."

Error in refusing certain questions held cured by an offer to open the case, and permit such questions to be asked.—*Bergtholdt v. Porter Bros. Co.* (Cal.) 738.

For the court to ask counsel, in the hearing of the jury, if they had any objection to separation, held not ground for reversal.—*State v. Holedger* (Wash.) 652.

The defense in a libel suit being justification, defendant is entitled to open and close.—*Hall v. Elgin Dairy Co.* (Wash.) 1049.

A general finding by the court in a case tried by it *held* to include every material fact necessary to sustain the judgment thereon.—*Casner v. Crawford* (Kan. App.) 41.

When case revised without regard to whether there are express findings of fact by the trial court.—*Watt v. Nevada Cent. R. Co.* (Nev.) 726.

Objections to evidence.

Objections to evidence should state the grounds on which they are based.—*Maddox v. Tague* (Mont.) 535.

Objections to evidence *held* not waived by cross-examining plaintiff thereon.—*Laver v. Hotaling* (Cal.) 1070.

Incompetent testimony, given without objection, will not be stricken out on motion.—*Evans v. Johnston* (Cal.) 906.

Refusal of a motion to strike out all the testimony of a witness, the greater part of which was unobjectionable, *held* proper.—*Southern Kansas Ry. Co. v. Michaels* (Kan. Sup.) 938.

Instructions.

Instructions must be applicable to the issues.—*Long Island Ins. Co. v. Hall* (Kan. App.) 47.

In an action for personal injuries, failure to charge in one instruction as to the question of contributory negligence *held* cured by a subsequent instruction.—*Carroll v. Burleigh* (Wash.) 232.

Where it does not appear that the jury could have misunderstood the verbal instructions given, the judgment will not be reversed because it was not reduced to writing.—*Deets v. National Bank* (Kan. Sup.) 306.

An objection to a charge *held* insufficient for indefiniteness.—*McDonough v. Great Northern Ry. Co.* (Wash.) 334.

Possible error in charging that an order for goods, signed by one party only, was conclusive of the contract between the parties, *held* cured by further instructions.—*Fitzhugh v. Spear* (Colo. App.) 625.

A refusal of instruction on a point already covered *held* not error.—*Hendrickson v. Harvey* (Kan. App.) 1003.

A charge partly in writing and partly oral *held* erroneous when a written charge was requested.—*State v. Miles* (Wash.) 1047.

It is not a compliance with the statute requiring a charge to be in writing that a stenographer took down an oral charge.—*State v. Miles* (Wash.) 1047.

Objections to instructions, where no exceptions are taken, are waived.—*Tatum v. Roberts* (Kan. App.) 983.

An error in the instructions which the findings show to be immaterial is not ground for reversal.—*Southern Kansas Ry. Co. v. Michaels* (Kan. Sup.) 938.

Where the complaint is supported by the evidence, and the verdict is in accordance with both, a new trial will not be granted because of an abstract instruction not applicable to the case.—*Stinson v. Rourke* (Idaho) 445.

Verdict and findings.

A finding that defendants "took possession" of premises June 26, 1893, negatives the allegation that they were in continuous possession from May 1, 1893.—*Amador Gold Mine v. Amador Gold Mine* (Cal.) 80.

Judgment for assignee of a claim for work done, evidenced by a time check, *held* unsupported by a finding merely that the claim was duly assigned.—*Daly v. Larsen* (Or.) 143.

Where a verdict has been returned, assessing the amount of plaintiff's recovery, and the jury have been discharged, the court cannot amend the verdict, though erroneous.—*Fiore v. Ladd* (Or.) 144.

A finding examined, and *held* to be without the issue.—*Burris v. Landers* (Cal.) 162.

Statement of judge considered, and *held* prejudicial to the rights of the party requesting submission of special questions to the jury.—*Cone v. Citizens' Bank* (Kan. App.) 414.

Where defendant claims that a reference in a contract of guaranty to another contract refers to an oral contract, and plaintiff claims that it refers to a written contract, a finding for defendant is a finding that it refers to the oral contract.—*McCormick Harvesting-Mach. Co. v. Reiner* (Kan. App.) 539.

Refusal to submit special questions of fact within the issues *held* material error.—*City of Oklahoma City v. Hill* (Okla.) 568.

After verdict a party cannot complain of the misconduct of jurors of which he was cognizant during the trial.—*Osmun v. Winters* (Or.) 780.

Where the jury, after agreeing that plaintiff should recover, by ballot ascertained the average sense of the jury as to the amount, it did not invalidate a verdict for a slightly greater amount.—*Watson v. Reed* (Wash.) 647.

In an action for personal injuries, a special finding that plaintiff was guilty of negligence to some extent is insufficient, when opposed to a general verdict in favor of plaintiff, to require judgment for defendant.—*Pittsburgh Electric Ry. Co. v. Kelly* (Kan. Sup.) 945.

Special findings *held* not in conflict with the general verdict.—*Tatum v. Roberts* (Kan. App.) 983.

Taking case from jury.

When the court may take the case from the jury and render judgment for amount of damages proved.—*Underwood v. Stack* (Wash.) 1031.

A demurrer to the evidence should be overruled when the evidence fairly tends to establish every material allegation of the complaint.—*Edgerton v. O'Neill* (Kan. App.) 206.

Evidence examined and *held* to justify the direction of a verdict for plaintiff.—*Deets v. National Bank* (Kan. Sup.) 306.

Where there is evidence tending to prove plaintiff's petition, it is error to sustain a demurrer to the evidence.—*Carnahan v. Lloyd* (Kan. App.) 323.

Where, in an action for personal injuries, the evidence showed the plaintiff guilty of contributory negligence, on demurrer by defendant to the evidence it was the duty of the trial court to sustain it.—*Pittman v. City of El Reno* (Okla.) 495.

A defendant does not waive an erroneous ruling in denying a motion for nonsuit for want of sufficient evidence by afterwards introducing evidence, unless he thereby supplies the defects in plaintiff's case.—*Elmore v. Elmore* (Cal.) 458.

TROVER AND CONVERSION.

Conversion by mortgagee, see "Chattel Mortgages."

Plaintiff may show what it would cost to purchase in open market and replace the property.—*Levy v. Scott* (Cal.) 892.

The measure of damages for the conversion of the stock of a corporation is its value at the time of the conversion.—*Continental Divide Min. Inv. Co. v. Bliley* (Colo. Sup.) 633.

TRUSTEE PROCESS.

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TRUSTS.

See, also, "Executors and Administrators."

Charitable trusts, see "Charities."

Limitation of actions, see "Limitation of Actions."

Trust fund in assets of insolvent corporation, see "Corporations."

A trustee of the title to a mining claim, for the purpose of obtaining the patent for himself and his co-tenants, who files an amended certificate, and obtains additional territory, holds it in trust for all.—*Hallack v. Traler* (Colo. Sup.) 110.

Delay in carrying out the trust in absence of any express declaration *held* not an abandonment thereof.—*Spence v. Widney* (Cal.) 463.

Delay of trustees in carrying out a trust *held* not unreasonable.—*Spence v. Widney* (Cal.) 463.

Trust under a will construed, and *held*, that the trust did not terminate because of the death of the trustees.—*Spence v. Widney* (Cal.) 463.

UNDERTAKINGS.

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See "Trusts."

VACANCY.

In school office, see "Schools and School Districts."

VACATION.

Of guardian's sales, see "Guardian and Ward."

Of judgment, see "Judgment."

—by default, see "Judgment."

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—pleading and proof, see "Pleading."

VENDOR AND PURCHASER.

See, also, "Deeds"; "Fraudulent Conveyances"; "Sales"; "Specific Performance."

Limitation of action for price, see "Limitation of Actions."

Measure of damages for breach of contract, see "Damages."

Specific performance of contract, see "Specific Performance."

A notary taking the acknowledgment of a deed and delivering it to the grantee *held* to have notice of the title of the grantee in the land conveyed.—*Greenlee v. Smith* (Kan. App.) 543.

Where one having notice of a conveyance obtains a deed from the same grantor to the property, such latter deed *held* invalid.—*Greenlee v. Smith* (Kan. App.) 543.

A mortgagee of land standing in the name of a brother *held* a bona fide purchaser without notice, though the brother held the land as the mortgagee of his sister.—*Rider v. Regan* (Cal.) 820.

A purchaser, to whom was delivered a deed in which the name of no person was inserted as grantee, *held* to have an equitable interest in the land.—*Shanks v. Simon* (Kan. Sup.) 774.

A purchaser from a fraudulent grantee without notice of an attachment against the grantor *held* a bona fide purchaser.—*Clerf v. Montgomery* (Wash.) 1028.

The vendor suing for the price must allege a tender of the deed.—*Berry v. Fairmount Town Co.* (Kan. App.) 28.

Facts *held* to show that one who furnished money to be used in the purchase of property did not become the purchaser, and was not liable as an undisclosed principal on a note given for purchase money.—*Krohn v. Lambeth* (Cal.) 164.

VENUE.

In criminal cases, see "Criminal Law."

The right to be sued in the county of defendants' residence *held* not waived.—*State v. Superior Court of Spokane County* (Wash.) 395.

By going to trial after a change of venue, questions of jurisdiction due to the order for the change are waived.—*Christ v. Flannagan* (Colo. Sup.) 688.

A corporation *held* properly sued in the county where the contract was prepared, and where it had an office.—*Ivey v. Kern County Land Co.* (Cal.) 926.

Breach of contract by a corporation *held* to have occurred in a county in which payments under the contract were to be made, and where the corporation had an office.—*Ivey v. Kern County Land Co.* (Cal.) 926.

VERDICT.

See "Trial."

VERIFICATION.

Of claim against estate, see "Executors and Administrators."

VESTED RIGHTS.

See "Constitutional Law."

VILLAGES.

See "Municipal Corporations."

VOLUNTARY PAYMENT.

See "Payment."

WAGES.

See "Master and Servant."

WAIVER.

Of conditions in policy, see "Insurance."

Of objections to pleading, see "Pleading."

WAREHOUSEMEN.

One receiving grain, and returning a like quantity, or paying the market price when demanded, *held* not a warehouseman, within Laws 1885, p. 61.—*State v. Stockman* (Or.) 851.

WARRANT.

County warrant, see "Counties."

State warrant, see "States."

WARRANTY.

See "Sales."

WATERS AND WATER COURSES.

Lease of irrigated land, see "Landlord and Tenant."

A complaint for failure to deliver water for irrigation in sufficient quantities *held* not to state a cause of action.—*Consolidated Canal Co. v. Peters* (Ariz.) 74.

A canal owner is liable for damages to adjoining landowners from a want of proper care in the management of the canal.—*Arave v. Idaho Canal Co.* (Idaho) 1024.

The owner of land through which an irrigation canal passed, *held* entitled under a contract to take water for his land from six different places, free from control of the water master.—*Brighton & N. P. Irrigation Co. v. Little* (Utah) 268.

A contract by which a landowner was to take water from a canal running through his land, *held* not to require him to contribute proportionately to keeping the canal in repair.—*Brighton & N. P. Irrigation Co. v. Little* (Utah) 268.

WHARVES.

A lease by a city of a water front to a steamship company construed and *held* not to require such company to permit the use of its wharf by others.—*Pacific Coast S. S. Co. v. Kimball* (Cal.) 275.

WIDOW.

Allowance to, see "Executors and Administrators."

WIFE.

See "Husband and Wife."

WILLS.

See, also, "Descent and Distribution"; "Executors and Administrators."

A devise to "said executors" of all testator's property, "in trust, nevertheless," for certain uses, *held* to constitute the executors named trustees.—*Smith v. Smith* (Wash.) 249.

Will of a wife, one of the owners of an estate in entirety in a homestead, construed, and *held* not such a sufficient contract or conveyance on her part as to create the estate of tenant in common as to her.—*Wilson v. Johnson* (Kan. App.) 833.

Will construed, and *held*, that under a bequest to testator's children, the administrator of one dying before majority was entitled to receive his share.—*Rogers v. Strobach* (Wash.) 1040.

WITNESSES.

See, also, "Evidence."

Indorsing names on information, see "Criminal Law."

Competency.

A witness as to declarations, a part of which were made through an interpreter, is competent to testify to such declarations only as he understood without the aid of the interpreter.—*Sharp v. McIntire* (Colo. Sup.) 115.

Conviction of a misdemeanor does not render one incompetent to testify.—*Borrego v. Territory* (N. M.) 349.

The issuance of a pardon, so as to render one competent to testify, may be shown by the archives.—*Borrego v. Territory* (N. M.) 349.

Relation of physician and patient *held* to exist between a person treated in a hospital and the surgeon in charge of his case.—*Colorado Fuel & Iron Co. v. Cummings* (Colo. App.) 875.

Examination.

Allowing leading questions is largely discretionary with a trial court.—*State v. Elsworth* (Wash.) 727.

Permitting a party to put leading questions to a witness *held* not error.—*Ellison v. Beannabia* (Okla.) 477.

Cross-examination of defendants in a criminal case is in the discretion of the court.—*Borrego v. Territory* (N. M.) 349.

The refusal of a party to cross-examine a witness is presumed to be prejudicial.—*Millikan v. Booth* (Okla.) 489.

Though a party does not appear until during the trial, he is entitled to cross-examine a witness then on the stand.—*Millikan v. Booth* (Okla.) 489.

Where real-estate dealers testify as to the value of land, they may be cross-examined as to the ground on which they base their evidence.—*In re Jack's Estate* (Cal.) 1057.

When party may be cross-examined as to matters outside his examination in chief, but pertinent to his adversary's case.—*Osmun v. Winters* (Or.) 780.

Credibility and impeachment.

A witness who testifies to the fair reputation of defendant in a particular respect may have his attention called to reports inconsistent with the testimony for the purpose of discrediting it.—*State v. McDonald* (Kan. Sup.) 906.

Defendants in a homicide case, for the purpose of discrediting them, may be questioned as to their killing other persons a few days after the homicide.—*Borrego v. Territory* (N. M.) 349.

A witness cannot be impeached by the transcript of the stenographer's notes of his testimony at the former trial.—*Redford v. Spokane St. Ry. Co.* (Wash.) 650.

A statement made by a witness cannot be introduced to impeach his testimony unless his attention has been called to it when on the stand.—*Michigan Fire & Marine Ins. Co. v. Wich* (Colo. App.) 687.

A defendant cannot impeach a prosecuting witness by placing him on the stand, and, on his denial of statements imputed to him, introducing testimony to contradict him.—*People v. Crespi* (Cal.) 863.

Where there was evidence that a witness' reputation for truth was bad, evidence that the witnesses testifying would not believe him on oath was inadmissible.—*State v. Miles* (Wash.) 1047.

Charge on credibility of prosecutrix *held* not to ignore the evidence.—*People v. Ross* (Cal.) 1059.

State *held* entitled to introduce testimony of its witness on preliminary examination in order to contradict him.—*People v. Ross* (Cal.) 1059.

WRIT OF REVIEW.

See "Certiorari."

WRITS.

See "Process."

Particular writs, see "Attachment"; "Certiorari"; "Execution"; "Garnishment"; "Injunction"; "Quo Warranto."

WRONGFUL ATTACHMENT.

See "Attachment."

